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JOSEPH A. HOLMES, DIRECTOR

ABSTRACTS OF CURRENT DECISIONS ON MINES AND MINING

MARCH TO DECEMBER, 1913

BY

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GENERAL SUBJECTS TREATED.

Minerals and mineral lands.
Mining corporations.
Mining claims.
Statutes relating to mining operations.
Mines and mining operations.
Mining leases.
Mining properties.
Damages for injuries to miners.
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PREFACE.

In the preface to Bulletin 61, "Abstract of Current Decisions on Mines and Mining, October, 1912, to March, 1913," it was stated that the Bureau of Mines proposed to issue similar bulletins with sufficient frequency to keep reasonably current the records of decisions of Federal and State courts of last resort on questions relating to the mineral industry, and that the interest manifested in Bulletin 61 would be taken as a basis for determining whether the issuance of similar bulletins would be warranted.

Bulletin 61 met greater favor than the Bureau of Mines anticipated. So many commendatory expressions regarding it have been received, with requests that the publication of the abstracts be continued, that the bureau has decided to issue similar bulletins at regular intervals of about three months.

The bureau will gladly welcome and consider any suggestions looking to improvement in the matter contained in these bulletins or the manner in which it is presented. The purpose of the bulletins will continue to be to improve directly or indirectly mining conditions and to promote the health and safety of miners by the prompt publication of decisions, and to this end it is desired that the bulletins reach all persons who are interested.

J. A. HOLMES.

ABSTRACTS OF CURRENT DECISIONS ON MINES AND MINING, MARCH TO DECEMBER, 1913.

By J. W. THOMPSON.

MINERALS AND MINERAL LANDS.

A. SALE AND CONVEYANCE.
B. SURFACE AND MINERALS—OWNERSHIP AND SEVERANCE.
C. COAL AND COAL LANDS—SALE AND CONVEYANCE.
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A. SALE AND CONVEYANCE.

CONSTRUCTION OF STATUTE—SALE BY ENTRYMAN.

The timber and stone act (20 Stat., 89) does not forbid an entryman from alienating his interest in his claim; but the act makes illegal any prior agreement by which the entryman acts for another in the purchase.

Worden *v.* United States, 204 Fed., 1, p. 4, April, 1913.

ASSUMPTION OF DEBT BY GRANTEE—LIABILITY TO CREDITOR OF GRANTOR.

A grantee of a mine who agrees to pay the grantor's debts in part payment of the purchase price of the mines becomes to that extent the principal debtor, and the grantor becomes the surety, and the grantor's creditor may in equity enforce his claim against the grantee of the mine, and the grantor in such a case is not a necessary party.

Silver King Coalition Mines Co. *v.* Silver King Consolidated Mining Co., 204 Fed., 166, p. 169, April, 1913.

RIGHT OF COTENANT TO MINE AND SELL.

A cotentant in exclusive possession of mining property who extracts and sells ore is entitled to charge against the proceeds of the sale the reasonable and necessary expense of its extraction and marketing, as in such case the cotenant is not a trespasser.

Silver King Coalition Mines Co. *v.* Silver King Consolidated Mining Co., 204 Fed., 166, p. 180, April, 1913.

INDEPENDENT OBLIGATION TO PAY CONSIDERATION.

A contract for the sale of certain mining claims by which one party agreed to sell and the other party agreed to buy all the placer claims described in consideration of the payment of certain stipulated sums to be due at different dates and a certain percentage of the gross output of the mine was construed to be a contract of sale and purchase, and the obligations to pay the stipulated amount were wholly independent of any contingency.

Pritchard *v.* McLeod, 205 Fed., 24, p. 26, May, 1913.

CONSIDERATION PAYABLE FROM OUTPUT—FAILURE TO OPERATE.

A certain part of a stipulated sum as the purchase price of mining claims sold was payable from the gross output of ore to be taken from the mine, but a purchaser under such stipulation can not escape liability by willfully neglecting to work the claim and produce the ore from which payments were to be made, and on such willful neglect to operate the claim the part of the purchase price to be payable from the output may be recovered after the expiration of the time for making full payment.

Pritchard *v.* McLeod, 205 Fed., 24, p. 26, May, 1913.

PRESUMPTION AS TO PRESENCE OF MINERAL.

Where a mining claim was sold at a stipulated price and a part of the purchase money was to be paid from the output of the claim, it will be presumed in an action to recover the purchase price, that the claim contained mineral, in the absence of any proof to the contrary.

Pritchard *v.* McLeod, 205 Fed., 24, p. 28, May, 1913.

CLASSIFICATION AND ENTRY.

The public lands of the West are open to entry and sale under two classes only, mineral and nonmineral, and the former can be entered only under the mineral-land laws, and must measure up to a certain standard in that they must be more valuable for mining than for agriculture, and although lands may be practically valueless for agriculture, yet if they do not measure up to the standard of mineral lands, they fall into the class of nonmineral lands and must be entered and purchased accordingly.

United States *v.* Kostelak, 207 Fed., 447, p. 450, August, 1913.

GRANT OF RIGHT TO MINE—LIFE ESTATE.

A deed to a certain person named with the right to mine soapstone and other minerals creates a life estate only in the grantee.

White *v.* Shippee, 102 Northeastern, 948 (Massachusetts), October, 1913.

OPERATION OF QUARRY—ADVERSE POSSESSION.

The mere failure of the owner of mineral land, during his lifetime, or the failure of his heirs, to quarry a certain ledge of minerals is not sufficient to divest his title, and the subsequent erection and maintenance of a fence around the particular tract of land containing such mineral ledge by a grantee of the tract under a deed expressly excepting the ledge of mineral, is not of itself furnish sufficient proof of the usual essential elements of adverse possession.

White *v.* Shippee, 102 Northeastern, 948, p. 949 (Massachusetts), October, 1913.

EXECUTION SALE—REDEMPTION—TENDER.

Where mining property has been sold on execution a tender for the purpose of redeeming the property from sale is not sufficient and effectual if coupled with the condition that an acceptance of the tender will involve an admission by the execution purchaser that no greater sum is due.

Union Esperanza Mining Co. *v.* Shandon Mining Co., 135 Pacific, 78, p. 80 (New Mexico), August, 1913.

RIGHT OF BROKER TO COMMISSION.

A broker is entitled to a commission for the sale of mining property where he finds a purchaser to whom the owner of the mining property sold the same, though at a price less than the price originally given the broker, where the proposition stated by the owner of the mining property contained the following provision: "In the event that any one should buy the property from us as a direct result of an introduction to the company by yourself, we should of course be glad to recognize your intervention by a suitable commission on any deal that might be made."

Forbes *v.* Arizona Parall Mining Co., 135 Pacific, 715 (Arizona), October, 1913.

ADVERSE POSSESSION AS AGAINST COTENANTS.

Persons in possession of lands who with their grantors have held possession for a period of over 30 years under a deed containing covenants of warranty conveying the entire fee hold under color of title and acquire title to the surface and to the underlying minerals by adverse possession, as against another claiming an undivided interest under a prior deed.

Virginia Oil & Iron Co. *v.* Hylton, 79 Southeastern, 337, p. 340 (Virginia), September, 1913.

CONVEYANCE OF MINERAL INTEREST BY COTENANT—VALIDITY.

A conveyance by less than all joint tenants of their mineral interest only is not void, under the laws of Virginia; but whereas one joint tenant can not make any conveyance to the prejudice of his cotenants,

such conveyance is effectual to pass the interest conveyed, making his grantee a tenant in common with the grantor's cotenant.

Virginia Oil & Iron Co. *v.* Hylton, 79 Southeastern, 337, p. 338 (Virginia), September, 1913.

CONVEYANCE BY ONE COTENANT OF SURFACE AND MINERALS—EFFECT.

The owner of land may grant all the minerals in the land or any particular species of them, such as coal, iron, lead, etc., and still remain the owner of the surface, or he may grant the land and reserve the minerals or any particular species of them, and thus create a separate estate in the minerals reserved distinct from the land in which they are found; but a conveyance by less than all the joint tenants where land is so owned does not effect a severance of the mineral interest from the surface, but makes the grantee a tenant in common with the joint tenants not uniting in the conveyance, and a conveyance of an undivided mineral interest only does not operate as a severance of the mineral interest from the surface.

Virginia Oil & Iron Co., *v.* Hylton, 79 Southeastern, 337, p. 338 (Virginia), September, 1913.

B. SURFACE AND MINERALS — OWNERSHIP AND SEVERANCE.

OWNERSHIP OF MINERALS BY ADVERSE POSSESSION.

The grantee of the surface of the land under a deed reserving the minerals, who has taken possession and retained the same for a period of more than 30 years, no other person having had any separate actual possession of the minerals during such period, becomes the owner of the minerals by adverse possession, and is in such constructive possession thereof as will authorize him to maintain a suit to quiet title to the mineral rights.

Moore *v.* Empire Land Co., 61 Southern, 940 (Alabama), April, 1913.

SURFACE AND MINERAL HOLDERS—POSSESSION.

In the absence of a physical severance of the surface and mineral rights, the possession of the mineral right goes with and follows the possession of the surface, and the holder of the surface, if the grantee of the mineral rights, holds for the benefit of his grantee of the mineral right; and on the other hand if the holder of the surface was the grantee of the surface right, then he holds the possession of the mineral right for the benefit of his grantor of the surface right, but who reserved the mineral right.

Moore *v.* Empire Land Co., 61 Southern, 940 (Alabama), April, 1913.

CONVEYANCE OF MINERALS IN PLACE—INTEREST CONVEYED.

A deed in due form granting the right of entering in and upon the lands described for the purpose of searching for marl deposits and fossil substance, and for taking and removing therefrom such marl and fossil substances as the grantee may find, and for mining and quarrying operations for that purpose, to any extent the grantee may deem advisable, conveys a fee simple estate in all marl deposits and fossil substance imbedded in the lands described, and the grantee's interest can not be terminated until all the marl deposits and fossil substance have been removed, as the deed is not in effect a revocable license.

Outlaw *v.* Gray, 79 Southeastern, 676, p. 677 (North Carolina), October, 1913.

MINERALS GRANTED SEPARATE FROM SURFACE.

Mineral substances beneath the surface of the earth may be conveyed by deed distinct from the right to the surface and such rights are regarded as corporeal hereditaments and pass by apt words in a deed, though not susceptible of livery of seisin, as delivery or registration takes its place.

Outlaw *v.* Gray, 79 Southeastern, 676, p. 677 (North Carolina), October, 1913.

C. COAL AND COAL LANDS—SALE AND CONVEYANCE.

SEVERANCE OF OWNERSHIP BY LEASE.

A lease of all merchantable anthracite coal in, upon, or under certain described tracts of land, is in effect a sale of the coal in place, and the lease operates as a severance of the coal from the surface and creates a divided ownership between the surface and the minerals.

Millard *v.* Delaware, Lackawanna & Western R. R. Co., 87 Atlantic, 601, p. 602 (Pennsylvania), March, 1913.

SALE OF COAL—DELIVERY TO CARRIER.

Under a contract providing for the sale of coal at a stipulated price per ton "f. o. b. the mine," a delivery of coal to a railroad company at the mine is a delivery to the purchaser and renders him liable for the amount of coal delivered, and evidence of the buyer that he did not receive any of the coal is inadmissible, as such evidence would not tend to show that the coal was not delivered on board the cars at the mine.

Richard Cocke & Co. *v.* Big Muddy Coal & Iron Co., 155 Southwestern, 1019, p. 1021 (Texas Civil Appeals), April, 1913.

RIGHT OF BUYER TO REJECT.

When a purchaser of coal from a coal-mining company under an executory contract for sale inspects the coal and finds that it is not of the quality specified in his contract, he can refuse to receive it and

recover such damages as he has suffered because of the breach of the agreement; but he must either refuse the coal and rescind the agreement, or accept the coal and abide by the agreement.

Richard Cocke & Co. *v.* Big Muddy Coal & Iron Co., 155 Southwestern, 1019, p. 1022 (Texas Civil Appeals), April, 1913.

CONTRACT FOR SALE OF COAL.

A contract between two coal-mining companies by which one party agreed to ship and the other party agreed to receive a certain number of carloads of lump coal, shipments to be made at the risk of the consignee, contemplated that the seller should deliver coal only when ordered by the buyer or to one to whom it has sold, where the parties knew that the contract was made for the purpose of enabling the buyer to carry out a contract made by him for the delivery of coal to a third person.

Big Muddy Coal & Iron Co. *v.* St. Louis-Carterville Coal Co., 158 Southwestern, 420, p. 421 (Missouri Appeals), July, 1913.

D. OIL AND OIL LANDS—SALE AND CONVEYANCE.

OIL AND GAS AS MINERALS.

It is now established beyond question that oil or petroleum and natural gas are minerals and judicially must be so treated.

Rives *v.* Gulf Refining Co., 62 Southern, 623 (Louisiana), May, 1913.

OIL—NATURE OF OIL WELL.

Oil is, technically speaking, a mineral, but an oil well 6 or 8 inches in diameter can not be called a mine.

Krepe *v.* Brady, 133 Pac., 216, p. 219 (Oklahoma), June, 1913.

RESERVATION OF MINERAL—PETROLEUM NOT INCLUDED.

Although petroleum is a mineral in the broadest sense of the word it will not be construed to be within the intent of parties in making a reservation of minerals, for the reason that it is not generally regarded as a mineral, except where the word is used in its popular and commercial sense in conveyances and leases.

Preston *v.* South Penn Oil Co., 86 Atlantic, 203 (Pennsylvania), October, 1913.

OIL AND GAS PART OF REALTY.

Oil and gas until severed are as much a part of the realty as coal or stone and so long as they remain in the ground outside of an artificial receptacle they must be treated as a part of the realty underneath the surface beneath which they lie, and the owner of the surface is the owner of the oil and gas beneath it; but if they escape into the lands of another the ownership of the original owner ceases.

Rives *v.* Gulf Refining Co., 62 Southern, 623, p. 624 (Louisiana), May, 1913.

OIL AND GAS LANDS—WITHDRAWAL FROM SETTLEMENT.

Prior to the act of June 25, 1910, there was no statute expressly authorizing the President or the Secretary of the Interior to withdraw oil lands from settlement, location, sale, or entry, under the public-land or mining laws, and an order of withdrawal made by either the President or the Secretary of the Interior prior to that time was void and the validity of an existing petroleum placer mining location was not affected by such order or withdrawal.

United States *v.* Midwest Oil Co., 206 Federal, 141, June, 1913.

RESERVATION OF MINERAL DOES NOT INCLUDE OIL AND GAS.

A general conveyance of land particularly described, containing a clause excepting and reserving therefrom all miner and mining rights and the incidents thereto, does not include in such exception and reservation petroleum and natural gas, in the absence of a clear intention to that effect.

Preston *v.* South Penn Oil Co., 86 Atlantic, 203 (Pennsylvania), January, 1913.

OIL AND GAS—JOINT TENANCY—ACCOUNTING.

A deed or grant by which the owner of land grants to another "the undivided one-fourth of all the oil and gas in and under" a certain described tract of land, subject to a certain oil and gas lease providing that so long as the premises are operated under such lease the grantee is entitled to receive one-fourth of the royalty provided in such lease, on the expiration of such lease the grantee to have possession of the land described for the purpose of operating for and producing therefrom the remaining undivided one-fourth of the oil and gas remaining in and under the described land for the term of 20 years from the expiration of such lease, and as long as oil and gas is found in paying quantities, and under which the lessor is bound to pay the one-thirty-second part of all oil produced and saved from the land and $50 per year for each gas well, if the gas is sold and utilized off the premises, invests the grantee with a present estate in fee simple in and to the undivided one-fourth of all the oil and gas under the land described, and the provision making the ground subject to an existing lease is not a restriction upon the ground, but is simply to preserve the rights of the parties to the lease; and a subsequent grantee of the land becomes the joint tenant of the grantee in the oil and gas conveyance and such joint tenant has no right to extract the oil without the cotenant's consent, and in an action for an accounting by the original grantee of the oil and gas, the fair and equitable basis is the one-thirty-second of the entire output of oil delivered at the surface; and such grantee is entitled to enjoin any further development of oil and gas.

South Penn Oil Co. *v.* Haught, 78 Southeastern, 759, p. 760 (West Virginia), February, 1913.

OWNERSHIP OF OIL AND GAS—REDUCING TO POSSESSION.

Although the owner of land is conceded to be the owner of the oil and gas beneath its surface, yet he has only a qualified right to the oil and gas—the right to reduce it to possession and to exclude others from exercising the right on his premises, and the actual or absolute title does not vest in him until he has reduced the oil or gas to actual possession, either by bringing it into a well or a pipe line, or into a tank or other receptacle in case of oil; and until he has so done the gas or oil under his surface may by natural force escape from his land and be reduced to possession by another.

Rives *v.* Gulf Refining Co., 62 Southern ,623, p. 625 (Louisiana), May, 1913.

GRANT OF RIGHT OF WAY—SUBSURFACE MINERALS—OIL.

A deed conveying to a railroad company "for the purpose of constructing, operating, and maintaining its railroad, or right of way, 200 feet in width over and upon the above-described tract of land, together with the right to take and use all the timber, earth, stone and mineral existing or that may be found within the right of way hereby granted," grants to the railroad company the surface mineral only and the granting clause refers to the particular preceding words "earth and stone," and does not include mineral oil found at greater depth and of much greater value, and does not authorize the railroad company to drill and operate oil wells on the right of way granted.

Right of Way Oil Co. *v.* Gladys City Oil, Gas & Mfg. Co., 157 Southwestern, 737, (Texas), June, 1913.

MINING CORPORATIONS.

SALE OF CAPITAL STOCK BELOW PAR—RIGHTS OF CREDITORS.

The statute of Indiana requires that the capital stock of manufacturing and mining companies shall be paid within 18 months; and it is also provided that the bonds, notes, or stock of such corporations may be disposed of at such rates and for such prices as in the opinion of the corporation will best advance its interests; and where such a corporation disposes of its capital stock in good faith at a discount, such sale is valid against subsequent creditors and the corporation can not be charged with fraud for failure to require the par value of its capital stock to be paid within 18 months.

Reel *v.* Brammer, 101, Northeastern, 1043, p. 1045 (Indiana), May, 1913.

RIGHT OF RECEIVER TO RECOVER UNPAID BALANCE ON CAPITAL STOCK.

Mining corporations, together with certain other corporations, under the statute of Indiana must have all their capital stock paid

within 18 months; but the subscribers to the capital stock, or the purchasers of the capital stock of a mining corporation, are not liable at the suit of a receiver for any unpaid balance on the capital stock of a mining corporation where the articles of corporation expressly provide that only 15 per cent of the par value of the stock is to be paid, as in such case the creditors of the corporation represented by the receiver occupy no stronger position than the corporation itself, and the public record of the articles is notice to all persons dealing with the corporation that its capital stock has not been paid in full, and it can not be said that the creditors extended credit on the faith of the capital stock under such circumstances.

Reel *v.* Brammer, 101 Northeastern, 1043, p. 1045 (Indiana), May, 1913.

AGREEMENT WITH PROMOTERS—RIGHT OF STOCKHOLDER TO ENFORCE.

Where a corporation was promoted and organized by the holders of an option contract for the purchase of certain mining property and the corporation accepted and ratified a contract made by the promoters to the effect that a certain assessment should be levied by the corporation on the shares retained by them as provided in the contract, a purchaser of a large block of the stock, with knowledge of the facts, might have maintained an action to enjoin the corporation from selling any additional stock and from levying any assessment on any of the other stock, until an assessment had been made on the stock held by the promoters.

Mantle *v.* Jack Waite Mining Co., 135 Pacific, 854, p. 855 (Idaho), October, 1913.

RIGHTS OF BONDHOLDERS—LIABILITY OF DIRECTORS.

The directors and officers of a mining corporation are not personally liable at a suit of bondholders for the amount received on a lease and option sale of a mine where the consideration was paid to the corporation.

Young *v.* Haviland, 102 Northeastern, 338, p. 339 (Massachusetts), May, 1913.

PERSONAL LIABILITY OF STOCKHOLDERS TO LABORERS.

The statute of Oklahoma making stockholders personally liable for debts due to workmen and laborers employed by the corporation, was intended to make the liability secondary, and a laborer can not proceed against a stockholder to enforce the liability so long as the corporation itself has assets of any kind—either real estate or personal property—subject to execution, and the stockholders' liability can not be enforced until an execution against the corporation is returned not satisfied.

Gilman *v.* Gaesser, 132 Pacific, 318 (Oklahoma), May, 1913.

LIABILITY OF STOCKHOLDERS OF FOREIGN CORPORATION.

The stockholders of a foreign mining corporation are not, under the laws of Texas, to be charged as partners for a debt assumed by the mining corporation where the contract and the transactions out of which the debt grew were made in another State, though the statute of Texas prohibits foreign corporations from transacting business in that State unless they first properly file a certified copy of their articles of incorporation, obtain a permit, and make the stockholders liable as partners for debts and liabilities incurred.

Leschen, A., & Sons Rope Co. *v.* Moser, 159 Southwestern, 1018, p. 1026 (Texas Civil Appeals), October, 1913.

LOAN TO CORPORATION—PAYMENT OUT OF NET EARNINGS—LIABILITY.

A contract between a mining corporation, its principal stockholders, and a third person, providing that such third person should loan it a specified amount and that the contracting stockholders should transfer to such third person certain shares as a bonus for making the loan, and further providing that the loan should be repaid out of the first earnings of the business after the running expenses had been deducted, such earnings to be computed and paid over at the monthly meetings of the board of directors, created no general or absolute liability on the part of the corporation to the lender so entitled to payment out of the first earnings of the business only, and the contract did not mean or imply that payment was to be made absolutely after the expiration of a reasonable time.

Frank *v.* Butte & Boulder Mining & Lumber Co., 135 Pacific, 904 (Montana), October, 1913.

POWER OF CORPORATION TO GUARANTEE DIVIDENDS.

A mining corporation has no authority under the statute of the State of Washington to give to the purchaser of its stock a bond guaranteeing that the dividends upon the stock purchased will amount to a stated sum within a given time, for the reason that the dividends can be paid only from profits or surplus earnings, and in the absence of profits such a bond is not enforceable against the corporation.

Jorguson *v.* Apex Gold Mines Co., 133 Pacific, 465, p. 466 (Washington), July, 1913.

DEPRECIATION OF MINING PROPERTY—NET INCOME—DIVIDENDS.

The net income of mining property for the purposes of a dividend does not take into account so-called waste of the property by reason of the extraction of ore in place, but this is to be determined by a computation of the proceeds of the company, after a deduction for operation, expenses of the company, and such reasonable contingencies as may in the light of experience be expected.

Stratton's Independence *v.* Howbert, 207 Fed., 419, p. 420, September, 1913.

SALE OF STOCK—FRAUDULENT REPRESENTATIONS.

An agent was liable for fraud in the sale of the mining stock of a mining corporation where he falsely stated to the prospective purchaser that he was acquainted with the mine, knew the parties who incorporated the mining company, and that their title was good, as such statements were calculated to mislead and deceive, and the character of the representations themselves was sufficient to prevent the proposed purchaser from making inquiry as to the mine and the title of the mining company, and the purchaser had a right to rely on such representation.

Foix *v.* Moeller, 159 Southwestern, 1048, p. 1052 (Texas Civil Appeals), October, 1913.

EMINENT DOMAIN—DUTIES OF PIPE-LINE CORPORATIONS—RATES.

The legislature of the State of West Virginia has by general law conferred on pipe-line companies organized for transporting oil and natural gas the right of eminent domain, and has thereby necessarily imposed on them as public-service corporations the right and duty of performing public service; and pipe lines for transporting oil must carry oil, as railroads must carry passengers and freight, at reasonable rates, unless the rates are fixed by statute; and pipe-line companies organized for transporting natural gas must serve the people with gas under reasonable and proper regulations along the entire line traversed, and for reasonable rates fixed by themselves or by statute or ordinance, and the rights of the people are thus sufficiently protected.

Carnegie National Gas Co. *v.* Swiger, 79 Southeastern, 3, p. 9 (West Virginia), May, 1913.

PIPE-LINE CORPORATIONS—EASEMENT FOR RIGHT OF WAY.

An easement for a right of way of a pipe line for the transportation of natural gas is not to be denied because only few persons are receiving or will be served with natural gas in the State in which the right of way is sought, or because most of the gas will be transported into another State, or because the corporation seeking such easement and right of way is a foreign corporation organized under tha laws of another State, and its principal business is to produce gas and transport it into the State of its incorporation for the use of the citizens and residents of that State, where such corporation has authority to do business in the State in which the right of way for its pipe line is sought, and where the purpose of such corporation is the transporting of natural gas, oils, and water, and it is in fact a common carrier subject to all the duties and liabilities of such carriers, and where it is serving and will serve the people of the State in which

such right of way is sought with natural gas at fixed and reasonable rates.

Carnegie National Gas Co. *v.* Swiger, 79 Southeastern, 3, p. 10 (West Virginia), May, 1913.

PIPE-LINE COMPANIES—VALIDITY OF STATUTE—DESCRIPTION OF EASEMENT.

The statute of West Virginia (ch. 74, act 1907), providing methods of condemning lands or easements by pipe-line companies organized for transporting oil or gas, is not unconstitutional on the ground that the provisions of the act are not sufficiently covered by the title, or on the ground that it is special legislation or is violative of the provision for the due process of law of the State and Federal constitutions, and under this statute a pipe-line company condemning a right of way or easement, when less than a fee, need not describe a definite width or depth when the proposal is for the mere right of way or easement to bury a pipe line of a certain size; but the line must pursue a definite line, with courses and distances given, and have definite and fixed termini.

Carnegie National Gas Co. *v.* Swiger, 79 Southeastern, 3, p. 4 (West Virginia), May, 1913.

FOREIGN CORPORATION—RIGHT TO ENFORCE OBLIGATION.

A mining corporation organized under the laws of Arizona, and authorized to hold meetings in the State of Texas, is not prevented from suing in the courts of Texas to enforce an obligation accruing to it from transactions outside of the State, though it has not received a permit to do business in the State of Texas, if the obligation did not involve the carrying on of the ordinary business of the corporation in competition with domestic corporations.

Leschen, A., & Sons Rope Co. *v.* Moser, 159 Southwestern, 1018, p. 1026 (Texas Civil Appeals), October, 1913.

JURISDICTION OF FEDERAL COURTS—DIVERSE CITIZENSHIP.

The Federal jurisdiction of an action brought by a citizen of New York against a coal corporation of the State of Delaware and operating a coal washery in Pennsylvania, on the ground of diverse citizenship, is in the Federal courts either in New York or in Delaware; but the question of jurisdiction was waived where the action was brought against the Delaware corporation in the State of Pennsylvania, and there was a general appearance to the action without raising the question of jurisdiction.

Marian Coal Co. *v.* Peale, 204 Fed., 161, p. 162, April, 1913.

MINING CLAIMS.

A. LODE LOCATIONS.

1. GENERAL FEATURES.

APEX OF VEIN—MEANING.

The word "apex" as used in the United States statute (sec. 2322, R. S.) means the highest point of a vein, and this point must be the top or terminal edge of the vein on the surface or the nearest point to the surface, and it must be the top of the vein proper rather than of a spur or a feeder, in the same sense that the highest point of the roof of a house would be taken to be the apex of the house, and not the chimney or flagstaff.

Stewart Mining Co. *v.* Ontario Mining Co., 132 Pacific, 787, p. 792 (Idaho), May, 1913.

The apex of a vein is the point from which the vein has a dip as well as strike or course; otherwise there can be no extralateral rights.

Stewart Mining Co. *v.* Ontario Mining Co., 132 Pacific, 787, p. 792 (Idaho), May, 1913.

VEIN OR LODE—DEFINITION.

A mineral lode is defined to be a mineral bed of rock with defined boundaries in the general mass of a mountain, or any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock, and is in place within the meaning of the statute when it is inclosed in a general mass of what is known as country rock—that general bed of the country that remains in its original state unaffected by the action of the elements.

Duffield *v.* San Francisco Chemical Co., 205 Fed., 480, p. 484, May, 1913.

DOWNWARD COURSE OF VEIN—MEANING.

The words "downward course" and "course downward," as used in the United States mining statute (sec. 2322, R. S.), are used interchangeably and signify the course of a vein from the surface toward the center of the earth.

Stewart Mining Co. *v.* Ontario Mining Co., 132 Pacific, 787, p. 792 (Idaho), May, 1913.

FORMATION AND NATURE OF LODE.

It is not important to inquire how a mineral deposit had its origin, whether mineralized waters have ascended from below through fissures in the rock and deposited their solutions therein, or whether the deposit has been washed into the fissures by the elements, or brought from a distance as alluvium, and the mining locator is not required to know the manner in which a mineral deposit had its origin, but it is enough for him to know that a mineral deposit in place between walls of rock is a lode and may be located as a lode claim.

Duffield *v.* San Francisco Chemical Co., 205 Fed., 480, p. 485, May, 1913.

LOCATION ON EXISTING CLAIM—VALIDITY.

A location of a mining claim based on a discovery of mineral within the limits of a valid subsisting claim is void.

Round Mountain Mining Co. *v.* Round Mountain Sphinx Mining Co., 129 Pacific, 308, p. 311 (Nevada).

A mining claim can not be located wholly on existing claims, as the law authorizes the location of mining claims only on unoccupied and unappropriated mineral lands of the United States.

Round Mountain Mining Co. *v.* Round Mountain Sphinx Mining Co., 129 Pacific, 308, p. 310 (Nevada).

The owner of a valid mining location, whether lode or placer, has the right to the exclusive possession of all the surface, and any person going upon a valid placer location to prospect for unknown lodes over the objection of the placer claimant is a trespasser and can not initiate any right thereby.

Duffield *v.* San Francisco Chemical Co., 205 Fed., 480, p. 483, May, 1913.

BOUNDARY LINES EXTENDING ACROSS PRIOR LOCATIONS.

It appears to be the settled doctrine of the land office and of the decisions to give a locator the right to extend the lines of his mining location over and across ground belonging to a prior location and to hold segregated pieces of ground within the exterior boundaries of the location, not exceeding the maximum area of 1,500 by 600 feet allowed by law and not conflicting with a previously located claim

Clark *v.* Mitchell, 134 Pacific, 449, p. 451 (Nevada), August, 1913.

CLAIM AS PUBLIC LAND.

An unpatented mining claim is "public land" within the meaning of the United States statute providing for the punishment of any person who in any manner interrupts, hinders, or prevents the surveying of public lands.

United States *v.* Fickett, 205 Fed., 134, p. 135, May, 1913.

CALCIUM PHOSPHATE—METHOD OF LOCATION.

A deposit of calcium phosphate between clearly defined walls, the overhanging wall being a cherty siliceous limestone of bluish color and the footwall a similar limestone of a grayish color with a belt of calcium phosphate about 60 feet in width and of a dark color with a strike northerly and southerly, and a dip westerly, varying from 15° to 45°, and the deposit lying between veins of shale and limestone containing individual beds of phosphate varying in thickness from a few inches to 5 feet, the outcrop of the deposit being visible at points along the surface, was held to be a vein or lode of rock in place within the meaning of section 2320 of the Revised Statutes of the United States and subject to entry as a lode claim only.

Duffield *v.* San Francisco Chemical Co., 205 Fed., 480, p. 481, May, 1913.

AGREEMENT TO LOCATE—TRUST.

An agreement made by one person with another for a valuable consideration to relocate a mine in the joint name of the contracting parties creates a trust relation and the party agreeing to make the location can not locate the claim in his individual name and transfer it to third persons as against the rights of the other contracting parties.

Clark *v.* Mitchell, 134 Pacific, 448 (Nevada), August, 1913.
Clark *v.* Mitchell, 134 Pacific, 449 (Nevada), August, 1913.

Directors of a mining corporation who agreed with certain stockholders for certain advantageous purposes to make a placer location for the benefit of the corporation and who marked the location accordingly, all expenses being paid by the corporation, can not make the proposed location in their own name and organize a new corporation and cause the location to be conveyed to such new corporation in violation of their agreement, and such new corporation can not be regarded as an innocent purchaser for value, where the principal stockholders of the new corporation understood that its organization was only a convenient medium or cover to shield the directors of the old corporation from the consequences of their breach of trust.

Utah Black Marble Co. *v.* American Marble & Onyx Co., 133 Pacific, 472, p. 474 (Utah), June, 1913.

MARKING BOUNDARIES—DESCRIPTION IN CERTIFICATE.

A description of a mining claim in a certificate of location is insufficient where it suggests that the claim is a parallelogram all the angles of which are right angles and that a person starting from the point of discovery and finding one corner may by proceeding at right angles follow the other lines and pick up the other corners, when as a matter of fact and according to the markings on the ground and the monuments at the corner he would miss one corner by over 500 feet and another corner by over 800 feet, and where the claim as laid out in no wise resembles what the certificate suggests.

Leveridge *v.* Hennessy, 135 Pacific, 906, p. 909 (Montana), October, 1913.

CERTIFICATE OF LOCATION—SUFFICIENCY OF DESCRIPTION.

A location certificate or a notice of location of a mining claim is not required to be strictly executed and the filing of a defective certificate of location will not invalidate a mining claim, and the failure in the description to carry a boundary line to a particular corner, where this may be readily implied from the entire description, will be regarded as an omission or a clerical error.

Clark *v.* Mitchell, 134 Pacific, 449, p. 451 (Nevada), August, 1913.

DESCRIPTION IN DECLARATORY STATEMENT—SUFFICIENCY.

Section 3612, Pol. Code, 1895, as amended by the laws of 1901 of Montana, does not require that a declaratory statement shall contain a description of the corners with the markings thereon; but section 3611 requires the locator, within 30 days after posting his preliminary notice of location, to define the boundaries of his claim by marking a tree or rock in place, or by setting a post or stone at each corner, and within 60 days after posting preliminary notice of location he shall file a declaratory statement specifying, among other things, the number of feet claimed in length along the course of a vein, from the point of discovery, with the width on each side of the center of the vein, and such a description of the location of the claim with reference to some natural object or permanent monument as will identify it; but the statute does not require that the declaratory statement shall contain a description by metes and bounds, but requires only that, with the discovery being taken as the initial point, the boundaries be so definite and certain as that they can be readily traced, and that the declaratory statement shall contain directions that, taken with the markings, will enable a person of reasonable intelligence to find the claim and run its lines, and the degree of accuracy required is indicated by the fact that a locator after his discovery has 30 days in which to ascertain the

course of the vein and to mark his boundaries, and 30 days more in which to file his declaratory statement describing the claim; but the required degree of accuracy is not met if the description given is so erroneous as to be delusive and misleading, and especially where the declaratory statement and the markings on the ground do not even approximately agree as to the general shape of the claim, or as to any point, direction, or distance.

Leveridge *v.* Hennessy, 135 Pacific, 906, p. 908 (Montana), October, 1913.

MINERAL ENTRY IN FOREST RESERVATION—DUTY OF OFFICERS.

The regulations of the Department of the Interior require that all mineral entries on lands in the forest reservations presented for patent shall be investigated and reported upon by the officers in charge of the respective reservations.

United States *v.* Lavenson, 206 Fed., 755, p. 759, June, 1913.

APPROPRIATION FOR RIGHT OF WAY—RIGHTS TO SEPARATE CLAIMS.

A railroad company instituted proceedings under a statute to condemn a right of way for its railroad across certain mining claims, and named certain persons as the owners of such claims and as parties to the proceeding. Subsequently a third person intervened, claiming to be the owner of a valid but unpatented mining claim constituting a part of the land sought to be condemned, and on proof of such fact was entitled to a proportionate share of the damages agreed upon and paid into court.

Las Vegas & Tonopah R. R. Co. *v.* Summerfield, 129 Pacific, 303, p. 305 (Nevada).

2. DISCOVERY ESSENTIAL TO LOCATION.

WHAT CONSTITUTES DISCOVERY.

Discovery is necessary to initiate a mining right, and to constitute discovery it is necessary that mineral-bearing rock in place be found under such circumstances and of such a character that a reasonably prudent man, not necessarily a skillful miner, would be justified in expending time and money in developing it with the reasonable expectation of finding ore in paying quantities.

United States *v.* Lavenson, 206 Fed., 755, p. 762, June, 1913.

TITLE RELATES TO DATE OF DISCOVERY.

Title to a mining claim when completed dates back to the time of the discovery of minerals in the ground, and discovery is always regarded as conferring rights or claims to reward.

Producers' Oil Co. *v.* Hanszen, 61 Southern, 754, p. 759 (Louisiana), March, 1913.

LANDS WITHIN A FOREST RESERVATION—SUFFICIENCY OF DISCOVERY.

Under the statute of 1897 (30 Stat., 11, p. 34), discovery alone is not sufficient on a mining claim located within a forest reserve, and nothing short of a mine of probable commercial value will satisfy this statute.

United States *v.* Lavenson, 206 Fed., 755, p. 763, June, 1913.

Lands within a forest reservation that under this statute (30 Stat., 11, p. 36), are shown to be better adapted for mining than for forest usage shall continue to be subject to location and entry under the mining laws, but a patent procured for land in a forest reservation on the representation that such land was valuable for mineral deposits and the patentee desired it for that purpose may be canceled at a suit on behalf of the United States where it is made to appear that the land was not in fact valuable for its mineral deposits and that it was not the purpose of the patentee to use the land for its mineral deposits but for other and different purposes and where there was no examination by personal investigation.

United States *v.* Lavenson, 206 Fed., 755, p. 764, June, 1913.

STATEMENTS IN LOCATION CERTIFICATE—PROOF OF DISCOVERY.

Although the law does not make a location certificate prima facie evidence of discovery and although such a certificate may not be sufficient evidence as against a contesting claimant, yet a declaration of that kind contained in a record by which a patent for a mining claim was obtained is some evidence that can be considered in the absence of proof showing that the record does not state the truth.

Round Mountain Mining Co. *v.* Round Mountain Sphinx Mining Co., 129 Pacific, 308, p. 311 (Nevada).

3. POSSESSORY RIGHTS—PROTECTION.

RIGHT OF LOCATOR TO POSSESSION.

Where a qualified person enters peaceably upon the public lands of the United States for the purpose of discovering oil or other valuable mineral deposits and the land is at the time unoccupied and there is no valid mineral location or lawful entry thereon, such person has the right to possession so long as he continues to occupy the same to the exclusion of others and diligently and in good faith prosecutes the work thereon endeavoring to discover minerals therein.

Smith *v.* Union Oil Co., 135 Pac., 966, p. 967 (California), September, 1913.

EXTENT OF POSSESSORY RIGHT.

Where the owner of a mining claim is in possession of its surface, asserting title to the entire claim, his possession as a matter of law extends to every part of the claim, whether vertically beneath its

surface or within the extralateral rights conferred by the mining laws, that is not in the actual possession of an adverse holder.

Golden Cycle Mining Co. *v.* Christmas Gold Mining Co., 204 Fed., 939, p. 940, April, 1913.

ACTION TO PROTECT POSSESSION AND TITLE.

A person in possession of a mining claim located under the United States Statutes may maintain an action to remove a cloud from his title or prospective title.

Producers' Oil Co. *v.* Hanszen, 61 Southern, 754, p. 759 (Louisiana), March, 1913.

LOCATION GIVES VESTED PROPERTY RIGHT.

A lode locator acquires a vested property right by virtue of his location under the United States statute making all valuable mineral deposits in public lands free and open to exploration and purchase.

Producers' Oil Co. *v.* Hanszen, 61 Southern, 754, p. 759 (Louisiana), March, 1913.

VESTED RIGHTS PROTECTED—WATER RIGHTS.

Under sections 2339 and 2340 of the Revised Statutes of the United States, vested and accrued water rights for beneficial purposes acquired by priority of possession are protected, and by the constitution of Colorado priority of appropriation gives the better right as between persons using the water for the same purpose.

Empire Power & Water Co. *v.* Cascade Town Co., 205 Fed., 123, p. 126, April, 1913.

DIVERTING SUBTERRANEAN STREAM DISCOVERED IN TUNNEL.

The owner and operator of a tunnel used for mining purposes who discovered in his tunnel and appropriated the waters of a well-defined subterranean stream for mining purposes may enjoin another owner of a mining tunnel from diverting such subterranean stream to the detriment of the first appropriator, as the first appropriator secured a vested right in the stream to the extent of his appropriation, and this right carries with it an interest in the stream to the source from which the supply is obtained.

Chandler *v.* Utah Copper Co., 135 Pacific, 106, p. 109 (Utah), September, 1913.

4. EXTRALATERAL RIGHTS.

POSSESSION OF SURFACE—ADVERSE POSSESSION OF VEIN.

The extralateral rights given by virtue of possession to the owner of the surface of a mining claim is constructive, and outside the downward planes of the surface lines must give way to the actual adverse possession of a third person.

Golden Cycle Mining Co. *v.* Christmas Gold Mining Co., 204 Fed., 939, p. 940, April, 1913.

EXTENT BEYOND ADJOINING CLAIM.

The owner of a mining claim is entitled to extralateral rights though his vein on its dip and downward course passes entirely through one or two or more adjoining claims, where its identity is not destroyed, and in determining the identity and continuity of a vein, a fault and a vein may be parts of one and the same fissure.

National Mines Co. *v.* Charleston Hill National Mining Syndicate, 205 Fed., 787.

TAKING MINERALS UNDER OTHER LOCATIONS—BURDEN OF PROOF.

The owner of a mining location who claims extralateral rights on a vein and seeks to take ore bodies from beneath the surface boundaries of another location must prove satisfactorily that the apex of the vein or lode is within the surface boundaries of his location and that he is pursuing the vein on its downward course; and in such a case where the evidence is doubtful and uncertain a court will decline its aid to enable a locator to pass beyond his own side lines to remove ore bodies from beneath another and a senior location.

Stewart Mining Co. *v.* Ontario Mining Co., 132 Pacific, 787, p. 794 (Idaho), May, 1913.

NO EXTRALATERAL RIGHTS FROM END OF VEIN.

Under no rule or definition can the end edge of a vein along a well-defined fault be treated as an apex of a vein so as to give title to ore bodies mined from underneath the surface of an adjoining valid claim.

Stewart Mining Co. *v.* Ontario Mining Co., 132 Pacific, 787, p. 794 (Idaho), May, 1913.

BLANKET VEIN—DIP AND COURSE.

The downward course of a vein may sometimes happen to be perpendicular, the vein thus forming a vertical plane, but generally there is a deflection in the downward course from the perpendicular and this is called the dip; but still the course of the dip is always downward, and when the plane of the vein reaches the horizontal it is then called a blanket vein or lode, and on such vein a locator has no extralateral rights.

Stewart Mining Co. *v.* Ontario Mining Co., 132 Pacific, 787, p. 792 (Idaho), May, 1913.

DIP OF VEIN—BASIS OF RIGHT.

The extralateral rights awarded by the United States mining statute (sec. 2322, R. S.) must in all cases be pursued upon the dip rather than the strike of the vein and upon the downward rather than the onward course, and to pursue a vein in the direction of its strike at an angle of less than 45° to its course would not be following the vein on its downward course, and this right in any event is limited to the vertical planes drawn downward through the end lines.

Stewart Mining Co. *v.* Ontario Mining Co., 132 Pacific, 787, p. 792 (Idaho), May, 1913.

FOLLOWING COURSE OF VEIN.

The downward course of a vein that may be followed in the exercise of the extralateral rights given by the United States mining statute (sec. 2322, R. S.) is not necessarily at right angles to the strike or true course of the vein, but it is the direction that a vein takes underneath the surface on its downward course between the vertical planes drawn downward through the end lines of the surface location.

Stewart Mining Co. *v.* Ontario Mining Co., 132 Pacific, 787, p. 792 (Idaho), May, 1913.

SEGMENT OF VEIN.

There can be no extralateral rights on the strike of a vein, but this right is limited to a segment in length throughout the entire depth of the vein within vertical planes drawn downward through the end lines, making the segment equal to the length of the apex covered by the surface boundaries, measured on lines on the plane of the vein, which, except for possible warping or local curving, would be parallel to the course of the apex of the vein.

Stewart Mining Co. *v.* Ontario Mining Co., 132 Pacific, 787, p. 793 (Idaho), May, 1913.

SIDE LINES MADE END LINES.

If a vein on its course or strike crosses a side line of the surface location, such side line is converted into an end line and the end lines of the surface location become side lines, and the locator can not pursue his extralateral rights beyond his new end line.

Stewart Mining Co. *v.* Ontario Mining Co., 132 Pacific, 787, p. 793 (Idaho), May, 1913.

DIFFERENT VEINS APEXING IN SURFACE LOCATION.

The course of the primary or discovery vein definitely determines the end lines and side lines for all veins having their apexes within the exterior boundaries of the surface location, and a locator can not treat the end lines of his location as the true end lines for the purposes of one vein apexing within his surface boundaries and pursue his extralateral rights on that vein in one direction and then claim that the same end lines are side lines with reference to another vein apexing within the surface boundaries so as to enable him to pursue his extralateral rights on the secondary vein in substantially the same direction as the course or strike of his discovery vein.

Stewart Mining Co. *v.* Ontario Mining Co., 132 Pacific, 787, p. 793 (Idaho), May, 1913.

MINERALS WITHIN SIDE LINES OF CLAIM—PRESUMPTION AS TO OWNERSHIP.

The presumption is that all the ore within the side lines of a particular claim belongs to the owner thereof, yet if the apex of a vein or lode is outside of the boundaries of such claim and within the surface boundaries of a different claim, then the owner of the latter

claim has the right to follow such vein or lode and remove the ore therefrom notwithstanding its extension within the boundaries of the first-mentioned claim; but the burden of proof is upon the person claiming the vein or lode to establish the fact that its apex was within the boundaries of his claim.

Liberty Bell Gold Mining Co. *v.* Smuggler-Union Mining Co., 203 Fed., 795, p. 805, March, 1913.

5. ASSESSMENT WORK.

CONSTRUCTION AND MEANING

The terms "assessment work" and "annual assessment" were in common use among miners long before the terms were used in the Revised Statutes of the United States and were used by the miners and in the decisions of the State and Federal courts on mining law to designate the annual labor required by section 2324 of the Revised Statutes; and the word "assessment," when used in connection with the right to a mining claim, is universally understood to mean the annual labor required by that section in order to hold the right to the possession of a mining claim after a discovery and complete location has been made, and is never used or understood to indicate work done to make a discovery on a claim where none has been made; but it is applied only to work done to hold the claim after discovery, such work having no necessary relation to a discovery, though it might lead to further or more comprehensive discoveries.

Smith *v.* Union Oil Co., 135 Pacific, 966, p. 969 (California), September, 1913.

ANNUAL ASSESSMENT—MEANING.

The words "location" and "located," as used in section 2320 of the Revised Statutes of the United States, mean and include the posting of a notice and the recording thereof, when required, and the marking of the boundaries as required by section 2324 of the Revised Statutes of the United States, and no one can maintain possession of a mining claim until he has discovered mineral within its limits; and, under the mining laws, in order to maintain his right of possession against another who has entered to make a mineral location in his absence the claimant may prove a previous discovery as well as the previous marking of his lines.

Smith *v.* Union Oil Co., 135 Pacific, 966, p. 968 (California), September, 1913.

SUSPENSION OF ASSESSMENT WORK.

Congress, in 1893 and in 1894, suspended the provisions of section 2324 of the Revised Statutes requiring $100 worth of labor to be performed or of improvements to be made during the years 1893 and 1894.

Peachy *v.* Frisco Gold Mining Co., 204 Fed., 659, p. 666, April, 1913.

RESUMPTION OF WORK—QUESTION OF FACT.

The question as to a resumption of work under the provisions of section 2324 of the Revised Statutes after a failure to do the annual work required for a particular year is a question of fact to be determined upon the trial of the case.

Peachy *v.* Frisco Gold Mining Co., 204 Fed., 659, p. 669, April, 1913.

WORK ON ONE OF SEVERAL CONTIGUOUS CLAIMS.

Where several mining claims are held in common, work to the amount necessary to hold all of them can be done upon one of such claims, provided it tends to develop or benefit all the claims for mining purposes and is done in good faith.

Smith *v.* Union Oil Co., 135 Pacific, 966, p. 968 (California), September, 1913.

OIL PLACER CLAIMS—ANNUAL ASSESSMENT LABOR.

The act of Congress approved February 12, 1903 (32 Stat., 825), providing for the location of oil lands as placer mining claims and providing that the annual assessment labor upon such claims may be done upon any one of a group of contiguous claims owned by the same person does not mean that the annual assessment labor can be done for the purpose of accomplishing a discovery in order to perfect the location, as the use of the phrase "annual assessment labor" limits the application of the act to claims upon which discovery has been made and in connection with which there has been a valid and completed location.

Smith *v.* Union Oil Co., 135 Pacific, 966, p. 968 (California), September, 1913.

6. ABANDONMENT.

WHAT CONSTITUTES ABANDONMENT—INTENTION AND ACT.

To constitute an abandonment of a mining claim there must be a going away and a relinquishment of rights with the intention never to return and with a voluntary and independent purpose to surrender the location or claim to the next comer. An abandonment, therefore, is a question of act and intention, to be found from the intention and the act when considered together in connection with all the circumstances in the case.

Peachy *v.* Frisco Gold Mining Co., 204 Fed., 659, p. 666, April, 1913.

Abandonment of a mining claim includes both the intention to abandon and the act by which the abandonment is carried into effect.

Peachy *v.* Frisco Gold Mining Co., 204 Fed., 659, p. 668, April, 1913.

DECLARATION OF ABANDONMENT—EFFECT.

A declaration of abandonment inserted in relocation notices in ignorance of a change in the law that such declaration was not required, is not sufficient to overcome proof of the fact and establish an abandonment, where the locator continued to perform the assessment work for the preceding year in order to prevent an abandonment.

Peachy *v.* Frisco Gold Mining Co., 204 Fed., 659, p. 668, April, 1913.

RELOCATION NOT ABANDONMENT.

Where the owner of a mining claim failed to perform the annual assessment work and thereafter attempted to relocate the claim and inserted in his notice of relocation the statement that the claim was relocated as abandoned property, and thereafter sunk on the ground a shaft disclosing mineral-bearing rock, work that was sufficient to prevent a forfeiture for failure to perform the assessment work for the preceding year, it can not be said that the declaration inserted in the relocation notice was sufficient as a matter of law to show that the claim had in fact been abandoned.

Peachy *v.* Frisco Gold Mining Co., 204 Fed., 659, p. 688, April, 1913.

RELOCATING CLAIM AS ABANDONED PROPERTY—EFFECT.

Section 3241 of the Revised Statutes of Arizona provides that the relocation of a forfeited or abandoned mining claim shall be made only by sinking a new discovery shaft and fixing the boundary in the same manner and in the same extent as is required in making an original location; or in lieu of this the original locator may sink the original shaft 10 feet deeper and erect a new location monument and state in the location notice whether any part of the new location is located as abandoned property. This section was amended by the act of March 12, 1907, by a provision that the location of an abandoned or forfeited claim shall be made in the same manner as the original location, except that the relocator may at his option perform his location work by sinking the original location shaft 10 feet deeper. The provision requiring the notice to state whether the claim or any part thereof is located as abandoned property was omitted.

Peachy *v.* Frisco Gold Mining Co., 204 Fed., 659, p. 667, April, 1913.

RIGHT OF COTENANT TO RECOVER INTEREST.

One cotenant can not abandon a mining claim for the reason that he can not by any course of conduct destroy the interest of his cotenant so that the claim reverts to the United States and his conduct will not enure to the benefit of his other cotenants; but when his conduct is such that if he were the sole owner, he would be held

to have abandoned his right in a technical sense he can not thereafter assert title to the interest so renounced, and it is of no concern to him what thereafter becomes of the claim, and in such case he should be left under the disability he has brought upon himself and be adjudged to have no standing in court to assert an interest or to question the interest of his cotenant or of any other person whomsoever.

O'Hanlon *v.* Ruby Gulch Mining Co., 135 Pacific, 914, p. 918 (Montana), October, 1913

7. FORFEITURE.

INTEREST OF DELINQUENT COOWNER—PURPOSE OF STATUTE.

The purpose of section 2324 of the Revised Statutes of the United States providing for the forfeiture of the interest of a delinquent coowner of a mining claim is to afford a speedy, convenient, and effective method of taking from one cotenant his interest in the property and giving it to another without the intervention of courts or juries; and when one cotenant ascertains that he has divested his cotenant of his interest in the common property, the courts will examine the circumstances under which the alleged divestiture has been brought about and deny the claim, unless conditions warranting the invocation of the provision exist, and the personal or constructive notice prescribed has been given in strict conformity with its requirements.

O'Hanlon *v.* Ruby Gulch Mining Co., 135 Pacific, 914, p. 917 (Montana), October, 1913.

WHO ARE COOWNERS.

A statute permitting one tenant in common of a mining claim to forfeit the interest of a delinquent coowner is one of forfeiture and must be strictly construed, and a notice given by one who was not at the time actually a coowner but vested only with an equity under a sheriff's certificate of sale, was not effective to work a forfeiture, though he had in fact done the full amount of work necessary to preserve the claim.

O'Hanlon *v.* Ruby Gulch Mining Co., 135 Pacific, 914, p. 917 (Montana), October, 1913.

COTENANT ACQUIRING TITLE OF DELINQUENT COOWNER—SUMMARY METHODS.

A statute authorizing a cotenant of a mining claim to forfeit the interest of a delinquent coowner provides a summary method for the purpose of insuring the proper contribution of coowners among themselves in the working of a mine, and provides means by which a delinquent coowner may be compelled to contribute his share, under the penalty of losing his interest in the property because of such failure.

O'Hanlon *v.* Ruby Gulch Mining Co., 135 Pacific, 914, p. 917 (Montana), October, 1913.

ADMINISTRATOR OF DECEASED COOWNER—KNOWLEDGE OF COOWNERS.

An administrator of a deceased cotenant of mining property will be presumed to know that the coowner with his decedent were asserting exclusive ownership to the mining claim, because of an attempted forfeiture of his decedent's interest by not contributing to the annual assessment work, as his official duty requires him to know such facts.

O'Hanlon *v.* Ruby Gulch Mining Co., 135 Pacific, 914, p. 918 (Montana), October 1913.

COTENANT'S DELAY IN ASCERTAINING RIGHTS.

Where the heirs of a deceased coowner of a mining claim, after a ong lapse of time, sued to recover the interest of their deceased ancestor, it was competent to show that at the time of the attempted forfeiture of their ancestor's interest they had been informed by the administrator of their ancestor's estate that he, the administrator, had been served with notice of the failure of the ancestor of the suing heirs to contribute to the representation work, for the purpose of showing laches on the part of such heirs in asserting their claim and for the purpose of showing that the suing heirs had in fact abandoned the interest of their ancestor in the claim.

O'Hanlon *v.* Ruby Gulch Mining Co., 135 Pacific,914, p. 920 (Montana), October, 1913..

ADMINISTRATOR NOT A COOWNER.

An administrator is not by virtue of his office a coowner with the cotenants of his decedent in a mining claim within the meaning of the statute providing for the service of notice on a delinquent coowner, and service of such notice upon the administrator is not legal service as required by the statute, as the heirs of the delinquent cotenant are the real coowners.

O'Hanlon *v.* Ruby Gulch Mining Co., 135 Pacific, 914, p. 916 (Montana), October 1913.

8. RELOCATION.

RELOCATOR—CONFIDENTIAL RELATIONS TO LOCATOR.

A person holding a confidential relation with the original locator of a mining claim can not take advantage of any dereliction of duty and relocate a claim and secure to himself any advantages flowing from a breach of the confidential obligations.

Cooperative Copper & Gold Mining Co. *v.* Law, 132 Pacific, 521, p. 522 (Oregon), May, 1913.

RELOCATION BY AGENT—EFFECT AND VALIDITY.

A person who located a mining claim in Oregon and induced certain acquaintances in Illinois to organize a corporation, advance money, and take over his location and other mines was not permitted, after the expenditure of a large sum of money by such persons and the corporation organized by them, to relocate the mining claim in his own

name, when he knew that no other representative of the mining corporation was in the State of Oregon and that the officers and the stockholders of the mining corporation depended implicitly on him for advice as to the management of the mine and to take care of the company's interests in the State of Oregon.

Cooperative Copper & Gold Mining Co. *v.* Law, 132 Pacific, 521, p. 522 (Oregon), May, 1913.

FAILURE TO PERFORM ASSESSMENT WORK—RELOCATION.

Failure to perform the annual labor on a mining claim makes the claim subject to relocation, but such failure is not a forfeiture of the claim, and the estate of the locator is not devested until there has been peaceable entry for the purpose of perfecting the relocation, and the right of the original location can be terminated only by the entry of a new one.

Cooperative Copper & Gold Mining Co. *v.* Law, 132 Pacific, 521, p. 522 (Oregon), May, 1913.

9. ADVERSE CLAIMS.

AUTHORITY OF LAND OFFICERS—METHODS OF ACQUIRING MINING CLAIMS.

There is lodged in the officers of the Land Department the authority to determine what public land is mineral land and as such open to mining location, and courts will not interfere or control the exercise of that power; but there is no express authority given such officers to decide under which of two different methods of acquiring mining claims, lode or placer, any given mineral land may be located, and the existence of such authority is not recognized by the decisions of the courts, but the inference to be drawn from the decisions is to the contrary.

Duffield *v.* San Francisco Chemical Co., 205 Fed., 480, p. 482, May, 1913.

QUESTIONS FOR DETERMINATION BY COURT.

Sections 2325 and 2326 of the Revised Statutes of the United States relegate to a court of competent jurisdiction the determination of the right of possession between adverse mineral claimants, and the determination of that question involves not only the question as to which of the adverse claims was prior in time in making location, and whether the location was made in compliance with law, but also the question as to whether the land occupied and covered by the location was subject to location in the manner attempted.

Duffield *v.* San Francisco Chemical Co., 205 Fed., 480, p. 481, May, 1913.

RIGHT OF COTENANT—CONFIDENTIAL RELATION.

An excluded cotenant may bring his adverse suit and have his rights determined in patent proceedings so that the patent will convey directly to him his interest; or he may wait until the conclusion of the patent proceedings and then assert his equities in the patent title and

have the patentee declared a trustee for his benefit to the extent of his interest, as cotenants stand in a certain relation toward each other of mutual trust and profit and neither will be permitted to act in hostility toward the other, and a defective title acquired by one will inure to the benefit of the others.

O'Hanlon *v.* Ruby Gulch Mining Co., 135 Pacific, 914, p. 919 (Montana), October, 1913.

POSSESSION BROKEN AND IRREGULAR—SUFFICIENCY OF CLAIM.

The fact that a prospector went upon a disputed area of a placer claim from time to time to prospect for gold and sunk shafts and ran tunnels and dug up the surface at different places within such area, but had not for any definite or great length of time, beyond 18 months or 2 years, mined in any definite locality, but shifted about, dug holes in different places, panning for colors, with the hope and view of making discovery at some point, but making no discovery in paying quantities, did not constitute such actual unbroken possession of any specifically defined locality as to constitute such actual, exclusive, and continuous possession as to give title against a record owner who had performed his assessment work from year to year.

Pacific Coal & Transportation Co. *v.* Pioneer Mining Co., 205 Fed., 577, p. 591, May, 1913.

10. LIENS.

STATUTORY LIEN FOR LABOR.

Although statutes giving liens to mechanics and laborers are to be liberally construed with a view of effecting substantial justice, yet the labor performed for which a lien is claimed must come within the contemplation of the statute before there can be a valid lien, and this rule applies to States giving a lien to persons performing labor upon a building, flume, mine, or tunnel.

Noble *v.* Gustafson, 204 Fed., 69, p. 71, March, 1913.

NATURE OF WORK—ALASKA CODE.

Section 262 of the Civil Code of Alaska, giving a lien to persons performing labor upon any building, flume, mine, tunnel, aqueduct, or other structure, does not give a lien to a laborer engaged in sluicing up a dump for extracting ore therefrom, where such dump consists of the pay dirt extracted from a mine and thrown out from the shafts and tunnels as the excavations were carried on and remains until the season is opportune for sluicing it up by the use of running water for washing out and separating the gold from the earth and gravel as the dump is thawed out.

Noble *v.* Gustafson, 204 Fed., 69, p. 71, March, 1913.

Section 262 of the Civil Code of Alaska, gives a lien to persons performing labor upon the construction, development, alteration, or

repair of any building, flume, mine, aqueduct, or other structure, but does not include the ordinary work of a miner in the operation of a placer claim, having no relation to the development or improvement of a mine.

Noble *v.* Gustafson, 204 Fed., 69, p. 71, March, 1913.

WORK DONE IN DEVELOPMENT OR IMPROVEMENT.

Section 262 of the Civil Code of Alaska gives a lien to persons performing labor upon the construction, alteration, or repair of any building, flume, mine, aqueduct, or other structure, but to entitle any such person to a lien he must show that the work done was in the development or improvement of a mine.

Noble *v.* Gustafson, 204 Fed., 69, p. 71, March, 1913.

ENFORCEMENT OF LIEN FOR LABOR—TIME OF COMMENCING ACTION.

Under the statute of Oklahoma, making stockholders of mining corporations personally liable for debts due to mechanics, workmen, and laborers, and providing that the liability may be enforced at any time after an execution against the corporation has been returned not satisfied, if the action be commenced within four months, such an action must be commenced within four months after the date of the return of the execution, not four months from the time when the goods were furnished or the labor performed.

Gilman *v.* Gaesser, 132 Pac., 318 (Oklahoma), May, 1913.

SALE OF MACHINERY—RESERVING SECRET LIEN.

Under the law as established in Colorado a machinery company can not make a conditional sale of machinery to the lessee for the purpose of permanently equipping a mine with proper and sufficient machinery to operate the same and retain a secret lien thereon for the purpose of securing the purchase price, especially when the lease under which the purchase of the machinery is made, provides that in case of its forfeiture all payments made shall be considered as rental for the property, and that all machinery and appliances installed in the mine and all improvements made shall revert to and become the property of the lessor.

Puzzle Mining & Reduction Co. *v.* Morse Machinery & Supply Co., 131 Pacific, 791 (Colorado), April, 1913.

AERIAL TRAMWAY.

An aerial tramway constructed by a mining corporation and extending from Mexico across a river to a point in Texas, for the transportation of ore from Mexico to a smelter within the State of Texas, is an improvement within the meaning of the statute giving laborers and material men liens on mines or mining properties.

Leschen, A., & Sons, Rope Co. *v.* Moser, 159 Southwestern, 1018, p. 1027 (Texas Civil Appeals), October, 1913.

11. DESCRIPTION OF MINING CLAIMS—SUFFICIENCY.

SUFFICIENCY OF DESCRIPTION—LODE CLAIM.

The fact that a lode claim is described as a placer claim in an agreement in relation thereto is immaterial, where the property is otherwise so described as to leave no doubt as to what was intended.

Las Vegas & Tonopah R. R. Co. *v.* Summerfield, 129 Pacific, 303, p. 305 (Nevada).

ACTION TO QUIET TITLE—DESCRIPTION.

The pleadings in an action to quiet title to a mining claim and to enjoin a defendant from taking valuable minerals therefrom failed to describe definitely the precise ground claimed by the plaintiff and upon which the defendant was trespassing; but the answer of the defendant alleging ownership of a particular and definite tract of ground of which it was properly in possession presented a material issue as to the ownership of the property, and a finding that the plaintiff was the owner of a mining claim known by name, particularly describing the same, and that the defendant had not claimed any interest in the particular claim of plaintiff, as described in the finding, and had not taken any mineral therefrom, or threatened to do so, and a finding that the defendant was the owner of an entirely different tract from that found to belong to the plaintiff, was a sufficient finding on the question of ownership and properly adjudicated the question of title and rights between the parties.

California Mother Lode Mining Co. *v.* Page, 133 Pacific, 14, p. 15 (California), June, 1913.

12. PATENTS.

APPLICATION MUST SHOW MINERAL CHARACTER OF LAND.

In an application for patent it must be shown that the land described was not only located for valuable deposits, but that it is claimed for such deposits, and if the purpose of either the location or of the patent is to secure valuable water power or timber, then the land can not be patented under the mineral-land laws.

United States *v.* Lavenson, 206 Fed., 755, p. 763, June, 1913.

APPLICATION—JURISDICTION OF LAND DEPARTMENT.

The Land Department has jurisdiction to determine the question of priority as between conflicting lode locations embraced in the same group application.

Round Mountain Mining Co. *v.* Round Mountain Sphinx Mining Co., 129 Pacific, 308, p. 312 (Nevada).

EFFECT AND RELATION.

A patent for a mining claim when duly issued relates back to the original location.

Las Vegas & Tonopah R. R. Co. *v.* Summerfield, 129 Pacific, 303, p. 304 (Nevada).

EFFECT AND CONCLUSIVENESS.

A patent for a mining claim issued by the Land Department is a conveyance of the legal title to the patentee and is not subject to collateral attack and is conclusive as concerns the adjudication of any matters that were before the tribunal for adjudication and as against all persons who were parties.

Round Mountain Mining Co. *v.* Round Mountain Sphinx Mining Co., 129 Pacific, 308, p. 311 (Nevada).

RIGHT TO POSSESSION.

A person holding possession of an option of the surface of a mining claim under conveyance from the original locator and his grantees, after patent has been issued to them, is entitled to the possession of the part of such claim described in such conveyance.

Las Vegas & Tonopah R. R. Co. *v.* Summerfield, 129 Pacific, 303, p. 304 (Nevada).

INVALIDITY OF PATENT—RIGHT TO CONTEST.

In an equitable action to quiet title to a mining claim the invalidity of the plaintiff's patent may be pleaded as a defense in the action and may be tried upon the same principles as an original bill in equity and it may be shown that the plaintiff's patent was for ground wholly located within a valid existing mining claim.

Round Mountain Mining Co. *v.* Round Mountain Sphinx Mining Co., 129 Pacific, 308, p. 311 (Nevada).

NONCONTIGUOUS PIECES EMBRACED IN SAME CLAIM.

It is the present practice of the General Land Office to grant patents to noncontiguous pieces of ground embraced in the same mining claim but supported by a prior location where the entire area does not exceed the amount allowed by law.

Clark *v.* Mitchell, 134 Pacific, 449, p. 451 (Nevada), August, 1913.

FRAUDULENT REPRESENTATION AS TO MINERAL CHARACTER OF LAND.

It is a fraud on the Government when a claimant obtains a patent on representations that the land described is valuable for its mineral deposits and that the purpose of obtaining the patent is because of such mineral deposits, when in fact the land is not valuable for such deposits and the patentee does not in fact desire it for that purpose, but for other and different purposes.

United States *v.* Lavenson, 206 Fed., 755, p. 763, June, 1913.

PRESUMPTION AS TO COURSE OF VEIN AFTER PATENT.

In the absence of proof as to the course of a discovery vein in a patented mining claim the presumption is that the surface location was made along the course of the vein, but there is no foundation

for this presumption where no question arises over any fact, the existence of which was essential to the obtaining of the patent, or where the subsequent controversy in any way involves the discovery vein or the right of the locator to pursue it in any manner or direction, and where the party against whom the presumption is sought to be invoked was not a party or privy to the location or patent proceeding.

Stewart Mining Co. *v.* Ontario Mining Co., 132 Pacific, 787, p. 793 (Idaho), May, 1913.

PRESUMPTION AS TO END LINES.

A legal presumption arises from the issuance of a patent to a mining claim to the effect that the end lines as established on the ground are the true end lines for all purposes of a subsequent controversy over underground extralateral rights.

Stewart Mining Co. *v.* Ontario Mining Co., 132 Pacific, 787, p. 793 (Idaho), May, 1913.

FAILURE TO ADVERSE—EFFECT OF EXTRALATERAL RIGHTS.

A senior locator of a mining claim failing to adverse the application of a junior locator can not, after patent issues, question the validity of the surface conveyed; but if the patent contains grants of distinct mining claims, described by metes and bounds, in conflict with each other, and controlling extralateral rights in different directions, the senior locator can then insist on a determination of the question of which grant carries the surface including the apex of the ledge as controlling such extralateral rights.

Round Mountain Mining Co. *v.* Round Mountain Sphinx Mining Co., 129 Pacific, 308, p. 312 (Nevada).

EXTRALATERAL RIGHTS—VALIDITY OF LOCATION.

In an action to quiet title to a lode or vein that involves the question of extralateral rights not involved in the patent proceedings, the defendants are not estopped from questioning the validity of the location of the claim under which the plaintiff seeks to enforce his extralateral rights as against them.

Round Mountain Mining Co. *v.* Round Mountain Sphinx Mining Co., 129 Pacific, 308, p. 311 (Nevada).

RIGHT OF GOVERNMENT TO CONVEY SEGREGATED LAND.

The Government has a right to convey the land included within the surface boundaries of a mining claim that has been regularly and legally segregated from occupancy or appropriation by another, and the Government has no further right to convey to a subsequent locator who makes an attempted location within the surface lines of the patented claim.

Round Mountain Mining Co. *v.* Round Mountain Sphinx Mining Co., 129 Pacific, 308, p. 311 (Nevada).

EFFECT OF DOUBLE GRANT.

Where the Land Department failed to determine the question of priority in the location of conflicting claims and made a double grant of the conflicting area, such double grant appearing upon the face of the second patent, the question of priority in such case was a matter that a court had power to consider and determine, and such determination was not a collateral attack upon the patent, but was a determination of the effect of a patent containing ambiguous provisions, and the burden of proof was upon the patentee named in the patent, which on its face was ambiguous in failing to show a priority of location and did show that it covered conflicting areas.

Round Mountain Mining Co. *v.* Round Mountain Sphinx Mining Co., 129 Pacific, 308, p. 312 (Nevada).

GROUP CLAIMS AND EXTRALATERAL RIGHTS.

Where the Government issues to a group of mining claims a patent purporting to grant the same surface to different claims constituting the group, all the several grants can not be valid so far as any conflicting area is concerned; but so far as the surface conveyed by the group patent is concerned there can be no difference, but as to the matter of extralateral rights it then becomes of the greatest importance on the question of which particular grant carries the surface including the apex.

Round Mountain Mining Co. *v.* Round Mountain Sphinx Mining Co., 129 Pacific, 308, p. 312 (Nevada).

CONVEYANCE OF SAME GROUND TO TWO PERSONS—VALIDITY.

The Government can not convey conflicting areas of mining claims to two parties, as in such case one of the grants must of necessity be void.

Round Mountain Mining Co. *v.* Round Mountain Sphinx Mining Co., 129 Pacific, 308, p. 312 (Nevada).

RIGHT OF COTENANTS TO RECOVER INTEREST AFTER PATENT.

An excluded cotenant of a mining claim may bring an action in the ordinary way without reference to the patent proceedings and have his rights in the claim established by judgment, as the pendency of the patent proceedings can not be alleged to oust a State court of jurisdiction, as the United States statute was intended to apply only to cases in which there are adverse claims arising out of conflicting locations, or where the adverse claimants derived their title from different sources.

O'Hanlon *v.* Ruby Gulch Mining Co., 135 Pacific, 914, p. 919 (Montana), October, 1913.

B. PLACER CLAIMS.

PLACER CLAIMS DEFINED.

The term "placer claim" applies to ground within defined boundaries containing mineral in its earth, sand, or gravel, or, as defined by the statute, ground that includes valuable deposits not in place, not fixed in rock, but found in a loose state, and that may in most cases be collected by washing or amalgamation without milling.

Duffield *v.* San Francisco Chemical Co., 205 Fed., 480, p. 484, May, 1913.

PLACER CLAIM—APPLICATION OF TERM.

The term "placer claim" applies to all forms of deposits except veins or quartz or other rock in place and means ground within well-defined boundaries containing mineral in its earth, sand, or gravel, recognized as valuable deposits not in place or not fixed in rock.

Duffield *v.* San Francisco Chemical Co., 205 Fed., 480, p. 483, May, 1913.

OIL LANDS—PLACER LOCATIONS—QUALIFIED LOCATORS.

Under the United States Statutes (27 Stat., 347), persons authorized to enter lands under the mining laws may locate oil lands as placer mining claims.

Producers' Oil Co. *v.* Hanszen, 61 Southern, 754, p. 759 (Louisiana), March, 1913.
Rives *v.* Gulf Refining Co., 62 Southern, 623, p. 629 (Louisiana), May, 1913.

POSSESSORY ACTION BY LOCATOR TO PROTECT RIGHTS.

The locator of an oil claim on placer grounds belonging to the United States, surveyed or unsurveyed, is the equitable owner of the mining grounds, and the Government holds the premises in trust for him to be delivered upon the payment specified, and the location gives a sufficient interest to maintain an action in the courts to protect his rights.

Producers' Oil Co. *v.* Hanszen, 61 Southern, 754, p. 759 (Louisiana), March, 1913
Rives *v.* Gulf Refining Co., 62 Southern, 623, p. 629 (Louisiana), May, 1913.

DISCOVERY OF OIL—DISCOVERY SUFFICIENT—ASSESSMENT WORK.

There may be a discovery on oil lands sufficient to perfect the location of certain lands as a placer claim, although at the same time it might be desirable and tend greatly to enhance the value of the claim if further explorations and further discoveries were made, and deeper drilling might disclose additional strata of oil-bearing sands, and thus determine the oil-bearing character of contiguous claims. However, such additional acts would be wholly unnecessary to perfect the location, and the effect of such acts would be to make such additional exploration on one of the contiguous claims suffice as the annual assessment labor upon all of them.

Smith *v.* Union Oil Co., 135 Pacific, 966, p. 969 (California), September, 1913.

OIL LOCATION—DISCOVERY—ANNUAL ASSESSMENT LABOR.

An oil company, by purchase from locators and by locations of its own, claimed five separate tracts or contiguous placer claims, the location of which was regularly made and the ground properly marked, although no discovery of oil or other minerals had been made. The oil company was in actual occupation of one of the contiguous claims upon which it was diligently drilling a well for the discovery of oil and upon which it had expended several thousands of dollars in drilling; but this fact was not sufficient to prevent a third person from making a peaceable entry upon one of such contiguous claims and locating the same on making a discovery of oil, as the work and expenditure of the oil company in drilling for the purpose of discovery can not be regarded as the performance of annual assessment labor upon one of a group of contiguous claims by which all of such claims can be held.

Smith *v.* Union Oil Co., 135 Pac., 966, p. 968 (California), September, 1913.

LOCATOR NOT A TRESPASSER.

A person who takes actual possession of and posts and files notices of his location under the placer-mining laws of the United States is not a trespasser upon the public lands.

Producers' Oil Co. *v.* Hanszen, 61 Southern, 754, p. 759 (Louisiana), March, 1913.

QUIETING TITLE AS AGAINST TRESPASSER.

A locator and owner of a valid placer claim was not estopped from maintaining a suit to quiet title as against a person who entered upon some parts of the claim and prospected for and actually removed some mineral, but expended no large sum of money in making explorations and made no permanent improvements, and had been several times warned by the original locator that he was trespassing upon a valid location.

Pacific Coal & Transportation Co. *v.* Pioneer Mining Co., 205 Fed., 577, p. 591, May, 1913.

LODE LOCATED AS PLACER—EFFECT.

Any scheme by which it is sought to locate lode mines as placers and secure the same as placers, is a fraud upon the Government and the location so made is void.

Duffield *v.* San Francisco Chemical Co., 205 Fed., 480, p. 486, May, 1913.

VOID PLACER LOCATION—LODE LOCATION.

A prospector has no right to enter upon the surface of a valid placer claim for the purpose of making a lode location; but if an attempted placer location is void because the mineral attempted to be located was in veins or lodes and not subject to placer location, then a pros-

pector may upon peaceable entry make a valid location of the same mineral as a lode claim, on the theory that the attempted placer location being void the ground was unappropriated mineral land within the meaning of the law and subject to location by others.

Duffield *v.* San Francisco Chemical Co., 205 Fed., 480, p. 485, May, 1913.

CALCIUM PHOSPHATE—FORM—METHOD OF LOCATION.

A deposit of calcium phosphate, between clearly defined walls of siliceous limestone, or of shale and limestone, having a width of about 60 feet, with a continuous well-defined strike and dip, varying in thickness from a few inches to 5 feet, with visible outcroppings at points along the surface, is not subject to entry under the mining laws as a placer claim.

Duffield *v.* San Francisco Chemical Co., 205 Fed., 480, p. 481, May, 1913.

C. COAL LOCATIONS.

SEPARATE ENTRY OF SURFACE AND MINERALS.

Under the statute of June 22, 1910 (36 Stat., 583), the surface may be entered under laws covering nonmineral lands, and the coal underneath the surface may be reserved, or the Land Department is authorized to withdraw such lands from entry as upon nonmineral or agricultural lands, and if it is believed that the geological conditions are such that valuable deposits may exist therein, can maintain such withdrawal until time and development determine.

United States *v.* Kostelak, 207 Fed., 447, p. 453, August, 1913.

MINERAL CHARACTER OF LANDS—PROOF.

The Government could not maintain a suit to cancel a patent issued under the homestead entry on the ground that the land was coal land, where it appeared from the evidence that, although the land had once been withdrawn from homestead entry on the ground of its mineral character, it was afterwards restored and later entered and patented under homestead laws in good faith, and the entryman resided thereon and improved and cultivated it for five years before obtaining patent, and where no workable coal had been found, developed, or mined save at a point some 2 miles distant, and where adjoining land had been entered as agricultural land, and where, although there had previously been some prospecting for coal, yet no one seemed to consider that its coal content warranted further prospecting, and where the entryman and patentee acted in good faith, and where it appeared that at no time before patent neither he nor any other person valued it for coal.

United States *v.* Kostelak, 207 Fed., 447, p. 450, August, 1913.

MINERAL CHARACTER NOT DETERMINED BY CHARACTER OF ADJOINING LANDS.

Outcroppings of mineral upon certain land, although more or less evidentiary, are by no means conclusive of its mineral character, and if such outcroppings are upon other lands, their value as evidence lessens, and although they indicate possibilities or even probabilities of valuable mineral deposits they are only indications; and lands of great agricultural value and devoted solely to agricultural uses not infrequently contain outcroppings of no value and nonmineral or agricultural lands may be found adjoining mineral lands and may be entered for agricultural purposes; and the rule is that any lands containing no known valuable mineral deposits fall into the nonmineral or agricultural class, however rich in minerals the adjoining lands may be, and proof of the mineral character of adjoining lands is not sufficient to establish the mineral character of a particular tract.

United States *v.* Kostelak, 207 Fed., 447, p. 452, August, 1913.

CANCELLATION OF PATENT—FRAUD—PROOF.

In a suit to procure the cancellation of a patent to land entered as agricultural lands but claimed to be valuable for coal, the proof must show that the land was known to contain mineral to such extent as to make it more valuable therefor than for agricultural uses.

United States *v.* Kostelak, 207 Fed., 447, p. 450, August, 1913.

STATUTES RELATING TO MINING OPERATIONS.

A. Construction and Validity.
B. Statutory Rights and Duties of Operator.
    1. Rights Granted.
    2. Duties Imposed on Operator—Compliance—Protection.
C. Violation of Statutory Regulations—Effect and Liability.
    1. Failure to Comply—Liability Generally.
    2. Willful Failure to Comply.
    3. Negligent Failure to Comply.
    4. Failure to Comply—Effect and Defense.
    5. Miner's Failure to Comply—Effect.
    6. Noncompliance—Liability for Negligence of Mine Foreman.
        a. Operator Liable—Instances.
        b. Operator not Liable—Instances.

A. CONSTRUCTION AND VALIDITY.

COMMON-LAW DUTIES NOT ABROGATED.

The mining statute of Kansas covering the conduct of the mining industry and providing for the health and safety of persons employed in and about the coal mines of the State does not abrogate the common-law duty of coal-mine owners and operators to furnish their employees safe places in which to work; but the mining statute gives additional rights and imposes additional duties beyond those recognized by the common law.

Cheek *v.* Missouri, K. & T. Ry Co., 131 Pacific, 617, p. 625 (Kansas), April, 1913.

STATUTES RELATING TO ABROGATION OF COMMON-LAW RULE—POWER OF COURTS.

A legislature may by positive enactment abrogate a common-law rule and it may give an injured miner a right of action against his employer conditioned upon the existence of certain specified elements, and a court has no power to change the statutory conditions by an exception that it may choose to make.

Burgin *v.* Missouri, K. & T. Ry Co., 133 Pacific, 560, p. 561 (Kansas), July, 1913.

STATUTORY ABROGATION OF FELLOW-SERVANT DOCTRINE.

The constitution of the State of Oklahoma abrogating the common-law doctrine of fellow servant in cases of mining and other corporations is not repugnant to the equal-protection clause of the fourteenth amendment to the Federal Constitution.

Krepe *v.* Brady, 133 Pacific, 216, p. 218 (Oklahoma), June, 1913.

STATUTE ABROGATING ASSUMPTION OF RISK—VALIDITY.

Section 3511 (1910) of the statute of Wyoming requiring a coal-mine operator to employ a competent mine boss whose duty it is to see that all loose coal, slate, and rock overhead are carefully secured against falling on the traveling ways as the miners advance their excavations, and to visit and examine their working places in the mine at least once every alternate day and to direct that each working place be properly secured by props or timbers, does not abrogate the doctrine of assumption of risk on the part of a miner as to the usual and ordinary risks incident to the employment and as to obvious injuries incident to service in rendering a place safe and suitable; but the statute has impliedly abrogated such defense as to the risks of the master's breach or violations of the specific duties imposed by the statute.

Bakka *v.* Kemmerer, 134 Pacific, 888, p. 891 (Utah), August, 1913.

STATUTORY CLASSIFICATION.

The statute of Kansas enacted to protect the health and safety of miners is not unconstitutional or invalid because of the classification made and its application to the mining industry and because it abolishes the defenses of assumption of risk and contributory negligence in certain actions for its violation.

Burgin *v.* Missouri, K. & T. Ry Co., 133 Pacific, 560, p. 561 (Kansas), July, 1913.

LEGISLATIVE POWER.

The Legislature of Kansas in enacting the statute to protect the health and safety of miners recognized the fact that mining is a hazardous employment and that the occupation of a shot firer is the most dangerous of all, and understood the general character, habits, customs, and conduct of the men who find their livelihood by daily toil in the bowels of the earth, and understood perfectly well the pressure that constrains them to keep on until the uncertain and shadowy boundary that marks the limits of ordinary prudence is sometimes overlooked and passed, and recognized the fact that the injuries and deaths among this class of miners can be largely prevented by certain enforced statutory precautions. The legislature also recognized the fact that it is within the power of mine owners to adopt and enforce protective regulations of the character prescribed by the statute, whereas the driller and shot firer and others whose safety is at stake can not do so, and the legislature has accordingly taken from the mine operator the defenses of assumption of risk and contributory negligence, and compels him to employ miners at his own risk and not at their risk if he willfully disobeys the mandate of the statute.

Burgin *v.* Missouri, K. & T. Ry. Co., 133 Pacific, 560, p. 561 (Kansas), July, 1913.

PURPOSE OF STATUTE—PROTECTION OF MINERS.

It is not the purpose of the mining statutes of Kansas merely to protect miners from the consequences of their own carelessness, but its purpose is to stop the insufferable waste of human life and limb, and it is a police regulation adopted to reform any inhumanity of mining methods and to prevent a casting into the world of dependent cripples, widows, and orphans left without means of support, and necessarily includes the reduction of the number of casualties to the careless as well as to the prudent, and if the statutory precautions are taken and the required safeguards adopted, killing and maiming will be reduced to a minimum, or altogether averted.

Cheek *v.* Missouri, K. & T. Ry. Co., 131 Pacific, 617, p. 625 (Kansas), April, 1913.

PURPOSES OF LAW NOT NULLIFIED BY AGREEMENT.

Every section of the coal-mining act of Montana of 1911 speaks the legislative realization of the hazards of coal mining such as may involve not only loss of lives but other consequences of grave import to society; consequences that, in the interests of the mine operator, the miner, and the public, should be reduced, and the provisions of such a statute and the duties imposed can not be nullified either by private agreement, private rule, or private custom, though agreements may be entered into by which miners shall have control of certain features in the work designed for their better protection, so long as the public policy of the statute is not violated.

Kallio *v.* Northwestern Improvement Co., 132 Pacific, 419, p. 421 (Montana), May, 1913.

ADOPTION OF STATUTE OF ANOTHER STATE—EFFECT.

Although many features of the statute of Kansas enacted for the protection of the health and safety of miners are identical with the mining act of the State of Pennsylvania that deals with the same subjects, yet the Pennsylvania statute was not adopted as the law of the State of Kansas, and the decisions of the Supreme Court of Pennsylvania interpreting the statute of that State are not binding upon the courts of the State of Kansas, but are persuasive only, and the courts of Kansas will not follow the decisions of the Pennsylvania courts in construing the statutes of that State, unless the reasoning and the conclusions of the Pennsylvania courts are sound and satisfactory.

Burgin *v.* Missouri, K. & T. Ry. Co., 133 Pacific, 560, p. 561 (Kansas), July, 1913.

LAW OF DIFFERENT STATE—REQUIRING MINE BOSS TO INSPECT.

In an action by a coal miner for an injury sustained by him while working in a coal mine, his cause of action being based on the violation of the Wyoming statute that requires the operator of a coal mine to employ an expert mine boss to inspect the roof of the mine, the Supreme Court of the State of Utah will not declare such statute repugnant to the constitution of Wyoming where the courts of Wyoming have not held the statute invalid, and where the statute has been in force in that State for a period of 20 years.

Bakka *v.* Kemmerer, 134 Pacific, 88, p. 889 (Utah), August, 1913.

ACTION FOR WRONGFUL DEATH—SEPARATE STATUTORY ACTIONS.

Section 4100 of the Revised Code of Idaho, authorizing the prosecution of an action for wrongful death, including actions for the death of miners caused by the negligence of the mine operator, was not repealed by the act approved March 6, 1909, which applies to actions for compensation for injuries, and requires in case of death certain

notice to be given before an action can be brought, as the purpose of the latter act was to extend the rights of employees and limit the defenses previously accorded to employers, such as the fellow-servant doctrine.

Chiara *v.* Stewart Mining Co., 135 Pacific, 345, p. 246 (Idaho), September, 1913.

REPEAL AND REENACTMENT—EFFECT ON PENDING ACTION.

The mining statute of April 18, 1899, of the State of Illinois was repealed by the mining statute of July 1, 1911, without any saving clause as to pending actions, but sections 18 and 19 of the law of 1899 were substantially repeated in sections 14 and 21 of the revision of 1911, and an action commenced in 1910 based on sections 18 and 19 of the act of 1899, requiring a mine operator to ventilate the mine and to construct stoppings in the crosscuts would be continued and perpetuated by sections 14 and 21 of the revision of 1911, containing substantially the same provision, as it was the intention of the legislature, even in the absence of a saving clause as to pending actions, to continue in force the provisions of the old law upon which the plaintiff based his cause of action, and, therefore, the new act did not affect the legal status of a pending case.

Merlo *v.* Johnston City & Big Muddy Coal Mining Co., 101 Northeastern, 525, p. 528 (Illinois), April, 1913.
Menglekamp *v.* Consolidated Coal Co., 102 Northeastern, 756, p. 760 (Illinois), October, 1913.

REPEAL AND REENACTMENT—PENDING ACTION—PROPER PARTIES.

Section 33 of the mining statute of Illinois, enacted April 18, 1899, provided that in case of loss of life by a willful violation of the act a right of action should accrue to the widow or heirs for recovery of damages not to exceed $10,000, and section 29 of the revision of mining laws enacted July 1, 1911, repeals the prior act and gives a right of action to the personal representatives of a person killed, for the exclusive use of the widow and next of kin for a like recovery, and requires the amount recovered to be distributed to the widow and next of kin in the same manner as personal property of intestates is distributed, and an objection that such action for damages by the widow of a deceased miner brought under the act of 1899, pending on appeal at the time of the revision of 1911, must fail and abate because an action under the statute of 1911 should be brought and prosecuted by the personal representative of the deceased miner is without avail, for the reason that the name of the personal representative would have been substituted on motion.

Merlo *v.* Johnston City & Big Muddy Coal Mining Co., 101 Northeastern, 525, p. 531 (Illinois), April, 1913.
Menglekamp *v.* Consolidated Coal Co., 102 Northeastern, 756, p. 760 (Illinois), October, 1913.

ACT GRANTING RIGHT OF WAY FOR DITCHES NOT REPEALED.

Sections 18 and 19 of the act of March 3, 1891 (26 Stat., 1101), extending the provisions of section 2339 of the Revised Statutes of the United States granting rights of way for the construction of ditches used in carrying on mining operations, were not repealed by the act of May 11, 1898 (34 Stat., 404).

United States *v.* Portneuf-Marsh Valley Irrigation Co., 205 Fed., 416, p. 419, May, 1913.

STATUTORY MEANS OF SIGNALING—MEANING.

The purpose of the statute of Kansas requiring the owner and operator of a shaft mine to maintain the ordinary means of signaling to and from the top and bottom of the shaft is to require mine owners to provide their miners with reasonably safe and efficient means for signaling through the shaft in order that the safety of the miners may be promoted and better guarded than before, and does not refer alone to the apparatus itself, but applies alike to rules ordained by the mine operator that control the use of the apparatus by the miners; and if the mine owner or operator prescribes a peculiar and unusual rule for the use of the apparatus that impairs its usefulness and safety, then the owner or operator fails to provide the ordinary means for signaling as required by the statute.

Miles *v.* Central Coal & Coke Co., 157 Southwestern, 867, p. 870 (Missouri Appeals), June, 1913.

STARTING SKIP WITHOUT SIGNAL—VIOLATION OF STATUTE.

Under section 5248 of the Montana Code it was actionable negligence for a hoisting engineer to raise the skip without a signal, thereby causing the death of a miner who was attempting to get off the skip at a station at which the skip had been stopped.

Melzner *v.* Raven Copper Co., 132 Pacific, 552, p. 555 (Montana), May, 1913.

DEFECTIVE CONDITIONS AND APPLIANCES—PLEADING.

In an action by a chain boy against a mine operator for injuries resulting from the derailment of a tram car on which he was riding, it was sufficient as a matter of pleading under the employers' liability act of Alabama to describe the particular defect as "a defective condition of the said car that was derailed and injured plaintiff," in view of the age of the plaintiff, his lack of specific knowledge of the particular defect, and the fact that the car was a mere tram car used in the mine.

Sloss-Sheffield Steele & Iron Co. *v.* Capps, 62 Southern, 66, p. 67 (Alabama), April, 1913.

ACCUMULATION OF GAS SUSPECTED—STATUTORY DUTY.

The word "suspected" used in the Kansas statute with reference to the accumulation of gas in abandoned coal mines has its usual and ordinary signification and does not necessarily involve knowledge, or belief, or likelihood; and if a person charged with the duty of compliance with the statute entertains even a slight or vague idea of the existence of inflammable gases in an abandoned mine, from whatever cause the idea arises, his duty to act is imperative under the statute, and the fact that a mine foreman directed miners to place bore holes in the face of a certain entry, when he knew that they were in proximity to an abandoned mine, was sufficient to show that he suspected that the abandoned mine contained gas.

Cheek *v.* Missouri, K. & T. Ry. Co., 131 Pacific, 617, p. 624 (Kansas), April, 1913.

VALIDITY OF LAWS REGULATING PIPE-LINE COMPANIES—COMMON CARRIERS.

The amendment of section 1 of the interstate commerce act of February 4, 1887 (24 Stat., 379), by the amendatory act of June 29, 1906 (34 Stat., 584), making the original act apply to any corporation or persons engaged in the transportation of oil by means of pipe-line common carriers, changes the nature and quality of the business of such persons from private to public by requiring them to share with others the facilities that they have provided for themselves alone, and requires them to employ such facilities in the service of the public, and this requirement is essentially different from and quite beyond the power delegated to Congress to regulate commerce between the States, and a law that in intention and result deprives the owners of private property of its exclusive enjoyment and compels the devotion of such property to public use, in the manner provided by this amendment, involves and exercises the legislative power in plain contravention of the fifth amendment of the Constitution of the United States.

Prairie Oil & Gas Co. *v.* United States, 204 Fed., 798, p. 809, March, 1913.

The amendment of June 29, 1906 (34 Stat., 584), to the original interstate commerce act was intended by Congress to make common carriers of the owners of private pipe lines who were not common carriers, and who used their respective pipe lines and had always used them solely for the transportation of their own oil in carrying on their private business, and the amendment made such owners subject to the provisions of the act, and was enacted with the full knowledge that the question of its constitutionality was involved, and the amendment as applied to such private owners is void for the reason that it deprives such owners of their property without

due process of law, by depriving them of the beneficial use and enjoyment of their property.

Prairie Oil & Gas Co. *v.* United States, 204 Fed., 798, pp. 806, 812, March, 1913.

POWER OF CONGRESS OVER PRIVATE PIPE LINES.

Congress has no power to compel a private pipe-line owner to become a common carrier of oil merely because his pipe line crosses or is laid along public highways.

Prairie Oil & Gas Co. *v.* United States, 204 Federal, 798, p. 819, March, 1913.

PIPE LINES—PRIVATE OWNERSHIP—STATUTORY REGULATIONS.

Private pipe-line companies separately owned by dealers in oil, or refiners, and used by them in the private business in which each is separately engaged, are not monopolistic possessions, and the ownership and operation of such private pipe lines do not result in monopoly and are not for this reason subject to the amendment of the interstate commerce act.

Prairie Oil & Gas Co. *v.* United States, 204 Fed., 798, p. 815, March, 1913.

B. STATUTORY RIGHTS AND DUTIES OF OPERATOR.

1. Rights Granted.
2. Duties Imposed on Operator—Compliance—Protection.

1. RIGHTS GRANTED.

STOCKHOLDER'S RIGHT TO INSPECT MINE.

A stockholder of a mining company who is denied the right under the California statute on proper application and notice to visit and examine, with an expert, the mines owned by the corporation is entitled to sue and recover the statutory penalty and in such action he is not required to make any specific allegation of damages.

Kinard *v.* Ward, 130 Pacific, 1196 (California.)

REFUSAL OF PRESIDENT TO PERMIT STOCKHOLDER TO EXAMINE MINE—PENALTY.

The statute of California gives the stockholder of a mining corporation the right, on proper demand on the president, to an order authorizing him to examine the mines of the corporation and does not require that the application for the order, or that the order from the president to the secretary, shall be in writing, or that either shall measure up to any fixed standard of sufficiency, and the refusal of the president will subject him to the statutory penalty.

Kinard *v.* Ward, 130 Pacific, 1196–1197 (California.)

RIGHT OF STOCKHOLDER TO REMOVE DIRECTORS—FAILURE TO REPORT.

Under the statute of California making it the duty of directors of mining corporations to make an itemized account or balance sheet for each month embracing a full and complete statement of all disbursements and receipts, and of all indebtedness or liabilities incurred, a board of directors of a mining corporation may at the suit of the stockholder be removed for failure to perform their duties, and the stockholder is not required to show that he suffered any actual damage by reason of the failure of the directors to perform their statutory duty, and the rule applies to directors holding over as well as to those directly elected.

Kinard *v.* Ward, 130 Pacific, 1194 (California.)

2. DUTIES IMPOSED ON OPERATOR—COMPLIANCE—PROTECTION.

SAFE APPLIANCES—CURTAILING COMMON-LAW FREEDOM.

A legislature may curtail the scope of the freedom the common law gives to the master in the discharge of his duty to exercise reasonable care to provide his servant with reasonably safe instrumentalities with which to work, and the courts must give effect to such statutes when enacted.

Miles *v.* Central Coal & Coke Co., 157 Southwestern, 867, p. 869 (Missouri Appeals), June, 1913.

FAILURE TO PERFORM DUTY—NO STATUTORY PROTECTION.

The statute of Pennsylvania does not relieve the mine owner or operator from all liability for his own neglect or failure of duty, and if through any neglect or failure of duty the mine owner causes injury to one of his employees, the general rule applicable in such cases subjects him to damages for the default.

Bogdanovicz *v.* Susquehanna Coal Co., 87 Atlantic, 295, p. 297 (Pennsylvania), March, 1913.

Although a mine owner or operator is not liable to an injured miner for a neglect of duties imposed by the statute of Pennsylvania upon a mine foreman, yet the mine owner is required by the statute to use every precaution to insure the safety of the miners; and if he has knowledge of any matter injuriously affecting the health or safety of the miners, it is his duty to take the proper steps to make correction; and if he knows that the mine foreman is neglecting the performance of his duties, or the mine is unsafe, he must act promptly and have the mine put in a safe condition.

Collins *v.* Northern Anthracite Coal Co., 88 Atlantic, 75, p. 76 (Pennsylvania), May, 1913.

EMPLOYMENT OF MINE FOREMAN—CONTINUING DUTIES OF OPERATOR.

The employment of a certified mine foreman as required by the statute of Pennsylvania does not relieve the mine owner or operator either from furnishing safe appliances for use in the underground workings of a mine or from keeping such appliances in suitable repair, and the operator's liability does not terminate upon the employment of such certified foreman, especially where such mine foreman performs many acts of superintendence not covered by his duties to the State.

Lehigh Valley Coal Co. *v.* Shandalla, 205 Fed., 715, p. 720, May, 1913.

EMPLOYMENT OF MINE FOREMAN FOR EACH MINE.

The Pennsylvania statute requiring a mine operator to place the underground workings of his mine and all that is related thereto under the charge and daily supervision of a mine foreman is not complied with by the employment of a mine foreman for two or more separate and distinct underground workings, distantly separated from each other, as in such case the mine foreman can not give them the personal attention or daily supervision required by the statute, and such mine foreman is not authorized to employ an assistant foreman to supervise a separate and distinct mine.

Janosky *v.* Lehigh Valley Coal Co., 88 Atlantic, 419, p. 422 (Pennsylvania), May, 1913.

EMPLOYMENT OF MINE FOREMAN—SEPARATE UNDERGROUND OPERATIONS.

The Pennsylvania anthracite mining act of June 2, 1891 (P. L., 176), requires the owner and operator of a mine or colliery to place the underground workings thereof under the charge and supervision of a mine foreman, who shall keep and carefully watch over the internal workings so as to insure the safety of miners; he is required to carry out personally all the statutory requirements, and is authorized to employ assistants only when he is unable to carry out the requirements, and under this statute each underground operation must be regarded as a mine, within the meaning of the statute, requiring the employment of a mine foreman.

Janosky *v.* Lehigh Valley Coal Co., 88 Atlantic, 419, p. 420 (Pennsylvania), May, 1913.

DUTY TO PROVIDE SAFE PASSAGEWAYS.

The fact that a mine operator has employed and placed in his mine a competent certified foreman does not relieve it from the statutory duty of providing a proper and safe passageway in the tunnel, as this is a nondelegable duty imposed upon the mine owner and not one of the statutory duties imposed upon the mine foreman.

Simmons *v.* Lehigh Valley Coal Co., 87 Atlantic, 568, p. 569 (Pennsylvania), April, 1913.

FAILURE TO PROVIDE SAFE PASSAGEWAYS.

Questions as to whether a mine operator has performed its duties in providing safe passageways, tunnels, gangways, and other openings for the safe ingress and egress of employees, as required by the Pennsylvania statute, and whether his failure to do so is the proximate cause of an injury, were questions of fact, where it appeared that a miner entered a mine and passed through a tunnel with another miner carrying a keg of powder, that by reason of loaded cars standing in the tunnel they were compelled to pass between the cars in order to proceed on their way, and that while they were so passing between the cars the keg of powder was exploded by coming in contact with the trolley wire, causing the injury for which suit was brought.

Simmons *v.* Lehigh Valley Coal Co., 87 Atlantic, 568 (Pennsylvania), April, 1913.

MINE FOREMAN—INSTRUCTING INEXPERIENCED MINER.

A mine foreman, under the Pennsylvania statute, is an employee of the mine owner or operator, and occupies the same relative position to the operator as any other employee, except in so far as the statute has specifically imposed upon him certain duties in the mine for the protection and safety of the miners, and it is not the duty of the mine foreman in the absence of statutory requirement to instruct young and inexperienced miners.

Bogdanovicz *v.* Susquehanna Coal Co., 87 Atlantic, 285, p. 297 (Pennsylvania), March, 1913.

POSITION OF SUPERINTENDENT AND MINE FOREMAN INCONSISTENT.

A mine owner or operator employing a mine foreman, as required by the statute of West Virginia (act of 1907, chap. 78), who is a quasi public agent and whose duties are imposed and defined by the statute and involve conflict with those of the owner or operator, can not by agreement with such mine foreman either limit his statutory duties or change their character; and it is not the intent of the statute to authorize the existence of any relation between them that might constitute an inducement or cause for neglect of the performance of such duties; and the position of superintendent conferred upon a mine foreman would in many instances have such an effect, for the reason that the mine foreman is supposed to have the safety of the miners in mind at all times and when necessary to the exclusion of everything else, whereas the superintendent has for his dominating purpose the production and marketing of coal for the profit of the operator, and accordingly the two positions can not consistently be placed in the hands of the same person.

Gartin *v.* Draper Coal & Coke Co., 78 Southeastern, 673, p. 678 (West Virginia), June, 1913.

EMPLOYMENT OF MINE BOSS—MINE BOSS AND MINERS NOT FELLOW SERVANTS.

Section 3511 of the statute of Wyoming (1910) requires a coal-mine operator to employ an expert mine boss whose duty it is to see that as the miners advance their excavations all loose coal, slate, and rock overhead are carefully secured against falling on the traveling ways, and such mine boss when so employed is not a fellow servant with a miner within the fellow-servant rule preventing a recovery by one servant for the negligence of another servant for the reason that under this statute the duties imposed upon the mine boss are the duties required to be performed by the master or mine operator.

Bakka *v.* Kemmerer, 134 Pacific, 888, p. 891 (Utah), August, 1913.

DUTY TO FURNISH PROPS NONDELEGABLE

The statute of Kentucky (sec. 2739*b*, subsec. 7) requiring a mine operator to furnish his miners with proper and sufficient timbers to secure the roof in their rooms and working places can not be delegated, and the negligent failure of an employee in failing to furnish and deliver proper timbers to the miner in his room is the negligence of the mine operator.

New Bell Jellico Coal Co. *v.* Sowders, 156 Southwestern, 1046, p. 1047 (Kentucky), May, 1913.

DUTY TO FURNISH MEANS OF SIGNALING—SAFETY.

The mining law of Kansas requiring the operator to maintain in shaft mines the ordinary means of signaling to and from the top and bottom of the shaft imposes on the operator of such a mine the duty to install and use means of signaling that will equal in efficiency and safety the means that have the approval of general usage, and the legislature did not intend to prevent a mine operator from installing and employing means of signaling that would be better and safer than those in general use, but the statute does define the limits of reasonable care and makes the use of means of signaling that are less safe than those approved by general usage negligence per se.

Miles *v.* Central Coal & Coke Co., 157 Southwestern, 867, p. 869 (Missouri Appeals), June, 1913.

INSPECTION AND REPAIR OF ROOF—QUESTION OF FACT.

The statute of Iowa makes it the duty of each employee or miner to examine his working place upon entering the same, and prohibits him from commencing to mine or load coal or other mineral until the place is made safe, and requires each miner to securely prop and timber the roof of his working place, but this has reference to the place where the miner is to mine or load coal and does not apply to an entry through which he reaches his working place, and whether the roof of an entry is to be inspected and repaired by the mine

operator or the miner depends upon who is in control, and this is a question of fact to be determined on the evidence.

Carnego *v.* Crescent Coal Co., 143 Northwestern, 550, p. 552 (Iowa), October, 1913.

DAILY INSPECTION OF MINE GENERATING GASES.

The statute of Kansas requiring that coal mines generating fire damp shall be carefully examined every morning with a safety lamp by a competent fire boss before the miners and employees are permitted to enter their working places applies to all mines generating fire damp in appreciable quantities, and the purpose of the statute is to cause the gas to be detected as soon as it appears so that all danger may be averted.

Cheek *v.* Missouri, K. & T. Ry. Co., 131 Pacific, 617, p. 620 (Kansas), April, 1913.

FAILURE TO INSPECT GASEOUS MINE.

The statute of Kansas requiring daily inspection of mines generating gas was not only designed to prevent danger from gas accumulated in the working places of a mine while the miners were absent, but it was intended also to protect miners from explosions of quantities of gas that would be revealed by a careful examination by a competent person, and the statute imposes a liability for results of an explosion of gas released from an abandoned mine in dangerous proximity to the working places of an active mine when the presence of such gas would have been disclosed by such an examination as the statute requires.

Cheek *v.* Missouri, K. & T. Ry. Co., 131 Pacific, 617, p. 620 (Kansas), April, 1913.

MINERS' WORKING PLACE—MEANING.

Section 83 of the coal-mining act of Montana requiring each miner to examine his working place and not to commence to mine or load until it is made safe seems to enlarge the common-law idea of the working place of a coal miner, and under this section the working place that the miner is required to examine and keep safe is a varying area and necessarily includes such places as are the seat of active operations, and this may mean the place either of mining down the coal or of loading coal already mined.

Kallio *v.* Northwestern Improvement Co., 132 Pacific, 419, p. 420 (Montana), May, 1913.

RELATIVE DUTY OF OPERATOR AND MINER.

The provision of section 83 of the coal-mining act of Montana, requiring each miner to examine his working place and prohibiting him from commencing to mine or load until it is safe, is not nullified by section 70 of the same act, which requires the master or mine owner to see that all loose coal or other material overhead in ribs

in traveling ways where the miners have to travel to or from their work is either taken down or secured; nor do the provisions of section 73, which require the foreman or his assistant to visit and examine every working place at least each alternate day and see to the security of the same, nullify the act; but the intent of the statute is that such places as are the seat of active operation shall be looked after by both mine operator and miner, and the mere fact that at a given time one place may not be the seat of active operations, and may be subject to the exclusive inspection of the mine operator, does not absolve the miner from the duty of examination when such place is, or is about to become, the scene of his labors.

Kallio *v.* Northwestern Improvement Co., 132 Pacific, 419, p. 420 (Montana), May, 1913.

EMPLOYERS' LIABILITY ACT—INDEPENDENT CONTRACTOR.

In an action for damages, where the evidence showed that the plaintiff engaged to mine coal in the defendant's mine at a stated rate per ton, at a place within the limits fixed by defendant's superintendent, but the evidence did not show that the defendant—the mine operator, or his representatives—had any control or direction in respect to the details of the mining, or when or how plaintiff should do that which he was engaged, as stated, to do, nor did the evidence show that the injured miner was a servant of the operator, there was no presumption that he was a servant rather than a contractor, and the burden was on him to show that he bore at the time of the injury the relation of servant or employee in order to bring him within the provisions of the employers' liability act of Alabama (code 1907, sec. 3910), and it was necessary that he show, to bring him within the act, that the operator had "control over the means and agencies" by which the mining of the coal in the areas of his labors "was to be produced," and therefore he was not entitled to recover.

Warrior-Pratt Coal Co. *v.* Shereda, 62 Southern, 721, p. 723 (Alabama), June, 1913.

EMPLOYMENT OF MINE FOREMAN—OPERATOR RELIEVED FROM LIABILITY.

The statute of Pennsylvania requires a mine owner or operator to employ a certified mine foreman, requires the owner or operator to place the mine under the charge and supervision of such mine foreman, and enumerates certain specific duties to be performed in the operation of the mine, such as giving him charge of the ventilation, requiring him to examine the gaseous parts of the mine, and to make bidaily examinations of the working places, and requiring him to examine and keep safe the slopes, shafts, roads, and timbers, subjecting him to a penalty if he fails and neglects to properly discharge his duty, and any violation or neglect of such duties of the mine foreman resulting in injury to a miner renders him and not the mine owner

or operator liable, and the fact that the State through such mine foreman thus assumes charge of the internal workings of the mine relieves the owner or operator from liability for injuries resulting from the negligence of the mine foreman.

Bogdanovicz *v.* Susquehanna Coal Co., 87 Atlantic, 295, p. 297 (Pennsylvania), March, 1913.

EMPLOYMENT OF COMPETENT MINE FOREMAN.

A mine operator is by the statute of West Virginia required to employ a mine foreman, who must be an experienced miner and whose qualifications and duties are distinctly provided for by statute; and where the internal workings of the mine are placed under the control of such mine foreman, and where the operator himself is subject to the foreman's orders, and the operator's duty ceases on the selection of a person from a required class and with the necessary qualifications, then in case of injury to a miner the operator is liable only for failure to perform his duty in the original selection.

Holly *v.* McDowell Coal & Coke Co., 203 Fed., 668, p. 670, March, 1913.

EMPLOYMENT OF MINE BOSS—NEGLIGENCE—LIABILITY OF OPERATOR.

The statute of West Virginia (sec. 11, chap. 15H, code 1906) makes it the duty of the mine boss, among other things, to keep a careful watch over the traveling ways, and under this section it is the duty of the mine boss to see that an entry is made of proper width for the safety of miners, and a mine operator is not liable for injuries resulting from the failure of a mine boss to perform duties required of him by the statute.

Sprinkle *v.* Big Sandy Coal & Coke Co., 78 Southeastern, 972 (West Virginia), June, 1913.

C. VIOLATIONS OF STATUTORY REGULATIONS—EFFECT AND LIABILITY.

1. Failure to Comply—Liability Generally.
2. Willful Failure to Comply.
3. Negligent Failure to Comply.
4. Failure to Comply—Effect and Defense.
5. Miner's Failure to Comply—Effect.
6. Noncompliance—Liability for Negligence of Mine Foreman.

1. FAILURE TO COMPLY—LIABILITY GENERALLY.

ESTABLISHING RULE OF RESPONDEAT SUPERIOR.

The purpose and effect of section 5248 of the revised code of Montana making a mine owner liable for injuries to a miner caused by the negligence of any superintendent, shift boss, hoisting or other engineer are to classify the employees in mines, mills, and

smelters by declaring who among them are vice principles and to make the employer answerable in certain cases under the maxim of respondeat superior, and in such cases to take away a defense that had been available before the passage of the statute; but a miner suing for an injury must bring himself within the statute and can not recover thereunder upon a complaint that discloses no basis for respondeat superior, but grounds itself wholly upon a breach of primary duty on the part of the mine operator.

Melzner *v.* Raven Copper Co., 132 Pacific, 552, p. 554 (Montana), May, 1913.

DANGEROUS CONDITION OF MINE.

The words "any dangerous conditions" in the Illinois mining act (laws of 1911, p. 387) apply to dangerous conditions in the track, road bed, or sides of the entries, and include any dangerous conditions existing in a coal mine that endanger the life, limb, or health of men working in the mine, whether such conditions are of a permanent character due to faulty construction, or of a temporary character due to operation, and this applies to an entry with a roof so low as to rake the coal off of loaded cars, causing an accumulation on the track sufficient to throw a car off the track to the injury or death of the driver.

Menglekamp *v.* Consolidated Coal Co., 102 Northeastern, 756, p. 758 (Illinois), October, 1913.

INCOMPATIBLE DUTIES OF SUPERINTENDENT AND MINE FOREMAN.

The superintendent of a mine is a representative of the owner, who stands in a certain relation to the mine foreman, a relation created by the statute of West Virginia, and the mine foreman is required to make requisitions for materials, machinery, and supplies for maintenance of the safety of the mine, and the position of the superintendent of a mine and the position of the mine foreman, under the statute, are incompatible, and the mine operator can not claim the protection of the statute of West Virginia against liability for negligence of the foreman in respect to common-law nonassignable duties imposed upon the foreman by the statute if the operator employs the same person for both positions.

Gartin *v.* Draper Coal & Coke Co., 78 Southeastern, 673, p. 675 (West Virginia), June, 1913.

DUTY OF MINE MANAGER TO MARK DANGEROUS PLACES—PLEADING.

The Illinois coal-mining act (laws of 1911, p. 387) requires the mine manager to see that all dangerous places are marked and this requirement imposes upon the mine manager the duty of marking the places himself or causing it to be done by some other person, and an averment that he did not mark the place when the duty of marking it, or causing it to be marked, rested upon him was an

argumentative allegation that the mine manager did not cause the place to be marked, or see that it was marked as required.

Mengelkamp *v.* Consolidated Coal Co., 102 Northeastern, 756, p. 759 (Illinois), October, 1913.

FAILURE TO VENTILATE MINE.

The statute of Washington requires a coal-mine owner and operator to provide for the persons employed in his or its mine good and sufficient ventilation, the quantity of air circulating to be in no case less than 100 cubic feet per minute for each person in the mine, and the air must be made to circulate through the shafts, levels, and working places, and this statutory duty can not be delegated by the mine operator, and any neglect of this duty resulting in the injury or death of a miner renders the mine operator liable, and where the dead body of a miner was found near his working place, evidence showing an apparent hasty effort to escape from the place, together with a cause for the collection of poisonous gas, and the characteristic symptoms on the body of the miner of poisoning by carbon monoxide gas, was sufficient to authorize a jury to decide that the death of such miner was caused from a violation of a statute and that the mine operator failed to furnish the required ventilation.

Davies *v.* Rose-Marshall Coal Co., 134 Pacific, 180 (Washington), August, 1913.

MINE FOREMAN AS SUPERINTENDENT—LIABILITY OF OPERATOR.

Where a mine foreman is authorized by the owner or operator of a mine to employ miners to work in the mine and to assign them to their duties, the operator thereby makes the mine foreman a superintendent to that extent and acts that involve the safety of the miners either in reference to the individual assigned to a particular duty with reference to his own safety, or others who might be injured by his incompetency, are nonassignable duties of the operator which the statute does not impose upon the mine foreman, and under such circumstances if the foreman employs a miner and puts him to work in a dangerous place without apprising him of the danger and instructing him as to means of avoidance thereof, and such employee is injured or killed as the result of such action, the operator is liable, notwithstanding the fact that the statute of West Virginia makes it the duty of mine foremen to instruct the miners working under them.

Gartin *v.* Draper Coal & Coke Co., 78 Southeastern, 673, p. 678 (West Virginia), June, 1913.

LIABILITY OF OPERATOR FOR FOREMAN'S FAILURE TO INSTRUCT.

In an action against a coal-mine operator for the wrongful death of a miner 17 years old, where it appears that the mine operator authorized the mine foreman to employ and to assign the miners to their places of work, the operator is liable for the death of such miner where the mine foreman put him to work in a room having a

dangerous roof with machinery peculiarly liable to jar down slate or rock but did not give him full explanation of the danger and instruction as to precautions for its avoidance, and proof of such facts and circumstances is competent in such an action, and the operator can not escape liability on the ground that he has complied with the statute of West Virginia (act of 1907, chap. 78, code supp., secs. 405–410) in the employment of a mine foreman.

Gartin *v.* Draper Coal & Coke Co., 78 Southeastern, 673, p. 678 (West Virginia), June, 1913.
Sprinkle *v.* Big Sandy Coal & Coke Co., 78 Southeastern, 971, p. 973 (West Virginia), June, 1913.

OPERATOR NOT EXCUSED FROM LIABILITY.

The statute of West Virginia (sec. 405, code supp., 1909) imposes upon the mine foreman the duty of instructing youthful or inexperienced miners and relieves the operator of this duty; but where the mine operator employs a qualified mine foreman as required by the statute and authorizes him to employ miners and assign them to their duties, the operator is not entitled to the benefit of the statutory provisions imposing the duty of instruction on the mine foreman, as the employment of miners and their assignment to duty under such circumstances come in direct conflict with the foreman's duty of instruction, and the whole spirit of the statute is violated, so that the operator is not permitted to use the statute as a shield from liability.

Gartin *v.* Draper Coal & Coke Co., 78 Southeastern, 673, p. 678 (West Virginia), June, 1913.
Sprinkle *v.* Big Sandy Coal & Coke Co., 78 Southeastern, 971, p. 973 (West Virginia), June, 1913.

IMPROPER MEANS OF SIGNALING.

The statute of Kansas requiring the operator of a shaft mine to maintain the ordinary means of signaling to and from the top and bottom of the shaft is not complied with where the superintendent of the mine orders the cagers to change from the method of "single-belling" to the method known as "cross-belling," the cross-belling not requiring the cager handling the empty car to give all hoisting signals, and where the death of a cager handling the loaded car results from a premature signaling by the cager handling the empty car, and where it appears that such premature signaling is the natural result of the negligent method adopted, a result that the operator should have anticipated as being likely to occur, the operator is not relieved from liability.

Miles *v.* Central Coal & Coke Co., 157 Southwestern, 867, p. 870 (Missouri Appeals), June, 1913.

FURNISHING PROPS AT MOUTH OF MINE INSUFFICIENT.

The statute of Kentucky (sec. 2739*b*, subsec. 7) requires the operator of a mine to provide and furnish to the miners a sufficient number of caps and props to be used by the miners in securing the

roof in their rooms, and this statute is not complied with on the part of a mine operator when he furnishes props at the mouth of the mine, as the duty of transporting the props is not imposed on the miner and the statute contemplates that the mine owner shall furnish the props at the place where they are to be used.

New Bell Jellico Coal Co. *v.* Sowders, 156 Southwestern, 1046, p. 1047 (Kentucky), May, 1913.

KNOWLEDGE OF BOUNDARIES OF MINES—DUTY TO DRILL BORE HOLES.

A coal-mine owner and operator is required as a matter of law to know the boundaries of its mines and the thickness of the walls of the coal between the mines, and under the statute of Kansas the owner and operator is under the absolute duty to drill bore holes in advance of the work when the work is in the proximity of an abandoned mine suspected of containing inflammable gas, and that duty can not be discharged on the part of the operator by giving an order to an agent or servant, as the law requires the owner or operator himself to take a precautionary measure for the safety of its employees, and the corporation can not escape liability by merely making provisions for the performance of the act, but the precautionary act itself must be performed.

Cheek *v.* Missouri, K. & T. Ry Co., 131 Pacific, 617, p. 625 (Kansas), April, 1913.

MINING COAL NEAR DIVISION LINE—OWNERSHIP OF LAND OR COAL.

In an action to recover the penalty of the West Virginia statute (chap. 79, sec. 7, code of 1906) for mining coal within 5 feet of the division line without the written consent of the adjoining landowner, it is sufficient to aver that the plaintiff owns the land and has not given his consent in writing, and under such averment he may prove that he owns coal under the land, and such proof is not a material variance from the allegations, as coal in place is land, and the statute was designed to protect the owner of a seam of coal as well as the owner of the surface of the land above it.

Selvey *v.* Grafton Coal & Coke Co., 79 Southeastern, 656, p. 657 (West Virginia), September, 1913.

MINING COAL NEAR DIVISION LINE—JOINT OWNER MAY SUE.

The statute of West Virginia (chap. 79, sec. 7, code of 1906), prohibiting the mining of coal within a given distance of a division line, under penalty, protects the owners of coal in place as well as owners of the surface lands, and it is immaterial that one of several plaintiffs is a joint owner only of the coal, whereas the others are joint owners of both coal and surface, and all are entitled to join in an action to recover the statutory penalty.

Selvey *v.* Grafton Coal & Coke Co., 79 Southeastern, 656, p. 657 (West Virginia), September, 1913.

MINING COAL NEAR PROPERTY LINE—JOINT PLAINTIFF MAY RECOVER PENALTY.

In an action under the West Virginia statute for the penalty imposed upon a person unlawfully mining and removing coal within 5 feet of the property line, without the written consent of the owner of the adjoining land, it is sufficient if the evidence shows that one of the plaintiffs did not give his written consent, as any one of a number of plaintiffs is entitled to recover the full penalty of the statute, and it is immaterial to a defending coal company whether it pays the penalty to one of several plaintiffs or to all of them jointly, as one payment will discharge it as to all.

Selvey *v.* Grafton Coal & Coke Co., 79 Southeastern, 656, p. 657 (West Virginia), September, 1913.

EXCAVATIONS NEAR BOUNDARY LINE—ACTION BY LIFE TENANT FOR PENALTY.

The statute of West Virginia (sec. 7, code of 1906), providing that no owner or tenant of any land containing coal shall sink, dig, or work in any coal mine or shaft on such land within 5 feet of the line dividing such land from that of another person without the consent in writing of every person interested in or having title to such adjoining land, and providing a forfeiture for a violation of the statute, entitles a life tenant to sue to recover the penalty in case of its violation and authorizes a life tenant to join with the reversioner or remainderman in such action, as a life tenant is within the plain terms and meaning of the statute and one whose consent is necessary before the adjoining landowner can dig for coal as provided in the statute.

Shinn *v.* O'Gara Coal Mining Co., 78 Southeastern, 104, p. 105 (West Virginia), April, 1913.
Selvey *v.* Grafton Coal & Coke Co., 79 Southeastern, 656 (West Virginia), September, 1913.

EXCAVATIONS NEAR DIVISION LINE—CONSENT OF COAL OWNER.

The owner of a vein of coal without ownership of the surface is within the terms of the statute of West Virginia (sec. 7, code of 1906) requiring the consent in writing of such vein owner before an adjoining owner can dig or work in any coal mine or shaft within 5 feet of the division line.

Shinn *v.* O'Gara Coal Mining Co., 78 Southeastern, 104, p. 105 (West Virginia), April, 1913.

MINING COAL NEAR DIVISION LINE—RECOVERY OF DAMAGES.

In an action by a landowner to recover the statutory penalty for mining coal near the division line without the written consent of an adjoining owner, under the statute of West Virginia (chap. 79, sec. 7, code of 1906), it is not necessary to prove any damages or special injury, as injury is inferred from the doing of the wrongful act, and

the statute fixes the penalty for its violation without any regard to the extent of damages actually suffered, and in no case can a plaintiff recover more than the statutory amount.

Selvey *v.* Grafton Coal & Coke Co., 79 Southeastern, 656, p. 657 (West Virginia), September, 1913.

ABANDONED MINES—JUDICIAL NOTICE AS TO ACCUMULATION OF GASES.

The courts of Kansas are authorized to take judicial notice of the fact that abandoned coal mines in the State of Kansas do generate and may accumulate dangerous gases because the statute requires bore holes to be kept not less than 12 feet in advance of the faces of working places in the coal mine when driven toward and in dangerous proximity to an abandoned mine suspected of containing inflammable gases.

Cheek *v.* Missouri, K. & T. Ry. Co., 131 Pacific, 617, p. 625 (Kansas), April, 1913.

RECOVERY FOR INJURY—RELEASE OF LIABILITY.

If, in an action by an injured miner for damages under the Nevada statute of 1907, which makes mine owners and others liable to miners in case of injury, modifies the common-law rule of fellow servant, and abrogates the common-law rule of contributory negligence, the proof showed that the plaintiff was damaged by such personal injuries in the sum of about $1,200, the action can not be defeated by proof on behalf of the defendant that in consideration of the payment of $36 the plaintiff had executed a written release in full of all account and claim of and for and on account of the facts set forth in his complaint and in full accord, relinquishment, and satisfaction of the injuries received, as section 5652 of the revised laws of Nevada expressly invalidates defenses based both on contracts made to cover future injuries and on acceptance of insurance, relief, benefits, or indemnity by a person already injured, but provides that any sums paid in case of injury and for and on behalf of the same may be set off against any sum the injured person may recover.

Lawson *v.* Halifax-Tonopah Mining Co., 135 Pacific, 611 (Nevada), October, 1913.

ACTION BY INJURED MINER—RELEASE OF LIABILITY—DEFENSE.

An action for damages by an injured miner under the employers' liability act of Nevada (sec. 5652 of the revised laws, 1912) can not be defeated by proof of a contract entered into by or on behalf of such miner covering the contingency of future injury; nor can a defense prevail that is based upon the payment of insurance, relief, benefit, or indemnity, accepted by the miner on account of the injury sustained and sued for; but the statute in such case permits the amount of indemnity actually paid to be set off against any sum the injured miner may recover in the action; and the law is not

unconstitutional as the legislature has power to enact laws to promote healthful conditions of work and freedom from undue oppression.

Lawson *v.* Halifax-Tonopah Mining Co., 135 Pacific, 611, p. 613 (Nevada), October, 1913.

2. WILLFUL FAILURE TO COMPLY.

SINGLE STANDARD OF LIABILITY.

The statute of Kansas giving a right of action for any violation of the mining act or for any willful failure to comply with its provisions prescribes a single standard of liability, embracing voluntary acts done in violation of the statute as well as voluntary inaction where the statute requires something to be done and excuses only involuntary action.

Cheek *v.* Missouri, K. & T. Ry. Co., 131 Pacific, 617, p. 624 (Kansas), April, 1913.

WILLFUL VIOLATION OF STATUTE—NEGLIGENCE—DISTINCTION.

The mining statute of Kansas for the protection of the health and safety of mine workers does not make the mine operator liable in every case of negligence, however slight, although the employee's negligence contributed to his injury, and, strictly speaking, the statute does not make the mine operator liable for negligence in the proper sense of that term, but his liability is based on his willful misconduct that consists in the intentional doing of something prohibited or his unintentional inaction when specific action is required by the statute.

Burgin *v.* Missouri, K. & T. Ry. Co., 133 Pacific, 560, p. 561 (Kansas), July, 1913.

WILLFUL FAILURE TO MAINTAIN BORE HOLES.

Under the statute of Kansas enacted for the safety and the preservation of the lives of miners, a mine operator is liable to an injured miner or for the death of a miner caused by the willful failure of the operator to maintain bore holes in advance of the work when approaching and when in dangerous proximity to an abandoned mine suspected of containing inflammable gas.

Burgin *v.* Missouri, K. & T. Ry. Co., 133 Pacific, 560, p. 561 (Kansas), July, 1913.
Cheek *v.* Missouri, K. & T. Ry. Co., 131 Pacific, 617 (Kansas), April, 1913.

WILLFUL FAILURE TO COMPLY.

The violation of the Kansas statute requiring certain acts to be done near the faces of the working places of a coal mine that are driven toward and in dangerous proximity to an abandoned mine does not imply either bad purpose or determined obstinacy, but a person charged with the duty to observe the statute who intentionally suffered mining operations to proceed without taking the prescribed precautionary measures when the circumstances demanded

that they should be taken, was guilty of a willful or intentional violation of the statute; and the failure of a mine foreman to cause bore holes to be drilled to the required depth, and kept drilled to the required depth, when an abandoned mine suspected of containing gas was being approached, constituted a willful failure to comply with the statute.

Cheek *v.* Missouri, K. & T. Ry. Co., 131 Pacific, 617, p. 625 (Kansas), April, 1913.

WILLFUL OR INTENTIONAL VIOLATION.

In an action by a coal miner for injuries produced by a violation of the mining statute of Indiana (sec. 8569, Burn, 1908), the miner is not required to aver in his complaint that the omission to comply with the statute was willful nor is it necessary to charge willful misconduct, for there may be intentional misconduct that is in no sense willful, and willful misconduct includes both intentional and wrongful action, and the statute does not require such a complaint to charge willful misconduct, either with respect to the omission to perform duties or with respect to the violation of the provisions of the statute.

Coal Bluff Mining Co. *v.* McMahon, 102 Northeastern, 862, p. 864 (Indiana Appeals), October, 1913.

WILLFUL OR NEGLIGENT VIOLATION—RECOVERY.

Although the statute of Kentucky (sec. 2739*b*, subsec. 8) makes the willful neglect or failure or refusal of a coal-mine operator or of a miner to comply with its provisions, yet another statute (sec. 466) provides that any person injured by a violation of a statute may recover from the offender, notwithstanding the fact that a penalty of forfeiture for such violation is also imposed, and accordingly a miner injured by reason of a violation of the statute on the part of a mine operator by its failure to furnish props, as required by the statute, may recover for an injury, whether such failure on the part of the mine operator was willful or negligent.

New Bell Jellico Coal Co. *v.* Sowders, 156 Southwestern, 1046, p. 1047 (Kentucky), May, 1913.

ACTIONS FOR DEATH OF MINER—PARTIES.

The statute of Kansas giving a right of action against any owner, lessee, or operator of a coal mine for any injury to any miner caused by the willful failure to comply with the statute takes its place among the provisions of the code relating to death by wrongful act, and the action may be prosecuted by the personal representatives of the deceased miner, but if no representative has been appointed the action may be prosecuted by the widow, and in such case the proceeding takes the same form and course as if conducted under the code provisions relating to death by wrongful act.

Cheek *v.* Missouri, K. & T. Ry. Co., 131 Pacific, 617, p. 620 (Kansas), April, 1913.

3. NEGLIGENT FAILURE TO COMPLY WITH STATUTES.

NEGLIGENCE PER SE.

The rule that a negligent violation of a statute defining reasonable care in the operation of agencies that may inflict injury if not properly used is negligence per se, applies to the violation of a statute regulating mining operations.

Miles *v.* Central Coal & Coke Co., 157 Southwestern, 867, p. 870 (Missouri Appeals), June, 1913.

EMPLOYMENT OF MINE FOREMAN—COMPLIANCE.

The statute of West Virginia requires a mine operator to employ a competent mine foreman who has his domicil and his actual residence in the State, in order to relieve the operator from liability for negligence of the mine foreman; and the employment of a nonresident mine foreman is not a compliance with the statute and makes such a mine foreman the mere common-law agent of the mine operator and a vice principal in respect to nonassignable duties delegated to the operator.

Gartin *v.* Draper Coal & Coke Co., 78 Southeastern, 673, p. 675 (West Virginia), June, 1913.

FAILURE TO EMPLOY MINE FOREMAN FOR SEPARATE MINES.

It is not sufficient under the Pennsylvania statute for a mine operator to employ a single mine foreman for two separate and distinct underground workings, located half a mile apart and not connected by underground workings, and a mine foreman so employed, as well as an assistant employed by him to look after one of the mines, must be regarded as representing the mine owner and as his vice principal for whose negligence the owner or operator is liable.

Janosky *v.* Lehigh Valley Coal Co., 88 Atlantic, 419, p. 421 (Pennsylvania), May, 1913.

FAILURE TO FURNISH PROPS.

The statute of Kentucky puts on the mine owner and operator the peremptory and nonassignable duty of furnishing to the miners the caps and props necessary to protect the roof of the room or place at which they are working when so requested by a miner; and if a miner is injured by the failure of a mine owner or operator to perform this duty, he may maintain an action to recover damages for any injury sustained, unless his own contributory negligence will defeat a recovery.

Left Fork Coal Co. *v.* Owens, 159 Southwestern, 703, p. 707 (Kentucky), October, 1913.

4. FAILURE TO COMPLY—EFFECT ON DEFENSE.

FAILURE TO COMPLY WITH STATUTE—CONTRIBUTORY NEGLIGENCE NO DEFENSE.

In an action by a miner against a mine owner or operator for injuries caused by a failure to comply with the statute, the defendant can not set up as a defense the contributory negligence of the miner.

Cheek *v.* Missouri, K. & T. Ry. Co., 131 Pacific, 617, p. 624 (Kansas), April, 1913.

A mine owner or operator, when sued by a miner for injury caused by failure to comply with the statute of Kansas intended to protect the health and safety of miners, can not set up as a defense to the action an assumption of risk on the part of the injured miner.

Cheek *v.* Missouri, K. & T. Ry. Co., 131 Pacific, 617, p. 624 (Kansas), April, 1913.

WILLFUL VIOLATION—DEFENSES.

The requirement of the statute of Kansas enacted to protect the health and safety of miners respecting bore holes and the duty to maintain them applies only when danger is suspected as being imminent; and the willful refusal to adopt the precautions imposed when in face of threatened danger amounts to wantonness, under the common-law rules, to which assumption of risk and contributory negligence are not defenses.

Burgin *v.* Missouri, K. & T. Ry. Co., 133 Pacific, 560, p. 561 (Kansas), July, 1913.

VIOLATION—APPLICATION OF PROXIMATE AND REMOTE CAUSE.

Under the mining statute of the State of Kansas the terms proximate cause, remote cause, and efficient cause, do not properly apply as to the relation of an omission of duty to an injury, and if injury or loss of life occurs by reason of a violation of the terms of the statute or a willful failure to comply with any of the provisions of the statute, a liability attaches without reference to the question of proximate, remote, or efficient cause.

Cheek *v.* Missouri, K. & T. Ry. Co., 131 Pacific, 617, p. 623 (Kansas), April, 1913.

5. MINER'S FAILURE TO COMPLY—EFFECT.

DUTY OF MINER TO MAKE PLACE SAFE.

The Montana coal-mining code imposes the duty upon the miner of examining and keeping safe his working place, and there can be no recovery by a miner injured by material falling from the roof of a working place in a mine where both he and the mine operator have violated the provisions of the statute, and where the injury was due to such nonobservance.

Kallio *v.* Northwestern Improvement Co., 132 Pacific, 419, p. 420 (Montana), May, 1913.

APPLICATION TO PARTICULAR MINERS.

The Illinois statute (act of 1911, p. 1560) requiring every miner to sound and examine the roof of his working place, and if dangerous, to do no work except to make the place safe, and making it the duty of the miner to properly secure his place, and prescribing a penalty for disobedience, applies to those employees who have a fixed working place in the mine, and has no application to a miner or employee who is directed by the mine manager to go into an entry or room and remove fallen material from a roadway.

Grannon *v.* Donk Brothers Coal & Coke Co., 102 Northeastern, 769, p. 772 (Illinois), October, 1913.

PLEADING FREEDOM FROM CONTRIBUTORY NEGLIGENCE.

A miner, in an action for damages for injuries occasioned by the negligence of certain officers and employees of the mine operator, is not required, under the statute of Montana, to aver his freedom from contributory negligence, where the statute expressly makes every person operating a mine liable for any damages sustained by a miner when such damage is caused by the negligence of a superintendent, shift boss, or hoisting or other engineer, unless the employee himself was guilty of contributory negligence, as in such case the proviso need not be negatived in the complaint.

Melzner *v.* Raven Copper Co., 132 Pacific, 552, p. 554 (Montana), May, 1913.

6. NEGLIGENCE OF MINE FOREMAN OR BOSS.

a. Operator Liable—Instances.
b. Operator not Liable—Instances.

a. OPERATOR LIABLE—INSTANCES.

FAILURE TO EMPLOY ELIGIBLE MINE FOREMAN.

A coal operator must comply strictly with the statute of West Virginia in order to claim the benefit of its provisions, and the employment of a mine foreman who is not a citizen and a resident of the State of West Virginia, though qualified as a mine foreman, is not such a compliance with the statute as will exonerate the operator from liability for injury occasioned by the negligence of such mine foreman.

Gartin *v.* Draper Coal & Coke Co., 78 Southeastern, 673, p. 675 (West Virginia), June, 1913.

DELEGATION OF DUTY—VICE PRINCIPAL.

Although a corporation or mine operator may delegate to another the duty of furnishing suitable appliances and of keeping them in repair, yet the person so delegated for such purposes stands in the place of the operator and the mine operator can not escape liability

by such delegation of authority, but the person so delegated stands in the position of a vice principal, and the operator is liable for his negligence.

Lehigh Valley Coal Co. *v.* Shandalla, 205 Fed., 715, p. 718, May, 1913.

FOREMAN AS VICE PRINCIPAL.

A foreman in a fire-clay mine and in charge of the day hands and of the work of posting and slabbing the mine, who informed a miner employed to work in the mine at night that the mine was properly timbered and that it was not the miner's duty to see to the timbering, was a vice principal of the mine operator and not a fellow servant of the miner, and his negligence in failing to provide the miner with a reasonably safe place in which to work was the negligence of the mine operator.

Olive Hill Fire Brick Co. *v.* Stone, 155 Southwestern, 733, p. 734 (Kentucky), April, 1913.

FOREMAN ACTING AS SUPERINTENDENT.

Under the statute of Pennsylvania a mine owner or operator is liable for the negligence of the superintendent of the mine; and where a mine foreman also acts as superintendent, the mine owner or operator is responsible for his negligence while acting in the latter capacity.

Collins *v.* Northern Anthracite Coal Co., 88 Atlantic, 75, p. 76 (Pennsylvania), May, 1913.

FOREMAN PERFORMING ACTS OF SUPERINTENDENCE.

The proper construction of the Pennsylvania statute requiring the employment by a mine operator of a certified mine foreman is that in so far as the foreman acts under the statute he is to that extent, and in a sense, the servant of the State, but when he performs acts or gives orders that relate strictly to superintendence, he does for such purpose become the servant of the mine operator, and a law intended for the protection of miners should not be so construed as to render them remediless when injured.

Lehigh Valley Coal Co. *v.* Shandalla, 205 Fed., 715, p. 720, May, 1913.

NOTE.—Circuit Judge Ward dissented on the ground that this decision is contrary to the decisions of the Supreme Court of Pennsylvania construing this statute and establishing the rule that by requiring the mine operator to employ a certified mine foreman to superintend the underground workings the State has taken from the operator all power of control and relieves him from liability for the reason that he has no voice in the control or management, but on the contrary, is himself subject under penalty to the orders and instructions of the mine foreman. The case might be distinguished from the Pennsylvania cases and from other Federal cases following the Pennsylvania rule on the theory that the mine foreman in this particular case was performing acts of superintendence not covered by his duties to the State; but the facts indicate that the mine operator furnished suitable blocks originally and the use

of the blocks after they became worn and unfit was under the immediate superintendence and control of the certified mine foreman as the officer of the State, and it was his duty and within his power as such officer to prohibit absolutely the use of the blocks either if their original use, or if their continued use after they became unfit, was dangerous, and his negligence in that regard, under decisions of the Pennsylvania Supreme Court and some Federal courts, can not be attributed to the mine operator.

KNOWLEDGE OF NEGLIGENCE OF MINE FOREMAN—LIABILITY.

The statute of West Virginia (acts of 1907, chap. 78, secs. 405–410, code supp., 1909) prescribes no duties for the superintendent of a mine, but he is the representative of the owner or operator, upon whom the statute does not impose duties; and under the statute the operator is bound to maintain in his mine a competent and qualified mine foreman for the protection of the miners, and if, after having employed such a foreman, the owner or operator knows he is habitually and persistently negligent and subjecting the miners to danger, and the operator fails to remove the cause of such danger or in some way to effect a remedy, he is not complying with the purpose of the statute, and notice to him of such conditions in the mine and of the foreman's transactions therein will impose upon the operator a liability, as the statute was not designed to shield him from noncompliance with its substantial requirements.

Gartin *v.* Draper Coal & Coke Co., 78 Southeastern, 673, p. 677 (West Virginia), June, 1913.

NOTICE OF MINE FOREMAN'S BREACH OF DUTY.

Where a mine operator employs the same person as a mine foreman under the statute and as his superintendent to represent him in the operations of the mine, and any statutory duties as mine foreman are omitted, the operator is given notice in law through the agency of such person as his superintendent, and responsibility and liability immediately attach for such omission of statutory duties.

Gartin *v.* Draper Coal & Coke Co., 78 Southeastern, 673, p. 678 (West Virginia), June, 1913.

FAILURE OF MINE FOREMAN TO DISCHARGE DUTIES—KNOWLEDGE OF OPERATOR.

The fact that a mine foreman appointed under the statute of Pennsylvania is negligent in the discharge of his duties, so that the injury of a miner results, will not relieve the mine owner or operator if he has knowledge of the fact of the foreman's negligence and of the dangerous condition existing in the mine and takes no step to remove the danger, as the statute that specifies the duties of the mine foreman expressly provides that the owner shall use every precaution to insure the safety of the workmen in all cases whether provided for in the act or not.

Bogdanovicz *v.* Susquehanna Coal Co., 87 Atlantic, 295, p. 297 (Pennsylvania), March, 1913.

FAILURE OF MINE FOREMAN TO INSPECT GASEOUS MINE—LIABILITY OF OPERATOR.

The statute of Kansas makes it the duty of the State mine inspector to see that all the provisions of the act to protect the health and safety of miners are observed and strictly carried out, yet the neglect on the part of the State mine inspector to require the appointment of a fire boss in a mine generating fire damp does not relieve the mine owner or operator from liability for failure to employ such mine boss or for failure to carefully examine a gaseous mine every morning.

Cheek *v.* Missouri, K. & T. Ry. Co., 131 Pacific, 617, p. 621 (Kansas), April, 1913.

FAILURE TO INSPECT ROOF AND FURNISH PROPS.

A complaint by a coal miner for injuries is sufficient where it avers that by reason of the failure of the mine operator to furnish sufficient props and the negligent failure of the mine boss to inspect the mine at least every alternate day, as required by the statute of Indiana (sec. 8569, Burns, 1908), and that by reason of the miner's inability to properly secure the roof for want of such props and timbers, he was injured by a fall of slate and material from the roof of his working place.

Coal Bluff Mining Co. *v.* McMahon, 102 Northeastern, 862, p. 863 (Indiana App.), October, 1913.

FAILURE OF MINE FOREMAN TO FURNISH PROPS—LIABILITY OF OPERATOR.

A mine owner or operator was liable to a miner injured because of the failure to furnish props, as required by the statute of Pennsylvania, where the miner notified the mine superintendent of the necessity for props to sustain the roof and stated that the mine foreman had failed to furnish the necessary props he requested, and where the superintendent promised the miner that he would see that the props were furnished immediately, but failed to do so, and the miner was injured.

Collins *v.* Northern Anthracite Coal Co., 88 Atlantic, 75, p. 76 (Pennsylvania), May, 1913.

NEGLIGENT EMPLOYMENT OF FIRE BOSS.

The fact that an assistant superintendent of a mine had authorized the employment of an assistant fire boss on condition that he would make an affidavit of competency required by the Pennsylvania statute is not sufficient to make the mine operator liable for the negligence of such assistant fire boss, where it appears that a competent mine foreman and fire boss were regularly employed and that the mine foreman employed or appointed the assistant fire boss who had not in fact made the affidavit required by statute as to his competency, and was in fact incompetent.

Watkins *v.* Lehigh Coal & Navigation Co., 87 Atlantic, 860, p. 861 (Pennsylvania), April, 1913.

INTOXICATION OF MINE FOREMAN.

In an action against a coal operator for damages for the death of a miner it is proper, for the purpose of effecting the credibility of the mine foreman and the weight that the jury might attach to his evidence, to show that at the time he gave the deceased miner directions to work in a particular place, he was under the influence of liquor, and that on the following day, and up to the date of the injury, he was in such condition from the use of liquor as not to know whether or not the deceased miner had marked and placed his timbers, and that on the morning of the accident, when the mine foreman inspected the mine roof, he was unable, on account of his intoxicated condition, to appreciate or understand the condition of the roof, and that at such times he was so intoxicated as not to know what he was doing or remember what he said, or be capable of having a distinct recollection, or any recollection, of the true facts of the matter; but proof of the fact that he was intoxicated on many other occasions, or his habit of drunkenness is irrevelent and prejudicial.

Left Fork Coal Co. *v.* Owens, 159 Southwestern, 703, p. 706 (Kentucky), October, 1913.

b. OPERATOR NOT LIABLE—INSTANCES.

OPERATIONS UNDER CONTROL OF STATUTORY FOREMAN.

Under the Pennsylvania statute requiring coal-mine operators to employ competent mine foremen, such employment is made compulsory and a foreman has full and absolute control of the underground workings of the mine, and nothing is left to the judgment and control of the operator, and the operator or master is not liable for an injury to a miner working in the mine where such injury is caused by the negligence of the mine foreman.

Pittsburgh-Buffalo Co. *v.* Cheko, 204 Fed., 353, p. 359, April, 1913.

Under the statute of West Virginia the negligence of a mine foreman in the operation of a coal mine, resulting in the injury and death of a miner, can not be imputed to the owner or operator of the mine, as the internal operations and control of the mine are by the statute placed in the hands of the mine foreman.

Holly *v.* McDowell Coal & Coke Co., 203 Fed., 668, p. 672, March, 1913.

NEGLIGENCE OF FOREMAN—LIABILITY OF OPERATOR.

Under the Pennsylvania statute of May 15, 1893, a mine owner or operator is not liable to a miner injured by the negligence of the mine foreman, for the reason that the statute takes the entire charge of the appliances and internal workings of the mine out of the control of the operator and gives it to the mine foreman, and prohibits

the superintendent of the mine from obstructing the mine foreman or other officers in their fulfillment of any of the duties required by the statute.

Pittsburgh-Buffalo Co. *v.* Cheko, 204 Fed., 353, p. 355, April, 1913.

FOREMAN AS AGENT OF STATE—OPERATOR RELIEVED.

The statute of Pennsylvania requires a coal-mine operator to employ a mine foreman, who is given entire charge of the appliances and internal workings of the mine, and under this statute a coal-mine operator is not liable for an injury to a miner caused by a defective brake on a compressed-air motor used for hauling coal cars inside of the mine, where such motor was in good order when put into service, for the reason that the mine foreman under the statute represents the Commonwealth, and his employment by the mine owner is compelled, and in the name of the police power the Commonwealth leaves to him the determination of all questions relating to the comfort and security of the miners and invests him with the power to compel compliance with his orders, and when the mine operator has employed a competent foreman he has discharged the full measure of his duty to the employees and is not liable for an injury arising from the negligence of such foreman.

Pittsburgh-Buffalo Co. *v.* Cheko, 204 Fed., 353, p. 356, April, 1913.

FAILURE OF MINE FOREMAN TO FURNISH PROPS—LIABILITY OF OWNER.

A mine owner and operator is not liable under the statute of Pennsylvania for an injury to a miner caused by the failure to furnish props, where the failure to furnish such props was the fault of the mine foreman alone.

Collins *v.* Northern Anthracite Coal Co., 88 Atlantic, 75, p. 76 (Pennsylvania), May, 1913.

FAILURE OF MINE FOREMAN TO INSPECT MINE—LIABILITY OF OPERATOR.

The Pennsylvania statute approved June 2, 1891 (P. L., 176), requires a mine operator to employ a qualified mine foreman and imposes upon such foreman the duty of examining the mine for gases before the miners commence work and prohibits miners from entering the mine or the working places until they are reported to be safe; and the mine owner or operator can not be held liable for the negligence of a properly qualified mine foreman, or for his failure to comply with the provisions of the act.

Watkins *v.* Lehigh Coal & Navigation Co., 87 Atlantic, 860, p. 861 (Pennsylvania), April, 1913.

INJURIES FROM FALLING COAL—STATUTORY INSPECTION.

The code of West Virginia (secs. 400 to 454), recognizing the hazardous condition attending the coal-mining business, has undertaken the control of the mining operations and prescribes conditions under which such operations may be conducted, and among other things directs the appointment of a mine inspector for each of 12 mining districts, and requires such inspector to inspect each mine at least once every three months and oftener when properly requested, and requires the operator of a coal mine to place the entire internal management of his mine in control of an inside foreman and, under certain circumstances, of a fire boss, and such mine inspector, mine foreman, and mine boss are answerable not to the operator but to the State for any neglect of duty; and the statute has set aside the common-law rules governing master and servant as regards negligence in the mining industry and has undertaken to define specifically the relative duties of the mine operator and of the miners; and under this law a mine operator is not liable for the death of a miner caused by slate falling from a roof of an entry.

Holly *v.* McDowell Coal & Coke Co., 203 Fed., 668, p. 670, March, 1913.

MINES AND MINING OPERATIONS.

A. Relation of Master and Servant—Duty of Mine Operator.

B. Negligence of Operator.

1. Negligence Not Presumed—Pleading and Proof.
2. Maintaining Dangerous Places.
3. Using Defective Appliances.
4. Negligence of Fellow Servants.
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C. Contributory Negligence of Miner.

D. Freedom from Contributory Negligence—Exercise of Care.

E. Assumption of Risk.

1. Risks Assumed.
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G. Methods of Operating.

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1. Contracts Generally.
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I. Enjoining Operations.

A. RELATION OF MASTER AND SERVANT—DUTY OF MINE OPERATOR.

PROOF OF RELATION OF MASTER AND SERVANT.

Whether the relation of master and servant exists between a mine operator and a miner is a mixed question of law and fact and must be proved as other questions of fact are proved, and any evidence tending to prove or disprove the relationship is admissible.

Memphis Mining Co. *v.* Shacklett, 155 Southwestern, 1154 (Kentucky), April, 1913.

SAFE PLACE AND APPLIANCES—METHOD OF WORK.

A mine owner and operator is not bound to provide his miners with the safest and best tools or the safest place of work, nor must he prescribe the safest method for doing his work; but he has a right to conduct his own business in his own way so long as he conducts it with reasonable care, and he may adopt any method, whether or not it be in general use, or as safe as some other, provided it be reasonably safe.

Miles *v.* Central Coal & Coke Co., 157 Southwestern, 867, p. 869 (Missouri Appeals), June, 1913.

DUTY OF SUPERVISION—RULES.

Where work is hazardous and of a complicated character, the master or mine operator must make and promulgate proper rules and exercise reasonable care to see that they are enforced and to see that such hazardous work as mining is conducted in the proper manner; and if he knows, or in the exercise of reasonable care ought to know, that work inherently hazardous is being done in such a way as unnecessarily to increase the hazard, in case of injury to an inexperienced workman, he is chargeable with negligence for permitting the unsafe method to be continued.

Mahoney *v.* Cayuga Lake Cement Co., 101 Northeastern, 802, p. 803 (New York), April, 1913.

DUTY TO FURNISH SAFE WORKING PLACE—INJURY TO MINER.

A miner working in a coal mine, whose duties, among others, was the loading of cars with coal in a room or entry and who was required to notify the driver when the cars were loaded and ready to be taken out, is entitled to recover for an injury caused by falling slate from the roof of an entry entered by him for the purpose of notifying the driver to take out a car, as the passing into or through the entry for the purpose of notifying the driver was in the line of his service, and the coal operator was under a duty to exercise ordinary care to keep the entry through which he was going in a reasonably safe condition.

Jellico Coal Mining Co. *v.* Woods, 159 Southwestern, 530, p. 531 (Kentucky), September, 1913.

In an action by a coal miner for injuries caused by falling of slate it is proper for a court to instruct a jury to the effect that it was the duty of a mine operator to exercise ordinary care to keep and maintain the entry in which the injury occurred in a reasonably safe condition, and if it failed to do so and the miner was injured as a direct result of such failure the jury should find for the injured miner such an amount in damages as would compensate him for pain and suffering and the loss of his powers to earn money.

Jellico Coal Mining Co. *v.* Woods, 159 Southwestern, 530, p. 531 (Kentucky), September, 1913.

If at the beginning of the work of drilling wells an oil company engaged in drilling the wells furnishes its employees a place free from all gases and danger therefrom with the necessary and proper tools and appliances for drilling a well and for keeping the place of work safe in drilling the well, it has performed its duty under the law by providing its employees a reasonably safe place in which to work, and it is not under duty to keep the working place safe when the work itself that the employees are performing changes the condition of the place and makes it more or less dangerous as the work advances.

Producers Co. *v.* Bush, 155 Southwestern, 1032, p. 1037 (Texas Civil Appeals), April, 1913.

CONTINUING DUTY TO KEEP WORKING PLACE SAFE.

A miner employed to work at night to mine fire clay is not charged with the duty of inspection and is not required to use ordinary care to ascertain whether the place of work is reasonably safe and has the right to presume that it is reasonably safe, where he has been informed by the foreman at the time of his employment that the duty of timbering is performed by the day hands employed in the mine, pursuant to a regulation of the mine operator, and he has the right to rely upon the foreman and upon the assumption that the day hands have performed the duty of maintaining the mine in such a condition as will make it reasonably safe for work, unless in fact it is not reasonably safe and the danger of continuing work is so obvious as to be plain and known to a person of his experience and understanding.

Olive Hill Fire Brick Co. *v.* Stone, 155 Southwestern, 733, p. 734 (Kentucky), April, 1913.

MINER MAY ASSUME PLACE IS SAFE.

Under the common-law rule, where it is incumbent upon a master or mine operator to exercise ordinary care and diligence to provide his employees or miners with a reasonably safe place in which to work, the miner is justified in assuming this duty to have been performed and is not required to stop and examine, and experiment

for himself to see whether the place is safe, and he is bound to protect himself only against such dangers as are open and obnoxious to his senses.

Kallio *v.* Northwestern Improvement Co., 132 Pacific, 419, p. 420 (Montana), May, 1913.

EXCEPTION—MINER MAKING WORKING PLACE SAFE.

The rule that a mine operator is required to furnish a safe working place for the miners does not apply where the miner and his fellow miners are themselves creating the working place and when it is constantly being changed in character by their labor and when it becomes dangerous only by the carelessness or negligence of the miners themselves, but the rule does apply where the working place is a completed one, as, for instance, that part of a mine tunnel that is behind the miner engaged in driving it.

Kallio *v.* Northwestern Improvement Co., 132 Pacific, 419, p. 420 (Montana), May, 1913.

DUTY TO FURNISH SAFE HAULAGE WAYS.

A miner employed by a mine operator in the capacity of loader on one of its trains used in carrying ore and waste out of the mine and propelled by an electric motor by a regular motorman was entitled to recover for an injury though he was operating the motor and the injury was caused by the motor running into a timber truck that had been placed upon the main track by an employee of the contractor in the mine, where it appeared that it had been previously suggested to the miner by the superintendent and shift boss that he learn to operate the motor, as his services might be needed in that capacity and where it appeared also that the regular motorman was not present to operate the motor and where it further appeared that the mine operator knew that collisions had taken place between the motor and timber trucks or other cars placed upon the same track and the miner did not know of any such collisions, and where it appeared that the tunnel was poorly lighted and there was no method of giving signals in case of danger.

Barter *v.* Stewart Mining Co., 135 Pacific, 68 (Idaho), September, 1913.

DUTY TO FURNISH SAFE APPLIANCES.

It is the duty of a mine owner and operator to furnish for the use of its miners and employees suitable, fit, and sufficient means and appliances, and to maintain them properly and keep them in repair.

Lehigh Valley Coal Co. *v.* Shandalla, 205 Fed., 715, p. 718, May, 1913.

SAFE APPLIANCES—PLEADING—BREACH OF DUTY.

It is the duty of the owner and operator of a mine to exercise reasonable care in providing his miners with reasonably safe appliances and machinery for work, and a complaint by an injured miner that sets up a breach of this duty upon the part of the mine operator and the consequent injuries to the miner therefrom is sufficient to constitute a cause of action.

Jones *v.* West End Consolidated Mining Co., 134 Pacific, 104, p. 105 (Nevada), July, 1913.

SAFE APPLIANCES—CHANGE OF APPLIANCES.

Where coal cars were permitted to enter a mine on a gravity grade and it was necessary to check the speed of the cars at certain places by putting blocks under the wheels, the duty rested upon the mine operator to furnish safe and suitable blocks to the person engaged in placing them upon the track in front of the running cars, and the operator is liable for an injury to such person where the blocks became worn, broken, or decayed; and an operator can not escape liability from the fact that he directed the discontinuance of the use of such blocks and the use of sprags instead, where the worn and broken blocks were not removed and no sprags were furnished, and where it was necessary in the operation of the mine that the speed of the cars should be checked.

Lehigh Valley Coal Co. *v.* Shandalla, 205 Fed., 715, p. 719, May, 1913.

DUTY TO INSPECT ROOF.

It is the duty of a mine operator to exercise ordinary diligence to keep the roof of its mine reasonably safe for its miners, and this duty may require inspections to be made with such care and frequency as reasonable prudence demands as varying conditions arise, and the formation of a mine roof may be such as to require an examination after each heavy shot.

Reynolds *v.* New Century Mining Co., 133 Pacific, 844, p. 845 (Kansas), July, 1913.

INSPECTION OF ROOF—QUESTION OF FACT.

Where the roof of a mine is composed of material likely to be affected by shots, ordinary diligence is required in inspection and care commensurate with dangers reasonably to be foreseen, and it can not be said as a matter of law that it was sufficient after a shot, or any number of shots, to look at the roof without otherwise testing it; and whether or not the prodding of the roof at points 10 feet from the place where the material subsequently fell was proper diligence was a question of fact to be determined by jurors trying the case and not by a court as a question of law.

Reynolds *v.* New Century Mining Co., 133 Pacific, 844, p. 846 (Kansas), July, 1913.

The question of whether the inspection and repair of the roof of an entry in a mine were upon the owner and operator, or upon the miner working in the entry, was one of fact to be determined by a jury in an action by a miner for injuries occasioned by falling material, where the witnesses testified that the miners had nothing to do with the entry and, on the other hand, the superintendent testified that it was the duty of the miner to inspect the roof of the entry from the point where he changed his clothes to the face of the coal where he worked, and where other miners testified to the fact that the duty of inspection devolved upon the miner from the switch to the face of the coal where he was employed.

Carnego *v.* Crescent Coal Co., 143 Northwestern, 550, p. 551 (Iowa), October, 1913.

A mine operator can not escape liability for injury to a miner caused by material falling from the roof on the ground that the injured miner could by reasonable care have known of the danger; but the argument ignores the relative duties of the mine operator and the miner, as the miner ordinarily is not charged with the duty of examining the roof high above his head as he works or goes about in the mine, but the duty is ordinarily imposed upon the operator to exercise proper care to make the mine reasonably safe. It is only when the miner knows of a defect and neglects reasonable precaution for his own safety, or where the danger is obvious to him while at his work, that he is required to exercise care to avoid danger.

Reynolds *v.* New Century Mining Co., 133 Pacific, 844, p. 845 (Kansas), July, 1913.

INJURY FROM FALLING ROOF—PLEADING.

An allegation that a miner's injuries resulted from the falling from the roof of a room of pieces of slate weighing 1 or 2 tons was by implication an averment that the roof of the room was defective and insecure, and if the entire roof was insecure and liable to fall the part thereof that did fall was necessarily insecure and liable to fall, and the complaint was clearly sufficient where it did aver directly that the defendant company was negligent in that it failed by and through its mine boss to visit and examine the roof of the room and in negligently failing to discover that the piece of slate that fell and injured the plaintiff was loose and in failing to discover and make safe the roof of such room by taking down such loose and dangerous piece of slate or stone.

Domestic Block Coal Co. *v.* De Armey, 101 Northeastern, 99, p. 103 (Indiana), June, 1913.

EVIDENCE—AGREEMENT AS TO TIMBERING ROOF OF ENTRY.

In an action by a miner for injuries received by the fall of material from the roof of an entry, an agreement between the operators and miners of the district in which the particular mine was located as to

the respective duties of the operators and miners relative to timbering the roof was admissible in evidence on the question of whether it was the duty of the miner or of the mine operator to timber and support the roof of the entry.

Carnego *v.* Crescent Coal Co., 143 Northwestern, 550, p. 552 (Iowa), October, 1913.

DUTY TO INSTRUCT INEXPERIENCED OR YOUTHFUL MINER.

The duty to instruct a youthful or inexperienced miner in the discharge of his duties is one to be performed by a mine owner or operator, and is not a duty imposed by the statute upon the mine foreman.

Bogdanovicz *v.* Susquehanna Coal Co., 87 Atlantic, 285, p. 297 (Pennsylvania), March, 1913.

It is the duty of a mine operator, when an employee is engaged in a dangerous service, to instruct not only a young person but also an inexperienced adult person.

Zeskie *v.* Pennsylvania Coal Co., 88 Atlantic, 414 (Pennsylvania), May, 1913.

It is a mine operator's nonassignable duty to instruct youthful and inexperienced miners in regard to the dangers incident to their employment, just as it is the operator's duty to furnish reasonably safe appliances, and the operator is liable for any failure to perform this duty if such failure was the proximate cause of the injury or death of a youthful or inexperienced miner.

Sprinkle *v.* Big Sandy Coal & Coke Co., 78 Southeastern, 972, p. 974 (West Virginia), June, 1913.

A mine owner and operator was not required to give a miner instructions as to matters within his own knowledge where the miner had for some considerable length of time been engaged in shake blasting in the breast of a mine by means of dynamite and a cap and fuse and was familiar with the work and dangers attending such blasting and where the man professed to be a good miner.

Stanich *v.* Pearson Mining Co., 141 Northwestern, 1100 (Minnesota), May, 1913.

The law makes it the duty of a master or coal-mine operator to warn any infant employee of the dangers attending his employment and to instruct him how to avoid them, unless he already fully understands them, or unless they are so simple and obvious that it can be fairly presumed that a person of the employee's age, possessing ordinary capacity, fully appreciates such dangers.

Sprinkle *v.* Big Sandy Coal & Coke Co., 78 Southeastern, 972, p. 973 (West Virginia), June, 1913.

INSTRUCTING YOUTHFUL EMPLOYEES—PRESUMPTION AS TO CAPACITY.

The law presumes that a boy over 14 years of age employed in a mine has sufficient capacity to apprehend all the ordinary risks attendant upon his employment, but this presumption may be re-

butted by proof that a particular boy did not in fact have the capacity ordinarily possessed by boys of his age to understand and avoid dangers; and such proof may be made by ordinary witnesses whose opinions are based upon observations of and conversations with the boy extending over a period of several months, and it is not a matter calling for expert testimony.

Sprinkle *v.* Big Sandy Coal & Coke Co., 78 Southeastern, 972, p. 973 (West Virginia), June, 1913.

DUTY TO INSTRUCT MINER—CHANGE OF WORK—QUESTION OF FACT.

Where the employment of a person as door tender and mule driver in a coal mine was changed to the position of brakeman on a compressed-air motor used in hauling cars and whose duty then consisted of turning the switches, coupling and uncoupling cars, and sanding the track, the question of the negligence of the mine operator for its failure to properly instruct the employee on such change of employment was a question of fact to be determined by a jury trying the case.

Zeskie *v.* Pennsylvania Coal Co., 88 Atlantic, 414 (Pennsylvania), May, 1913.

B. NEGLIGENCE OF OPERATOR.

1. Negligence not Presumed—Pleading and Proof.
2. Maintaining Dangerous Places.
3. Using Defective Appliances.
4. Negligence of Fellow Servants.
5. Negligence of Strangers.

1. NEGLIGENCE NOT PRESUMED—PLEADING AND PROOF.

NEGLIGENCE NOT PRESUMED FROM INJURY.

The fact that a miner's body was run over and crushed by a motor on the tracks in a mine raises no presumption of negligence on the part of the mine owner and operator, but in such case actionable negligence must be affirmatively shown.

Pittsburgh Coal Co. *v.* Myers, 203 Fed., 221, p. 222, April, 1913.

NEGLIGENCE NOT PRESUMED—BURDEN OF PROOF.

In an action against a coal company for the death of a miner caused while riding as a licensee on an engine of the coal company, negligence on the part of the company will not be presumed, but the burden is upon the plaintiff to prove affirmatively and by a preponderance of the testimony that the defendant's negligence was the proximate cause of the miner's death.

Steele *v.* Colonial Coal & Coke Co., 79 Southeastern, 346, p. 347 (Virginia), September, 1913.

PLEADING NEGLIGENCE—PROOF CONFINED TO ALLEGATIONS.

In an action for damages by an injured miner based upon the alleged negligence of the mine operator, specifically set forth in the pleading, the plaintiff is confined to the negligence thus alleged and evidence of any other negligence is inadmissible; but the fact that the plaintiff filed an amended complaint charging other acts of negligence will not prevent proof of the negligence charged in his original complaint, where in the amended pleading he specifically reiterates and adopts all the allegations of the original pleading.

Interstate Coal Co. *v.* Love, 155 Southwestern, 746, p. 748 (Kentucky), April, 1913

2. MAINTAINING DANGEROUS PLACES.

ACQUIESCENCE IN VIOLATION OF RULES—EFFECT ON LIABILITY.

When the rules and regulations established by a mine operator are habitually disobeyed with the knowledge of and in the presence of the officers of the mine operator, or even disregarded without the express consent of the mine operator in such a manner and for such a length of time as to raise a presumption that the mine operator must be aware of such habitual disregard, such rules and regulations will be regarded as waived.

Memphis Mining Co. *v.* Shacklett, 155 Southwestern, 1154, p. 1155 (Kentucky), April, 1913.

YOUTHFUL MINER WORKING IN DANGEROUS PLACE.

A coal-mine operator was liable for the death of a 15-year-old boy performing the services of a trapper at a point in the haulage way, where the rail of the track was only 22 inches from the wall and where the body of the car extended beyond the rail 8 or 10 inches and the brake extended beyond the body of the car 3 or 4 inches, and where the boy was not instructed as to the manner of avoiding danger, but was cautioned only to keep as clear of the trip as possible, and had been told that the place was dangerous, but had not before the day of the accident trapped at this particular place, though he was employed and put to work at this particular place by the mine boss, and though the particular manner in which he met his death could not be fully explained.

Sprinkle *v.* Big Sandy Coal & Coke Co., 78 Southeastern, 972, p. 973 (West Virginia), June, 1913.

NEGLIGENT ORDER TO WORK IN DANGEROUS PLACE.

A miner or a rock shifter whose duty it was to remove falls from the roof and make dangerous places safe was not excepted from the benefit of the rule that requires the mine operator to exercise reasonable diligence to furnish a reasonably safe place in which the miner shall perform his work, where his complaint for an injury was not

based upon a violation of the duty of the master to furnish a reasonably safe place in which the miner was required to work, but the action was based upon the giving by the operator of a negligent order to work in a dangerous place.

Grannon *v.* Donk Brothers Coal & Coke Co., 102 Northeastern, 769, p. 773 (Illinois), October, 1913.

PROPS IN DANGEROUS PROXIMITY TO TRACK.

A mine operator may properly be charged with negligence and held liable for the death of a miner where props supporting the roof were placed so close to the track as to endanger the lives of persons riding on a motor, and where miners so riding had been struck by the props, and where a miner working as a track layer was sent to work with a night crew in loading cars, and on his first trip on the motor was struck by a prop, thrown under the car, and killed.

West Kentucky Coal Co. *v.* Butler, 159 Southwestern, 959, p. 959 (Kentucky), October, 1913.

In the trial of an action for the death of a miner killed by being caught between a motor on which he was riding and a prop set near the track, the court properly instructed the jury to the effect that it was not the duty of the mine operator to provide and maintain an absolutely safe place in which the miner could work or pass through or along in going to or from his work; but it was the duty of the operator to exercise ordinary care to provide and maintain a reasonably safe passageway through which he could go to and from his work in the mine, and if the evidence showed that the operator failed to do so, but negligently caused posts or props to be placed so near the track as to render the passage along the same unsafe and dangerous for the miner to ride along and by the same on a motor, and such condition was known or could have been known to the operator by the exercise of ordinary care, and if the evidence showed that the deceased miner, while riding on the motor to his work along such passageway, and while exercising ordinary care for his own safety, was struck and caught between one of such posts or props and the motor and was thereby killed, then the mine operator was liable.

West Kentucky Coal Co. *v.* Butler, 159 Southwestern, 958, p. 959 (Kentucky), October, 1913.

UNSAFE ROOF—FAILURE TO PROP.

Where an assistant mine manager inspected an entry of a mine from the roof of which a large amount of slate and rock had fallen, and thereafter directed a timberman and slate shifter to clean up and remove the fall of slate and rock, the mine owner was liable to the timberman for an injury received by the latter while he was removing the slate and rock as directed, where the timberman himself exercised

due care, and where the danger was not so apparent that any reasonable man would not undertake to obey the order given, as the order of the assistant mine manager under the circumstances was an implied assurance to the slate shifter that the roof was safe.

Grannon *v.* Donk Brothers Coal & Coke Co., 102 Northeastern, 769, p. 771 (Illinois), October, 1913.
Coal Bluff Mining Co. *v.* McMahon, 102 Northeastern, 862, p. 865 (Indiana), October, 1913.

A complaint sufficiently describes a defect in the condition of a mine under the employers' liability act of Alabama (code of 1907, sec. 3910) and sufficiently charges negligence, where it alleges that the plaintiff, a miner, was in the employ of the defendant, a mine operator, in the latter's mine, and that while engaged in the discharge of the duties of his employment a piece of rock, or slate, or other hard substance fell from the roof of the mine striking and injuring him, and that such injuries were caused by reason of a defect in the condition of the ways, works, machinery, or plant of such mine operator, and that such defect consisted in this: That the mine operator failed to pull down what is known as a "middle man" from the roof and that because of such failure the "middle man" fell upon plaintiff inflicting the injuries complained of, and that the defect arose, or had not been discovered or removed, owing to the negligence of the defendant, the mine operator, or some person intrusted by it with the duty of seeing that its ways, works, machinery, or plant were in proper condition.

Warrior-Pratt Coal Co. *v.* Shereda, 62 Southern, 721, p. 722 (Alabama), June, 1913.
Sloss-Sheffield Steel & Iron Co. *v.* Webster, 62 Southern, 764 (Alabama), May, 1913.

In an action for the death of a miner caused by a fall of the roof it was proper to prove that the mine boss did not approve the setting of big entry timbers by miners unless they were expressly directed to do so, where the statute required the mine owner or operator to supply the miners with props to secure the workings from caving.

Northern Central Coal Co. *v.* Milburn, 205 Fed., 270, p. 271, April, 1913.

In an action by a coal miner for injuries received from falling slate while passing through an entry in the line of his service, it was sufficient to show negligence on the part of the mine operator, where the evidence showed that the mine foreman, whose duty it was to inspect the entry, had not been in the entry where the injury occurred on the day of the injury or the preceding day, and where the person whose duty it was to prop the entry told the mine foreman, about the time of the injury, that the entry at the particular place where the slate fell ought to be timbered, and the foreman replied that they did not intend to timber the cross entry and were going to try to get the coal out without doing so.

Jellico Coal Mining Co. *v.* Woods, 159 Southwestern, 530, p. 531 (Kentucky), September, 1913.

A mine operator was liable for an injury to a miner caused by rock and material falling from the roof of a mine, where it was the operator's duty to use reasonable care to keep the roof safe and to furnish a safe working place for the miners; and this liability was not affected by the fact that the place where the injury occurred was outside of the miner's working place, where the miner at the time of the injury was returning tools borrowed of other miners, and where the operator knew of the custom among the miners to borrow and use the tools of each other.

King *v.* Mendota Coal Co., 143 Northwestern, 539, p. 540 (Iowa), October, 1913.

INJURY TO CAR DRIVER—DANGEROUS OBSTRUCTIONS ON TRACK.

It was the duty of a mine boss to see that a water car used to sprinkle the tracks and entries was not left in a place where it was dangerous; and a mine operator was liable for injuries to a driver of coal cars injured while bringing loaded cars out of an entry, where the injury was caused by a collision with such water car left by the mine boss in a dangerous position.

Loescher *v.* Consolidated Coal Co., 102 Northeastern, 196, p. 197 (Illinois), June, 1913.

ACTION FOR INJURY—PLEADING—SUFFICIENCY OF COMPLAINT.

The complaint of a miner asking a recovery for injuries caused by an unattended coal car descending an inclined track into a mine and colliding with a car operated by the plaintiff can not be regarded as defective because it alleges that the miner operating the car causing the collision fell down and lost control of it because of an obstruction on the track and in the space between the rail, where, on the trial, the proof showed that the miner fell down and lost control of his car from stepping into a hole or depression, for the reason that the word "obstruction" applies to anything that interferes with or renders dangerous travel along the track, whether it consists of a physical object on the track or a removal of some part of the traveled way.

La Caff *v.* Roslyn-Cascade Coal Co., 131 Pacific, 194, p. 196 (Washington), April, 1913.

NO LIABILITY IN ABSENCE OF NEGLIGENCE.

A miner engaged in digging an air shaft for a coal mine—the work being conducted by throwing the dirt and material to one platform and from that to another above—can not recover for an injury occasioned by such material falling upon him, where there is no allegation in his pleading that the injury resulted from or was caused by any negligent act of the mine operator, and where such injury can not be fairly inferred from any such negligence, and where there was no allegation that the material was caused to fall

by any negligent act or omission on the part of the mine operator or its employees; and an allegation that the work was being prosecuted in a dangerous manner will not justify a recovery unless that method of doing the work was the direct or proximate cause of the injury.

Saylor *v.* Bon Jellico Coal Co., 155 Southwestern, 1138, p. 1139 (Kentucky), April, 1913.

INJURY TO PERSON ON HIGHWAY.

The owner and operator of an iron mine situated in close proximity to a public highway, operating his mine as an open pit and using explosives for blasting, was liable to a person traveling along the highway who was struck and seriously injured by stones and other material thrown by a blast from such mine, where there was no notice or warning given to the traveler or other persons upon the highway.

Bartnes *v.* Pittsburgh Iron Ore Co., 143 Northwestern, 117 (Minnesota), October, 1913.

3. USING DEFECTIVE APPLIANCES.

DEFECTIVE TRACK FOR HAULING COAL CARS.

A coal-mine operator is liable for the death of a trip driver where it appears that his death was caused by his being thrown from the car because of the swaying and bouncing of the car produced by an accumulation of coal on the track, and where it also appeared that many of the ties were rotten, the spikes loose, the joints weak, and the track shaky.

Mengelkamp *v.* Consolidated Coal Co., 102 Northeastern, 756, p. 757 (Illinois), October, 1913.

DEFECTIVE TRACKS—OBSTRUCTION CAUSED BY LOW ROOF.

A low roof in a part of an entry of a mine does not of itself constitute a dangerous condition under the Illinois mining act, but it is sufficient to create a liability on the part of a mine operator for the death of a trip driver where such low roof raked coal from the loaded cars, and the coal fell on the tracks, causing a car to be thrown from the track, and did, in fact, endanger employees, the accumulation and obstruction of coal upon the track constituting a dangerous condition within the meaning of the statute, where such coal was not coal that had been shot down and was being removed by the loaders.

Mengelkamp *v.* Consolidated Coal Co., 102 Northeastern, 756, p. 758 (Illinois), October, 1913.

DEFECTIVE HOISTING CABLE.

Not only is a mine owner and operator in duty bound to furnish a safe hoisting cable, but he is charged with the duty of making reasonable inspection to see that the cable remains safe; and it was

not a forced inference to assume that a half-inch cable having a breaking strain of 7 to 9 tons and a safe working strain of 2½ to 3 tons, gave way while carrying a load of 486 pounds, with the added weight of three miners, and that its subsequent usefulness as a cable was greatly impaired.

Maki *v.* Mohawk Mining Co., 142 Northwestern, 780, p. 782 (Michigan), July, 1913.

INSUFFICIENT CABLE FOR HAULING CARS.

A complaint in an action for injuries to a chain boy caused by the derailing of the tramcar on which he was riding, which averred that the "cable or rope that pulled the car was so defectively constructed that it pulled the car sideways off the track" was sufficient, as this allegation did not refer to the warp or woof of the rope, or to the manner in which it was woven or manufactured, but it referred to the manner, mode, or condition in which it was attached to the car, motive power, pulleys, etc., rather than to the texture of the rope itself.

Sloss-Sheffield Steel & Iron Co. *v.* Capps, 62 Southern, 66, p. 68 (Alabama), April, 1913.

INSECURE CAGE—DEFECTIVE ENGINE.

A recovery by a miner for injuries occasioned by the falling of the cage in which he was being lowered to his work in the mine was justified by the evidence showing a defect in the throttle of the engine operating the cage, the throttle being that part of the engine by which the movement of the cage was controlled, the defect being a stiffness, or a disposition of the throttle to stick in such manner as to prevent the engineer from operating it readily, where the evidence showed that this defect had existed for a considerable time prior to the accident, and that the coal-mine operator had been negligent in permitting the throttle to remain in the defective condition.

Texas & Pacific Coal Co. *v.* Choate, 159 Southwestern, 1058, (Texas Civil Appeals), October, 1913.

KNOWLEDGE OF DEFECTS—PROOF.

In an action by a chain boy for injuries incurred while riding out of the mine on a tramcar and resulting from a derailment of the car because of its defective condition, it was proper to prove the mine operator's knowledge by showing that another employee had called attention to the particular defect causing the injury complained of.

Sloss-Sheffield Steel & Iron Co. *v.* Capps, 62 Southern, 66, p. 68 (Alabama), April 1913.

INJURY FROM PREMATURE SIGNALING.

The death of a cager handling loaded cars in a shaft mine resulting from a premature signal given under the "cross-belling" method by the cager handling the empty car must be regarded as the result of

the mine operator's negligent failure to maintain the ordinary means of signaling, and not to the negligence of a fellow servant.

Miles *v.* Central Coal & Coke Co., 157 Southwestern, 867, p. 870 (Missouri Appeals), June, 1913.

INSUFFICIENT MEANS OF SIGNALING.

A mine operator was liable for the death of a miner that resulted in direct consequence of the adoption of a means of signaling from the bottom to the top of a shaft not ordinarily used in the operation of coal mines in the State of Kansas, where it appeared that the means of signaling used was more dangerous than that ordinarily in use in that State, and not in compliance with the statute on that subject.

Miles *v.* Central Coal & Coke Co., 157 Southwestern, 867, p. 869 (Missouri Appeals), June, 1913.

4. LIABILITY FOR NEGLIGENCE OF FELLOW SERVANT.

MINERS IN COMMON EMPLOYMENT—NO RECOVERY.

Two experienced oil-well drillers engaged in drilling oil wells for the same company, neither being entrusted with the power to employ and discharge, are fellow servants and neither can recover from the common employer for an injury caused by the negligence of the other.

Producers Co. *v.* Bush, 155 Southwestern, 1032, p. 1037 (Texas Civil Appeals), April, 1913.

RELATION OF MINE FOREMAN TO BRAKEMAN.

A mine foreman who has under him a large number of miners, with full charge of the underground workings of a mine, is not a fellow servant of a brakeman working on coal cars in a tunnel of the mine.

Lehigh Valley Coal Co. *v.* Shandalla, 205 Fed., 715, p. 720, May, 1913.

MINE BOSS AS VICE PRINCIPAL.

A person entrusted by a coal-mine operator with the duties of inspecting the roof of the mine and providing and maintaining reasonably safe places in which to work is not a fellow servant with the miners engaged in mining, but is a vice principal.

Baka *v.* Kemmerer, 134 Pacific, 888, p. 891 (Utah), August, 1913.

INCOMPETENT FELLOW SERVANT—INDEPENDENT INJURY.

A mine owner and operator was not liable for an injury to a miner because he retained an incompetent fellow servant after he had received notice of such incompetency, where the injury complained of was not caused by the particular incompetency complained of.

Stanich *v.* Pearson Mining Co., 141 Northwestern, 1100, p. 1101 (Minnesota), May, 1913.

INJURY FROM EXPLOSIVES—CAUSAL CONNECTION.

Allegations in a complaint to the effect that the plaintiff, an employee of a mine operator, was injured, while engaged in his duties on the surface near the boiler house, by another employee who negli-

gently and carelessly threw out of the boiler house a lighted fuse to which was attached a dynamite cap, causing an explosion and thereby injuring the plaintiff, showed no causal connection between the injury and the negligence of the mine operator, and an allegation that the fellow servant destroyed a fuse and cap in the method indicated did not in any way connect the mine operator with the negligence of the fellow servant, in the absence of an allegation that ordinary care required that fuses cut too short should be destroyed and that the dynamite caps attached be exploded in the manner indicated.

Laine *v.* Consolidated Vermillion & Extension Co., 143 Northwestern, 783 (Minnesota), October, 1913.

INJURY—WORK DONE "IN HASTE."

Under the statute of Minnesota a coal-mine operator also operating a railroad is liable for an injury to an employee caused by the negligence of his fellow employees, although the particular work engaged in is not hazardous but has to be done with great and unusual haste, if such haste is an essential element in causing the accident, and the case is brought within what is known as "the rule of haste."

Jelos *v.* Oliver Mining Co., 141 Northwestern, 843, p. 844 (Minnesota), May, 1913

CAR DRIVERS AND SPRINKLERS.

A driver of coal-mine cars used for hauling coal and waste material in the mine is not a fellow servant with employees in charge of a water car used in sprinkling the tracks and entries of the mine.

Loescher *v.* Consolidated Coal Co., 102 Northeastern, 196, p. 197 (Illinois), June, 1913.

RETAINING INCOMPETENT ENGINEER.

An owner or operator of an iron mine was liable to a miner injured while being lowered into the mine by the sudden dropping and sudden stopping of the elevator because of the incompetency of the engineer where it appeared from the evidence that the mine operator was negligent in retaining the unfit engineer in its service with knowledge of his incompetence.

Pullaman *v.* Bangor Mining Co., 141 Northwestern, 114 (Minnesota), April, 1913.

FELLOW-SERVANT RULE CHANGED BY STATUTE.

By section 5248 of the Code of Montana the rule that a mine owner shall not be liable for injury to any miner due to the negligence of a fellow servant is changed, but the rule that a mine operator shall not be liable if an injured miner is killed by contributory negligence remains unchanged, and if the miner is killed by such contributory negligence that is a defense to be alleged and shown by the mine operator, unless it sufficiently appears from the pleading and proof of the plaintiff himself.

Melzner *v.* Raven Copper Co., 132 Pacific, 552, p. 554 (Montana), May, 1913.

INDEPENDENT CONTRACTOR AND FELLOW SERVANT.

A miner who is injured while passing to and from the mine by the negligence of a person employed by the mine owner and operator to furnish timbers for the mine may recover from the mine operator, unless the operator shows that the person so employed to furnish the timber is an independent contractor; but a mere agreement as to the prices to be paid for the different sizes and lengths of props is not sufficient to make the person furnishing them an independent contractor, where the mine operator retains the control of the manner of supplying the timbers and props.

Simila *v.* Northwestern Improvement Co., 131 Pacific, 831, p. 832 (Washington), April, 1913.

5. NEGLIGENCE OF STRANGERS.

LIABILITY FOR MALPRACTICE OF PHYSICIAN.

A coal-mining company employing a large number of miners and employing a physician to treat professionally its employees and their families and requiring each miner to pay a certain monthly fee that is deducted from the wages earned, for the purpose of paying the physician, but none of which is retained by the coal company, is not liable at a suit of one of its miners treated by such physician, for the malpractice of the physician, where the coal company has not been negligent in the employment of the physician and where it has exercised reasonable care in selecting a competent and skillful physician.

Guy *v.* Lanark Fuel Co., 79 Southeastern, 941 (West Virginia), November, 1913.

LIABILITY OF INDEPENDENT RAILROAD COMPANY.

A railroad company that ships and transfers and sets in their proper place the cars of a mining company used by the latter for the purpose of shipping its ore from its tipple and ore chutes is liable to a miner injured by reason of the negligence of the railroad employees while engaged in setting a car at the ore chute, and under such circumstances it can not be said that the employees of the railroad company are, for the time being, the employees of the coal company and therefore fellow servants with the injured miner.

Colorado Midland Ry. Co. *v.* Edwards, 134 Pacific, 248, p. 249 (Colorado), July, 1913.

A railroad company furnishing cars to a mining company for the transportation of its coal, is liable for the death of an employee of the coal company caused by a defective brake on one of its cars, though the railroad company left the car on a spur track on the property of the coal company, to be taken charge of by employees of the coal company and managed and operated by them from the place at which it was left to the place at which it was used by the coal company, where the railroad company had knowledge of the defective condi-

tion of the brake and had knowledge that in placing the cars to be used by the coal company it was done by rolling them of their own momentum from their position on the spur track down the incline of the spur track and that by reason of the defective brake the movement and speed of the car down the incline could not be controlled, and where it appeared by the evidence that the employees of the coal company did not know and could not by the exercise of ordinary care have known of the defective condition of the brake.

Franklin *v.* Louisville & Nashville R. R. Co., 160 Southwestern, 162 (Kentucky), October, 1913.

RELATION OF EMPLOYER AND EMPLOYEE—PROOF.

A mere allusion in the testimony of a witness to the presence of a person representing an insurance company and the statement by the witness that he "sent into the mine and brought the men out who knew about the accident" causing the injury sued for did not even tend to show that the mine operator had insured to protect itself from damages for the injury to the miner complained of.

Warrior-Pratt Coal Co. *v.* Shereda, 62 Southern, 721, p. 723 (Alabama), June, 1913.

FINDING AGAINST ONE DEFENDANT ALONE—EFFECT.

In an action by an injured miner for damages, under section 5248 of the Code of Montana, against a mine operator and the hoisting engineer, a verdict of the jury assessing damages against the mine operator will not be set aside merely because the finding was silent as to any liability of the hoisting engineer, as the joining of the hoisting engineer as a party defendant was optional with the plaintiff and his presence as a defendant in no way affected the liability of the mine operator, and for the further reason that the mine operator still had its recourse or right of action against the hoisting engineer.

Melzner *v.* Raven Copper Co., 132 Pacific, 552, p. 554 (Montana), May, 1913.

C. CONTRIBUTORY NEGLIGENCE OF MINER.

ORIGIN AND REASON OF RULE.

The doctrine of contributory negligence is not the creature of any constitution or of legislative enactment, but it is in fact a court-made rule invented to meet certain ideals of justice respecting certain social and economic conditions and relations, and should these change, the reason of the rule would be wanting and courts would cease to apply it.

Burgin *v.* Missouri, K. & T. Ry. Co., 133 Pacific, 560, p. 561 (Kansas), July, 1913.

WANT OF CARE AND PROXIMATE CAUSE.

Contributory negligence as applied to mining operations, in a sound judicial sense, is negligence of a miner on account of whose death or injury an action is brought, and that amounts to a want of ordinary

care and proximately contributes to bring about the injury. Two elements must concur in every case in order to constitute such contributory negligence as will bar a recovery of damages: (1) Want of ordinary care on the part of the miner, and (2) a proximate connection between such want of ordinary care and the injury complained of; but these are always questions of fact.

Hailey-Ola Coal Co. *v.* Morgan, 134 Pacific, 29, p. 31 (Oklahoma), August, 1913.

QUESTION OF FACT.

The question of contributory negligence in an action by a miner for injuries resulting while in the line of his service is a matter for the consideration of the jury trying the case, unless the facts proved leave no room for honest difference of opinion among intelligent men that the conduct on the part of the injured miner was not that of an ordinarily prudent man.

Fuson *v.* New Bell Jellico Coal Co., 159 Southwestern, 619, p. 620 (Kentucky), October, 1913.

INSTRUCTION AS TO RIGHT TO RECOVER.

On the question of contributory negligence in an action for damages for personal injuries by a miner it is sufficient for the court to instruct a jury to the effect that if the plaintiff has brought the injury upon himself by his own negligence he is not entitled to recover.

Barter *v.* Stewart Mining Co., 135 Pacific, 68, p. 69 (Idaho), September, 1913.

USE OF ORDINARY CARE.

In an action by a coal miner for injuries received as a result of a fall of slate from the roof of an entry, it is proper for the court to instruct the jury that it was the duty of the miner to exercise ordinary care for his own safety; and if the failure on his part to exercise such care brought about the injuries complained of, he is not entitled to recover.

Jellico Coal Mining Co. *v.* Woods, 159 Southwestern, 530, p. 531 (Kentucky), September, 1913.

KNOWLEDGE OF DANGER—FAILURE TO INFORM OPERATOR.

Under the Alabama statute (Code of 1907, sec. 3910) a mine operator sets up a good defense to an action by a miner for injuries caused by fall of rock, when it avers that the miner was aware of the defect or negligence complained of and failed within a reasonable time to inform the mine operator or some person superior to himself of the same. Although the statute relieves the servant from informing the employer, or mine operator, if the operator already knew of the defect, but knowledge of the operator or superintendent need not be negatived in the plea, but is affirmative matter that must be

pleaded and proven by the plaintiff and should be set up in the replication.

Sloss-Sheffield Steel & Iron Co. *v.* Webster, 62 Southern, 764 (Alabama), May, 1913.

KNOWLEDGE OF DANGEROUS MACHINERY.

An experienced employee on a sand digger equipped for the purpose of raising quantities of coal, whose duty it was to stand behind a "wince wheel" around which was wrapped a cable called the wince line, used in drawing up a barge or in shifting the position of the sand digger, and who was required to attend to the cable, to wrap it on the spool, and to see that it did not become tangled or fouled, was not entitled to recover for an injury for alleged negligence in failing to give notice of the starting of the machinery at a time when the cable was taut—as the tautness of the cable indicated that a weight was attached to the other end of the cable—where the employee knew that when the cable was taut the machinery or the wince wheel might be suddenly stopped and suddenly started without any notice or warning, and where the operation of the machinery itself was notice of its sudden stopping and starting, and where the regular duty of the employee could be performed without danger, by the exercise of due care, notwithstanding the sudden stopping and starting of the wince wheel.

West Kentucky Coal Co. *v.* Kelly, 159 Southwestern, 1052 (Kentucky), October, 1913.

KNOWLEDGE OF DANGEROUS EXPLOSIVES.

An experienced miner engaged in using explosives in a mine, who had had seven years' experience in such work and whose duty it was in connection with others engaged in the same work to charge the holes with explosives, to know the number of holes charged and the number of shots that would follow, and to warn other workmen immediately preceding the shots, and who knew the necessity of retreating to a safe place and remaining until the entire number of shots had exploded, is guilty of such contributory negligence as prevents a recovery for injuries occasioned by the explosion because of his returning to the place, where the shots were fired before the entire number of shots had exploded.

Snarski *v.* Montreal Mining Co., 143 Northwestern, 28 (Michigan), September, 1913.

KNOWLEDGE OF DANGER—VICIOUS MULE.

A coal-mine operator was not liable for injuries to a mine mule driver resulting from a kick of the mule, though the operator failed to instruct the driver as to the dangerous or vicious disposition of the mule, where the driver himself knew the vicious disposition of

the mule and that it would kick, and where it appeared that the kicking of the mule was due to the driver's ill treatment.

Douglas *v.* Scandia Coal Co., 141 Northwestern, 960 (Iowa), June, 1913.

MINER'S KNOWLEDGE OF DANGER—QUESTION OF FACT.

In an action for damages for the death of a miner it was a question of fact for the jury to determine as to whether the miner knew of the danger by reason of the proximity of props to the tracks over which the motor was passing at the time he received the fatal injuries, and whether he negligently failed to guard against such danger or assumed the risk by continuing in the service; and a judgment in favor of the deceased miner's estate was not to be disturbed on the evidence where it appeared that the deceased miner had worked as a track layer until the day of the injury and there was nothing in his previous work to call his attention to the narrow space between the motor and the props and where it also appeared that he was injured on the first trip and was knocked or dragged from the motor because of the dangerous proximity of the props to the track.

West Kentucky Coal Co. *v.* Butler, 159 Southwestern, 958, p. 959 (Kentucky), October, 1913.

MINER CREATING DANGEROUS CONDITIONS.

There can be no recovery for the death of a miner caused by falling rock where the fall was caused by the miner's own labors in removing the coal that he was engaged in mining and that supported the rock, where he was fully aware of the effect of the removal of this support, and where he had sounded and tested the rock with his pick and concluded that it was still safe to place himself in the sphere of danger if it fell; and the fact that the mine foreman visited the mine in the forenoon of the same day and inspected and pronounced the place safe does not render the mine operator liable, where the miner himself subsequently removed the coal supporting the rock.

Merriweather *v.* Sayre Mining & Mfg. Co., 62 Southern, 70 (Alabama), April, 1913.

MINER MAKING DANGEROUS PLACE SAFE.

A miner whose duty it was to examine the roof of an entry and sound the roof either with an ax or hammer, to take down or prop all the loose rock that he could find, and to make the haulage way safe for the use of other employees could not recover for an injury caused by falling rock, where the rock fell while he was in the act of removing a prop.

Adams *v.* Corona Coal & Iron Co., 62 Southern, 536 (Alabama), May, 1913.
Warrior-Pratt Coal Co. *v.* Schereda, 62 Southern, 721, p. 723 (Alabama), June, 1913.

Although it was the duty of a bank boss to examine and see that the roof of the haulage ways in the mine were in a reasonably safe

condition, yet a mine operator was not liable for an injury to a miner caused by a fall of rock from the roof, where it was the duty of the miner himself to examine and sound the roof and remove loose or dangerous material, and where it was his duty to remove the particular rock that fell in order to increase the height of the haulage way, and where the rock fell at the time he was knocking a prop from under it.

Adams *v.* Corona Coal & Iron Co., 62 Southern, 536 (Alabama), May, 1913.

MINER RIDING ON ENGINE.

A coal company operating as an adjunct to its business a railroad or tramway extending from its coal mines and coking plant to a railroad junction, and using such adjunct line under the statute permitting coal companies to operate railroads from their mines to a junction point with a general railroad, is not a common carrier and is not liable for the death of a coal miner riding on the platform of a dinky engine used by the coal company, where an engine on the railroad proper suddenly comes in contact with a car coupled to the dinky engine with sufficient force to throw the miner from his position to the track below where he is run over and killed, as the facts are insufficient to show any actionable negligence on the part of the coal company or of its employees.

Steele *v.* Colonial Coal & Coke Co., 79 Southeastern, 346, p. 347 (Virginia), September, 1913.

MINER RIDING ON BUMPER OF CAR.

A mine operator is liable for the death of a miner whose duty it was to assist in loading the ore cars, and who was accustomed to ride from the dump back to the mouth of the tunnel on the bumper of the back car, where his death was caused by either falling or being thrown from the bumper and run over by the car, although the bumper was an unsafe place in which to ride, where it appears that the operator had furnished the miner with no other, more safe, place in which he could ride or do his work, and that the operator had been accustomed to permit other loaders to ride on the bumpers of the back car. It can not be said as a matter of law in such a case that the miner was guilty of contributory negligence.

Chiara *v.* Stewart Mining Co., 135 Pacific, 245 (Idaho), September, 1913.

FALL OF MATERIAL FROM ROOF.

A comparatively inexperienced miner working in a mine in a chamber or stope more than 100 feet high, who was assisting three other miners in breaking up ore previously blasted from an upper level during their absence and in loading and removing the same upon a car, where the chamber or stope was dimly lighted by lamps on the

caps of the four miners and where on returning to work they were all informed that the blasting was over and that it was safe to resume work, is not to be charged with contributory negligence in the matter of injury from a fall of rock from the roof, although the attention of the four miners had been attracted shortly before the accident by the falling of some fine pieces of rock and dirt and they had immediately run under a ledge some distance away and remained four or five minutes before returning, and had then returned at the direction of the man operating a tramcar to assist in getting the car out, the miner being injured by the fall of rock about five minutes thereafter, especially where it appeared that it was not the duty of these miners to inspect the roof or to make the place safe.

Tennessee Copper Co. *v.* Gaddey, 207 Fed., 297, p. 299, June, 1913.

INJURY TO BOY—NEGLIGENCE OF FATHER.

A father could not recover for the death of his 14-year-old son who had been working in a coal mine as a "trapper" and whose duty it was to open and close a trapdoor in the mine, where with the knowledge of the father the boy had worked from 7 o'clock in the morning of one day until 9.30 o'clock in the morning of the next day, with comparatively short stops for his meals, and where he had returned to work on the morning of the second day, after having been at work all the preceding night, with the knowledge and assent of the father, and where the boy was killed while asleep on the track; nor will an administrator of the boy's estate be permitted to recover where the father is the sole beneficiary.

Lee *v.* New River Pocahontas, etc., Coal Co., 203 Fed., 644, p. 645, March, 1913.

INJURY TO AN INFANT TRESPASSER.

A coal company operating a tramroad and motor track is not liable for the death of a 3-year-old child caused by the child's taking hold of a broken electric-light wire strung on the motor poles and bringing the wire in contact with the rail, causing a flash that set fire to her clothing, as the child was a trespasser or a bare licensee, where the place of the accident was distant from a path and road, and the bringing of the broken wire in contact with the rail of the track was a result which could hardly have been foreseen, and where the child with others was at the particular place in disobedience of the positive orders from their parents and without the knowledge and consent of the company.

Kaiser *v.* Colonial Coal & Coke Co., 79 Southeastern, 348 (Virginia), September, 1913.

LIABILITY FOR INJURIES UNDER SUDDEN PERIL.

A motorman who was driving a motor through a tunnel of a mine was not to be charged with contributory negligence where, through the negligence of the mine operator, the motor caught fire and the motorman, after having made ineffectual attempts to stop the motor, jumped from the moving motor and was injured, though it subsequently developed that if he had remained in the car the fire would have been extinguished and he would not have been injured.

Interstate Coal Co. *v.* Love, 155 Southwestern, 746, p. 748 (Kentucky), April, 1913.

PROOF OF NEGLIGENCE AS PROXIMATE CAUSE.

There could be no recovery for the death of a coal miner who for several months was employed as a "snapper" or brakeman in the underground operations of a mine and who during such time passed along a gallery and along the tracks where coal cars were hauled many times a day and was familiar with the conditions and with the method of operating the coal cars and the motor used in hauling, where it developed that while he was standing on the end of the cars he gave the proper signal for the motor to approach and connect with certain coal cars, and that the motor while approaching pursuant to the signal ran over his body without any fault or negligence of the person in operation of the motor and without any knowledge on the part of the motorman of the presence of the miner's body on the track, though it was too dark for the motorman to see the tracks ahead of the motor.

Pittsburgh Coal Co. *v.* Myers, 203 Fed., 221, p. 222, April, 1913.

DEFENSE AND BURDEN OF PROOF.

A mining company in sinking its mine to the 400-foot level had used a hoisting engine on the surface. The company determined to extend the shaft to the 500-foot level, and for that purpose used a windlass in sinking the shaft, but subsequently lowered to a station on the 400-foot level a small engine to be used as a hoist. The hoist was provided with a friction brake, but no ratchet was attached that would hold the brake, and the hoist could be held only when the engineer was at his place and had his hand on the lever. The coal company had imposed upon the engineer in charge of the hoist the additional duty of caging cars from the 400-foot level, and this latter duty required his leaving his post at the hoisting engine. At a time when the engineer was thus temporarily absent from operating the hoist and the hoisting engine a miner stepped upon the bucket used in lowering and raising the miners and received injuries for which he sued. Under such circumstances, and where there was conflict of the evidence as to the injured miner's knowledge of the condition of the hoist and the duties of the hoisting engineer, a court can not say

as a matter of law that the miner is to be charged with such contributory negligence as would defeat a recovery and require the court to set aside a verdict returned by a jury.

Jones *v.* West End Consolidated Mining Co., 134 Pacific, 104, p. 105 (Nevada), July, 1913.

CONTRIBUTORY NEGLIGENCE DOES NOT MITIGATE DAMAGES—ERRONEOUS INSTRUCTIONS.

In an action by a miner for damages for injuries caused by the negligence of the mine operator an instruction by the court to the jury trying the case to the effect that the plaintiff may recover though his negligent acts contributed to his injury, if the mine operator was negligent, but that the jury may consider the miner's acts of negligence in mitigation of the damages is erroneous for the reason that the law makes contributory negligence a valid defense, and when proved as a matter of fact it prevents recovery.

Hailey-Ola Coal Co. *v.* Morgan, 134 Pacific, 29, p. 30 (Oklahoma), August, 1913.

D. FREEDOM FROM CONTRIBUTORY NEGLIGENCE—EXERCISE OF CARE.

PROOF AND INFERENCE—DEFENSE.

Contributory negligence in an action for damages for the death of a miner is a defense and must be proved by the defendant, the mine operator, if it does not appear from facts and circumstances proven by the plaintiff, and where a defendant operator offers no proof on this subject a jury may conclude from all the evidence in the case that the deceased miner was not guilty of contributory negligence.

Sprinkle *v.* Big Sandy Coal & Coke Co., 78 Southeastern, 972, p. 974 (West Virginia), June, 1913.

INSTINCTS OF SELF-PRESERVATION—PRESUMPTION.

In the absence of proof to the contrary the presumption must be indulged that a miner killed by falling or being thrown from the bumper of a back car on which he was riding, and being run over, where no safe place for riding was provided, was exercising reasonable care and precaution for the protection and preservation of his person and life, and that he was possessed of the ordinary instincts of self-preservation.

Chiara *v.* Stewart Mining Co., 135 Pacific, 245 (Idaho), September, 1913.

WANT OF KNOWLEDGE OF DANGER—RIDING ON BUCKET.

A miner while ascending a shaft in a mine was injured by the breaking of the hoisting cable. He will not be denied the right to recover because he chose to ascend on the bucket rather than walk up

on the footwall, where it appears that the miner had never done the particular work before, had received no instructions to come up on the footwall unaided, and did what he was told to do by an old mucker, to whom he was supposed to look for instructions.

Maki *v.* Mohawk Mining Co., 142 Northwestern, 780, p. 782 (Michigan), July, 1913.

WANT OF KNOWLEDGE OF DANGER—RIDING ON BUMPER.

A mine employee whose employment was changed from that of door tender and mule driver to that of brakeman, and whose duty thereafter consisted of turning the switches, coupling and uncoupling the cars, and sanding the tracks, was not as a matter of law to be charged with contributory negligence for an injury sustained while sitting on the front bumper of the motor car, where he was not instructed as to the danger of the position and had no knowledge of the proper and safe way to do the work, and where prior to his employment as brakeman he had seen another brakeman sanding the track while sitting on the front bumper, and had never seen the work done in any other way.

Zeskie *v.* Pennsylvania Coal Co., 88 Atlantic, 414, p. 415 (Pennsylvania), May, 1913.

WANT OF KNOWLEDGE OF DEFECT OF APPLIANCES.

A miner whose duty it was to let his car into the mine down an inclined track was not as a matter of law to be charged with contributory negligence because he stopped his car on the incline and put an extra sprag into the wheel without looking back to see whether any car was close upon him where such stop and the use of the extra sprag was customary and necessary, and only a few seconds was required to make the stop, and where the miner had the right to assume that the person in charge of the car following had it under proper control.

La Caff *v.* Roslyn-Cascade Coal Co., 131 Pacific, 194, p. 196 (Washington), April, 1913.

FAILURE TO FURNISH PROPS—DANGER NOT OBVIOUS.

Under the statute of Kentucky a mine operator was liable for an injury to a miner caused by its failure to furnish props on request of the miner unless the miner himself was guilty of contributory negligence; but a miner under such circumstances was not to be charged with contributory negligence unless the danger from working without props was not only imminent but so obvious that an ordinarily careful man would not have worked under such conditions.

Left Fork Coal Co. *v.* Owens, 159 Southwestern, 703, p. 707 (Kentucky), October, 1913.

INJURY FROM FALLING MATERIAL.

An injured miner is not as a matter of law guilty of contributory negligence for continuing to work in a dangerous place, where the situation was not so openly and plainly dangerous that a man of common prudence would not have worked, and where before beginning work the miner sounded the roof and it appeared to him and other miners to be safe enough to work under.

Collins *v.* Northern Anthracite Coal Co., 88 Atlantic, 75, p. 76 (Pennsylvania), May, 1913.

PROMISE TO REPAIR—RELIANCE.

Where miners were told of the defective condition of the roof of an entry and were at the same time promised by the mine foreman that the roof would be repaired, the miners were not bound to quit work immediately, unless in the exercise of ordinary prudence a continuance would have seemed hazardous to a person of ordinary prudence, and a miner injured under such circumstances was not to be charged with contributory negligence.

Carnego *v.* Crescent Coal Co., 143 Northwestern, 550, p. 552 (Iowa), October, 1913.
Aspund *v.* Calumet & Hecla Mining Co., 143 Northwestern, 633, p. 639 (Michigan), November, 1913.

CONDUCT IN CASE OF SUDDEN PERIL.

A miner who operated a motor car through a tunnel in a mine was not to be charged with contributory negligence where the motor car took fire and after his making two unsuccessful efforts to shut off the power and stop the motor, and where the fire at the time was 3 feet high and burning him and his clothes, because he jumped from the moving motor and received the injury, where it also appeared that the fire was caused by the negligence of the mine operator.

Interstate Coal Co. *v.* Love, 155 Southwestern, 746, p. 748 (Kentucky), April, 1913.

When a person is confronted with a sudden peril he can not be expected to act with the same degree of caution and presence of mind as one who has full opportunity to exercise his judgment, and a car driver operating cars hauling coal out of a mine could not be charged with contributory negligence where he was suddenly confronted with a dangerous obstruction negligently placed upon the tracks without knowledge or warning, because he did not act with apparent prudence, and whether he was guilty of contributory negligence under such circumstances was not a question of law but one of fact for a jury to determine.

Loescher *v.* Consolidated Coal Co., 102 Northeastern, 196, p. 197 (Illinois), June, 1913.

VIOLATION OF RULES—CONSENT OF OPERATOR.

Where a chain boy working in a mine was injured while riding out of the mine on a tram car, and the mine owner, as a defense to an action for damages for the injuries, introduced in evidence a rule prohibiting employees from riding out of the mine on the tram-cars, it was competent for the plaintiff on this issue to show that the rule was violated repeatedly with the knowledge and without objection on the part of the mine operator.

Sloss-Sheffield Steel & Iron Co. *v.* Capps, 62 Southern, 66, p. 68 (Alabama), April, 1913.

A miner was entitled to recover for an injury caused by slate falling from the roof while he, together with other miners, was riding into the mine on a car, in violation of a rule and regulation, where the rule had been constantly disregarded with the knowledge of the mine operator, and where the fall of slate was due to the negligent failure of the operator to properly timber or protect the roof.

Memphis Mining Co. *v.* Shacklett, 155 Southwestern, 1154, p. 1155 (Kentucky), April, 1913.

E. ASSUMPTION OF RISK.

1. Risks Assumed.
2. Risks Not Assumed.

1. RISKS ASSUMED.

ORIGIN AND REASON OF RULE.

The doctrine of assumption of risk is not the creature of any constitution nor of legislative enactment, but is in fact a court-made rule invented to meet certain ideals of justice respecting certain social and economic conditions and relations, and should these change, the reason for the rule would be wanting and courts would cease to apply it.

Burgin *v.* Missouri, K. & T. Ry. Co., 133 Pacific, 560, p. 561 (Kansas), July, 1913.

QUESTION OF FACT.

The question of assumption of risk in an action by a miner for injuries resulting while in the line of his service is a matter for the consideration of the jury trying the case, unless the facts proved leave no room for honest difference of opinion among intelligent men that the conduct on the part of the injured miner was not that of an ordinarily prudent man.

Fuson *v.* New Bell Jellico Coal Co., 159 Southwestern, 619, p. 620 (Kentucky), October, 1913.

INSTRUCTION AS TO RULE OF ASSUMPTION OF RISK.

In an action by an experienced coal miner for injuries received by loose coal falling from the roof of a mine, an instruction by the court to the jury trying the case to the effect that to maintain the defense of assumption of risk, the jury must find from the evidence that the plaintiff's danger of getting injured in the manner described was so open, obvious, and apparent that a man of ordinary care and prudence, as an experienced miner, surrounded by similar conditions, would not have taken the chance of risk of such injury, and that in determining this question the jury must decide it by the standard of what ordinarily careful and prudent men of similar knowledge and experience and under similar conditions and surroundings would do was erroneous, for the reason that the test of assumption of risk was not stated to be knowledge, either actual or presumptive, of the danger and the appreciation of it, but whether one of ordinary care with the knowledge and experience possessed by the injured person would have taken the chance or risk of injury.

Bakka *v.* Kemmerer, 134 Pacific, 888, p. 893 (Utah), August, 1913.

DEFECTIVE APPLIANCE—LENGTH OF FUSE.

A mine owner and operator was not liable for an injury to an experienced person engaged in shake blasting in the breast of a mine for failure to furnish a blast with a longer fuse, in order to give the shot firer a sufficient length of time to reach a place of safety, where the fuse was the length always used for the particular class of work, and where the fuse was furnished by the powder man who furnished any lengths of fuse requested, and where the injured miner, experienced in such work, had never requested a longer fuse.

Stanich *v.* Pearson Mining Co., 141 Northwestern, 1100, p. 1101 (Minnesota), May 1913.

MINER INJURED BY FALLING OF MATERIAL.

An experienced coal miner who with another miner was sent into an entry to clean up and remove waste material, débris, and gob, to take down all loose coal, rock, and slate, and to clean up the entry and make it safe assumed the risks incident to the work and the danger from coal or material falling from the roof, where no part of the roof was more than 7 feet high, and where the miner himself saw the coal projecting and hanging from the top of a rib and did nothing to ascertain whether it was loose, though easily within reach, and where the miner admitted he knew how to sound for loose coal and rock and had frequently done that and taken down coal and rock found to be loose.

Bakka *v.* Kemmerer, 134 Pacific, 888, p. 892 (Utah), August, 1913.

MINER RIDING ON DINKY ENGINE.

A miner who takes passage on the platform of a dinky engine used by a coal company to haul cars over its branch road to the main line of a railroad is a mere licensee and assumes the risk of such sudden jerking and jarring as are incident to the operation of freight trains and coal trains as distinguished from passenger trains and the coal company is not liable for the death of such miner caused by being thrown from his position on the dinky engine by a slight but not unusual jar caused by operating the engine in the company's yards.

Steele *v.* Colonial Coal & Coke Co., 79 Southeastern, 346, p. 347 (Virginia), September, 1913.

2. RISKS NOT ASSUMED.

KNOWLEDGE OF DEFECT—PROMISE TO REPAIR.

A miner who was required to take empty cars by gravity from an entry into his room to load them and had knowledge of a defective condition in the track and had notified his superior officers of the defect, was not to be charged with the assumption of risk, unless he knew of the danger as well as the defect, and unless the danger to him was such an open and obvious one that no man of ordinary prudence would have continued at work under the circumstances, and where he continued to work after a promise by his superiors to repair the track, the law will not impute to him an assumption of risk before the track was repaired, if the injury occurred within the time when the repairs could have been reasonably made.

Fuson *v.* New Bell Jellico Coal Co., 159 Southwestern, 619, p. 620 (Kentucky), October, 1913.

DANGERS NOT DISCOVERABLE.

An inexperienced miner engaged with three other experienced miners in breaking and loading ore in a 100-foot stope in a mine in which the blasting was done on a higher level, and where it was not his duty or that of his associates to inspect the roof or to make the place safe, was not to be charged with the assumption of risk where he was killed by material falling from the roof, although the four miners observed the falling of fine pieces of rock and dirt and took refuge under a ledge, and where, after having waited some five minutes, the experienced miners believed that there was no danger, and where after they had returned to work it was some five minutes or more before the accident happened, and where it appeared that the fall of fine material was not an invariable token of the falling of heavier material, especially after several minutes had intervened.

Tennessee Copper Co. *v.* Gaddey, 207 Fed., 297, p. 299, June, 1913.

DEFECTIVE APPLIANCES.

A miner who was required to take his coal car down an inclined track leading into the mine, and, in order to prevent excessive speed, was required to lock the wheels of his car with sprags, did not as a matter of law assume the risk of injury from cars similarly operated by other miners, by reason of defects in the track, especially where the operator of the mine caused the track to be inspected daily and assumed the duty of keeping the same in suitable repair.

La Caff *v.* Roslyn-Cascade Coal Co., 131 Pacific, 194, p. 196 (Washington), April, 1913.

OBEYING DIRECTIONS OF OPERATOR—KNOWLEDGE OF DANGER.

It is the duty of a mine operator not to send a miner or employee into a place of danger, and when a miner or employee is required by the orders of a mine manager to work in a particular place, he has a right to assume that the operator has discharged his duty in regard to an examination of the surrounding circumstances, and if the miner or employee, exercising ordinary care for his own safety, proceeds to execute an order and to perform work required, he does not assume risk of injury unless a danger is so apparent that no reasonable or prudent man would incur it; and his right to recover for an injury under such circumstances, though he had some knowledge of the attendant danger, will not be denied, if in obeying the order given he acted with the degree of diligence that an ordinarily prudent man would exercise under the same circumstances.

Grannon *v.* Donk Brothers Coal & Coke Co., 102 Northeastern, 769, p. 772 (Illinois), October, 1913.

DANGEROUS PLACE—ASSURANCE OF SAFETY.

The fact that a copper miner had knowledge of the dangerous condition of a part of a hanging wall of a mine did not of itself prevent a recovery for damages caused by the falling of such hanging wall, where he had notified the mine foreman and superintendent of the danger and the foreman had promised to repair the same and where before going to work in proximity to such danger he had been assured by the foreman or superintendent that the place was safe, and where the appearance of danger was not so immediate as to justify the miner in disregarding the assurance and direction of the foreman.

Aspund *v.* Calumet & Hecla Mining Co., 143 Northwestern, 633, p. 639 (Michigan), November, 1913.

Carnego *v.* Crescent Coal Co., 143 Northwestern, 550, p. 552 (Iowa), October, 1913.

NEGLIGENCE OF OPERATOR.

A brakeman on a compressed-air motor hauling coal cars in and out of a coal mine, who was directed to sit on the front bumper of the motor while sanding the track, assumed the risk necessarily

incident to the performance of the duty; but he did not assume the risk of the negligence of the mine operator resulting in his injury by reason of empty cars being negligently left on the track in front of the motor.

Zeskie *v.* Pennsylvania Coal Co., 88 Atlantic, 414, p. 416 (Pennsylvania), May, 1913.

F. OPERATOR'S PROMISE TO REPAIR—MINER'S RELIANCE.

DANGEROUS ROOF—PROMISE TO REPAIR.

Where the foreman in a coal mine inspected the roof at a switch and at the mouth of a certain entry and it sounded loose and heavy, and stated that "he would have it fixed right away," an unreasonable delay in causing the roof to be made safe rendered the mine operator liable for the death of a miner caused by the falling of the roof at the particular place, where it appeared that the deceased miner had knowledge of the promise of the foreman to repair the roof.

Carnego *v.* Crescent Coal Co., 143 Northwestern, 550, p. 552 (Iowa), October, 1913.

MINER MAY RELY ON PROMISE.

A miner whose duty it was to load coal into cars in a room off an entry and to bring back empty cars by gravity from the main entry to his room was entitled to recover damages for an injury received by him while bringing an empty car from the entry into his room, where it was shown that the car, by reason of a defect in the track, jumped the track and crushed his hand against the rib or wall of coal standing within less than a foot from the side of the car when on the track, and where it was further shown that the mine operator had knowledge of the defect in the track, and that loaded cars had frequently gotten off the track, and where the miner himself had complained to superior officers of the particular defect and asked that it be remedied and they had promised that as soon as their track-repairing employees could complete some work on the outside of the mine they would be sent to remedy the defect, and where the miner relied upon this promise and continued at his work as the officers directed.

Fuson *v.* New Bell Jellico Coal Co., 159 Southwestern, 619 (Kentucky), October, 1913.

G. METHODS OF OPERATING.

WHAT CONSTITUTES A MINE.

A mine within the contemplation of the Pennsylvania anthracite mining act includes all the underground workings, excavations, and shafts, connected below the surface by tunnels and other ways and openings, and operated by one general haulage, ventilation, and railroad system, but does not include separate and distinct under-

ground operations disconnected and operated by separate and distinct mining systems.

Janosky *v.* Lehigh Valley Coal Co., 88 Atlantic, 419, p. 420 (Pennsylvania), May, 1913.

H. CONTRACTS RELATING TO OPERATIONS.

1. CONTRACTS GENERALLY.
2. PARTNERSHIP AGREEMENTS.
3. CONTRACTS FOR TRANSPORTATION.

1. CONTRACTS GENERALLY.

CERTAINTY AS TO TIME.

A contract by which a miner was to do certain work and labor for a mine operator and coal company at a stipulated price based on the amount of work done in and about digging a slope or entry, and driving an air course in the coal mine, the miner to be furnished with work until the operator began shipping coal from its mine, was not void for uncertainty, as the contract was capable of being rendered certain as to its period of duration by showing the date the coal-mine operator actually did commence shipping coal, and the coal-mine operator was liable in damages for a wrongful discharge of the miner.

Barney Coal Co. *v.* Davis, 62 Southern, 985 (Alabama), June, 1913.
Cholokovitch *v.* Porkupine Mining Co., 131 Pacific, 459, p. 460 (Washington), April, 1913.

EMPLOYMENT DURING SEASON—MEANING.

A breach of a contract by which a miner was employed to work in a mine in Alaska during the season of a certain year at a stipulated price per day and board entitled the party employed to recover the contract price for the season, less any amount earned by him in any other employment during the season, and such a contract was not void because of uncertainty as to its duration, as the contract was made sufficiently certain where it was shown that the employer did operate his mine in Alaska for the entire mining season of the year stated.

Cholokovitch *v.* Porkupine Mining Co., 131 Pacific, 459, p. 460 (Washington), April, 1913.
Barney Coal Co. *v.* Davis, 62 Southern, 985 (Alabama), June, 1913.

TRUST AGREEMENT—TIME IS OF ESSENCE.

Where a trust agreement was entered into for the purpose among other things of forming a corporation to prospect, develop, and work certain described mining claims, time was of the essence of the agreement, and a failure to organize the corporation within a reasonable time rendered the trust agreement ineffectual and of no binding force.

Olympia Mining & Milling Co. *v.* Kerns, 135 Pacific, 255 (Idaho), September, 1913.

TRUST AGREEMENT—POWER TO ENFORCE.

An agreement by the original parties interested in certain mining claims for the purpose of consolidating all the interests in such claims and forming a mining corporation to prospect, develop, and work the same, and declaring that a certain named person held the legal title to such mining claims for the use and benefit of the corporation to be thereafter formed under a certain name on condition that another interested person, or the proposed corporation, complied with the provisions of a certain agreement in writing, did not create a trust relation, and where the organization of the corporation was delayed for more than eight years, and where the other interested party wholly failed to keep his part of the agreement referred to, by which he was bound to furnish money with which to purchase the interest of other persons in such mining claims, and therefore the legal title was not vested in the party named to be held in trust by him for the corporation to be organized, under such circumstances a corporation organized eight years after the date of the agreement could not enforce the alleged trust.

Olympia Mining & Milling Co. *v.* Kerns, 135 Pacific, 255, p. 256 (Idaho), September, 1913.

LIABILITY FOR BREACH—BASIS FOR RECOVERY.

Under a contract by which the first party was to get water out of a certain entry in a mine and keep it out and do such work on the entry as the mining company would have to do in their entries, and in consideration of which he was to have 9 cents a ton for all coal mined from this entry, and if in addition to this he mined out the coal himself he was to receive 45 cents a ton, he was not entitled to recover, in an action for a wrongful discharge and a breach of the contract, the sum of $1,500, where there was no evidence as to the amount of coal that he mined, and where there was no evidence as to what a reasonable cost of doing the work that he was to do under the contract would have been, or how long it would have taken to get out the coal referred to.

Trosper Coal Co. *v.* Rader, 159 Southwestern, 536, p. 537 (Kentucky), September, 1913.

CONTRACT OF SALE—SPECIFIC PERFORMANCE.

A contract requiring a coal company to furnish to the other contracting party the entire output from a certain culm bank, in consideration of a certain loan made to the coal company, and in case of default on the part of the coal company, requiring that the other party should be entitled to a writ of waste or to the appointment of a receiver and an execution sale of the property to be had for the collection of the entire amount of the loan, provides within itself the remedies to be invoked in case of default of the coal company,

and the other party to the contract, in case of default on the part of the coal company, is not entitled to maintain a suit for specific performance.

Marian Coal Co. v. Peale, 204 Fed., 161, p. 165, April, 1913.

CONTRACT OF SALE—ADVANCES—BREACH.

A contract between the lessee of a coal mine and an agent employed to dispose of the coal provided that the lessee should receive 85 cents per ton, each of two lessors 5 cents per ton, and the agent 5 cents per ton, in consideration of which the agent agreed to make or meet the weekly pay rolls of the miners of the lessee, and a failure to do so and a refusal to advance or supply the money for the weekly pay rolls rendered him liable to the lessee for the actual damages sustained.

Pugh *v.* Jackson, 157 Southwestern, 1082 (Kentucky), June, 1913.

RECOVERY BY SHERIFF FOR GUARDING MINE.

A sheriff employed by a coal company during a strike to furnish deputies and guard the property of the mining company, in an action on such contract, can recover only a sum sufficient to reimburse him for his expenses, including the amount paid to the deputies, and can not recover any amount as a profit to himself over and above his actual expenditures; as to such excess the contract was void as against public policy.

Shields *v.* Latrobe-Connellsville Coal & Coke Co., 86 Atlantic, 784 (Pennsylvania), January, 1913.

2. PARTNERSHIP AGREEMENTS.

RIGHTS OF INDIVIDUAL PARTNERS.

One member of a mining partnership may bring a suit for dissolution of a copartnership and for an accounting, but it is within the discretion of the court to grant a preliminary injunction or to appoint a receiver, and an injunction will not be granted or a receiver appointed where it is not shown that the lessees of the mining property were working the property and where it is not made to appear that royalties were or would become due.

Greenberg *v.* Lesamis, 203 Fed., 678, February, 1913.

3. CONTRACTS FOR TRANSPORTATION.

LIABILITY OF CARRIER FOR FAILURE TO FURNISH CARS.

The refusal by a railroad company to give the lessees of a mine a siding connection was an unreasonable discrimination, and the mere congested condition of traffic on the railroad afforded neither excuse nor extenuation, as the railroad company had means of protecting itself and was under no duty to haul more coal than

could safely and conveniently be transported over its line, and as it had in its self-protection adopted a basis of car distribution based on the productive capacity of the mines, and the lessees and operators of the mines were entitled only to share ratably with others similarly situated in the matter of cars and rate established.

Cox *v.* Pennsylvania R. R. Co., 87 Atlantic, 581, p. 583 (Pennsylvania), March, 1913.

FAILURE OF CARRIER TO SHIP—DISCRIMINATION—MEASURE OF DAMAGES.

In an action by a coal operator against a railroad company for damages for an unlawful discrimination and for failure to make siding connections and to furnish cars for the shipment of his coal, the measure of damages was the difference between the market value of the coal immediately after such unlawful discrimination ceased and shipments of the coal were actually made and the market value of coal during the period such unlawful discrimination continued, based upon the amount of coal that could reasonably have been mined and shipped during the period of such discrimination, all the existing conditions and difficulties of mining, as well as the difficulty in obtaining a car supply, being taken into consideration.

Cox *v.* Pennsylvania R. R. Co., 87 Atlantic, 581, p. 583 (Pennsylvania), March, 1913.

REGULATION OF RATES—INTERSTATE COMMERCE COMMISSION.

A court can not say that the reduction of a particular rate of shipment for coal made by the order of the Interstate Commerce Commission to a point not below cost of service and some substantial profit is confiscatory merely because it will reduce the gross income, and where the carrier is charging more than a reasonable rate on coal, but is not earning a sufficient amount on the remainder of its traffic to yield an income, investigation may be made into the rates on other traffic to determine whether they are too low or based upon considerations not properly regarded. But the rate on coal as fixed by the commission can not be assumed to be unreasonable, and the burden rests on the carrier to prove that its rates as to their lines of traffic are sufficiently high; and in the absence of such proof a court can not interfere with an order of the Interstate Commerce Commission fixing shipping rates on coal.

Lehigh Valley R. R. Co. *v.* United States, 204 Fed., 986, p. 992, April, 1913.

I. ENJOINING OPERATIONS.

MINING UNDER RAILROAD RIGHT OF WAY.

Injunction is the proper remedy on the part of a railroad company to prevent mining under its right of way and track that is likely to result in a caving in of the ground, interfering with its use as a

railroad right of way and endangering the lives of its employees and of passengers traveling over its road.

Kansas City Southern Ry. Co. *v.* Sandlin, 158 Southwestern, 857 (Missouri Appeals), July, 1913.

MANDATORY INJUNCTION TO ABATE NUISANCE.

A mandatory injunction was not granted at the suit of a city to compel a coal company to remove large piles and accumulations of refuse and slack, accumulated in the transactions of its coal operations and of a washery for many years within the city limits, where the evidence showed that the poisonous gases and injurious fumes and odors emanating from the burning slack were not in fact injurious to persons or property in the immediate vicinity and were not more insanitary and injurious to the health and happiness of the citizens of the city than odors and gases from locomotive engines used upon numerous railroads in the immediate vicinity.

City of Pana *v.* Central Washed Coal Co., 102 Northeastern, 992, p. 998 (Illinois), October, 1913.

NUISANCE—EFFECT OF ACQUIESCENCE AND DELAY.

A city could not enjoin a coal company from carrying on its lawful business and operations and conducting a washery within the city limits, and compel it to remove large accumulations of refuse and slack on a petition alleging that certain streets were obstructed and that injurious fumes and odors and poisonous gases were given off by reason of the burning of such slack, where the coal company had been carrying on its operations and operating its washery for many years, and the piles of slack complained of had been constantly accumulating for many years without any material change as to the general effects, and where the streets alleged to be obstructed had been abandoned for more than 20 years and the injurious fumes and odors and poisonous gases were not shown to have had any perceptible effect on the health of persons in the immediate vicinity, and the odors and gases from such burning slack could not be detected from similar odors and gases emitted by railroad engines continually operating in the immediate vicinity.

City of Pana *v.* Central Washed Coal Co., 102 Northeastern, 992, p. 998 (Illinois), October, 1913.

A coal company carrying on its business and operating a washery within the limits of a city for many years, in which business and the erection of its buildings and necessary equipment, engines, machinery, and appliances, vast sums of money have been invested, will not, at the suit of the city, after long delay and acquiescence, be enjoined from operating its washery and accumulating quantities of refuse and slack, or be compelled to remove such accumulations of refuse

and slack, on the ground of maintaining a public nuisance after such acquiescence and long delay, where the fact of the nuisance has not been established at law, and the continued operations of the coal company and the accumulations of the refuse and slack have been continued for many years, and the large expenditures have been incurred under the reasonable belief that there will be no objection to the carrying on of the business.

City of Pana *v.* Central Washed Coal Co., 102 Northeastern, 992, p. 998 (Illinois), October, 1913.

NUISANCE—LAWFUL BUSINESS.

Where it is sought to restrain by injunction the prosecution of the business of a coal company carrying on a washery in connection therewith that is lawful in itself, on the ground that it is obnoxious to the health, comfort, and convenience of the persons residing in the vicinity by reason of disagreeable noises, poisonous odors, and injurious fumes and gases and the like, no general rule can be stated, but each case must be decided on its own particular facts, the question being largely one of degree to be determined in the light of human experience; and if the business as conducted is so offensive as to materially interfere with ordinary physical comfort, measured, not by the standard of persons of delicate sensibilities and fastidious habits, but by the habits and feelings of ordinary people, then an injunction may be granted; but the damages to constitute a nuisance must be real and not fanciful, and the mere annoyance of morbid tastes or excited imagination is not sufficient.

City of Pana *v.* Central Washed Coal Co., 102 Northeastern, 992, p. 998 (Illinois), October, 1913.

NUISANCE—INSUFFICIENT SHOWING.

A coal company could not be enjoined at the suit of a city from carrying on its operations and from operating a washery in connection therewith within the corporate limits of the city on a petition alleging generally that in the operation of the business it had accumulated large quantities of waste matter, refuse, and slack which it had piled and continued to pile upon its premises and upon a part of the public streets of the city, which refuse was continually burning and smoldering, giving off large quantities of poisonous and injurious fumes and obnoxious odors, to the detriment of the health, comfort, and happiness of the citizens of the city; that the coal company used large quantities of water to suppress the burning of such slack, and that it made no provision for purifying the water, and that it carried sulphur and other poisonous matters into ponds and sink holes near by. The evidence showed in the main that the streets alleged to be obstructed had been abandoned by the city and by the public for more than 20 years, that no wells in the immediate

vicinity had been contaminated by reason of the impure water, that there were no known injurious effects to health from the odors or gases in the vicinity of the property, that these were noticed only immediately joining or close to the premises, and that the odors and gases from the slack pile were no more insanitary and injurious to the health and happiness of the citizens of the city than the odors and gases from the engines and cinders of the coal company, or from the locomotive engines continuously used upon railroads in the immediate vicinity; and the evidence showed further that many witnesses worked on the premises, or lived at or had lived close by, none of whom had been inconvenienced or annoyed or had suffered any ill health by reason of any odors or gases from the slack pile; that men, women, and children were continually working about the slack pile picking up coal and hauling it away, and that much of the refuse and slack was being used to make the streets in the city; and all the evidence on the question of the nuisance was sharply conflicting.

City of Pana *v.* Central Washed Coal Co., 102 Northeastern, 992, p. 993 (Illinois), October, 1913.

MINING LEASES.

A. Leases Generally—Construction.
B. Coal Leases.
C. Oil and Gas Leases.
   1. Construction—Rights and Liabilities.
   2. Indian Lands.
D. Phosphate Lands.

A. LEASES GENERALLY—CONSTRUCTION.

NATURE AND CONSTRUCTION.

In determining the scope and legal effect of an instrument giving rights and privileges to mine or take minerals, oil, or gas, it is immaterial by what name the instrument is called, whether a lease, license, sale, contract, grant, deed of conveyance, or any other name, as a court will look to the language used in the instrument aside from the terms used and determine its legal effect; but usually such an instrument is in the nature of a lease or a mineral-drilling contract.

Rives *v.* Gulf Refining Co., 62 Southern, 623, p. 625 (Louisiana), May, 1913.

LEASEHOLD INTEREST IN MINING CLAIM.

A mining lease is a grant in presenti of all the minerals in the land with the right to enter and search for them and to mine and remove the same when found.

Westerlund *v.* Black Bear Mining Co., 203 Fed., 599, p. 604, January, 1913.

LEASE CONSTRUED FAVORABLE TO LESSEE.

Where the meaning and effect of a mining lease are fairly capable of two constructions, the one will be adopted that is the more favorable to the lessee.

Stonegap Collier Co. *v.* Kelly, 79 Southeastern, 341, p. 342 (Virginia), September, 1913.
Rives *v.* Gulf Refining Co., 62 Southern, 623, p. 629 (Louisiana), May, 1913.

IMPLIED OBLIGATION TO DEVELOP.

In all mining leases there is an implied obligation on the lessee to proceed with the exploration and development of the land with reasonable diligence, according to the usual course of business, and a failure to do so amounts to an abandonment that will sustain a reentry by the lessor.

McColl *v.* Bear Creek Coal Mining Co., 143 Northwestern, 532, p. 534 (Iowa), October, 1913.

LEASE OF MINE—ALL THINGS APPURTENANT PASS.

The rule of law is that a lessee of real property is entitled to the exclusive use of the demised premises for any purpose not prohibited by the lease, not amounting to waste or destruction, and under this rule the lease of a mine carries as a necessary part thereof all things appurtenant to the mine, though not mentioned in the lease.

Stonegap Collier Co. *v.* Kelly, 79 Southeastern, 341, p. 342 (Virginia), September, 1913.

PROPERTY PLACED IN MINE—OWNERSHIP.

A lease of a mine with the condition that when the lease is terminated for any reason the lessee "is to leave all supports and timbers, ladders, stairs, steps, and tracks used for or furnishing means of access, ingress, or egress, in and from said mine, to be absolutely the property of the lessor," shows a clear intention that the personal property placed in the mine by the lessee shall remain as a security for the payment of the rent or royalties due under the lease.

Freeman *v.* New Jersey Portland Cement Co., 207 Fed., 699, p. 700, September, 1913.

INJUNCTION TO PREVENT REMOVAL OF PROPERTY FROM MINE.

An assignee of a mining lease may maintain a suit to enjoin the lessee from removing property out of the mine where the lease requires the lessee to leave all supports, timbers, and property of like character and makes them the property of the lessor on the termination of the lease for any reason, and where the lease expressly provides that such property shall not be removed without the consent of the lessor, and without any reference to any accounting between the parties.

Freeman *v.* New Jersey Portland Cement Co., 207 Fed., 699, p. 700, September, 1913.

PERFORMANCE OF CONDITION PRECEDENT.

A lessor of mining property agreed with the lessee to procure a release of a lien of a deed of trust upon the premises as a consideration and as a condition precedent to payment of a stipulated part of the consideration of the lease, but the agreement was not discharged or the condition precedent performed by the procurement on the part of the lessor of a release of the lien of such trustee by the original creditor, where both the lessor and lessee knew that the note secured by the deed of trust had been assigned and was held by a third person.

Boggess *v.* Bartlett, 78 Southeastern, 241, p. 242 (West Virginia), April, 1913.

LEASE EXECUTED WITHOUT AUTHORITY OF STOCKHOLDERS—VALIDITY.

Under the Colorado statute prohibiting a board of directors of a mining corporation from encumbering its mines, plants, or principal machinery without the approving votes of the holders of a majority of shares of stock, a mining corporation can not itself avoid a lease or an encumbrance on the ground that it has not received the approving votes of the stockholders, but the right to avoid a lease or an encumbrance so made is in the stockholders alone.

Westerlund *v.* Black Bear Mining Co., 203 Fed., 599, p. 613, January, 1913.

RIGHTS OF LESSEE OF COTENANT.

A lessee of one cotenant in common has no right to mine and take mineral ores from a tract of land against the will and without the consent of the other cotenant.

Kansas City Southern Railway Co. *v.* Sandlin, 158 Southwestern, 857 (Missouri Appeals), July, 1913.

ROYALTIES FOLLOW TITLE OF LAND.

A mining lease of certain lands and mining property in Minnesota executed by a nonresident testatrix in her lifetime, and in which her husband joined, was not a conditional sale of the mineral in place and did not give the surviving husband, claiming as statutory heir, one-third of the royalties accruing and to accrue thereunder subsequently to the death of the testatrix; but the proceeds or royalties of such lease followed the title to the land as incident to the ownership.

Owsley Estate, In re, 142 Northwestern, 129, p. 133 (Minnesota), June, 1913.

ROYALTIES PAYABLE TO WIFE—CONSIDERATION.

The fact that a wife joined with her husband in the execution of a mining lease on his land furnished a sufficient consideration for the provisions of the lease, making a part of the rent or royalty payable to her.

Vantage Mining Co. *v.* Baker, 155 Southwestern, 466, p. 467 (Missouri Appeals), April, 1913.

LEASE EXECUTED BY HUSBAND AND WIFE—DEATH OF WIFE—OWNERSHIP OF ROYALTIES.

Where a mining lease stipulated that, in consideration of the wife joining her husband as a lessor, a certain part of the royalty should be paid to her, the reversion on her death did not pass to her husband, but her death merely extinguished her inchoate right of dower, and her share of the rents due and to become due under the lease passed to her heirs and not to her husband alone.

Vantage Mining Co. *v.* Baker, 155 Southwestern, 466, p. 467 (Missouri Appeals), April 1913.

DEATH OF LESSEE—ASSIGNMENT OF ROYALTY.

Where a husband and wife executed a mining lease to certain lands of the husband, and in consideration of the wife joining in the lease a certain share of the stipulated royalties was to be paid to her, and where, after her death, pending administration of her estate, the husband sold and assigned to a son all his right, title, and interest in and to the distributive share of the estate of the wife and mother, such assignment was sufficient to pass the husband's interest in the part of the estate payable to the wife, as such royalties pass to the estate of the wife at her death and not to the husband as her heir or by virtue of his marital rights.

Vantage Mining Co. *v.* Baker, 155 Southwestern, 466, p. 468 (Missouri Appeals), April, 1913.

RIGHT OF LESSEE TO MINE UNDER RAILROAD RIGHT OF WAY—INJUNCTION.

The lessee in a mining lease of lands upon and over which was a railroad in active operation acquires his right to mine subject to the rights of the railroad company operating its trains over the land, and injunctive relief will be awarded the railroad company to prevent the lessee from mining under its right of way without requiring it to make a clear and unquestioned case, and in such a case it is sufficient that the evidence reasonably shows the certainty that the danger exists, rather than the certainty that a fatal disaster will occur, and courts should see to it that railroad companies are not hampered in maintaining a safe roadbed.

Kansas City Southern Railway Co. *v.* Sandlin, 158 Southwestern, 857, p. 859 (Missouri Appeals), July, 1913.

ABANDONMENT AND LIABILITY—BANKRUPTCY.

Where a mining lease was abandoned because of the bankruptcy of the lessee, the cost and expense of pumping the mine after bankruptcy proceedings were begun was, under the lease, a contingent liability not provable against the estate of the bankrupt, and dam-

ages so caused did not constitute a claim secured by the contract lien created in favor of the lessor by the terms of the lease.

Gallacher Coal Co., In re, 205 Fed., 183, p. 184, May, 1913.

EXHAUSTION OF MINE—LIABILITY OF DIRECTORS TO BONDHOLDERS.

A mining corporation or its lessee has the right to work a mine reasonably and properly, though the working results in the exhaustion of the mine, and bondholders can not hold either the corporation or the directors and officers personally liable, as such a condition must be regarded as a misfortune to persons who invested their money upon uncertain and wasting security.

Young *v.* Haviland, 102 Northeastern, 338, p. 340 (Massachusetts), May, 1913.

B. COAL LEASES.

ABANDONMENT AND FORFEITURE—DISTINCTION.

In reference to coal, as well as other, leases, there is a distinction between forfeiture and abandonment in that, unlike abandonment, there is no question of intent involved in forfeiture; but on a claim of forfeiture the question is whether the lease or law has been complied with, whereas abandonment is a question of intent, to be proved by facts and circumstance showing such an intention.

McColl *v.* Bear Creek Coal Mining Co., 143 Northwestern, 532, p. 537 (Iowa), October, 1913.

BANKRUPTCY OF COAL LESSEE—ROYALTIES CEASE.

The minimum royalty for the six months following the bankruptcy of a lessee of a coal mine is not a provable claim against the assets of the bankrupt's estate, where the lease makes the royalty contingent upon the continuance of the lease and provides that it shall cease to be due in the event of strikes, car shortages, faults, or squeezes.

Gallacher Coal Co., In re, 205 Fed., 183, p. 187, May, 1913.

ABANDONMENT—FAILURE TO DEVELOP.

A lessor may treat a lease of coal lands as abandoned by the lessee when the lease requires the lessee to commence the work of development within 90 days from its date, where it appears that no continuous work of development has been commenced and prosecuted on the leased land for a period of two years and where the lessee has entered upon the work of sinking a shaft, but after sinking it about 60 feet has entirely abandoned the work and failed for a period of two years to further prosecute the work, and where the president of the lessee corporation, after the cessation of work and removal of the ma-

chinery and materials, states that the land is not worth doing anything on and that the company is willing to give up the right to the land.

McColl *v.* Bear Creek Coal Mining Co., 143 Northwestern, 532, p. 534 (Iowa), October, 1913.

INTEREST IN LAND—ABANDONMENT—STATUTE OF LIMITATIONS.

A lease of certain coal lands granting the right to mine the coal for a period of 25 years, and providing that work of development should commence within 90 days from the date of the contract and for the payment of certain royalties, did not show a purpose or intention to convey a title to the land, nor did it give the lessee a vested right to the coal under the land, but it constituted an interest in real estate so that there could not be an abandonment unless the statutory period barring the rights of recovery of real estate had run.

McColl *v.* Bear Creek Coal Mining Co., 143 Northwestern, 532, p. 536 (Iowa), October, 1913.

EQUITY IN LAND—ABANDONMENT.

The fact that a lessee under a coal lease expended money in prospecting and attempting to reach coal is not sufficient to give the lessee an equity in the land that can not be lost by the abandonment of the premises by the lessee.

McColl *v.* Bear Creek Coal Mining Co., 143 Northwestern, 532, p. 537 (Iowa), October, 1913.

FORFEITURE—FAILURE TO OPERATE.

A stipulation in a mining lease to the effect that it should be forfeited if the mine remained idle for more than 60 consecutive days, unless the lessee was prevented from operating the same by reason of strikes, or of a failure of cars, was a lawful stipulation and one the lessor could and did make as a condition of the lease, and although forfeitures are not favored by the courts and can not rest on a lawful agreement or condition, yet where the right is expressly reserved and is reasonable it will be enforced by the courts, whether founded on the breach of a condition precedent or subsequent; and the right of forfeiture being expressly reserved and the right of reentry being a necessary incident to a forfeiture, the right of reentry will be implied, and on a breach of the condition the right of possession immediately arises.

Smith *v.* Eagle Coal & Mercantile Co., 155 Southwestern, 886, p. 888 (Missouri Appeals), April, 1913.

A stipulation in a mining lease to the effect that the lease shall be forfeited if the mine remains idle for more than 60 consecutive days, unless the lessee shall be prevented from operating the same by reason of strikes of employees or a failure of cars or train service, must be construed with reference to the subject matter and expressed

objects of the contract, and where it appears that the only rent that the lessor is to receive is a royalty, depending largely on the activity, skill, and ability of the lessee, and where the object of both parties is to mine and sell the coal, the lease must be held to impose on the lessee the obligation to work the mine with reasonable diligence and in a reasonably proper manner, and to denounce as unreasonable and violative of a material condition any cessation of productive activity for a period of 60 consecutive days; and although the lessee is not required to mine and sell coal during every period of 60 days, yet the lease contemplates and provides for the development and expansion of mines on the premises, and accordingly time consumed in the installation or betterments and improvements of the mines by which the production of marketable coal might be increased can not be considered as time spent in idleness; but, on the other hand, time consumed in doing nothing toward mining or preparing to mine coal is intended by the parties to be treated as lost time; and work done in the mere preservation of the property, although operative work, is not a kind of activity that would be contrary to the idleness contemplated by this stipulation; and merely keeping the fans and pumps going and clearing passageways occasionally would not fulfill the required stipulation as to activity, and such a course would be at variance with the express terms and conditions of the lease and would justify a forfeiture.

Smith *v.* Eagle Coal & Mercantile Co., 155 Southwestern, 886, p. 888 (Missouri Appeals), April, 1913.

FORFEITURE—OPERATIONS PREVENTED BY STRIKES.

A stipulation in a coal lease to the effect that the lease could be forfeited if the mine remained idle for more than 60 consecutive days, unless the lessee was prevented from operating the same by reason of strikes of employees, was necessarily regarded as using the word "strike" in its broader meaning of an insurrection of labor; and although it did not apply to a mere cessation of labor by miners caused by the insolvency of a sublessee and its inability to pay the miners, yet it did apply where, after the miners had so ceased working, a labor union ordered the miners not to resume work until their wages had been paid by the original lessee, for whom they had not worked and who owed them no sums for their services, and where it clearly appeared to be a combination of miners having for its object the coercion of the lessee into compliance with an unjust demand on pain of being prevented from resuming operations of the mine, and this was clearly within the contemplation of the parties in the use of the stipulation and sufficient to prevent a forfeiture of the lease.

Smith *v.* Eagle Coal & Mercantile Co., 155 Southwestern, 886, p. 888 (Missouri Appeals), April, 1913.

MINING OPERATIONS—PROOF OF VERBAL STATEMENTS.

The terms of a coal lease providing that work or development should commence within 90 days from its date was not varied by proof of contemporaneous verbal statements of the lessee to the effect that it would commence developing the mine as quickly as it got the machinery there and would prosecute the work after it began to take out coal and that it could develop the coal field at once, the lease itself being silent as to how mining should be carried on after the mine had been developed and when coal should have been taken out.

McColl *v.* Bear Creek Coal Mining Co., 143 Northwestern, 532, p. 533 (Iowa), October, 1913.

TIME WITHIN WHICH COAL MAY BE REMOVED—DILIGENCE.

A coal lease providing that the lessee, if it shall elect to mine the coal, can do so within 25 years, does not give the lessee 25 years to commence removing the coal nor does it exempt the lessee from the implied obligation to proceed with reasonable diligence.

McColl *v.* Bear Creek Coal Mining Co., 143 Northwestern, 532, p. 534 (Iowa), October, 1913.

TERMINATION FOR STATED REASONS NOT EXCLUSIVE.

A coal lease providing that it may be terminated for certain reasons and according to a certain prescribed method may be terminated by an abandonment of the premises on the part of the lessee; and although there is coal in paying quantities, yet if the lessee is satisfied that it can not be reached, or mined if reached, the lessee can abandon the lease for this or any other cause, subject to its contract obligations to the lessor under the lease.

McColl *v.* Bear Creek Coal Mining Co., 143 Northwestern, 532, p. 536 (Iowa), October, 1913.

CANCELLATION—LEGAL AND EQUITABLE REMEDIES—ABANDONMENT.

The fact that a coal lease provides that all land over one-half a mile from the shaft shall have a guaranty royalty of $1 per acre, that over three-fourths of a mile, $2 per acre, and that over one mile, $3 per acre, annually, after two years, is not such an adequate remedy for tying up an 80-acre tract of land for an indefinite period as will prevent the lessor from maintaining an action to cancel the lease and quiet his title to the land, where the lessee has in fact abandoned the premises.

McColl *v.* Bear Creek Coal Mining Co., 143 Northwestern, 532, p. 538 (Iowa), October, 1913.

RESERVATION OF LIEN—RECORDING.

A stipulation in a lease of a coal mine reserving or creating a lien in favor of the lessor on the property described is not a "conveyance of personal property to secure debts," or to provide indemnity within the meaning of the Alabama Code requiring instruments for that purpose to be recorded.

Gallacher Coal Co., In re, 205 Fed., 183, p. 185, May, 1913.

LIABILITY OF LESSOR FOR WRONGFUL POSSESSION—VALUE OF IMPROVEMENTS.

In an action by the lessee of a coal mine against the lessor for damages for wrongfully obtaining possession of the mine and of the improvements made by the lessee, as required by the lease, the lessee's measure of damages was the value of the use of the improvements from the time the possession was wrongfully taken by the lessor until the expiration of the lease, where by the terms of the lease all the improvements were to become, on the termination of the lease, the property of the lessor.

Grant *v.* Phoenix Jellico Coal Co., 159 Southwestern, 1161, p. 1162 (Kentucky), October, 1913.

USES LESSEE MAY MAKE OF THE SURFACE.

A mining lease for the purpose of mining coal, manufacturing coke, and selling the coke and coal in and under certain large tracts of land and transferring all rights and privileges of the lessor, the surface of certain described tracts previously conveyed being excepted from the lease, passes to the lessee the whole of the properties owned by the lessor, together with all rights and privileges appurtenant thereto; and a covenant that the premises shall be used by the lessee for a particular specified purpose does not by implication forbid the use for a similar lawful purpose, not injurious to the lessor's rights; and such a lease does not prevent the lessee as a coal operator from building tenement houses for its employees, storehouses, warehouses, office buildings, hospitals, supply houses, hotels, boarding houses, tipples for loading coal, crushing plants, side tracks, and tram and motor roads, nor does it prevent the lessee from subletting the surface of tracts of land for purposes not inconsistent with the lease.

Stonegap Colliery Co. *v.* Kelly, 79 Southeastern, 341, p. 342 (Virginia), September, 1913.

RECOVERY OF ADDITIONAL ROYALTY AFTER RECEIPT.

The fact that, during a controversy and disagreement between a lessor and a lessee of mining properties as to the amount of royalty due, the lessor signed vouchers purporting to be in full of the account, and later the vouchers were receipted "on account, without prejudice to claim for additional royalty due under lease," did not estop

the lessor from subsequently maintaining a suit to recover any unpaid royalty.

Hillside Coal & Iron Co. *v.* Sterrick Creek Coal Co., 86 Atlantic, 865, p. 866 (Pennsylvania), February, 1913.

PAYMENT AND APPLICATION OF ROYALTY.

A lease for a coal mine provided for the payment of certain royalties on different grades of coal and bound the lessee for one year to mine sufficient coal to make the royalties amount to $600 annually, or pay such sum in lieu of royalties, and provided that any sum paid in excess of coal actually mined should be treated as advanced royalty and be deducted out of any excess over $600 in any subsequent year. Such a lease was not ambiguous and did not authorize the lessee to receive a credit for an amount paid in excess of $600 for coal actually mined in any one year.

Vandalia Coal Co. *v.* Underwood, 101 Northeastern, 1047, p. 1049 (Indiana App.), May, 1913.

AVERAGING ROYALTIES FOR DIFFERENT VEINS.

A mining lease providing that certain royalties should be paid upon coal taken from different veins—that when the price of coal advanced to a stated sum, then 25 per cent per ton royalty should be paid on all coal mined from a certain 4-foot vein; and that when the average price of coal of the size above pea coal should exceed a certain amount, then a royalty of 16 per cent should be paid on the excess—required these provisions to be construed together, as showing that it was the intention of the parties that the excess of 16 per cent mentioned in one provision of the lease applied to coal from all veins covered by the lease and not alone to the coal mined from the 4-foot vein; as it was the clear intention under the lease, as shown by other provisions, that when the 4-foot vein should show more than 4½ feet of coal it would cease to be an inferior vein and should pay the same royalty as the coal from the other veins; or, on the other hand, when the average of all sizes of coal above pea coal brought $2.15 per ton at the breaker that that fact alone should be a reason for ending the discrimination in favor of the 4-foot vein, as that price would justify the lessee in paying the same royalty on all the coal going through the breaker.

Hillside Coal & Iron Co. *v.* Sterrick Creek Coal Co., 86 Atlantic, 865, p. 868 (Pennsylvania), February, 1913.

CONSIDERATION—SHARE OF CAPITAL STOCK.

A lease giving the lessee the exclusive right and privilege of mining, shipping, and selling all coal on, under, and from the premises described, together with the privilege of manufacturing coke and other by-products of coal for a term of 50 years, or until the merchantable

coal was mined and removed, reserving to the lessors a one-tenth interest in and to all the rights, privileges, and property interest of the lease, which interest should be held in the nature and condition of paid-up and nonassessable stock in the lessee corporation, evidenced by certificate properly executed and issued to the lessors in proper proportion, whenever or under whatever circumstances the corporation might issue any stock, gave the lessors the right to demand their stated percentage of the stock issued under authority vested in the corporation at the time of the contract and did not give them any right to demand and receive the percentage of the increase in the capital stock of the corporation subsequently acquired under direct authority from the State, where the corporation had subsequently acquired and was operating mining leases on lands other than the leased premises and had also acquired and owned large holdings of valuable real estate purchased from the profits made in the business of mining and shipping coal.

Taylor *v.* Buffalo Colliers Co., 79 Southeastern, 27 (West Virginia), April, 1913.

C. OIL AND GAS LEASES.

1. CONSTRUCTION—RIGHTS AND LIABILITIES.
2. INDIAN LANDS.
3. PHOSPHATE LANDS.

1. CONSTRUCTION—RIGHTS AND LIABILITIES.

INTEREST AND RIGHTS GRANTED BY LEASE.

A lease of oil and gas grants no corporeal interests or hereditaments, and a grantee under such a lease who has never been in possession of the premises described and has caused no operations under his lease can not maintain ejectment thereon.

Priddy *v.* Thompson, 204 Fed., 955, p. 960, April, 1913.

NATURE OF RIGHT GRANTED—INTEREST IN LAND.

An oil and gas lease is a grant of a right in the nature of an incorporeal hereditament, operative from the time of its execution and during the accomplishment of its purpose as a transfer of an exclusive right to search for, take, and appropriate the gas and oil, and such an instrument must be held to be a conveyance of an interest in land; and a grant of all the oil and gas in and under a tract of land is not a grant of any particular specific substance as a grant of coal, and the owner of the land, the grantor of the oil and gas, is not by virtue of his ownership of the soil the absolute owner of the oil and gas, and he can grant only the right to reduce to ownership the oil and gas that may be obtained by operating on his land.

Rives *v.* Gulf Refining Co., 62 Southern, 623, p. 626 (Louisiana), May, 1913.

EFFECT OF UNILATERAL OPTION.

An oil and gas lease containing a drilling contract optional as to one of the parties renders the lease optional as to the other party.

Long *v.* Sun Co., 61 Southern, 684, p. 685 (Louisiana), March, 1913.

WANT OF MUTUALITY—RIGHT TO ANNUL.

An oil and gas lease providing that the lessee shall drill for oil or gas within six months from its date, or pay the lessor 10 cents per acre each year until the drilling is commenced, and providing that the lessee may terminate the lease at any time by giving notice and paying $1, but giving the lessor no rights as relates to the term of the lease except by notifying the lessee for 36 months, and providing that at the end of such time the lessor shall wait another 36 months before the lease actually expires, has no binding effect upon the lessee and permits him to terminate the lease at any time, and is therefore invalid as to the lessor, and he has the right to terminate the lease and sue for its annulment.

Long *v.* Sun Co., 61 Southern, 684 (Louisiana), March, 1913.

OPTION—WANT OF MUTUALITY—FORFEITURE.

An oil and gas lease granting the mineral rights under certain described land to the lessee in consideration of the payment of a certain sum and the payment of a certain royalty on the oil produced and on all coal mined for the term of five years and as long thereafter as oil, gas, or other minerals should be found in paying quantities, and providing that if operations for drilling wells or mining should not be commenced within 60 days the grant should immediately become null and void, and providing also that the lessee might prevent a forfeiture by paying to the lessor a certain stated sum every 60 days until a well should be commenced or shipment should have begun did not convey any interest in the land, but merely an optional right to acquire an interest therein upon the performance of certain conditions, was only a unilateral agreement, did not bind the lessee to perform any of the conditions stipulated, and was therefore lacking in mutuality, and the option would terminate on the failure of the lessee to perform the condition.

Witherspoon *v.* Staley, 156 Southwestern, 557 (Texas Civil Appeals), April, 1913.

TITLE OF OIL AND GAS—EFFECT OF COVENANT.

A covenant for a good and sufficient title for oil and gas conveys all oil and gas rights in the premises, together with all rights necessary in securing to the lessee the enjoyment of the estate, such as the right of access, and the right to install the necessary plants for producing and removing the oil or gas; but such rights are subject

to the natural servitudes that secure to the owners of the surface or of other strata of clay and coal their full rights and titles.

Telford *v.* Jenning Producing Co., 203 Fed., 456, p. 459, March, 1913.

OWNERSHIP OF OIL AND GAS.

Oil and gas in the earth, unlike ore and coal, are fugacious and not susceptible to ownership distinct from the soil, and a lease of the oil or gas in a certain described tract and of the right to occupy and use the necessary part of the surface for prospecting and operating is not a grant of the oil and gas in the land, but of such part thereof only as the lessee discovers and reduces to possession, and no title to any oil or gas vests in the lessee until he has discovered and reduced the same to possession, and accordingly the lessee has no title to any corporeal right or interest and can not maintain ejectment.

Priddy *v.* Thompson, 204 Fed., 955, p. 960, April, 1913.

AGREEMENT TO OBTAIN OIL AND GAS LEASE—EFFECT AND EXTENT.

A contract stating that the first party, in consideration of a certain price per acre, agreed with the second party to procure and deliver to the latter a lease, in due form signed by the owner of the premises, for the oil and gas under certain described property does not require the first party to cause to be conveyed to the second party an absolute estate in fee to the premises described, but only the gas and oil and other appurtenances, including such other estate as is reasonably necessary in securing the enjoyment of the gas and oil estate therein, and gives no interest whatever to any coal in the premises.

Telford *v.* Jenning Producing Co., 203 Fed., 456, p. 458, March, 1913.

STATUTORY RULES APPLICABLE TO SALES DO NOT APPLY.

Oil and gas leases and contracts are apart by themselves, with little, if any, comparison between them and the ordinary farm and house lease, although there is some resemblance between them and coal or solid-mineral leases, and the ordinary statutory rules applicable to sales and leases generally can not well be applied to oil and gas leases where there are no special provisions on the subject.

Rives *v.* Gulf Refining Co., 62 Southern, 623, p. 624 (Louisiana), May, 1913.

CONDITIONS AS TO DRILLING WELLS—ACCEPTANCE AND PAYMENT.

A contract for drilling oil wells provided that the wells should be drilled to a depth of 850 feet, unless sooner stopped by the owner and lessor, and provided also that the driller should, if necessary and possible, drill wells deeper than 850 feet, the owner and lessor to pay a stipulated price per foot for such additional depth, as determined by the lesson; and provided that all money should be due and payable

when each well was turned over to and accepted by the lessor. Under such conditions the lessee, on drilling a well to a depth of 863 feet, could not cease drilling, remove his rig, and recover the price, where neither oil nor gas had been struck and where the owner insisted upon drilling deeper, and where it did not appear that further drilling was impossible, as the contract contemplated that the owner must accept the well or stop the drilling, and it was clearly the intention of the parties, as shown by the lease, to prospect thoroughly for oil and gas.

Lamont Gas & Oil Co. *v.* Doop, 135 Pacific, 392, p. 394 (Oklahoma), September, 1913.

RIGHT OF LESSEE TO DENY LESSOR'S TITLE.

The rule that a tenant can not deny his landlord's title did not embrace an oil or gas lease that the lessor had no right to execute, if neither the lessee nor his assignee took possession of, or executed any powers or rights under it.

Rives *v.* Gulf Refining Co., 62 Southern, 623, p. 627 (Louisiana), May, 1913.

DUTY OF LESSEE TO DEVELOP.

A lessee who binds himself to explore the leased land for oil or gas must perform that which he has bound himself to do and must explore for oil and gas, and if delay is his purpose there must be no doubt about the sufficiency of the consideration for the delay, and where the consideration moving to the lessor is the payment of a proportionate part of the oil produced, the condition is imperative and can not be neglected and ignored by the lessee, where no other consideration is expressed.

Long *v.* Sun Co., 61 Southern, 684, p. 685 (Louisiana), March, 1913.

FAILURE TO DEVELOP—FORFEITURE AND CANCELLATION—PLEADING AND PROOF.

A lessor of an oil and gas lease can not maintain an action for forfeiture and have the lease declared null and void and canceled and released of record, and for the possession of the premises, on the ground that the lessee has paid no royalty on the production of oil and has thereby abandoned the lease because of a breach of an implied covenant in the lease to proceed with the exploration of the property with due diligence where there is no allegation in the complaint upon which to base proof of failure to explore and develop the property with due diligence.

Gillespie *v.* Ohio Oil Co., 102 Northeastern, 1043, p. 1044 (Illinois), October, 1913.

ABANDONMENT AND FORFEITURE—UNPROFITABLE PRODUCTION.

An oil and gas lease for a period of five years and so long thereafter as oil or gas is produced can not be forfeited on the ground of abandonment where the lessee has taken possession and drilled a well, and was, at the time of the commencement of the action, pumping an oil well

daily, and oil was produced continuously after the drilling of the first well, though the quantity was so small as to make the venture unprofitable, and the lessor had in fact never received any royalty from the sale of oil produced.

Gillespie *v.* Ohio Oil Co., 102 Northeastern, 1043, p. 1044 (Illinois), October, 1913.

USE OF GAS FOR DOMESTIC PURPOSES—MEANING.

An oil and gas lease providing that lessors are to have free gas for domestic purposes by making their own connections to any gas well drilled on the premises must be given a broad and liberal construction and read in the light of an established usage or custom known by the parties to the lease, and such a lease requires the lessee to furnish gas, not only within the walls of the dwelling house of the lessors, but for lighting all the outbuildings within the premises immediately connected with the dwelling house, but it does not require the lessee to furnish gas for open lights or flambeaux to be used about the premises of the lessor.

Hall *v.* Philadelphia Co., 78 Southeastern, 755, p. 756 (West Virginia), May, 1913.

LESSEE TO FURNISH GAS FOR DOMESTIC PURPOSES—FLAMBEAUX.

Under an oil and gas lease requiring the lessee to furnish the lessor free gas for domestic purposes, the lessor can not maintain a suit in the form of a mandatory injunction to compel the lessee to furnish gas for what is known as storm lights or flambeux; and although it is a custom to burn such lights at the time of the execution of the lease, such custom does not settle nor cover the right to future use, and the law will assume an intent on the part of the lessee and lessor to carry the contract into execution in such manner as to avoid useless and unnecessary waste such as occurs in the use of flambeaux.

Hall *v.* Philadelphia Co., 78 Southeastern, 755, p. 756 (West Virginia), May, 1913.

ACCOUNTING FOR GAS—RIGHT OF TENANT IN COMMON.

In an action by a tenant in common for the value of gas taken from certain gas wells during a period of several years, where it appeared that the gas was marketed through a pipe line in which the defendant, a cotenant and natural-gas company, owned a large interest in the stock and securities of the pipe line, the plaintiff was not to be charged with the burden of paying any part of the sums expended in the purchase of the stock and securities of the underlying companies, or any sinking funds to redeem bonds issued in payment of the original cost of the pipe line, or for drilling new wells on behalf of the defendant, nor could the reasonable rental value of such pipe line be established by proof of such payments.

Johnson *v.* Kansas Natural Gas Co., 135 Pacific, 589, p. 592 (Kansas), October, 1913.

USE OF GAS BY ONE COTENANT—RECOVERY BY OTHER COTENANT.

In an action by a tenant in common for an accounting for natural gas produced from six gas wells during a period of several years, where the defendant gas company failed to produce proof showing the approximate quantity of gas taken, or the net price for which it sold, or the reasonable rental value of the pipe lines, and where there was a wide variance in the testimony of the witnesses and the claims of the parties, the estimates of the quantities taken and of the fair and reasonable expense of transporting the gas to market, made by the trial court upon a consideration of all the evidence as well as upon the court's general information and knowledge of the history and conditions of the gas field where the wells were located, was taken as conclusive, and the judgment of the trial court was not to be disturbed on appeal simply because the trial court did not agree with the witnesses on either side in determining the quantity of gas taken from the wells, as it was the province of the court to consider all the evidence and arrive at what it deemed a just decision.

Johnson *v.* Kansas Natural Gas Co., 135 Pacific, 589, p. 590 (Kansas), October, 1913.

RECOVERY FOR GAS TAKEN—METHOD OF PROOF.

A tenant in common of lands operated and producing natural gas may sue for an accounting and may recover a fair and reasonable value of the gas at the time and place at which it is taken; or he may recover the amount the gas sold, less the fair and reasonable expense of marketing the same, and where the defendant has taken the product of six producing gas wells for a period of several years and has sold and marketed the same through pipe lines to which other wells of the defendant are connected the burden is on the defendant to prove what allowances he is entitled to.

Johnson *v.* Kansas Natural Gas Co., 135 Pacific, 589, p. 590 (Kansas), October, 1913.

OIL LEASES—PRIORITY AND RIGHT TO POSSESSION.

In an action of forcible entry and detainer under the laws and procedure of the State of Oklahoma, a court can not adjudicate the relative rights of the parties held under separate oil leases executed at different times, where one party is in possession and the other is seeking to gain possession, as the action of forcible entry and detainer is a possessory action only, and a title to land can not be made an issue in such an action.

Cahill *v.* Pine Creek Oil Co., 134 Pacific, 64 (Oklahoma), July, 1913.

OIL LEASE AN ENCUMBRANCE—DIRECTORS' POWER TO EXECUTE.

The statute of Colorado prevents boards of directors of mining corporations and the corporations themselves from encumbering their property in the absence of approving votes of the stockholders, and

a mining lease for five years is an encumbrance within the meaning of this statute.

Westerlund *v.* Black Bear Mining Co., 203 Fed., 599, p. 603, January, 1913.

OIL LEASE—TENDER TO PREVENT FORFEITURE—SUFFICIENCY.

An oil and gas lease provided among other things that a forfeiture could be prevented on account of a failure of the lessee to operate by the payment of a certain stipulated sum every 60 days until operations were commenced. In such case the payment and acceptance of the sum named on the 30th day of November would keep the lease in life for a period of 60 days, or until the 28th day of January only; and a tender made on the 30th day of January following was not sufficient, though the former receipt recited that the sum paid was in full for two months' rental "in accordance with the terms of the lease."

Witherspoon *v.* Staley, 156 Southwestern, 557, p. 560 (Texas Civil Appeals), April, 1913.

LEASE FOR GAS WELL—DESTRUCTION BY ABANDONED WELL—LIABILITY OF LESSEE.

An oil and gas company leasing a small tract of land for the purpose of drilling a gas well and agreeing to pay the lessor and owner of the land a certain stipulated price quarterly and furnish him free gas for domestic purposes, if gas in paying quantities was discovered, was liable to the lessor and owner in damages where it subsequently drilled an unproductive well on another tract about 100 feet distant from the first well and pulled the casing and abandoned such well without plugging the same or taking any other precuation against the escape of gas or oil or surface water, and where as a result, water entered through such abandoned well into the strata of gas-bearing sand and percolated to such an extent therein and so far permeated it as to obstruct the flow of gas in the well of the lessor, so that it became worthless and was wholly lost to him as a producing well.

Atkinson *v.* Virginia Oil & Gas Co., 79 Southeastern, 647 (West Virginia), September, 1913.

2. INDIAN LANDS.

EFFECT OF DEPARTMENTAL REGULATIONS.

Under the act of July 1, 1902 (32 Stat., 716, p. 726), the power of the Secretary of the Interior relating to Indian leases for oil and gas is not limited to the mere approval or disapproval of such leases, but he is authorized to make any such lease subject to any existing departmental regulation, and such a regulation is binding alike on the lessor and the lessee.

Dixon *v.* Owen, 132 Pacific, 351, p. 353 (Oklahoma), May, 1913.

TIME OF APPROVAL BY SECRETARY.

Although the statute of July 1, 1902 (32 Stat., 716, p. 726), requires the approval of the Secretary of the Interior of an oil and gas lease made by an Indian allottee for a period exceeding five years, yet the act does not provide within what time the Secretary shall be required to make the approval.

Alameda Oil Co. *v.* Kelly, 130 Pacific, 931, p. 933 (Oklahoma), March, 1913.

VALIDITY OF LEASE—APPROVAL BY SECRETARY—VOID LEASES.

Under the statute of July 1, 1902 (32 Stat., 716, p. 726), a Cherokee citizen is authorized to lease his allotment for oil and gas purposes for a period exceeding five years on the approval of the lease by the Secretary of the Interior, but any lease made in violation of the statute is void.

Alameda Oil Co. *v.* Kelly, 130 Pacific, 931, p. 932 (Oklahoma), March, 1913.

INDIVIDUAL RIGHT TO ROYALTIES.

The act of March 3, 1905 (33 Stat., 1048, p. 1061), does not give to the individual members of the Osage Tribe, who were subsequently allotted lands under the act of June 28, 1906 (34 Stat., 539), any individual right to the royalties on oil and gas wells located on their respective allotments, and such royalties can not be claimed by individuals in the absence of a lease to that effect.

Leahy *v.* Indian Territory Illuminating Oil Co., 135 Pacific, 416, pp. 417–419 (Oklahoma), September, 1913

INDIAN ALLOTTEE—INDIVIDUAL OWNERSHIP.

Paragraph 7 of section 2 of the act of June 28, 1906 (34 Stat., 539), expressly provides that the oil, gas, coal, or other minerals on allotted lands of the Osage Tribe of Indians shall be reserved to the use of the tribe for a period of 25 years, and that at the expiration of that time, unless otherwise provided by act of Congress, the allotment shall become the property of the individual allottee.

Leahy *v.* Indian Territory Illuminating Oil Co., 135 Pacific, 416, pp. 417–419 (Oklahoma), September, 1913.

POWER OF INDIAN ALLOTTEE TO LEASE—LIMITATION.

The limitation and authority of the act of July 1, 1902 (32 Stat., 716, p. 726), necessarily placed a restriction upon the power and authority of an Indian allottee to lease his lands for the purposes mentioned to just such terms as would meet the approval of the Secretary; and all Indian allottees took their lands and held them with this limitation upon their power to contract.

Dixon *v.* Owen, 132 Pacific, 351, p. 353 (Oklahoma), May, 1913.

POWER OF CONGRESS TO CHANGE ROYALTY PAYMENTS.

The power of Congress over the tribal relations and lands of the Osage Tribe of Indians in Oklahoma was not limited by any provision of the act of March 3, 1905 (33 Stat., 1048, p. 1061), extending in part for an additional term a certain oil and gas lease dated March 16, 1896, given by the Osage Nation to one Edwin B. Foster, duly approved by the Secretary of the Interior, so as to preclude Congress, by the act of June 28, 1906 (34 Stat., 539), from providing how and to whom the oil and gas royalties on allotted lands should be paid, nor was Congress precluded by the terms of the Foster lease, providing for payment of royalties to the respective allottees under certain circumstances, from afterwards providing that royalties from the allotted lands should be paid into the United States Treasury to the credit of the Osage Nation.

Leahy *v.* Indian Territory Illuminating Oil Co., 135 Pacific, 416, pp. 417–419 (Oklahoma), September, 1913.

CHANGE OF METHOD OF PAYING ROYALTIES.

Notwithstanding an oil and gas lease given by the Osage Nation to Edwin B. Foster, executed March 16, 1896, and the act extending the lease for an additional term, Congress had the power, and did by the act of June 28, 1906 (34 Stat., 544), provide that the royalties received from oil, gas, coal, and other mineral leases upon allotted lands could be placed in the United States Treasury to the credit of the members of the Osage Tribe of Indians and should be distributed to the individual members of such tribe in the same manner as payments of interest on tribal trust funds are made.

Leahy *v.* Indian Territory Illuminating Oil Co., 135 Pacific, 416, pp. 417–419 (Oklahoma), September, 1913.

POWER OF SECRETARY TO MODIFY LEASE.

An oil and gas lease by a citizen of the Cherokee Nation providing that the lessee should drill at least one well within 12 months and that on failure to do so the Secretary of the Interior might at his option declare the lease null and void, and providing further, that the lease should be subject to the rules and regulations theretofore or thereafter prescribed by the Secretary, made the lease subject to a subsequent regulation prescribed before the approval of the lease, to the effect that the lessee on paying certain stipulated amounts should have the privilege of delay of operation for a period not exceeding five years from a certain fixed date, and such regulation became a part of the lease, binding on both parties.

Dixon *v.* Owen, 132 Pacific, 351, p. 354 (Oklahoma), May, 1913.

REPRESENTATIONS TO OBTAIN DISAPPROVAL—FRAUD ON SECRETARY.

A representation by which the Secretary of the Interior was induced to disapprove an oil lease of Indian lands, to the effect that if the lease were disapproved the lessor could receive a much larger sum for such lease, and that a larger sum had been tendered and deposited with the Indian agent to be paid on disapproval of the lease was not a fraud on the Secretary, as he had full authority to prove or disapprove the lease on any ground, and he was authorized to subsequently approve the lease on condition that the lessor, or his personal representative, would, pursuant to the terms of the lease itself, assign to a third person a part of the leased premises.

Indiahoma Oil Co. *v.* Thompson Oil & Gas Co., 132 Pacific, 481 (Oklahoma), May, 1913.

STATUTORY AUTHORITY FOR TRIBAL LEASES—EFFECT ON EXISTING LEASES.

Section 3 of the act of June 28, 1906 (34 Stat., 543), reserves to the Osage Tribe of Indians for a period of 25 years from April 8, 1906, the oil, gas, coal, or other minerals covered by the tribal lands and authorizes the tribal council to lease allotted lands for oil, gas, and other minerals, with the approval of the Secretary of the Interior, but the act does not affect any valid existing lease.

Leahy *v.* Indian Territory Illuminating Oil Co., 135 Pacific 416, pp. 417–419 (Oklahoma), September, 1913.

EFFECT OF REMOVAL OF RESTRICTIONS ON ALIENATION.

A Cherokee citizen who leased his allotment for oil and gas purposes for a period exceeding five years and submitted the same to the Secretary of the Interior for approval, under the statute, could not, after the removal of the restraints upon the Cherokee's power of alienation by the Secretary of the Interior, withdraw such lease from the jurisdiction of the Secretary and prevent his subsequent approval, for the reason that the approval of the lease by the Secretary related back to the date of its execution between the parties and rendered it valid from that time; and the removal of the restrictions of the allottee's complete right to execute a lease would not have given him the right to withdraw the lease from the Secretary and thereby cancel the same, where the lessee had performed its part of the lease; but the removal of the restrictions would have had the effect of rendering the lease complete without the Secretary's approval.

Alameda Oil Co. *v.* Kelly, 130 Pacific, 931, p. 933 (Oklahoma), March, 1913.

PRIVILEGE GRANTED LESSEE NOT AN OBLIGATION—CANCELLATION.

A gas and oil lease of Indian lands provided that the lessee should sink one well for oil and gas within 12 months and that upon failure to do so the Secretary of the Interior might declare the lease void after

10 days' notice; and the lease further provided that the lessee could avoid the exercise of the right of cancellation by the Secretary for five years by paying the sum of $1 per acre in addition to the stipulated royalties. On the failure of the lessee to drill a well as required, the lease might have been canceled by the Secretary of the Interior, but the lessee, never having indicated a desire to exercise the privilege of paying the $1 per acre, was not liable for such stipulated sum, as this privilege granted by the lease could not be construed into an obligation.

United States *v.* Comet Oil & Gas Co., 202 Fed., 849, p. 851.

FORFEITURE AND RECOVERY OF ROYALTIES.

An oil and gas lease of Indian lands providing for the payment of what is termed "advanced royalties" of a certain stipulated amount each year was declared by the Secretary of the Interior to be forfeited for failure to pay such advanced royalties for a particular year, and upon such forfeiture the United States as the trustee of the Indian beneficiary had the right to recover such stipulated royalties for the entire year, as the "advanced royalties" stipulated constituted guaranteed minimum rent.

United States *v.* Comet Oil & Gas Co., 202 Fed., 849, p. 852.

3. PHOSPHATE LANDS.

CONSTRUCTION OF LEASE—EXISTENCE OF PHOSPHATE ASSUMED.

A lease of land made for the sole purpose of granting to the lessee the rights and privileges of acquiring for mining, taking out, and shipping therefrom the merchantable phosphate rock, as well as all other mineral of every kind that might be found on, in, or under the described premises, with the right in the lessee to construct all buildings and to make excavations, ditches, and drains and construct railroads, wagon roads, and other improvements necessary and suitable for the purpose of mining or removing the phosphate or other mineral, gave to the lessee the mining rights set forth in the lease; and although there was no express covenant on the part of the lessor that the leased premises contained phosphate rock, yet the parties assumed that sufficient phosphate was in or under the land to enable the lessee to comply with the terms of the lease, and except for this mutual assumption the lease would not have been made, and covenants as to the payments of rents were dependent on the presence of the phosphate rock in the leased lands.

Ross *v.* Savage, 63 Southern, 148, p. 155 (Florida), July, 1913.

COVENANTS TO PAY ADVANCED ROYALTIES DEPENDENT.

A lease of lands for exploring, mining, and shipping all merchantable phosphate rock in or under the leased premises, and binding the lessee to pay royalty on all phosphate rock mined and shipped under the lease while it remained in force at a certain stipulated price per ton payable at certain stated times, the lessee agreeing to mine and ship as a minimum output of phosphate rock certain stated amounts at different stated dates and further agreeing to pay advanced royalties or ground rent up to a certain named amount, whether or not sufficient rock was mined to yield such an amount, at the royalty per ton named, did not authorize the lessor to recover of the lessee the advanced royalties or ground rent, where the lessee demonstrated that there was no merchantable phosphate rock in or under the leased lands, as this covenant was not an independent covenant, and was based upon the assumption that rock of the specified quantity and quality existed in the land; and the contingency sought to be guarded against was the failure to mine, and not the failure to find rock to mine, as the parties assumed and contemplated the existence of the rock as the subject matter of the entire lease.

Ross *v.* Savage, 63 Southern, 148, pp. 150–155 (Florida), July, 1913.

MINING PROPERTIES.

A MORTGAGES
B. TAXATION.
C. TRESPASS.
1. LIABILITY—REMEDY.
2. INNOCENT TRESPASS—MEASURE OF DAMAGES.
3. WILLFUL TRESPASS—MEASURE OF DAMAGES.

A. MORTGAGES.

AUTHORITY OF STOCKHOLDERS TO EXECUTE MORTGAGE—DEFENSE.

The statute of Colorado provides that the board of directors of a mining corporation shall not encumber its mine or machinery without the authority of the stockholders, and makes any mortgage executed without such authority absolutely void; but a mining corporation executing a mortgage in violation of the provision can not, in an action to foreclose such mortgage, defend on the ground that the mortgage has not been authorized by the stockholders, as this defense is available to the stockholders and not to the corporation.

Firestone Coal Co. *v.* McKissick, 134 Pacific, 147, p. 149 (Colorado), July, 1913.

FORECLOSURE SALE—REDEMPTION—EFFECT OF RELOCATION.

A mining company holding a second mortgage on a mining claim could not, in attempting to redeem the property from a sale on the foreclosure of the first mortgage, recover from the original mortgagee who purchased at foreclosure sale the amount of money paid to redeem the property from such sale, where the original mining company failed to perform the annual assessment work and the purchaser subsequently relocated the claim in his own name, and then sold it to the original mining company, where the redemption money was paid with the knowledge that the claim had been relocated.

Copper Belle Mining Co. *v.* Gleeson, 134 Pacific, 285, p. 287 (Arizona), June, 1913.

FORECLOSURE—FRAUD OF CORPORATION AS A DEFENSE.

A mortgagee of mining property whose mortgage was also secured by a trust agreement covering the capital stock of a corporation, which was to be released as payments were made, owed no duty either to the mining company itself or to the purchasers of its capital stock, to have the mortgage placed on record, or to prevent the mining company and its original promoters from entering into a conspiracy for the purposes of defrauding the stockholders and proposed purchasers of the stock of the corporation, and proof of such a conspiracy could constitute no defense to an action to foreclose the mortgage.

Firestone Coal Co. *v.* McKissick, 134 Pacific, 147, p. 149 (Colorado), July, 1913.

FORECLOSURE—AUTHORITY OF STOCKHOLDERS—WAIVER OF DEFENSE.

In an action to foreclose a mortgage given by a coal-mining company on its mining property, a resolution passed at a stockholders' meeting by which the stockholders agreed to accept a note executed by the original promoter of the corporation for an amount equal to the amount of the mortgage, was sufficient to show that the mining company, by direction of its stockholders, had voluntarily accepted the note of the promoter for the amount of the mortgage, and this constituted a waiver of the defense of the foreclosure that the mortgage was not originally authorized by the stockholders.

Firestone Coal Co. *v.* McKissick, 134 Pacific, 147, p. 149 (Colorado), July, 1913.

B. TAXATION.

CONSTITUTIONALITY OF EXCISE-TAX LAW.

The corporation-tax law (36 Stat., 112), imposing a tax on the net income of corporations, is not unconstitutional in its application to mining property on the ground that it imposes a tax on the corpus of mining estates in violation of the Constitution; but the Constitu-

tion permits the law-making power to adopt as a basis for assessing an excise tax that which, if attempted as a matter of direct taxation, would not be permissible, and it may use a nontaxable basis as a standard for an excise tax; and, as applied to mining companies, it permits the net income to be determined by ascertaining the value of ore extracted, after the cost of extraction and treatment, and the cost of administration have been deducted, with a reasonable reservation for contingencies.

Stratton's Independence *v.* Howbert, 207 Fed., 419, p. 421, September, 1913.

NET INCOME.

The law as applied to the net income of a corporation operating a mine under the corporation-tax act (36 Stat., 112) does not contemplate an allowance in favor of the corporation for ore in place extracted from the property; but the net income of mining property for taxing purposes is the proceeds of what is extracted, after the cost of extraction and treatment, and the cost of administering the company conducting the operation have been deducted, and after a reasonable reservation for such contingencies as may in the light of experience be expected.

Stratton's Independence *v.* Howbert, 207 Fed., 419, p. 420, September, 1913. (Affirmed U. S. Sup. Court.)

ALLOWANCE FOR DEPRECIATION—MEANING.

As applied to mining properties the word "depreciation" carries with it, as in the case of other businesses, the idea of deterioration in visible improvements, and in mining properties especially depreciation is viewed as a lessening in value by time, or possibly by accident, of those physical elements that go to develop and to improve the property, but it does not include the extraction of ore as an element of depreciation, and although the taking out of ore is in a sense depreciation from the body, yet it often leads to the discovery of still larger bodies resulting not in a lessening of the value of the property but in an increase in such value; and mining excavation when properly conducted is often more a development than a waste or detraction, and accordingly the mere fact that ore may be extracted does not make the value of such ore an element to be classed and deducted as depreciation of property and therefore can not constitute a credit in favor of a mining corporation on the question of taxation.

Stratton's Independence *v.* Howbert, 207 Fed., 419, p. 421, September, 1913.

TAXATION OF MINERALS—QUARTERLY REPORTS.

The intent of the Oklahoma act of May 26, 1908, as amended by the act of March 27, 1909, requiring persons or corporations engaged in the mining or production of coal, oil, or gas to make quarterly reports,

is to provide for the collection of a tax, whether the mineral is put on the market or used by the producer, and the expression "gross receipts from total production" refers to equivalents in either case and accomplishes the object of obtaining revenues from all production of minerals regardless of use.

Missouri, K. & T. Ry. Co. *v.* Meyer, 204 Fed., 140, p. 143, January, 1913.

TAXATION OF MINERALS—USE AND CONSUMPTION OF COAL.

The Oklahoma statute of May 26, 1908, as amended March 27, 1909, requiring every person or corporation engaged in the mining or production of coal, oil, or gas to make quarterly reports of the production and to pay the State a certain tax on the "gross receipts from total production," does not exempt or relieve a railroad company or other corporation from the duty of making such quarterly reports and paying the tax on the total production because the company uses and consumes the coal mined in the operation of its road or machinery and does not sell or dispose of the coal mined.

Missouri, K. & T. Ry. Co. *v.* Meyer, 204 Fed., 140, p. 143, January, 1913.

COAL MINED FROM INDIAN LANDS.

The Oklahoma statute requiring every person or corporation engaged in the mining or production of coal, oil, or gas to make quarterly reports of all production and pay a certain tax thereon is a tax intended to be laid upon the pursuit of mining and is invalid as applied to leases of coal lands of the Indian tribes and is in effect a burden upon an instrumentality of the Federal Government.

Missouri, K. & T. Ry. Co. *v.* Meyer, 204 Fed., 140, p. 145, January, 1913.

LIABILITY OF LESSEE FOR TAXES ON COAL.

A lease that conveys to the lessee all the coal in place in or under certain tracts of land imposes upon the lessee the obligation of paying all taxes on the coal from the date of the sale, unless otherwise agreed upon, under the rule making a vendee, whether the legal or equitable owner, liable for taxes subsequent to a sale of realty.

Millard *v.* Delaware, etc., R. Co., 87 Atlantic, 601, p. 603 (Pennsylvania), March, 1913.

LIABILITY OF LESSOR AND LESSEE FOR TAXES.

A lease by the owner of coal lands of all merchantable anthracite coal in, upon, or under two certain described tracts of land is in effect a sale of the coal to the lessee and renders him liable for the taxes on such coal; and the fact that the lease expressly requires the lessee to pay the taxes on the surface and on the coal in one tract does not change the rule of law as to the other tract and impose on the lessor the obligation of paying the taxes on the coal in place.

Millard *v.* Delaware, etc., R. Co., 87 Atlantic, 601, p. 603 (Pennsylvania), March, 1913.

C. TRESPASS.

1. Liability—Remedy.
2. Innocent Trespass—Measure of Damages.
3. Willful Trespass—Measure of Damages.

1. LIABILITY AND REMEDY.

INJUNCTION TO PREVENT REMOVAL OF MINERALS.

Where, in an application for an injunction to prevent a trespass and the mining and removal of minerals, it is made to appear that the defendant is in the wrongful possession of the property and is engaged in removing and converting to his own use mineral deposits taken from the mining claim of the plaintiff, and that unless he is restrained he will mine and remove such deposits, it is the duty of a court, in the absence of any legal remedy, to grant an injunction restraining the defendant from committing the alleged trespass, in order to preserve the property pending proceedings at law for the determination of the respective rights of the parties; but the rule does not apply if the defendant has before the commencement of the proceeding mined and converted to his own use the subject of the litigation, as in such case the injunction would afford the plaintiff no remedy.

Martin *v.* Danziger, 132 Pacific, 284, p. 285 (California), March, 1913.

MINING UNDER SUPPOSEDLY VALID LICENSE—LIABILITY.

A mining company that accepted in good faith the assignment of a written article of agreement and option to purchase under the belief that the agreement was valid, and under it entered the premises and mined and removed a certain quantity of coal, was not subject to the Pennsylvania statute imposing a penalty upon any person or corporation that mines or digs out any coal, knowing the same to be on the lands of another person without the consent of the owner, though the agreement and option was subsequently declared invalid.

Rhoades *v.* Quemahoning Coal Co., 86 Atlantic, 273, p. 274 (Pennsylvania), January, 1913.

TRESPASS AND WASTE—ACCOUNTING.

The extraction by one joint tenant of oil and gas without the consent of his cotenant constitutes waste and is a trespass for which he is liable for an accounting to his cotenant.

South Penn Oil Co. *v.* Haught, 78 Southeastern, 759, p. 761 (West Virginia), February, 1913.

BURDEN OF PROOF AS TO NATURE OF TRESPASS.

In an action for the value of ore alleged to have been taken by willful and intentional trespass on the part of the defendant, where the taking is proved or admitted, the burden of proof is upon the defendant to show that the trespass was not willful and intentional, as the

trespass upon the property of another in the absence of any other proof is presumed to be willful and intentional, and the proof that it is not so is solely in the possession of the trespasser, as he alone knows the reason and intent that induced him to commit the trespass.

Liberty Bell Gold Mining Co. *v.* Smuggler-Union Mining Co., 203 Fed., 795, p. 804, March, 1913.

2. INNOCENT TRESPASS—MEASURE OF DAMAGES.

HONEST MISTAKE—EFFECT ON MEASURE OF DAMAGES.

In the taking of coal by one to whom it does not belong the rule is that if the taking was the result of an honest mistake as to the true ownership of the mine, and was not a willful trespass, then the measure of damages is the value of the coal as it was in the mine before it was disturbed, and not its value when dug out and delivered at the mouth of the mine.

Liberty Bell Gold Mining Co. *v.* Smuggler-Union Mining Co., 203 Fed., 795, p. 800, March, 1913.

MINERALS REMOVED BY COTENANT—LIABILITY.

The measure of damages in case of a willful trespass and removal of ore from a mine does not apply to the case of a cotenant who extracted the ore from a mine, although he intended to appropriate it to himself by concealing his acts, caving the stope, and making it difficult and expensive to ascertain the volume and value of the ore taken.

Silver King Coalition Mines Co. *v.* Silver King Consolidated Mining Co., 204, Fed. 166, p. 179, April, 1913.

TRESPASS ON VEIN BELOW SURFACE.

The presumption is that all ore found under the surface of a mining claim belongs to the owner of the claim, and unless a person who has taken ore from under the claim of another can satisfactorily show that the ore was a part of a vein having its top or apex in his claim, and so situated that he is entitled in law to follow such vein on its dip, he is a trespasser and is accountable to the true owner of the surface for the value of the ore taken.

Liberty Bell Gold Mining Co. *v.* Smuggler-Union Mining Co., 203 Fed., 795, p. 805, March, 1913.

8. WILLFUL TRESPASS—MEASURE OF DAMAGES.

INDIFFERENCE AS TO DIVISION LINE OR OWNERSHIP.

Where a party, not under an honest mistake but willfully, crossed a dividing line knowing that he was crossing the line, or if he was indifferent about his possession and did not care or think as to whether he was on his own land or that of another, and thereupon

took and removed coal from the land of another person, it was an intentional and willful trespass and he was liable for the enhanced value of the coal without any deduction for the cost of mining.

Liberty Bell Gold Mining Co. *v.* Smuggler-Union Mining Co., 203 Fed., 795, p. 799, March, 1913.

ENHANCED VALUE OF ORE—PROPER MEASURE OF DAMAGES.

The measure of damages in an action for intentional and willful trespass in taking ore is the enhanced value of the ore at the place and time it was finally converted to the use of defendant.

Liberty Bell Gold Mining Co. *v.* Smuggler-Union Mining Co., 203 Fed., 795, p. 798, March, 1913.

A railroad company wrongfully drilling oil wells and producing oil upon its right of way is liable to the owner of the land for the value of the oil without any deduction for the cost of producing it.

Right of Way Oil Co. *v.* Gladys City Oil, Gas & Mfg. Co., 157 Southwestern, 737, p. 740 (Texas), June, 1913.

In an action for damages for the wrongful taking and conversion of ore it is not error for a court to charge the jury that if the ore was either recklessly, willfully, or intentionally taken by the defendants, then the measure of damages is the enhanced value of the ore at the place and time where it was actually converted.

Liberty Bell Gold Mining Co. *v.* Smuggler-Union Mining Co., 203 Fed., 795, p. 798, March, 1913.

The measure of damages for the reckless, willful, or intentional taking of ore from the land of another without right is the enhanced value of such ore when it has been finally converted to the use of the trespasser, without any allowance for labor bestowed or expense incurred in removing and appropriating the same for market.

Silver King Coalition Mines Co. *v.* Silver King Consolidated Mining Co., 204 Fed., 166, p. 178, April, 1913.

Where the proof establishes a willful and intentional trespass in the taking and removing of ore, the measure of damages recoverable is not the value of the ore at the mouth of the mine, but the plaintiff is entitled to recover the full amount realized by the defendant from the conversion of the ore to his own use, regardless of the expenditures incurred by him in so doing.

Liberty Bell Gold Mining Co. *v.* Smuggler-Union Mining Co., 203 Fed., 795, p. 806, March, 1913.

LIABILITY FOR TREBLE DAMAGES.

A coal company that takes an assignment of an option contract to purchase and mine certain quantities of coal, and believing the option to be valid, enters upon the premises and mines and removes a quantity of coal, is not subject to the liability for treble damages provided

by the statute of Pennsylvania, which subjects a person or corporation that mines or digs out any coal, when knowing the same to be upon the lands of another person without his consent, to treble the amount of such coal.

Rhoades *v.* Quemahoning Coal Co., 86 Atlantic, 273, p. 274 (Pennsylvania), January, 1913.

DAMAGES FOR INJURIES TO MINERS.

A. Elements of Damages—Proof and Extent of Injuries.
B. Damages Excessive—Instance.
C. Damages not Excessive—Instance.

A. ELEMENTS OF DAMAGES—PROOF AND EXTENT OF INJURIES.

INJURIES PROXIMATE RESULT OF NEGLIGENCE.

In an action by a coal miner for personal injuries, it is improper for a court to instruct the jury to the effect that if they should find for the plaintiff they may assess his damages at such a sum as would reasonably compensate him for any physical pain suffered and for any diminution of his earning capacity, as long as such diminution shall exist, where such pain and diminution of earning capacity are the direct and proximate result of the negligence of the mine operator.

Texas & Pacific Coal Co. *v.* Choate, 159 Southwestern, 1058, p. 1059 (Texas Civil Appeals), October, 1913.

INABILITY TO LABOR AND SUPPORT FAMILY.

In an action by a coal miner for damages for injuries received from material falling from the roof, where it was claimed that the injuries wholly incapacitated the plaintiff for the performance of manual labor, it was not proper to prove that the plaintiff had a wife and 6 children from 2 to 16 years of age, as such evidence did not tend to show the character and extent of the injury and had no relevancy as showing the plaintiff's ability to labor.

Bakka *v.* Kemmerer, 134 Pacific, 888, p. 893 (Utah), August, 1913.

PROOF OF OTHER INJURIES.

In an action by a coal miner for damages for injuries caused by coal falling and striking him on the back, it was error for a court to exclude evidence showing that after the alleged injury from the falling coal the plaintiff had been kicked in the back by a mule and had also received injuries to his back by being thrown out of a wagon in the mountains, where the plaintiff alleged and adduced evidence tending to support the allegation that his injury and condition were due solely to the falling coal.

Bakka *v.* Kemmerer, 134 Pacific, 888, p. 894 (Utah), August, 1913.

B. DAMAGES EXCESSIVE—INSTANCE.

A judgment for $7,500 for an injury to a miner was excessive, where the injury was to the miner's foot and caused the loss of his second, third, and fourth toes, where it appeared from the evidence that the injury would not seriously affect the miner's health and that he would not be disabled from doing many kinds of manual labor.

Barter *v.* Stewart Mining Co., 135 Pacific, 68, p. 69 (Idaho), September, 1913.

C. DAMAGES NOT EXCESSIVE—INSTANCE.

In an action for damages for the death of a miner a verdict of $15,000 as damages and $5,000 by way of exemplary damages was not regarded as excessive where the evidence showed that the deceased was a young man in good health, industrious, with an experience of one or more years as a miner and with an expectancy of ability to work more than 29 years, as the amount was not so disproportionate to the damage sustained as to appear at first blush to have resulted from passion or prejudice, where the evidence showed that the operator knew that blasting was being done at irregular hours, that it was dangerous to life for an employee to pass in or out of the entry without notice or warning of the danger, and knew that some of the employees were in the habit of passing in and out of this entry, and that the deceased was a stranger in the mine and knew nothing of the danger in this particular entry, or the danger attendant upon passing out that way, and where the evidence also showed that the foreman, with knowledge of this danger, took the deceased and other employees to or near this new entry and directed them and caused them to come out that way, without giving any notice or warning of the danger to their lives.

Continental Coal Corporation *v.* Cole, 159 Southwestern, 668, p. 670 (Kentucky), October, 1913.

QUARRIES—OPERATIONS.

WHAT CONSTITUTES A QUARRY.

A contract for the purchase of a tract of land containing stone granting the right to establish quarries and to quarry stone upon the land, and providing that on failure to quarry stone upon the premises during the period of five years from date the agreement should cease, is sufficiently complied with where the purchaser immediately proceeds to clear and grade the land for the purpose of drilling and blasting, and drills holes and blasts stone, though the stone thus blasted is not subsequently reduced to commercial form.

Fisk *v.* Shore Line Electric R. R. Co., 87 Atlantic, 876 (Connecticut), July, 1913.

BLASTING ROCK—LIABILITY OF OPERATOR.

For the ordinary discomforts and injurious effects attendant upon the lawful operations of a stone quarry upon the premises of the owner and operator, not constituting a legal nuisance, there is no

liability to an adjoining or neighboring proprietor except for some proximate negligence in the mode or circumstances of such operations.

Birmingham Realty Co., Ex parte, 63 Southern, 67, p. 68 (Alabama), June, 1913.

GIVING RIGHT TO BLAST—ESTOPPEL.

A conveyance by the owner of land of "all the rock and stone, both surface and subsurface, located on" the land described and giving to the grantee the right and easement of said land in any way whatever that may be necessary or expedient to quarry, blast, crush, and remove all the stone and rock authorizes the grantee to operate a stone quarry on the land by blasting, and the grantor can not recover for damages caused by stones falling upon his adjacent land and injuring his property.

Spencer *v.* Mayor and Council of Gainesville, 79 Southeastern, 543 (Georgia), September, 1913.
Birmingham Realty Co., Ex parte, 63 Southern, 67, p. 68 (Alabama), June, 1913.

INJURY TO ADJOINING PREMISES—PRUDENT OR NEGLIGENT OPERATION—TRESPASS.

The owner and operator of a stone quarry who by blasting throws rock and other débris upon the premises of an adjoining or neighboring proprietor is guilty of a direct invasion and a trespass for which he is absolutely liable, regardless of any considerations of prudence or negligence in the mode or circumstances of the blasting, unless he has by law or contract acquired an easement against the adjoining premises that expressly or impliedly authorizes the operations of blasting, either directly or as a reasonably necessary incident to some other lawful purpose, when liability arises only as the result of some proximate negligence on the part of the operator.

Birmingham Realty Co., Ex parte, 63 Southern, 67, p. 68 (Alabama), June, 1913.
Spencer *v.* Mayor and Council of Gainesville, 79 Southeastern, 543 (Georgia), September, 1913.

ASSUMPTION OF RISK—INJURY TO WORKMAN.

Where it was customary in the operation of a quarry for the superintendent or foreman to inspect drilled holes in which small quantities of powder were exploded for the purpose of enlarging them, a laborer directed to reload such drilled holes did not assume, while so reloading, the risk of injury from an explosion due to unextinguished fire in the hole, where he was not informed that the foreman had not inspected the hole after the enlarging shot had been made.

Taylor *v.* Atchison Gravel, Sand & Rock Co., 135 Pacific, 576, p. 577 (Kansas), October, 1913.

RIGHT OF LABORER TO RELY ON TESTS—DUTY OF SUPERINTENDENT.

A miner or quarryman was entitled to recover for damages caused by an explosion where in the operation of the quarry a small charge of powder was exploded for the purpose of enlarging a drill hole so that it would receive a larger quantity of explosives, and where the custom in such cases was for the superintendent to test the hole and see that no fire remained before the hole was loaded for blasting, and where the injured quarryman was directed by the superintendent to load the hole and was informed that it was safe, and where he knew the custom and believed the test had been made by the superintendent, and where, while relying on this belief, he attempted to load the hole and was injured by the powder being exploded because of fire remaining in the hole.

Taylor *v.* Atchison Gravel, Sand & Rock Co., 135 Pacific, 576 (Kansas), October, 1913.

DUTY TO INSTRUCT WORKMAN—FOREMAN'S NEGLIGENCE.

The action of a foreman in charge of a stone quarry in taking a workman from a safe work that he was employed to do and putting him at the hazardous work of "squibbing" the holes, work with which he was unfamiliar, was the act of the master, and it was the master's duty on putting him at such hazardous work to give him proper instructions and to warn him of the dangers of which he was ignorant, and the failure of the foreman to so instruct the workman made the master liable for an injury, as the foreman's negligence in such case was the negligence of the employer or master.

Mahoney *v.* Cayuga Lake Cement Co., 101 Northeastern, 802, p. 803 (New York), April, 1913.

FAILURE OF FOREMAN TO INSTRUCT WORKMAN.

An employee in a quarry when ordered from the safe work at which he was employed, and directed to explode dynamite cartridges in a hole in the rock, work with which he was wholly unfamiliar, had the right to assume that he had time enough without undue haste to shove the cartridge to the bottom of the hole and reach a safe place before the explosion; and although the act of a foreman in preparing the squib with a short fuse may be the act of a fellow servant, yet the act of the foreman in placing an inexperienced workman at such hazardous work without instructing him as to the length of time it would take the fuse to burn was the act of the employer, whose duty to so instruct could not be delegated.

Mahoney *v.* Cayuga Lake Cement Co., 101 Northeastern, 802, p. 803 (New York), April, 1913.

INJURY FROM DEFECTIVE CABLE.

A judgment for damages for injuries caused to an employee in a quarry by the breaking of a cable used in hoisting stone was fully supported by the evidence where it was shown that the cable had been subjected to undue strains by lifting heavier loads than it was adapted for, that some of its strands of wires had become broken, that it was so weakened as to be unsafe for the purpose for which it was used, and that the operator of the quarry had not taken proper care in inspecting it and in not discovering its weakened condition and in permitting it to be used, and where from the breaking of the cable under such circumstances the inference was that it had become unsound.

Golden *v.* Mannex, 101 Northeastern, 1081 (Massachusetts), May, 1913.

BLASTING—INJURY TO WELL—OPINION EVIDENCE.

In an action for damages for loss of water in a well resulting from a heavy explosion of powder on an adjoining railroad right of way, it was proper to permit mining engineers who had had experience in the use of explosives in large quantities to answer hypothetical questions involving facts that the evidence tended to establish and to express the opinion that the explosion caused the loss of the water.

Patrick *v.* Smith, 134 Pacific, 1076, p. 1077 (Washington), September, 1913.

PUBLICATIONS ON MINE ACCIDENTS AND METHODS OF MINING.

The following Bureau of Mines publications may be obtained free by applying to the Director, Bureau of Mines, Washington, D. C.

BULLETIN 10. The use of permissible explosives, by J. J. Rutledge and Clarence Hall. 1912. 34 pp., 5 pls., 4 figs.

BULLETIN 17. A primer on explosives for coal miners, by C. E. Munroe and Clarence Hall. 61 pp., 10 pls., 12 figs. Reprint of United States Geological Survey Bulletin 423.

BULLETIN 20. The explosibility of coal dust, by G. S. Rice, with chapters by J. C. W. Frazer, Axel Larsen, Frank Haas, and Carl Scholz. 204 pp., 14 pls., 28 figs. Reprint of United States Geological Survey Bulletin 425.

BULLETIN 42. The sampling and examination of mine gases and natural gas, by G. A. Burrell and F. M. Seibert. 1913. 116 pp., 2 pls., 23 figs.

BULLETIN 46. An investigation of explosion-proof mine motors, by H. H. Clark. 1912. 44 pp., 6 pls., 14 figs.

BULLETIN 48. The selection of explosives used in engineering and mining operations, by Clarence Hall and S. P. Howell. 1913. 50 pp., 3 pls., 7 figs.

BULLETIN 50. A laboratory study of the inflammability of coal dust, by J. C. W. Frazer, E. J. Hoffman, and L. A. Scholl, jr. 1913. 60 pp., 95 figs.

BULLETIN 52. Ignition of mine gases by the filaments of incandescent electric lamps, by H. H. Clark and L. C. Ilsley. 1913. 31 pp., 6 pls., 2 figs.

BULLETIN 56. First series of coal-dust explosion tests in the experimental mine, by G. S. Rice, L. M. Jones, J. K. Clement, and W. L. Egy. 1913. 115 pp., 12 pls., 28 figs.

BULLETIN 60. Hydraulic mine filling; its use in the Pennsylvania anthracite fields; a preliminary report, by Charles Enzian. 1913. 77 pp., 3 pls., 12 figs.

BULLETIN 61. Abstract of current decisions on mines and mining, October, 1912, to March, 1913, by J. W. Thompson. 1913. 82 pp.

BULLETIN 62. National mine-rescue and first-aid conference, Pittsburgh, Pa., September 23–26, 1912, by H. M. Wilson. 1913. 74 pp.

BULLETIN 68. Electric switches for use in gaseous mines, by H. H. Clark and R. W. Crocker. 1913. 40 pp., 6 pls.

BULLETIN 69. Coal-mine accidents in the United States and foreign countries, compiled by F. W. Horton. 1913. 102 pp., 3 pls., 40 figs.

TECHNICAL PAPER 4. The electrical section of the Bureau of Mines, its purpose and equipment, by H. H. Clark. 1911. 12 pp.

TECHNICAL PAPER 6. The rate of burning of fuse as influenced by temperature and pressure, by W. O. Snelling and W. C. Cope. 1912. 28 pp.

TECHNICAL PAPER 7. Investigations of fuse and miners' squibs, by Clarence Hall and S. P. Howell. 1912. 19 pp.

TECHNICAL PAPER 11. The use of mice and birds for detecting carbon monoxide after mine fires and explosions, by G. A. Burrell. 1912. 15 pp.

TECHNICAL PAPER 13. Gas analysis as an aid in fighting mine fires, by G. A. Burrell and F. M. Seibert. 1912. 16 pp., 1 fig.

TECHNICAL PAPER 14. Apparatus for gas-analysis laboratories at coal mines, by G. A. Burrell and F. M. Seibert. 1913. 24 pp., 7 figs.

TECHNICAL PAPER 17. The effect of stemming on the efficiency of explosives, by W. O. Snelling and Clarence Hall. 1912. 20 pp., 11 figs.

TECHNICAL PAPER 18. Magazines and thaw houses for explosives, by Clarence Hall and S. P. Howell. 1912. 34 pp., 1 pl., 5 figs.

TECHNICAL PAPER 19. The factor of safety in mine electrical installations, by H. H. Clark. 1912. 14 pp.

TECHNICAL PAPER 21. The prevention of mine explosions, report and recommendations, by Victor Watteyne, Carl Meissner, and Arthur Desborough. 12 pp. Reprint of United States Geological Survey Bulletin 369.

TECHNICAL PAPER 22. Electrical symbols for mine maps, by H. H. Clark. 1912. 11 pp., 8 figs.

TECHNICAL PAPER 24. Mine fires, a preliminary study, by G. S. Rice. 1912. 51 pp., 1 fig.

TECHNICAL PAPER 28. The ignition of mine gas by standard incandescent lamps, by H. H. Clark. 1912. 6 pp.

TECHNICAL PAPER 30. Mine-accident prevention at Lake Superior iron mines, by D. E. Woodbridge. 1913. 38 pp., 9 figs.

TECHNICAL PAPER 39. Inflammable gases in mine air, by G. A. Burrell and F. M. Seibert. 1913. 24 pp., 2 figs.

TECHNICAL PAPER 40. Metal-mine accidents in the United States during the calendar year 1911, compiled by A. H. Fay. 1913. 54 pp.

TECHNICAL PAPER 41. The mining and treatment of lead and zinc ores in the Joplin district, Mo.; a preliminary report, by C. A. Wright. 1913. 43 pp., 5 figs.

TECHNICAL PAPER 43. The influence of inert gases on inflammable gaseous mixtures, by J. K. Clement. 1913. 24 pp., 1 pl., 8 figs.

TECHNICAL PAPER 44. Safety electric switches for mines, by H. H. Clark. 1913. 8 pp.

TECHNICAL PAPER 46. Quarry accidents in the United States during the calendar year 1911, compiled by A. H. Fay. 1913. 32 pp.

TECHNICAL PAPER 47. Portable electric mine lamps, by H. H. Clark. 1913. 13 pp.

TECHNICAL PAPER 48. Coal-mine accidents in the United States, 1896–1912, with monthly statistics for 1912, compiled by F. W. Horton. 1913. 74 pp., 10 figs.

TECHNICAL PAPER 52. Permissible explosives tested prior to March 1, 1913, by Clarence Hall. 1913. 11 pp.

TECHNICAL PAPER 55. The production and use of brown coal in the vicinity of Cologne, Germany, by C. A. Davis. 1913. 15 pp.

TECHNICAL PAPER 58. The action of acid mine water on the insulation of electric conductors; a preliminary report, by H. H. Clark and L. C. Ilsley. 1913. 26 pp., 1 fig.

TECHNICAL PAPER 59. Fires in the Lake Superior iron mines, by Edwin Higgins. 1913. 34 pp., 2 pls.

TECHNICAL PAPER 61. Metal-mine accidents in the United States during the calendar year 1912, compiled by A. H. Fay. 1913. 76 pp., 1 fig.

MINERS' CIRCULAR 3. Coal-dust explosions, by G. S. Rice. 1911. 22 pp.

MINERS' CIRCULAR 4. The use and care of mine-rescue breathing apparatus, by J. W. Paul. 1911. 24 pp., 5 figs.

MINERS' CIRCULAR 5. Electrical accidents in mines; their causes and prevention, by H. H. Clark, W. D. Roberts, L. C. Ilsley, and H. F. Randolph. 1911. 10 pp., 3 pls.

MINERS' CIRCULAR 6. Permissible explosives tested prior to January 1, 1912, and precautions to be taken in their use, by Clarence Hall. 1912. 20 pp.

MINERS' CIRCULAR 7. The use and misuse of explosives in coal mining, by J. J. Rutledge, with a preface by J. A. Holmes. 1913. 52 pp., 8 figs.

MINERS' CIRCULAR 8. First-aid instructions for miners, by M. W. Glasgow, W. A. Raudenbush, and C. O. Roberts. 1913. 66 pp., 46 figs.

MINERS' CIRCULAR 9. Accidents from falls of roof and coal, by G. S. Rice. 1912. 16 pp.

MINERS' CIRCULAR 10. Mine fires and how to fight them, by J. W. Paul. 1912. 14 pp.

MINERS' CIRCULAR 11. Accidents from mine cars and locomotives, by L. M. Jones. 1912. 16 pp.

MINERS' CIRCULAR 12. The use and care of miners' safety lamps, by J. W. Paul. 1913. 16 pp., 4 figs.

MINERS' CIRCULAR 13. Safety in tunneling, by D. W. Brunton and J. A. Davis. 1913. 19 pp.

MINERS' CIRCULAR 14. Gases found in coal mines, by G. A. Burrell and F. M. Seibert. 1913. 23 pp.

MINERS' CIRCULAR 15. Rules for mine-rescue and first-aid field contests, by J. W. Paul. 1913. 12 pp.

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