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VAN. H. MANNING, DIRECTOR

ABSTRACTS OF CURRENT DECISIONS

ON

MINES AND MINING

REPORTED FROM
MAY TO SEPTEMBER, 1915

BY

J. W. THOMPSON

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PREFACE.

This bulletin is the fifth of its kind to be published by the Bureau of Mines, the four preceding being Bulletins 61, 79, 90, and 101.

The wide demand for the information contained in these bulletins has led the bureau to decide 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.

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.

VAN. H. MANNING.

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By J. W. Thompson.

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MINERALS.

OIL AND GAS AS MINERALS.

Oil and gas within the ground are minerals and the fact that they have attributes not common to other minerals because of their fugitive nature or vagrant habit, and the disposition to percolate, and the possibility of their escape from beneath one part of the surface to another, does not remove them from the class of minerals.

Texas Co. *v.* Daugherty (Texas), 176 Southwestern, 717, p. 719, May, 1915.

OWNERSHIP OF TAILINGS—ABANDONMENT.

A corporation engaged in milling and the reduction of ores deposited the tailings therefrom upon a portion of its own land lying in a gulch through which water flows at times in great volumes and with great force and notwithstanding all reasonable efforts by dams and otherwise to retain its tailings, the tailings eventually were forced upon the lands of an adjoining owner; these tailings were valuable and their retreatment, intended by the mill owner, profitable; and the fact that the tailings were so washed down upon the lands of the adjoining owner and permitted to accumulate and remain for some considerable time is not sufficient to show an abandonment on the part of the owner of the tailings, where it is clear that the owner had no intention of so doing, but on the contrary, always intended to conserve and retreat the tailings.

Goldfield Consolidated Milling, etc., Co. *v.* Old Sandstrom Annex Gold Mining Co. (Nevada), 150 Pacific, 313, p. 317, July, 1915.

SALE AND CONVEYANCE.

CONSTRUCTION OF DEED.

All parts of a deed conveying mining property must be construed together without regard to its mere formal divisions.

Brier Hill Collieries *v.* Gernt (Tennessee), 175 Southwestern, 560, p. 561, January, 1915.

CONSTRUCTION OF DEED—CONVEYANCE LIMITED TO INTEREST OF GRANTOR.

A deed conveying certain described mineral lands and providing that the grantors convey and assign all their right, title, claim, and interest in and to the property described as fully as the same is in them vested, and not otherwise, limits the previous conveying words and confines and restricts them to such right, title, and interest only in the lands described as was at the time vested in the vendors; and such a deed does not purport to convey, and does not convey, a tract of land previously conveyed to another person, though included within the description contained in the deed, and the conveyance in such case does not operate even as color of title to such prior conveyed tract.

Brier Hill Collieries *v.* Gernt (Tennessee), 175 Southwestern, 560, p. 561, January, 1915.

SALE OF SURFACE—RESERVATION OF EASEMENT—CONSTRUCTION OF DEED.

A deed conveying the surface of certain mineral lands described, with a reservation to the grantor of minerals and the usual mining rights and certain parts of a river and creek bank, together with a "right to build railroads through said lands in order to reach other lands beyond and above," is not to be limited to the lands then owned by the grantor, as distinguished from those that he might afterwards acquire, where it appears that the grantor was engaged in acquiring mineral lands and in bodying them up so as to make profitable mining propositions, and in such case it will be presumed that the grantor reserved the rights described in the deed in his own interest and in that of his heirs and assigns and for the purposes of the occupation and projects in which he was then engaged; and it would appear to be equally advantageous to reserve the right to build railroads to reach lands to which the grantor never got title, as it might be impossible for him to utilize, either by mining or sale, his lands except in connection with the adjoining lands of others, and it is reasonable that the reservation was intended to cover such lands, as it was probable that the grantor or his heirs might be interested in having served by the railroad, in connection with his own lands "above and beyond" the lands described; and it seems reasonable that the grantor intended the reservation to be as broad as the necessity, and if the necessity included other lands than those then owned by him or those thereafter acquired by him, it should be held to extend to and cover such other lands.

Oak Leaf Coal Co., In re, 225 Federal, 126, p. 127, July, 1915.

CONTRACT OF PURCHASE—CONSIDERATION—ARBITRARY PRICE.

A mining corporation whose specific operations have failed and its plant has been destroyed, its mines closed and flooded, and its opera-

tions expensive and unprofitable for a long period of years, can not be compelled to borrow unnecessarily large sums of money to pay its debts and expenses, or to enable it to rehabilitate its mines and experiment and explore unworkable bodies of ore; and under such conditions there is common law power, coextensive with any possibly given by statutes or articles, and without unanimous consent of the stockholders to sell the property of the corporation and the fact that it has large bodies of unworkable zinc and silver ore, and much virgin ground will not make the sale at any arbitrary price necessarily illegal where there is no market value for such properties and where it is impossible to ascertain an accurate value or a certain basis for ascertaining the value of its properties.

Geddes *v.* Anaconda Copper Min. Co., 222 Federal, 129, p. 131, May, 1915.

CONTRACT OF PURCHASE—EFFECT AND QUIETING TITLE.

A contract which transfers and assigns an estate in mining property and at the same time withholds from the transferee or assignee all right of control over such property, is lacking in the elements of a sale or transfer of title, and vests no rights of ownership or title in the transferee, for the reason that a person who has no right to control, handle, or dispose of a mine can not be considered its owner, as the essential attributes of ownership of property are the rights in the owner to control, handle, and dispose of the thing owned; and in an action to quiet title to such mining property such a contract is no evidence of title and will not authorize a judgment quieting title in the mining property to the promisee.

Hardinge *v.* Empire Zinc Co. (Arizona), 148 Pacific, 306, p. 312, May, 1915.

CONTRACT FOR UNDIVIDED INTEREST—RESERVING CONTROL AND DISPOSAL.

A mining corporation holding options to lease and purchase mining property, transferred and assigned, by the officers and persons in whose names the contract was made, an undivided one-twentieth interest in the mining properties described to a certain named stockholder, subject to the control, handling, and disposal by the officers and persons in whose names the contract was executed, as in their judgment shall seem best for all concerned. This limiting clause was understood and construed by the assignee to the effect that he had no control of his interest but that such interest was subject to the control of the persons named and with power to sell and dispose of the same at the same rate and on the same conditions that they should sell their own, and the contract thus construed and the words of the contract all considered make clear that it was the purpose and intention of the parties to secure to such assignee a one-twentieth interest of the property asset, and there was no intention of conveying to

him any interest in the title to such asset, the mining property itself, and the purpose was to withhold from such assignee the right to control and dispose of his interest and not to make the contract in effect a conveyance of title to the property described. And under this contract the assignee could not maintain an action to quiet the title to his undivided interest.

Hardinge *v.* Empire Zinc Co. (Arizona), 148 Pacific, 306, p. 310, May, 1915.

CONTRACT FOR SALE OF MINERAL LANDS—RELIEF.

Equity will not entertain a suit to cancel a contract for the sale of a large tract of mineral lands, alleged to be valuable for mining purposes, on the ground that it was procured by fraudulent representations or on the ground that such an executory contract is a cloud upon the complainant's title, as in such case the complainant has a full, adequate, and complete remedy at law, either by action or defense, as the contract involved is simply executory.

Big Huff Coal Co. *v.* Thomas (West Virginia), 85 Southeastern, 171, p. 173, April, 1915.

CONTRACT OF PURCHASE—CONSTRUCTION AND EFFECT.

The execution of a written instrument by the owner of certain described mining land whereby he offered and agreed to sell to the person named therein for a stated consideration a certain part to be paid in cash as soon as an engineer's report upon the property was completed and abstracts of title to the property had been examined by an attorney of the purchasing party, a deed for the property was delivered and possession given, and the remainder of the consideration to be paid in three equal annual installments, with 6 per cent interest per annum, to be secured by deed of trust on the property, is a contract for the sale of the property described; and the fact that it was left to the purchaser or his attorney to determine the question of the sufficiency of title did not affect its force as a contract for the sale of the property, for the reason that a purchaser under such circumstances can not arbitrarily or capriciously or in bad faith say there was no title shown when in fact a title was shown; neither does a further provision giving the purchaser the right to have the land surveyed and mapped and to have it examined and reported upon by an engineer before making the first payment affect the validity of the agreement, as the taking of the property by the purchaser was not conditioned upon either a favorable or an unfavorable report of the engineer, and as the evident purpose of this provision was to give the purchaser time in which to make his first payment and also to enable him to ascertain such facts as would help him organize an intended corporation to handle

and hold the property; and neither of these provisions, nor bad faith combined, have the effect of making the agreement an option agreement on the part of the purchaser to purchase the land.

Knisely *v.* Leathe (Missouri), 178 Southwestern, 453, p. 455, June, 1915.

OPTION AGREEMENT TO PURCHASE—ACCEPTANCE.

A contract by which a purchaser undertook and agreed to pay a certain consideration in stipulated payments for mining property on the seller furnishing an abstract of title and delivering the deed, the deferred payments to be secured by a deed of trust, is binding on the purchaser on the performance of the conditions imposed upon the seller, and though it may be regarded as an option agreement to purchase, is accepted by the purchaser where after the delivery of the abstracts and the tender of the deed the purchaser sent his engineer to examine and report upon the mine, and the engineer did examine and make maps of the mine and made full reports to the purchaser.

Knisely *v.* Leathe (Missouri), 178 Southwestern, 453, p. 455, June, 1915.

CONDITIONAL SALE—FORFEITURE—RIGHT TO RECOVER PURCHASE MONEY.

Where a vendor of mineral lands and mining claims declares a forfeiture under the terms of the conveyance, he can not thereafter sue and recover for an unpaid installment of the purchase price.

Croup *v.* Humboldt Quartz & Placer Mining Co. (Washington), 151 Pacific, 493, September, 1915.

SPECIFIC PERFORMANCE OF CONTRACT OF PURCHASE—DESCRIPTION OF CLAIM.

In an action by a seller to compel the performance of a contract to purchase certain mining claims, the complaint is not insufficient either because it fails to describe the mining claims or because it describes them differently from the contract where the contract itself is filed with the complaint as an exhibit, as this sufficiently establishes the identity of the apparently different descriptions.

Ehrhart *v.* Mahony (California), 148 Pacific, 934, May, 1915.

ACTION TO ENFORCE SPECIFIC PERFORMANCE—ALLEGATION AS TO CONSIDERATION.

A vendor of mining claims can not enforce specific performance of a contract of purchase where he fails to allege and prove facts showing that there was an adequate consideration for the obligation sought to be enforced, or that the contract was just and reasonable as to the purchaser, as such facts must be alleged and proved in a suit for the specific performance of a contract of purchase.

Ehrhart *v.* Mahony (California), 148 Pacific, 934, p. 935, May, 1915.

AGREEMENT TO DEVELOP MINE AND RECONVEY—EFFECT OF LACHES.

Where lands supposed to be valuable for minerals were conveyed under a trust arrangement and agreement by which the grantee agreed to develop the lands and operate the same for mining purposes and to receive the issues, rents, and profits, and bound himself to reconvey the lands to the grantor when he had received as such rents and profits and products of the mines the amount of money which he had paid out, together with interest thereon, and where after a long delay there was nothing to show that the mines yielded a profit within a reasonable number of years sufficient to reimburse the grantee, and where subsequently the grantee conveyed an undivided interest in the property to other persons without any declaration of trust, and some 13 years later the land was conveyed by the tenants in common in trust to secure performance of certain covenants entered into by a certain mining corporation, which had agreed to purchase the land for the purpose of mining the same, and subsequently abandoned its rights under the contract, and where subsequent grantees held and occupied the land for a period of more than 30 years, the delay for such time before seeking to enforce the original trust is such laches as would bar relief, and the subsequent conveyance was such a repudiation of the trust as would set in operation the statute of limitations. Neither can the original conveyance of the mineral land on the trust to develop the mine and reconvey when the profits of the mine equaled the original consideration with interest, be regarded as a mortgage where the vendors were not debtors to the vendee, but the transaction partakes more of the nature of a defeasible purchase, but if regarded as a mortgage it would be barred by the statute of limitations.

Coxe *v.* Carson (North Carolina), 85 Southeastern, 224, p. 225, May, 1915.

VENDOR'S LIEN—ACTION FOR PURCHASE PRICE NOT A WAIVER.

Where the vendor of mining property retains the legal title, a proceeding at law for the purchase price is not a waiver of his right to proceed against the property.

Ehrhart *v.* Mahony (California), 148 Pacific, 934, May, 1915.

BROKER'S COMMISSION—RIGHT TO RECOVER.

Where an agent or broker is employed by the owner of mining property to secure a purchaser and the agent brings to the owner a purchaser for such mining property, and the owner enters into a contract of his own making with the purchaser so furnished, the owner thereby accepts the purchaser so found by the broker, and

the broker's commission is then due, although it may afterwards turn out that the customer was not financially able to buy.

Knisely *v.* Leathe (Missouri), 178 Southwestern, 453, p. 459, June, 1915.

FRAUDULENT REPRESENTATIONS—CANCELLATION OF INSTRUMENT—ESTOPPEL.

An action to rescind a contract of purchase of a mining lease on the ground of fraud and false representations as to the minerals and quantity of ore can not be maintained where the purchaser became aware of the failure of the mining property in the principal particulars to come up to the representations and where, after acquiring such knowledge, he continued in its ownership and use and thereby elected to stand by the contract, as in order to rescind he must act promptly on first discovering the fraud.

Greenstreet *v.* Walsch (Missouri Appeals), 176 Southwestern, 1062, p. 1063, May, 1915.

FRAUD—BELIEF AS TO EXISTENCE OF CONTRACT OF PURCHASE—RIGHT TO ENFORCE.

A person who is fraudulently led to believe that a certain contract for the purchase of mining property was in writing and contained certain terms and stipulations for his protection and acted upon such belief to his prejudice has the right to enforce the contract against the person defrauding him.

Davenport *v.* Burke (Idaho), 149 Pacific, 511, June, 1915.

SURFACE AND MINERALS—OWNERSHIP AND SEVERANCE.

SEPARATION OF MINERAL AND SURFACE ESTATES.

The owner of mineral lands whether platted or not has the power to convey the surface to one person and the mineral below the surface to another, or he may convey either the surface or the underlying mineral to one person and retain the remaining part of the estate to himself.

Hyde Park Investment Co. *v.* Glenwood Coal Co. (Iowa), 153 Northwestern, 181, p. 184, June, 1915.

BURDEN OF PROOF TO SHOW TITLE IN MINERAL GRANTEE.

Where the description of land conveyed is couched in such general terms that it may cover two or more tracts of land, the ambiguity is a latent one and parol evidence is admissible to show which tract was meant; and the grantee of oil and minerals in and under a part of

one tract included in such ambiguous description has the burden of showing, as against a grantee of other parts of such ambiguous description, that his deed covered, and that his mineral rights apply to, the particular tract in controversy.

Virginia Iron, Coal & Coke Co. *v.* Combs (Kentucky), 177 Southwestern, 238, June, 1915.

RESERVATION OF MINERALS IN DEDICATORY PLAT—EFFECT OF RECONVEYANCE BY QUITCLAIM DEED.

The owner of a large tract of land containing valuable coal deposits conveyed the same to an investment company for the purpose of platting it into lots as an addition to the city of Des Moines. At the time of the execution of the deed a mortgage was given by the purchaser to secure the principal part of the unpaid purchase price. The investment company immediately platted the land into lots and in the dedicatory statement accompanying the plat the investment company expressly reserved the coal and minerals of all kinds underlying the entire tract embraced by the plat with the right to mine and remove the coal. Subsequently numerous lots were sold by the company, but the enterprise not proving successful and the mortgagor failing to pay the installments of the mortgage, the original owner, in the course of time through various tax sales and sheriff's sales reacquired title to a large part of the lots composing the tract now in controversy, and the subject matter of the present suit. The original grantee, the investment company, desiring to avoid foreclosure proceedings and a possible deficiency judgment, proposed to and did reconvey by quitclaim deed to the original grantor the part of the tract so reacquired by such tax and sheriff's sales, but no reference in such quitclaim deed was made to the mineral rights or coal, as reserved by the investment company in its original plat. After thus reacquiring title and obtaining the equity of redemption by quitclaim deed from the mortgagor, the original grantee, the original grantor resold the reacquired part to a third person who thereupon leased the same to a coal company for the purpose of developing and mining the coal. The quitclaim deed so executed by the investment company was held sufficient to convey all its rights, title, and interest in and to the land as well as to the mineral rights and coal as against the reservation made by it in its plat of the land, and the investment company had no right or equity on which it could base a suit to enjoin the coal company from mining and remove the coal under its lease from the grantee of the original grantor.

Hyde Park Investment Co. *v.* Glenwood Coal Co. (Iowa), 153 Northwestern, 181, p. 184, June, 1915.

CONVEYANCE OF PLATTED LOTS—EFFECT ON MINERAL RIGHTS AS AGAINST RESERVATION IN PLAT.

The mere platting of the surface of mineral lands in town lots does not affect the nature or solidarity or integrity of the estate of the owner in the land as one individual entity, except as his rights may be affected by the streets and grounds which he has dedicated to the public, but he is still the owner of the property and holds it by precisely the same title as before and may sell and convey the surface above and the mineral below, or separately, as he choses; and if the owner after making and recording such plat conveys a lot by a description such as would be regarded as sufficient to convey the entire title in ordinary cases, there is no conclusive presumption that such conveyance was executed, delivered, and accepted with the understanding that it should convey the surface right only, as against a general reservation of minerals underlying the entire tract expressly stated in the plat.

Hyde Park Investment Co. *v.* Glenwood Coal Co. (Iowa), 153 Northwestern, 181, p. 184, June, 1915.

COAL AND COAL LANDS.

SALE OF COAL IN PLACE—SPACE LEFT BY REMOVAL OF COAL.

Where there has been an absolute sale of the mineral lying under land and a severance of the estate in the mineral from the estate in the surface, the title obtained by the owner of the mineral is an estate in fee, terminating when the mine has been exhausted; and where there are no restrictions in the grant, reservation, or exception which creates the estate, the space which may be left by the removal of the mineral and so much of the containing strata as may be reasonably required for the mining operations, remains a part of the property of the mineral owner only until the exhaustion of the mine and may be used by him during the continuance of the estate as he may see fit, provided that such use does no injury to the surface, and this right of use includes the right to haul mineral and turn water through such space from other mines.

Sharum *v.* Whitehead Coal Mining Co., 223 Federal 282, p. 290, April, 1915.
See Moore *v.* Indian Camp Coal Co., 75 Ohio State, 493, 80, Northeastern, 6.
Lillibridge *v.* Lackawana Coal Co., 143, Pacific 293, 22 Atlantic, 1035.

ACTION FOR POSSESSION—DISCLAIMER—MINERAL RIGHTS.

In an action for the possession of mineral lands without any reference to the severance of the surface and underlying minerals, the plaintiff can not recover as to the specific underlying minerals in the disputed ground, where he makes no claim or demand and offers no

proof as to such underlying mineral other than that shown in respect of the soil; and where there was no suggestion in the evidence of a severance between the soil and the minerals, or of a right to minerals more extensive than the soil to which he showed title; and the fact that the defendant disclaimed the mineral rights because they were reserved by his grantor, does not give the plaintiff under his evidence a right to a judgment to the mineral rights separate from his title to the surface as proved by him.

Martin *v.* Howard (Alabama), 68 Southern, 982, p. 983, May, 1915.

CONVERSION—INSTRUCTION AS TO MEASURE OF DAMAGES—DUTY OF PARTY TO REQUEST.

In an action by one land owner against another for mining and converting coal, an instruction to the effect that if the jury believe from the evidence that the defendant mined the coal from the plaintiff's land and converted the coal to its own use and at the time of the mining and conversion the land was the property of the plaintiff, then the plaintiff will be entitled to recover and they should assess his damages at what they think would be reasonable and right under the evidence—not to exceed the amount of his complaint, is not erroneous or prejudical error, though the instruction did not purport to define rules by which the amount should be ascertained under the evidence; and if the defendant conceived that the instruction was deficient in not so defining the method of ascertainment of damages it was its duty to request a definite instruction on the proposition.

Aldrich Mining Co. *v.* Pierce (Alabama), 68 Southern, 901, p. 902, May, 1915.

MINING AND CONVERTING COAL—ADVERSE POSSESSION.

In an action by a land owner against a mining company, the owner of adjoining land, for wrongfully mining and converting coal under the plaintiff's land, the defendant is liable where the evidence shows that the coal was mined under the plaintiff's land, and the defense of adverse possession can not prevail where the evidence shows that the defendant's possession was under claim of right and hostile to plaintiff's possession, only up to the true line between the sections in which the plaintiff's and defendant's lands respectively lay.

Aldrich Mining Co. *v.* Pierce (Alabama), 68 Southern, 901, p. 902, May, 1915.

EJECTMENT—LEGAL TITLE PREVAILS OVER EQUITABLE.

In an action for the possession of coal, iron ore, fire clay, and other minerals on a certain tract of land, proof on the part of the plaintiff

showing a prior legal title from a common source will entitle him to recover as against an equitable title from the same common source.

Clinchfield Coal Corporation *v.* Steinman, 223 Federal, 743, p. 746, May, 1915.

ADVERSE POSSESSION INSUFFICIENT.

The masting of hogs or the grazing of cattle on inclosed mineral land will not constitute adverse possession as these are in the same category with other fitful acts of possession, such as the occasional cutting of timber, mowing of hay, or digging of coal, which are generally regarded as insufficient to sustain a plea of limitation.

Kentucky Coal Lands Co. *v.* Wilder (Kentucky), 176 Southwestern, 1155, p. 1156, June, 1915.

OIL AND OIL LANDS—SALE AND CONVEYANCE.

OIL AND GAS AS REAL ESTATE—CONVEYANCE.

For the purpose of ownership and conveyance of solid minerals the earth may be divided horizontally as well as vertically and title to the surface may rest in one person and title to the strata beneath the surface containing such minerals in another; and oil and gas lying within the strata of the earth necessarily are a part of the realty, and being a part of the realty while in place it must legally follow that when they are conveyed while in that condition or possessing that status, a conveyance of an interest in the realty results. There is substantial ground for the distinction sometimes made in this respect between solid minerals and oil and gas, and a purchaser of the oil and gas within the ground assumes the hazard of their absence through the possibility of their escape from beneath a particular tract of the surface and if they are not discovered the conveyance is of no effect; but the possibility of the escape of oil and gas does not render them while in place incapable of conveyance, and their ownership while in that condition with the exclusive right to take them from the land is nothing less than ownership of an interest in the land, and especially so where parties have contracted upon the assumption that they do exist in the land described and their conveyance while in place is consequently a conveyance of an interest in the realty, and their conveyance requires all the formalities of a conveyance of any other interest in the real estate.

Texas Co. *v.* Daugherty (Texas), 176 Southwestern, 717, p. 719, May, 1915.

NATURE OF OIL AND GAS—OWNERSHIP AND POSSESSION.

Oil and gas in the ground, outside of an artificial receptacle, as the casing of a well or pipe line, are parts of the realty underneath the surface where they lie and the owner of the surface is the owner

of the oil and gas beneath, but if they stray into the lands of another he ceases to own them, and until they are severed from the realty they are as much a part of it as coal or salt; but the possession of the land is not necessarily the possession of oil and gas for the reason that if an adjoining or even a distant owner drills on his own land and takes oil or gas therefrom, and oil or gas from under the lands of another enters into his well or under his control, it then becomes his property. The owner of the land has only qualified rights to the oil and gas beneath the surface. These include the right to reduce them to possession and to exclude all others exercising the right on his premises, but title in him to such oil and gas does not vest until he has reduced them to actual possession, either by bringing them into a well or into a pipe line, or into a tank or other receptacle in case of oil, as until this is done the gas and oil by natural forces may escape from his land and be reduced to possession as property of another.

Natalie Oil Co. *v.* Louisiana Railway & Navigation Co. (Louisiana), 69 Southern, 146, p. 148, June, 1915.

GRANT OF OIL AND GAS.

A grant of all the oil and gas, coal, and other minerals in and under a particular tract of land described for a stated consideration and certain stipulated royalties, together with the exclusive right of ingress and egress at all times for the purpose of drilling, mining, and operating for such minerals and the erection of appliances, structures, the laying of the necessary pipe lines, and providing that the grantee is "to have and to hold, all and singular, the above-described premises, rights, properties, and privileges, and all such as are hereinafter specified, unto the said grantee, and the heirs, successors, and assigns of such, forever," is not a mere demise of the premises for a given period, nor is it a grant of the right to prospect upon the lands for oil and gas and reduce the same to possession and ownership, but it amounts to a defeasible title in fee to the oil and gas in the ground and the conditions of forfeiture must be taken as conditions subsequent and renders the title subject to be defeated for failure to perform the stipulated conditions.

Texas Co. *v.* Daugherty (Texas), 176 Southwestern, 717, p. 718, May, 1915.

CONTRACT FOR SALE OF OIL LANDS—CONSTRUCTION AND COMPENSATION.

The owner of valuable oil property entered into a contract with another by which the other contracting party was authorized to sell on commission or to buy certain oil property at a stipulated price until a well then in process of drilling should be "drilled in" and "completed," this provision being manifestly intended to protect

the owner from depreciation in the event of a "dry hole" or loss from depreciation in the value of his property if the well in process of drilling should prove to be a good well, and such contract and its terms are limited to the time between the date of the contract and the time immediately before the drilling in and completion of such well into and through all the oil and gas bearing sands in the vicinity of the well; and it must be understood that the words "drilled in" and "completed," as applied to the well in process of drilling, are used synonymously and mean one and the same thing, and have reference to the well being drilled in and completed through the oil or gas bearing sands; and the time limit in the contract can not be controlled by any agreement or arrangement between the owner of the well and the drilling contractor, not referred to, nor made with reference thereto, as to what was meant by the words "drilled in" or "completed," as employed in the original contract of agency; and the second party to the contract, in order to entitle him to the stipulated compensation, or to any compensation, must perform the contract and find a purchaser within the time specified.

Chambers *v.* Simmons (West Virginia), 85 Southeastern, 182, April, 1915.

RIGHT OF RAILROAD COMPANY TO DRILL ON RIGHT OF WAY—INJUNCTION BY ADJOINING LANDOWNER.

Where a railroad company is the owner in fee in the land used as its right of way, it has the right to explore the same and drill thereon for the purpose of extracting oil therefrom, and an adjoining landowner is without right to disturb its operation or enjoin it from the exercise of such right; and where, under such circumstances an adjoining landowner seeks to enjoin the drilling operations on the part of the railroad company, a bond is properly required before the injunction issues, so as to compensate the company in damages if it developed later that oil was extracted from beneath the land owned by the railroad company; but the difficulty in the way of proving damages, owing to the peculiar character of the gas and oil which may escape from one place to another, renders such a bond of little use is case of a definitive judgment against the complainant in the suit and an injunction under such circumstances might work an irreparable injury, while on the other hand if the developments continued to the injury of the complainant it would be a small matter to measure the oil and gas extracted through the wells bored on the right of way.

Natalie Oil Co. *v.* Louisiana Railway & Navigation Co. (Louisiana), 69 Southern, 146, p. 148, June, 1915.

See Hayne *v.* Edenborn (Louisiana), 68 Southern, 737, May, 1915.

MINING TERMS.

BATTERY.

A battery is made of three stulls placed together and put in at the pitch of the vein, usually located a few feet apart, up and down, and crosswise of a stope.

Lesh *v.* Tamarack Mining Co. (Michigan), 152 Northwestern, 1021, p. 1022, June, 1915.

MILLS.

Mills are openings in the floor or bottom of a stope through which the ore or mineral is passed or thrown downward along the footwall to the level.

Lesh *v.* Tamarack Mining Co. (Michigan), 152 Northwestern, 1021, p. 1022, June, 1915.

POP SHOTS.

A pop shot is a shot by which a bowlder in a mine is broken up by placing a stick of dynamite on top of the bowlder and exploding it.

Baltesel *v.* American Zinc, Lead & Smelting Co. (Missouri Appeals), 176 Southwestern, 446, p. 447, May, 1915.

PUFFER BOY.

A puffer boy is a person employed to operate an engine in a mine called a puffer engine, used for hauling loaded cars through haulage-ways.

Lahti *v.* Tamarack Mining Co. (Michigan), 152 Northwestern, 907, June, 1915.

SCRAM.

A scram is a small soft-coal mine complete in itself.

Republic Steel & Iron Co. *v.* Luster (Alabama), 68 Southern, 358, p. 359, April, 1915.

SOLLAR.

A sollar is a place or platform from which trammers shovel or throw the ore or rock into a car.

Lesh *v.* Tamarack Mining Co. (Michigan), 152, Northwestern, 1021, p. 1022, June, 1915.

MINING CORPORATIONS.

INJUNCTION TO PREVENT CONSOLIDATION.

In an action by a minority stockholder of a mining corporation to prevent by injunction a consolidation of a number of mining corporations, the plaintiff makes a prima facie case which the defendants

are bound to overcome, when he shows by competent testimony that the consolidation plant and the milling plant proposed and which are being pursued are prejudicial to the rights of the minority stockholders in one company and unduly favorable to the interests of the controlling company seeking to enforce the consolidation.

Hyams *v.* Calumet & Hecla Mining Co., 221 Federal, 529, p. 541 (January, 1915).
Turner *v.* Calumet & Hecla Mining Co. (Michigan), 153 Northwestern, 718, July, 1915.

PROMOTERS OCCUPY FIDUCIARY RELATION TO COMPANY SUBSCRIBERS.

Promoters of a mining corporation formed for the purpose of purchasing from them valuable mining property occupy a fiduciary relation to their cosubscribers and are bound to truthfully declare to their associates any personal interest they may have in the matter of the purchase; and without such disclosures they can not legally profit at the expense of their associates, and the interests of future stockholders are entitled to protection from concealed benefits or profits acquired by the promoters in other transactions with the corporation and to a full disclosure of the true facts of the purchase price of the mining property, and an advantage or benefit accruing to the promoters by failure to do so or concealment constitutes a fraud on the corporation; and the corporation is entitled to set aside the transaction or recover compensation for any loss suffered.

California Calaveras Mining Co. *v.* Walls (California), 149 Pacific, 595, p. 599, June, 1915.

MANDAMUS TO COMPEL DIRECTORS TO CALL MEETING.

The stockholders of a mining corporation may avail themselves of the remedy by mandamus to compel the board of directors to call an annual meeting for the election of directors, and the rule applies to directors of foreign corporations who reside in the State, where the property of the corporation is in the State and where the usual corporate acts have been performed.

Stapler *v.* El Dora Oil Co. (California Appeals), 150 Pacific, 643, p. 644, July, 1915.

CONTROL BY AID OF PROXIES.

The control of a mining corporation purposely gained and exercised by a majority stockholder with the aid of proxies of other stockholders may have the same effect as a control by actual stock majority.

Hyams *v.* Calumet & Hecla Mining Co., 221 Federal, 529, p. 541 (January, 1915).
Turner *v.* Calumet & Hecla Mining Co. (Michigan), 153 Northwestern, 718, July, 1915.

BANKRUPTCY—AUTHORITY OF MANAGING OFFICERS.

An act of bankruptcy on the part of a mining corporation at the instance of the managing director and those acting with him having full control of the company's affairs is sufficient to authorize the appointment of a receiver, though not authorized by a vote of the directors or stockholders.

James Supply & Hardware Co. *v.* Dayton Coal & Iron Co., 223 Federal, 991, p. 994, June, 1915.

LIABILITY ON NOTE EXECUTED BY OFFICERS.

A mining corporation is liable on a note executed by its officers, though the name of the corporation does not appear as a maker, where the evidence shows that the corporation negotiated the loan, received the money, and expended it for its own purposes, and the president and secretary signed the note, intending thereby to execute it as the note of the corporation, and it was accepted as such, and where the execution of the note was subsequently ratified by the directors and stockholders.

San Joaquin Valley Bank *v.* Gate City Oil Co. (California), 149 Pacific, 557, p. 558, June, 1915.

RIGHT OF STOCKHOLDER TO SUE AT LAW WHERE CORPORATION REFUSES.

A stockholder of the United Copper Securities Co. can not, on behalf of himself and all other stockholders of the company, maintain an action to recover treble damages under section 7 of the Sherman Antitrust Act of July 2, 1890 (26 Stat., 40), from certain-named individuals and the Amalgamated Copper Co., on the ground of conspiracy to create a monopoly in the interstate commerce and trade in copper produced in the State of Montana, although he avers that he had requested such United Copper Securities Co. to bring suit and it had refused to do so. There seems to be no ground for holding that a stockholder may bring an action at law in the name of the corporation to recover money damages or specific property where the corporation itself refuses to do so.

United Copper Securities Co. *v.* Amalgamated Copper Co., 223 Federal, 421, April, 1915.

RIGHTS OF MINORITY STOCKHOLDERS—ENJOINING SALE AND CONSOLIDATION.

Minority stockholders of a mining corporation may maintain a suit in equity to set aside a sale of the property of the mining corporation and an attempted consolidation with smaller corporations, where the price paid for the mining property was inadequate, because of the methods of sale, the nature of the consideration and its intended disposition.

Geddes *v.* Anaconda Copper Mining Co., 222 Federal, 129, p. 131, May, 1915.

PURCHASE OF STOCK—CONTROL.

A mining corporation empowered to subscribe for, purchase, own, and dispose of stock in any company organized under the laws of Michigan, for the purpose of mining, refining, smelting, or manufacturing any or all kinds of ores or minerals, has no power to purchase stock of other corporations for the purpose of controlling their management; and the statutory right to stock ownership in another corporation and the control thereby given effect no change in the fiduciary obligation which exists on the part of majority holders toward minority holders in the absence of statutes expressly permitting such ownership.

Hyams *v.* Calumet & Hecla Mining Co., 221 Federal, 529, p. 537 (January, 1915).
Turner *v.* Calumet & Hecla Mining Co. (Michigan), 153 Northwestern, 718, July, 1915.

SALE OF STOCK TO ANOTHER CORPORATION—RIGHT OF STOCKHOLDER.

A stockholder in a mining corporation can insist that any sale of all corporate property upon dissolution shall be to the highest bidder for cash, and not to a corporation in which the majority are interested and for its stock at prices fixed by them.

Geddes *v.* Anaconda Copper Mining Co., 222 Federal, 129, p. 134, May, 1915.

RIGHTS OF MAJORITY AND MINORITY STOCKHOLDERS—EQUITABLE RELIEF.

Independently of State or National antitrust statutes the rule is that a person in control of a majority of the stock and of the board of directors of a mining corporation occupies a fiduciary relation toward the minority stockholders and is charged with the duty of exercising a high degree of good faith, care, and diligence for the protection of such minority interests, and any act in his own interest to the detriment of the minority stockholders is a breach of duty and of trust, and entitles a minority stockholder to plenary relief from a court of equity.

Hyams *v.* Calumet & Hecla Mining Co., 221 Federal, 529, p. 537 (January, 1915).
Turner *v.* Calumet & Hecla Mining Co. (Michigan), 153 Northwestern, 718, July, 1915.

SALE AND DISTRIBUTION OF CORPORATE PROPERTY—RIGHTS OF STOCKHOLDERS.

A stockholder in a mining corporation is not bound to expect anything but money for his equitable share of corporate property, nor is he bound to permit a sale to be made for other chattels or goods to be distributed.

Geddes *v.* Anaconda Copper Mining Co., 222 Federal, 129, p. 134, May, 1915.

SALE OF PROPERTY BY COMMON DIRECTORS—RELIEF IN EQUITY.

The sale of the stock of a mining corporation made by the directors who were also directors in the purchasing company and consented to by a majority of the stockholders, and where large dividends have been subsequently paid on the stock, will not be unconditionally set aside at a suit of the minority stockholders, where the corporation was largely in debt, its mines exhausted, closed, and flooded, and its remaining properties were virgin ground and unworkable zinc-silver ore; but in such case a resale will be ordered if a greater sum can be realized, but if no greater bid than the total proceeds of the sale as originally made, then the original sale may stand.

Geddes *v.* Anaconda Copper Mining Co., 222 Federal, 129, p. 135, May, 1915.

FORECLOSURE OF MORTGAGE—RIGHT OF STOCKHOLDER TO INTERVENE.

In an action by a creditor against a mining corporation to foreclose a mortgage, a stockholder and a third person interested in the premises may, on a showing that he has demanded of the officers of the mining company that they defend the action of foreclosure, but that the officers have neglected to do so and are in a conspiracy with the plaintiff to prevent a defense being interposed and on an averment that the notes and mortgages sued upon were fraudulent and ultra vires, intervene and make such defense on behalf of the mining corporation, and his complaint and petition for intervention may be treated by the court as an answer to the complaint and petition to foreclose.

Investors' Syndicate *v.* North American Coal & Mining Co. (North Dakota), 153 Northwestern, 472, p. 473, July, 1915.

AGREEMENT AS TO ISSUANCE OF STOCK—VIOLATION AND REMEDY.

By an arrangement and agreement three persons, by joint adventure, procured an option to develop a mine, and formed a corporation for that purpose under an agreement by which each should receive one-third of the capital stock of the corporation. The corporation was formed with the capital stock fixed at 500,000 shares of the par value of $1 each and $250,000 was made treasury stock, and thereupon one of the parties caused to be issued to himself 125,000 shares and to each of the other two members 62,500 shares. Under the original agreement and without making any treasury stock each of the ventures was entitled to receive 83,333⅓ shares; but after deducting the treasury stock the issuance of the 125,000 shares to one of the parties was a violation of the agreement, and the others had the right to refuse the 62,500 and to compel the party

receiving the 125,000 shares to transfer 20,833⅓ shares; but it was an error for the trial court to award one of them 41,666⅔ shares of the 125,000 so issued to one of the parties.

Kent *v.* Costin (Minnesota), 153 Northwestern, 874, p. 875, July, 1915.

AUTHORITY OF AGENT—FAILURE TO COMMUNICATE INSTRUCTIONS.

A general superintendent of a milling company instructed and directed to employ a person to do certain hauling and to have certain machinery installed has power to bind the company to the terms of the contract made by him for the purpose of accomplishing the work, and the party with whom he contracts is not bound by the limitations placed upon the agent as to the price to be paid for the work, where such instructions as to price were not communicated to him.

Bonanza Milling Co. *v.* Borego (Colorado), 148 Pacific, 859, p. 860, May, 1915.

SERVICE OF PROCESS—DOING BUSINESS WITHIN A STATE.

The statute of Washington (Remington and Ballinger's Code, section 225, subdivision 9), providing that summons may be served on a foreign corporation doing business within the State, does not apply to a corporation organized in the State of Minnesota and conducting mining operations in Alaska, and is maintaining in Seattle, in the State of Washington, a purchasing and forwarding agent on a salary, the corporation paying the office rent and expenses, and where such agent has purchased goods, wares, and merchandise in the city of Seattle with directions that they be shipped to the defendant corporation at its place of business in Alaska, and where such agent is charged also with the duty of seeing that the goods ordered by the defendant corporation from eastern points or cities are transshipped at Seattle and forwarded to the place of business of the corporation in Alaska, and where such agent does not pay for any goods or disburse any moneys whatsoever, but where moneys are disbursed from the general office of the defendant corporation at places outside of the State of Washington, as in such case the corporation is not doing business within a State.

Johnson *v.* Alaska Treadwell Gold Mining Co., 225 Federal, 270, April, 1915. See Daly *v.* Lahontan Mines Co. (Nevada), 151 Pacific, 514, September, 1915.

MANDAMUS TO CONTROL NATURAL GAS COMPANY.

A corporation organized prior to the passage of the act approved March 26, 1913 (Session Laws of Oklahoma, 1913, ch. 99), as a gas purchasing, producing, transporting, and delivering company, and at the time of the passage of the act referred to the corporation had

acquired gas-producing wells throughout the State and was engaged in the business of transporting natural gas from such wells through a system of pipe lines to the limits of certain cities in the State and there selling and delivering its natural gas to domestic corporations with which it was in nowise connected. The wells of the corporation in its several gas fields all drew from the same source of supply as other wells in the same field owned and operated by other producers, and so much as any one well produced the supply was diminished, but the gas when reduced to possession could not be profitably stored. While the corporation was so operated the act of March 26, 1913, was passed making it unlawful for the corporation to engage in the business of purchasing, producing, transporting, and delivering natural gas within the limits of the State, except as authorized by and subject to the provisions and restrictions of such act; and the act permitted the corporation to continue its business as a common carrier and a common purchaser by first accepting the provisions of the act in a certain manner within a certain time, but on the failure of the corporation to do so, mandamus will not lie to compel it to accept the provisions of the act and operate thereunder as a common carrier and common purchaser, nor will mandamus lie to compel a general course of conduct and a long series of continuous acts, where it is not possible for the court to oversee the performance of the company's duties as prescribed in the act, and where the act affords the State a plain, adequate, and complete statutory remedy against the corporation.

Oklahoma Natural Gas Co. *v.* State (Oklahoma, 150 Pacific, 475, June, 1915.

ACTS OF BANKRUPTCY—INSOLVENT CORPORATION AS DEFENDANT.

Where a receivership was procured by actual authority of a mining corporation and on its behalf, as a defendant in a pending suit, it was as effectual an act of bankruptcy as if the suit had been directly in the name of such corporation as complainant; and it is immaterial that the receivership was not ordered because of insolvency if the mining corporation showed actual insolvency at the time the receivership was applied for.

James Supply & Hardware Co. *v.* Dayton Coal & Iron Co., 223 Federal, 991, p. 993, June, 1915.

SUFFICIENCY OF APPLICATION FOR RECEIVER.

A petition by certain minority stockholders of an oil company averring that the corporation owned property of the value of $100,000 and owed debts in the sum of about $15,000, and that among that corporation's assets was a claim or cause of action against certain named persons in the sum of about $20,000, which

claim was for stock-promotion expenses and commissions and cash wrongfully and fraudulently obtained by such named persons, as fully shown in a prior report of an auditor, and that such named persons were disposing of their stock in the corporation for the purpose either of controlling the corporation and having such claims canceled or to prevent the corporation from bringing suit to collect such claims, and also averring that if suit was not brought the claims would be barred by the statute of limitations, and averring also that the managing officers of the corporation declined and refused to bring suit, is not sufficient to authorize the appointment of a receiver for the corporation where no cause of action is asserted in the petition against any of the defendants, nor any recovery sought in the suit, nor any relief prayed for except the appointment of a receiver, as the minority stockholders themselves could, on a proper showing, bring suit to recover for the benefit of the corporation.

Forest Oil Co. *v.* Wilson (Texas Civil Appeals), 178 Southwestern, 626, p. 628, June, 1915.

APPOINTMENT OF RECEIVER—PRIMA FACIE CASE.

Section 8, chapter 51, of the laws of 1909 of South Dakota, authorizing the appointment of a receiver in a suit commenced for the foreclosure of a miner's lien upon mining property and making it the duty of a court in such case to appoint a receiver does not mean that simply upon the filing of such suit and a demand for the appointment of a receiver the court is authorized to make such appointment, as the effect of the appointment of a receiver is to take from the owner the right of possession and control of his property and place it under the control of a stranger, and any statute permitting or authorizing such act without a showing justifying it is fundamentally and clearly void; but the provisions of this act, so far as they relate to the appointment of receivers, should be construed in the light of other existing laws in relation to receivers, and before a court would be authorized to appoint a receiver in such an action a showing upon notice should be made sufficient to justify and warrant the appointment.

Cessna *v.* Otho Development & Power Co. (South Dakota), 153 Northwestern, 380, p. 382, June, 1915.

RECEIVER—POWER OF COURT TO DECREE PRIORITY OF LIEN.

A court of equity appointing a receiver of a mining corporation has no power in the absence of the consent of prior contract lien creditors, in authorizing its receiver to continue the business of the company, to decree that the indebtedness of a particular defendant

shall take precedence over such prior contract liens as a mortgage in the absence of the consent of the mortgagee.

Stacey *v.* McNicholas (Oregon), 148 Pacific, 67, p. 71, April, 1915.

RECEIVER'S SALARY AND EXPENSES AS FIRST LIEN.

Property of a mining corporation properly placed in the hands of a receiver by order of a court of equity becomes chargeable with the necessary expenses incurred in taking care of and saving it, and such expenses, together with the compensation for the services of the receiver, are taxable as part of the costs and entitled to priority of payment as a first lien upon the mining property.

Stacey *v.* McNicholas (Oregon), 148 Pacific, 67, p. 71, April, 1915.

RECEIVER—FUND FOR PAYMENT OF OPERATING EXPENSES.

Where a receiver is appointed by a court for a mining corporation and is by the order directed to continue its business, the claims for expenses in operating the mine not shown to be necessary for the care and preservation of the property should be paid as far as possible from the income realized from the mining operations.

Stacey *v.* McNicholas (Oregon), 148 Pacific, 67, p. 71, April, 1915.

CONTRACT FOR SALE OF MINING STOCK—SILENCE NOT A RATIFICATION.

In an action to recover the balance due on a contract for the sale of certain mining stock in the absence of evidence to the effect that the agent, a brother of the seller, agreed that a certain sum of money used to develop the mine should be applied on the contract, the mere silence of the seller can not be taken as a ratification of a contract that he claimed did not exist.

Clough *v.* Monro (Washington), 150 Pacific, 1190, p. 1192, August, 1915.

EMINENT DOMAIN.

MINING A PUBLIC USE.

By section 2456 of the Revised Statutes of Nevada mining for gold, silver, copper, lead, cinnabar, and other valuable minerals is recognized as the paramount interest of the State and is declared to be a public use.

Goldfield Consolidated Milling, etc., Co. *v.* Old Sandstrom Annex Gold Mining Co. (Nevada), 150 Pacific, 313, p. 316, July, 1915.

APPROPRIATION OF LAND FOR MINING PURPOSES—CONSTRUCTION AND VALIDITY OF STATUTE.

The validity of statutes for the appropriation of private property for mining purposes may sometimes depend upon many different facts, the existence of which would make a public use, even by an

individual, where in the absence of such facts the use would be clearly private; but such facts must be general, notorious, and acknowledged in the State, and are not the subject of judicial investigation, but are well known by the courts; and the courts in the construction of such statutes will notice the situation and conditions leading to the demand for the enactment of such statutes, and in their construction may consider the results upon the growth and prosperity of a State which in all probability would flow from a denial of the validity of such statutes, and all such matters may have a material bearing upon the question whether the individual use proposed is not in a fact a public use. But for the existence and validity of such statutes, the owners of mines and of works for the reduction of ores, the operations of which furnish thousands of men in the State with employment at good wages, and to which the general prosperity of the State is largely due, would be denied the right to invoke such statutes when necessary to the successful operation of their business, or for acquiring rights of way for the transportation of ores from the mines to the mills and smelters, or for the construction of tunnels for drains, or for necessary lands for the deposit of tailings; and parties holding title to ground necessary and suitable for these purposes, which might be entirely worthless except for such purposes, would be clothed with power to demand and compel payment of unconscionable prices for their lands before parting with the title, or they could refuse absolutely to grant the easement required on any terms, and thereby cripple mining enterprises or destroy them altogether. Courts may know that such a policy would not only be inconsistent and unreasonable, but would greatly retard the development of one of the greatest natural resources of the State; and in consideration of such facts, persons and corporations owning and operating mines and mills for the reduction of ores may, under such statutes, condemn land for obtaining water for mining purposes, the construction of rights of way for tunnels, flumes, and dumping places for tailings, where the statute makes ample provision for the payment of a fair price to the owner for lands sought to be condemned, as well as for all damages that he may suffer because of the appropriation and use.

Goldfield Consolidated Milling, etc., Co. *v.* Old Sandstrom Annex Gold Mining Co. (Nevada), 150 Pacific, 313, p. 316, July, 1915.
Clark *v.* Nash, 198 U. S., 361, 25 S. Ct., 676.
Strickley *v.* Highland Boy Gold Mining Co., 200 U. S., 527, 26 S. Ct., 301.
Highland Boy Gold Mining Co. *v.* Strickley, 28 Utah, 215; 78 Pacific, 296; 107 Am. St., 711; 1 L. R. A. (N. S.), 976.

NECESSITY OF CONDEMNATION.

In a proceeding by a corporation operating a mill for the reduction of ores to condemn lands for the deposit of its tailings, the law does

not require that an absolute necessity should exist for the identical lands sought to be condemned, but it is sufficient if the lands sought to be used will be of great benefit and advantage to the mining industry of the particular community; that it is necessary to condemn such lands for the protection and advancement of these interests, and that the benefits arising therefrom are of paramount importance as compared with the individual loss or inconvenience to the owner of the land; and generally under such circumstances the discretion of the corporation in the selection of land for its use will not be questioned where it acts in good faith and not capriciously.

Goldfield Consolidated Milling, etc., Co. *v.* Old Sandstrom Annex Gold Mining Co. (Nevada), 150 Pacific, 313, p. 318, July, 1915.

INTEREST IN LAND APPROPRIATED.

The statute of Nevada provides for the right of eminent domain for certain public uses and provides also for the appropriation of the fee of land, but the statute does not say that the fee simple shall be taken, but only that it is subject to be taken, and in condemnation proceedings only such an interest as is necessary can be taken.

Goldfield Consolidated Milling, etc., Co. *v.* Old Sandstrom Annex Gold Mining Co. (Nevada), 150 Pacific, 313, p. 319, July, 1915.

APPROPRIATION OF LAND FOR DEPOSIT OF TAILINGS.

The statute of Nevada, section 5606, Revised Statutes, provides that the right of eminent domain may be exercised in behalf of such public uses as tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling and smelting or reduction of ores or the working of mines and for all mining purposes as well as for outlets, natural or otherwise, for the deposit or conduct of tailings, refuse, or water from mills, smelters, or other works for the production of ores, or from mines, milldams, natural-gas or oil pipe lines, tanks, or reservoirs (statutes of 1907, p. 279), and under this section, together with sections 2456 and 2458, a corporation engaged in mining and milling and reducing by other methods gold, silver, and other ores has the right to condemn land for the deposit of the tailings from its mills.

Goldfield Consolidated Milling, etc., Co. *v.* Old Sandstrom Annex Gold Mining Co. (Nevada), 150 Pacific, 313, p. 316, July, 1915.

DEPOSIT OF TAILINGS WITHOUT LANDOWNER'S CONSENT—RIGHT OF SUBSEQUENT APPROPRIATION.

A mining corporation engaged in milling and the reduction of ores, depositing the tailings from the treatment of its ores upon a portion of its own land lying in a gulch and there conserved the same for the purpose of retreatment, but where by reason of high waters

and floods large parts of such tailings were washed down upon the land of an adjoining owner, has the right under the statute of Nevada (Revised Laws, sections 2456, 2458, and 5606) to condemn the land or a sufficient part thereof for a right of way for a tramway for the purpose of erecting a tram thereon to reconvey such tailings to its mill; and the common-law rule to the effect that a structure erected by a tort feasor upon the lands of another becomes a part of the land does not apply.

Goldfield Consolidated Milling, etc., Co. *v.* Old Sandstrom Annex Gold Mining Co. (Nevada), 150 Pacific, 313, p. 317, July, 1915.

APPROPRIATION OF SURFACE OF MINING CLAIM.

The fact that a tract of land sought to be appropriated for deposit of tailings by a mining corporation operating a mill and reduction works is a patented mining claim will not defeat the proceedings for appropriation where it appears that the claim was not in fact being worked and had not been worked for several years; and the mere possibility that the land may some time in the future be used by the owner for mining purposes will not prevent condemnation of a right of way for a tramway, and especially where the use for which the condemnation is sought will not interfere with the operation of the land as a mining claim.

Goldfield Consolidated Milling, etc., Co. *v.* Old Sandstrom Annex Gold Mining Co. (Nevada), 150 Pacific, 313, p. 319, July, 1915.

MINING CLAIMS.

NATURE AND GENERAL FEATURES.

NATURE OF STATE STATUTES.

The disposition of mining ground is wholly within the control of the Federal Government, and State statutes for regulation of the location of mining claims and for protection of the possession thereof are statutes of peace and repose, intending to prevent disorder in claiming and holding mining ground.

Florence-Rae Copper Co. *v.* Kimbel (Washington), 147 Pacific, 881, p. 884, January, 1915.

METHOD OF ACQUIRING CLAIM.

Congress has provided how mining claims can be acquired, and this may be done by discovery of mineral, gold, silver, or copper, and the like, upon the public lands and by staking the same off or marking it upon the ground.

Trinity Gold Dredging & Hydraulic Co. *v.* Beaudry, 223 Federal, 739, p. 741, May, 1915.

SIGNIFICANCE AND RELATION.

A mining claim in its accepted significance relates to that portion of the public mineral land which the miner takes up and holds in accordance with the mining law and local statutes and regulations, for mining purposes.

Trinity Gold Dredging & Hydraulic Co. *v.* Beaudry, 223 Federal, 739, p. 741, May, 1915.
See United States Mining Statutes Annotated, 179.

MINING CLAIM AS PROPERTY.

A mining claim when perfected is declared to be property in the highest sense of the term, and may be bought, sold, and conveyed, and will pass by descent.

Trinity Gold Dredging & Hydraulic Co. *v.* Beaudry, 223 Federal, 739, p. 741, May, 1915.
See United States Mining Statutes Annotated, 32, 93, 122, 188, 701.

Mining claims are property in the fullest sense of the word, distinct from the land itself, vendable, inheritable, and taxable.

Earhart *v.* Powers (Arizona), 148 Pacific, 286, p. 287, May, 1915.

LOCATION OF MINING CLAIM.

ORIGINAL OR RELOCATION—QUESTION OF FACT.

Where a mining claim is relocated as abandoned or forfeited ground, such relocation admits the validity of the prior location, and the issue is whether the prior locator has lost his right by forfeiture or by abandonment; but where a subsequent locator bases his right upon the contention that the prior locator never made a valid location under the law, then he is not relocating a forfeited or abandoned claim, but is making an original location of a claim, the prior attempt at which was invalid. In such case the issue is not whether the prior locator has lost a possessory right once legally established, but whether the prior locator ever established a legal right; and the Arizona statutes of 1901, paragraph 3241, has no application, and it not only would not be proper for the new locator to state in his location notice that he located the claim as abandoned property, but such statement if made would preclude him from contesting the question as to the validity of such prior location, the very fact or point he denies.

Copper Queen Consolidated Mining Co. *v.* Stratton (Arizona), 149 Pacific, 389, p. 392, June, 1915.
See Cunningham *v.* Pirrung, 9 Arizona, 288, p. 293; 80 Pacific, 330.

LOCATION OF ABANDONED CLAIMS.

When mineral ground has once been segregated from the public domain by a valid mining location, and thereafter reverts to the public domain by reason of the abandonment or forfeiture of the

location by the first locator, a subsequent locator of such abandoned or forfeited ground so opened to location acquires no rights thereto unless he located such ground as abandoned property and such ground can not be otherwise located by any one.

Copper Queen Consolidated Mining Co. *v.* Stratton (Arizona), 149 Pacific, 389, p. 391, June, 1915.

OVERLAPPING LOCATION—EFFECT AND VALIDITY.

The acts of a second locator in locating his claims, so far as they overlap or conflict with existing claims, are ineffectual for the purpose of vesting any right thereto in such locator unless there had been an abandonment of such existing claims or a forfeiture of the rights of the first locator by reason of the failure to do the annual assessment work for the year.

Musser *v.* Fitting (California Appeals), 148 Pacific, 536, p. 537, March, 1915.

VALID LOCATION AS PRIMA FACIE TITLE.

The performance of the annual labor on a mining claim is not necessary except to protect the rights of the locator against parties seeking to initiate title to the same premises; and as against an attempted subsequent location the original locator makes a prima facie case by showing a valid location.

Lancaster *v.* Coale (Colorado Appeals), 150 Pacific, 821, July, 1915.
See United States Mining Statutes, Annotated, 256.

LOCATION NOTICE AND CERTIFICATE.

LOCATION NOTICE—CONTENTS.

The requirements as to the contents of the location notice of a mining claim as provided for by section 7359 of the statutes of Washington (Remington and Ballinger Code), applies only to an original or new location and does not apply as to the contents of a relocation notice under section 7365.

Florence-Rae Copper Co. *v.* Kimbel (Washington), 147 Pacific, 881, p. 884, January, 1915.

OBJECTS AND SUFFICIENCY.

The objects and functions of a location notice do not extend to conferring full title to mining properties, and such a notice differs from the ordinary documentary muniments of title in that it is not a title nor proof of title, nor does it constitute or of itself establish the possessory right to which it relates. It is purely a creature of the statute and its purposes and functions are twofold: 1. When duly recorded it becomes notice to the world of the facts therein set forth and is constructive notice of the claimant's possession. 2. It

is by statute made one of the steps requisite to constitute a perfected mining location.

Copper Queen Consolidated Mining Co. *v.* Stratton (Arizona), 149 Pacific, 389, p. 393, June, 1915.

ORIGINAL OR RELOCATION—ABANDONED PROPERTY.

Before its amendment paragraph 3241 of the Revised Statutes of Arizona, 1901, provided that if a location was made on abandoned property the location notice should state such fact, but the statute never required the location notice of an original location to so state, nor did it require the locator of open, unappropriated, public mineral land to so state in his location notice when he located the same as an original location and not as abandoned or forfeited property, though the ground was actually abandoned and forfeited at the time of the controverted location.

Copper Queen Consolidated Mining Co. *v.* Stratton (Arizona), 149 Pacific, 389, p. 392, June, 1915.

POSTING AND RECORDING—PURPOSE AND TITLE.

The object of posting and recording mining notices is to protect a locator and give him an opportunity to develop the property, obtain the ore, and eventually to get title to the land where he continues the improvements to a sufficient extent; and a locator must rely upon his own right or title and can not strengthen the same by tacking on stale claims of other persons.

Richen *v.* Davis (Oregon), 148 Pacific, 1130, p. 1132, May, 1915.

POSTING AND RECORDING AS STEPS TO LOCATION.

A location notice or certificate containing all the matters provided for by paragraph 3232 of the Revised Statutes of Arizona, 1901, and recorded within 90 days after the commencement of the location as required by paragraph 3234 of these statutes, is constructive notice of the location; and when posted on the claim as required, together with the recording, it is one of the steps requisite to constitute a perfected mining location and thereby performs the functions for which the law intended it to serve.

Copper Queen Consolidated Mining Co. *v.* Stratton (Arizona), 149 Pacific, 389, p. 393, June, 1915.

AMENDMENT.

A location notice if defective when posted and recorded, because it fails to contain the statutory recitals required by section 3241 of the Revised Statutes of Arizona, 1901, is not void but voidable only, and is subject to amendment under section 3238 of the statute. This

right of amendment is based on the fact that a full, complete, and unimpeachable certificate can not be made without the aid of a surveyor, and persons familiar with the making of mining locations know that usually the first record is imperfect, and recognizing these difficulties it is not the policy of the law to avoid a location for defects in the notice, but rather to give the locator an opportunity to correct his records whenever defects are discovered.

Copper Queen Consolidated Mining Co. *v.* Stratton (Arizona), 149 Pacific, 389, p. 393, June, 1915.

DISCOVERY.

LOCATION WITHOUT DISCOVERY—EFFECT AND VALUE.

A mining location under the United States statutes, without discovery of minerals, can not be said to be totally invalid and of no effect, as the title by such location and possession is good as against every person contending against it, except the Government of the United States; and a transfer of such a location gives the transferee the right to proceed to prosecute work with a view of making a discovery of oil and such possession can not be disturbed by strangers, and is good and the right to such possession is sufficient as a consideration for a lease.

Hullinger *v.* Big Sespe Oil Co. (California), 151 Pacific, 369, p. 370, August, 1915.

APEX OF VEIN.

DEFINITION.

An apex of a vein is that part or portion of the terminal edge of a vein from which the vein has extension downward in the direction of the dip and the definition involves the elements of terminal edge and downward course therefrom; but the locality of the terminal edge is a question of fact and the downward course of a vein has no significance whatever independently of the terminal edge of the vein.

Stuart Mining Co. *v.* Ontario Mining Co., 237 U. S. 350, p. 360, April, 1915.

EXTRALATERAL RIGHTS.

STRIKE AND DIP OF VEIN.

The United States mining statutes, section 2322, calls for no effort of construction, and the distinction which obtains in the parlance of miners and in the cases between the strike or course and the dip of a vein, is compelled by the statute and marks accurately the linear and extralateral rights of a location and the language of the section expresses the distinction which can be observed, and the strike and the dip of the vein must not be confounded nor the rights dependent upon them confused.

Stuart Mining Co. *v.* Ontario Mining Co., 237 U. S., 350, p. 353, April, 1915.

RIGHT TO FOLLOW VEIN THROUGH SIDE LINES.

The locator of a mining claim under section 2322 of the United States Revised Statutes has the right to the surface within the lines of his claim, and if a vein has its top or apex within the claim he may follow such vein downward, though it depart from a perpendicular in its downward course outside the vertical side lines of his location in the adjoining ground.

Stuart Mining Co. *v.* Ontario Mining Co., 237 U. S., 350, p. 352, April, 1915. See United States Mining Statutes Annotated, 133.

VEIN APEXING WITHIN LOCATION—QUESTION OF FACT.

The locator or owner of a mining claim in seeking to recover the value of ore bodies taken and appropriated by another on a vein outside the vertical planes of the complaining locator must show that the vein from which the ores was alleged to have been taken had its apex within the surface boundaries of the lines of his location and that his is the senior location; but where the court or jury trying the case found as a fact that the particular vein from which the ore was taken as complained of did not apex in the claim of the complaining locator, a court on appeal can not say as a matter of law that the complaining locator is entitled to recover such ore bodies, as in such case the essential fact for the purpose of his recovery is determined against him.

Stuart Mining Co. *v.* Ontario Mining Co., 237 U. S., 350, p. 358, April, 1915.

RIGHT TO FOLLOW VEIN—LIABILITY FOR TRESPASS—AGREEMENT AS TO LOCATION.

In an action by the owner of a mining claim against the owner of an adjoining claim to recover the value of ores alleged to have been taken by the defendant from veins apexing in the plaintiff's claim and extending on their dip outside of the vertical side lines of his claim the plaintiff alleged that he was in possession and entitled to the possession of such named veins throughout their entire depth, but that the defendant, without right, entered upon such veins, ousted the plaintiff therefrom, and has ever since held and continues to hold possession thereof and has extracted therefrom ores of a stated value. In such action a stipulation and an agreement by which the issue of title and ownership and right of possession of the veins and ores in controversy shall be alone tried and determined, and the issue of damages shall be reserved for further trial and proceedings, must be held to relate only to the title and right to possession of the ore in the particular veins mentioned by name in the plaintiff's complaint and petition and put in issue by the pleading; and in a subsequent trial for damages the defendant is entitled to prove, as against the

claim for damages, that a large portion of the ore in controversy which was taken from his claim was from other veins that did not apex in plaintiff's claim and for which he could not be required to account to the plaintiff, and the defendant was not estopped by the trial and judgment in the former case as to the title from litigating the question of the amount and value of the ores extracted from the veins named in the plaintiff's complaint and petition.

Work Mining & Milling Co. *v.* Doctor Jack Pot Mining Co., 222 Federal, 216, February, 1915.

OWNERSHIP OF ORES AT INTERSECTION OF VEINS.

The owner of a senior location owns all the ore in a vein apexing within his location and owns all the ore at the point of intersection of his vein and a vein apexing in the junior location and is not subject to the charge of being a trespasser while extracting and removing the ore at such point of intersection.

Esselstyn *v.* United States Gold Corporation (Colorado), 149 Pacific, 93, p. 95, June, 1915.

ASSESSMENT WORK.

EXPENSES INCURRED IN MOVING MACHINERY.

The expenses of getting heavy machinery to a mining claim and a mine thereon which, when in use, will tend to the development of the claim will be allowed on the annual assessment work on such claim, although the machinery and expenses incurred are not within the boundaries of the claim.

Florence-Rae Copper Co. *v.* Kimbel (Washington), 147 Pacific, 881, p. 885, January, 1915.

WORK DONE BY STOCKHOLDERS FOR CORPORATION.

Work done by stockholders for a mining corporation and employees engaged by them for a corporation owning mining claims is a sufficient performance of assessment work, as the stockholder has such an equitable and beneficial interest in the property by reason of which the assessment work done by him inures to the benefit of the corporation and prevents a forfeiture.

Florence-Rae Copper Co. *v.* Kimbel (Washington), 147 Pacific, 881, p. 885, January, 1915.
Musser *v.* Fitting (California Appeals), 148 Pacific, 536, p. 537, March, 1915.

RESUMPTION AND PERFORMANCE—NATURE OF IMPROVEMENTS.

The penalty for failure to comply with the requirements of the United States statutes in respect to the performance of annual labor is that the location shall be opened to relocation in the same manner

as if no location had ever been made; but if the original locator has resumed work and is in good faith engaged in the performance of the assessment work, the claim is not subject to relocation. It is sufficient in the performance of such work and the making of improvements that engines, wire cables, and labor used in moving and installing the same were intended primarily for the development and operation of the claim, though they were to be secondarily used for the purpose of aiding and constructing a railway that was itself intended to be an aid and cooperator with the mining claims.

Florence-Rae Copper Co. *v.* Kimbel (Washington), 147 Pacific, 881, p. 884, January, 1915.

RESUMPTION WHEN RELOCATOR FAILS TO PERFORM ASSESSMENT WORK.

The failure of a locator of a mining claim to perform the assessment work required by statute within the year renders the claim subject to relocation; but the fact that another subsequently enters upon and attempts to relocate the claim and himself fails to perform the assessment work for the succeeding year does not prevent the original locator from resuming work on the claim and thereby saving the claim from further relocation, as it is against intervening rights only that the original locator can resume work and resuscitate his possessory rights.

Richen *v.* Davis (Oregon), 148 Pacific, 1130, p. 1132, May, 1915.

RESUMPTION PREVENTS RELOCATION.

The fact that the locator of a placer-mining claim cleared and burned the brush and débris thereon for the purpose of dredging the claim may be taken as a fair indication of the good faith of the locator in maintaining the claim, and together with the money expended in the same direction negatives any intent to abandon the mining claim, and where it shows a resumption of the required labor it will defeat an attempted subsequent relocation.

Richen *v.* Davis (Oregon), 148 Pacific, 1130, p. 1133, May, 1915.

NATURE AND PROOF OF PERFORMANCE.

The more profitable and practical way of extracting mineral from placer mining claim is by means of a dredge, and in order to do so it is absolutely necessary to clear off the brush and timber; and where the surface of a placer claim was covered with a thick growth of brush, with some larger timber, considerable débris which had been deposited by a river during high water, and the labor performed in clearing the surface of such brush, timber, and débris may properly be included as annual assessment work on the mining claim that will prevent a forfeiture and relocation of the claim.

Richen *v.* Davis (Oregon), 148 Pacific, 1130, p. 1131, May, 1915.

STATUTORY AFFIDAVIT AS PRIMA FACIE PROOF.

The affidavit provided by section 1426m of the Civil Code of California constitutes prima facie evidence of the performance of the annual assessment work upon a mining claim; and if such prima facie case is not overcome by proof, then the fact of the performance of the assessment work must be taken as established.

Musser *v.* Fitting (California Appeals), 148 Pacific, 536, p. 536, March, 1915.

FORFEITURE.

WHAT CONSTITUTES AND WHAT PREVENTS.

The term "forfeiture" does not appear in the United States statutes providing for the relocation of mining claims; but the courts employ the term as a comprehensive word indicating a legal result flowing from a breach of condition subsequent, subject to which the locator acquires his title; but courts do not incline to the enforcement of this class of penalties, and a forfeiture of a mining claim does not ensue from the mere failure to comply with the law, but it requires the intervention of a third person and a relocation of the ground before any forfeiture can arise, and when thereby such forfeiture becomes effectual the estate of the original locator is hopelessly lost, and there is no possibility of its being restored. The reason of this rule is that the resumption of the annual assessment work at any time prior to the lawful inception of an intervening right prevents a forfeiture.

Florence-Rae Copper Co. *v.* Kimbel (Washington), 147 Pacific, 881, p. 885, January, 1915.

DEGREE AND BURDEN OF PROOF.

A person seeking to avail himself of the failure of a preceding locator to comply with the law in order to secure a relocation of a mining claim must establish such failure by clear and convincing proof, and a court will construe a mining regulation or custom so as to defeat a forfeiture, if it can, and every reasonable doubt will be resolved in favor of the validity of a mining claim as against the assertion of a forfeiture. The burden of establishing a forfeiture rests upon the party charging it or claiming benefits by reason of an alleged forfeiture.

Florence-Rae Copper Co. *v.* Kimbel (Washington), 147 Pacific, 881, p. 885, January, 1915.
Musser *v.* Fitting (California Appeals), 148 Pacific, 536, p. 537, March, 1915.
Richen *v.* Davis (Oregon), 148 Pacific, 1130, p. 1131, May, 1915.

FAILURE TO PERFORM ASSESSMENT WORK—PROOF.

In order to establish the forfeiture of a mining claim it must be shown by clear and convincing proof that the former locator or owner failed to have the work performed or the improvements made as required by statute, as forfeitures are not favored in such cases.

Richen *v.* Davis (Oregon), 148 Pacific, 1130, p. 1131, May, 1915.

ASSESSMENT WORK PERFORMED BY COOWNER—FORFEITURE.

The only labor or improvement required by section 2324 of the United States Revised Statutes which will entitle a coowner doing the work or making the improvement to forfeit a delinquent coowner's interest is the expenditure of the full sum required by the statute, and this is not less than $100 for each claim. The expenditure required by the statute for 175 mining claims for one year would be $17,500 and for two years $35,000; and an expenditure of $5,600 by one coowner upon the 175 mining claims will not authorize such coowner to forfeit the interest of a coowner that fails to contribute.

Pack *v.* Thompson, 223 Federal, 635, p. 637, May, 1915.

SUFFICIENCY OF NOTICE TO COOWNER.

A notice by coowners professing to perform assessment work on mining claims held in common to another coowner is not sufficient to forfeit the interest of the noncontributing coowner where it conclusively appears from the notice that only a small portion of the assessment work required by the statute had been performed, for the reason that the notice shows that all the assessment work had not been performed and the mining claims were then subject to relocation, and no interest was saved by a partial compliance with the statute.

Pack *v.* Thompson, 223 Federal, 635, p. 638, May, 1915.

FORFEITURE PROCEEDINGS ENJOINED.

Where several coowners of 175 mining claims owned in common served notice on one coowner for the purpose of forfeiting his interest for failure to contribute where the amount stated was less than the required statutory amount for all the claims, and where the same coowners served another notice on such other coowner for failure to contribute his part of the assessment work of $1,200 expended by them on 12 claims, the same being a part of the $5,600 mentioned in the other notice, and the 12 claims being a part of the 175 claims described in the other notice, the notices are so inconsistent, defective, and insufficient, and one notice so discredits the other that it will

justify a court of equity in suspending by temporary injunction the forfeiture proceedings until the actual facts can be ascertained and the questions involved determined upon the merits.

Pack *v.* Thompson, 223 Federal, 641, May, 1915.

ABANDONMENT.

INTENT.

Abandonment of a mining claim is a question of intent.

Richen *v.* Davis (Oregon), 148 Pacific, 1130, p. 1132, May, 1915.

WHAT CONSTITUTES—KNOWLEDGE OF RELOCATOR.

Where it appears that several thousand dollars had been expended in furnishing and moving engines and other material and in building and improving trails and roads for the better development of a mining claim and the mine thereon, commencing as early as May and continuing without interruption until July of the year following, this is sufficient not only to show a performance of the assessment work but also to show that the locator had no intention of abandoning the mining claim; and a person in the employ of the locator assisting by his labor in the performance of such assessment work and knowing the precise situation and boundaries of the mining claim can not make a valid relocation of such mining ground.

Florence-Rae Copper Co. *v.* Kimbel (Washington), 147 Pacific, 881, p. 884, January, 1915.

RELOCATION.

SINKING NEW DISCOVERY SHAFT—APPLICATION OF STATUTE.

That portion of section 7365 of the statute of Washington (Remington and Ballinger Code) that refers to the sinking of a new discovery shaft on a relocated claim does not apply to mining claims west of the summit of the Cascade Mountains.

Florence-Rae Copper Co. *v.* Kimbel (Washington), 147 Pacific, 881, p. 883, January, 1915.

SUFFICIENCY OF NOTICE.

Under the statute of Washington (Remington and Ballinger Code, section 7365) the relocation of a forfeited or abandoned lode claim can only be made by sinking a new discovery shaft and fixing new boundaries, the same as in the original location; or in lieu of the new discovery shaft the relocator may sink the original discovery shaft 10 feet deeper and erect new or renew the old monuments, and the relocation certificate must state whether the whole or any

part is located as abandoned property; and under this statute a relocation certificate is insufficient if it fails to state that the new location was located as "abandoned property." The fact that the mining claim had been forfeited does not relieve the relocator from the necessity of stating in his certificate that the ground was located as abandoned property, as the words "abandoned" and "forfeiture" in the statute are used synonymously and interchangeably, and the word "abandoned" in the latter part of the section includes both the terms "forfeiture" and "abandoned" as used in the first part of the section.

Florence-Rae Copper Co. *v.* Kimbel (Washington), 147 Pacific, 881, p. 883, January, 1914.
See Clason *v.* Matko, 223 U. S., 646.

SUFFICIENCY OF POSTED NOTICE.

The provision of section 7365 of the statutes of Washington (Remington and Ballinger Code), to the effect that a location certificate shall contain a statement as to whether the ground is located in whole or in part upon forfeited or abandoned ground, obviously and necessarily refers to the notice to be posted upon the ground, and a posted notice that fails to contain this statement is insufficient.

Florence-Rae Copper Co. *v.* Kimbel (Washington), 147 Pacific, 881, p. 884, January, 1915.

BURDEN OF PROOF—PERFORMANCE OF ASSESSMENT WORK.

Where a valid mining location is made the title thus acquired remains so whether the annual assessment work is performed or not, until forfeited or abandoned; and a party seeking to initiate a claim to the mining premises already legally located must prove that the annual labor thereon has not been performed in order to establish the fact that the ground so located is subject to relocation.

Lancaster *v.* Coale (Colorado Appeals), 150 Pacific, 821, July, 1915.

GROUND LOCATED AS ABANDONED PROPERTY.

While mineral lands revert to the public domain by abandonment or forfeiture of a valid location, yet its character is so changed by the original location so that after such reversion it can not be relocated as other mineral lands of the public domain, but requires a different form of location notice, stating a fact, preserving this peculiar character derived from the prior location, and giving notice to the world that the ground was of that character of the public domain when the subsequent location was commenced.

Copper Queen Consolidated Mining Co. *v.* Stratton (Arizona), 149 Pacific, 389, p. 391, June, 1915.

RELOCATION ON ABANDONED OR FORFEITED GROUND.

The only restraint the statute of Arizona (Civil Code, 1901, paragraph 3241) places upon the relocation of mineral lands after an original location has been made is such as prevents the relocator, by his relocation, from depriving the former locator of any of his rights; but where all the rights of the original locator have been abandoned or forfeited and no claim of such right is asserted by any proper person, and the contesting parties concede that all rights existing by reason of such prior location ceased to exist before the attempted relocation, then the ground was open to relocation in the same manner as if no location had ever been made, and the ground at such time was in character open, unappropriated public mineral land subject to location in the same manner as if it had never been located, and, being of such character, a location made in such manner as an original location is required to be made was effective as such, and its validity can not be questioned upon the same grounds that a location upon ground that had theretofore been the subject of location can be questioned; and a valid location of such ground can be made without the locator stating whether the whole or any part thereof was located as abandoned property, as such locator or relocator was not in fact locating the ground as abandoned property, but was locating it in the same manner as other public mineral ground is located—that is, as an original location; and to complete such an original location the law does not require the locator to state in his location notice whether the whole or any part of the location was located as abandoned property.

Copper Queen Consolidated Mining Co. *v.* Stratton (Arizona), 149 Pacific, 389, p. 392, June, 1915.

POSSESSORY RIGHTS.

ACQUIRED BY VIRTUE OF LOCATION.

The title and rights acquired by virtue of a valid location of a lode mining claim upon the public domain are subject to the paramount title of the United States to the lands upon which such claims may be located, and such right may be forfeited by a failure to perform conditions imposed by the Government for holding property; but this possessory right, with the enjoyment incident thereto, called a mining claim, is, after the acquisition of the title to the land on which is located by a patent from the Government, called a mine.

Earhart *v.* Powers (Arizona), 148 Pacific, 286, p. 287, May, 1915.

CONDITIONS—PERFORMANCE OF ASSESSMENT WORK.

The right of continuous occupation of a mining claim properly located under the statute may be maintained by keeping up the assessment work prescribed by law; and this may be done without in-

curring the obligation toward the Government of buying and paying for the same; and when a person entitled to the benefit of the statute has made a location in accordance therewith and has gone into possession of the same, he is said to be the owner and in the possession of the mining claim thus located.

Trinity Gold Dredging & Hydraulic Co. *v.* Beaudry, 223 Federal, 739, p. 741, May, 1915.

POSSESSION—PARAMOUNT TITLE.

Congress has by statute provided for the existence of an exclusive right to the possession of a mining claim, while the paramount title to the land remains in the United States, and this right of possession is made separable from the fee and a perfected location has the effect of a grant by the United States of the right of present and exclusive possession.

Trinity Gold Dredging & Hydraulic Co. *v.* Beaudry, 223 Federal, 739, p. 742, May, 1915.
See United States Mining Statutes Annotated, 114.

SALE AND TRANSFER.

MODE OF CONVEYANCE.

The usual mode of conveyance of a mining claim is by deed.

Trinity Gold Dredging & Hydraulic Co. *v.* Beaudry, 223 Federal, 739, p. 741, May, 1915.
See United States Mining Statutes Annotated, 124, 188.

AGREEMENT TO CONVEY—POSSESSORY TITLE.

An agreement by which one party is given the option to purchase certain mines and mining claims designated by name, of which a certain number were described as patented, another certain number as unpatented, and others as having receiver's receipts issued, must be construed as dealing with the possessory title as to all unpatented claims and as binding the obligor to convey his possessory title and right, especially in view of the fact that the purchasing party was to pay all expenses, fees, and costs in connection with contests in the land office and was to perform the annual assessment work and improvements on all unpatented claims; and a stipulation that the final conveyance should be by deed was intended that the conveyance should be of the mining claims as such, and not of the ultimate title to the land known to the parties to rest in the General Government.

Trinity Gold Dredging & Hydraulic Co. *v.* Beaudry, 223 Federal, 739, p. 742, May, 1915.

ADVERSE CLAIMS.

FAILURE TO FILE—NO OBJECTION TO APPLICATION.

The issuance of a patent for a mining claim can not be stayed by reason of some one else claiming a better right to the possession of

the claim, unless the person making such claim files the same against the application in the land office; and an action brought in support of such adverse claim must be based on the right asserted in such claim, as it must be conclusively assumed that no adverse claim exists except such as have been filed.

Lancaster *v.* Coale (Colorado Appeals), 150 Pacific, 821, p. 822, July, 1915.

PLACER CLAIMS.

RULE OF APPROXIMATION.

The rule of approximation is now applicable to placer mining locations and entries upon surveyed lands, to be applied on the basis of 10-acre legal subdivisions.

McKitrick Oil Co., In re Land Decisions, August 13, 1915.

LOCATIONS BY INDIVIDUALS FOR CORPORATION.

Where placer mining claims were located by a number of persons with the understanding that each of such locators would have an equal interest in all of the land so located, and where it was the intention and understanding of such locators that a corporation would be organized by them for the purpose of developing the claims and that to such company when organized the claims would be conveyed, the stock of the corporation distributed among such persons according to their respective interests in the land to be conveyed, and where such persons subsequently met, organized a corporation under the laws of the State, and subscribed stock in proportion to the amount and value of the land located by each, such locations are held to be valid, as the locators under such circumstances located the claim solely for their own individual benefit and not as mere agents for the benefit of some other person or of some corporation in which they had no interest; and under their arrangement the corporation to which it was proposed to transfer the claims was to be one in which such locators were to be the sole stockholders and each the owner of the equal undivided part of the stock; and it is not a case of dummy locators lending their names to persons or corporations for the purpose of permitting them to acquire lands.

McKitrick Oil Co., In re Land Decisions, August 13, 1915.

PATENTS.

APPLICATION AND RIGHT OF LOCATOR AS AGAINST THIRD PERSONS.

Where the right to a patent to a mining claim from the United States is the issue and the purpose of the suit, and the evidence is sufficient to satisfy the requirements of the statute and entitle the party, by reason of prior location, to a patent, it would be sufficient

to sustain the verdict and judgment, so far as the rights of all the parties are concerned, and the question of title in a third person or a third person's interest can not be raised to defeat the right to a patent from the United States to a mining claim.

Lancaster *v.* Coale (Colorado Appeals), 150 Pacific, 821, p. 822, July, 1915.

DEPARTMENTAL DETERMINATION—NOT SUBJECT TO COLLATERAL ATTACK.

The Land Department of the United States, including in that term the Secretary of the Interior, the Commissioner of the General Land Office, and other subordinate officers, constitutes a special tribunal, vested with judicial power to hear and determine the claims of all parties to the public lands which it is authorized to dispose of and with power to execute its judgments by conveyances to the parties entitled to them; and a patent to land within its jurisdiction, issued by the Land Department, is the judgment of that tribunal and a conveyance of the legal title to the land to the patentee is an execution of the judgment; and when a patent is issued it is, like the judgments of other judicial tribunals, impervious to collateral attack. Accordingly, a decision by the Secretary of the Interior, on appeal from the Land Office, to the effect that a prior placer entry on Government land opened to entry was invalid, as to the extent of any existing conflict with the homestead entry, for the reason that the land was not mineral in character and a cancellation of such entry and the directing the issuance of a patent to the homestead claimant must be regarded by the courts as a judicial determination of an issue within the jurisdiction of such special tribunal, vested with judicial powers to hear and determine matters in controversy, and a patent issued on such determination is not subject to collateral attack in an action brought by the homestead claimant against the placer entryman to recover possession of the disputed ground.

Olson *v.* Kirk (South Dakota), 153 Northwestern, 893, July, 1915.
See King *v.* McAndrews, 111 Federal, 860.
United States Mining Statutes Annotated, 296, 316, 1135.

MINING PARTNERSHIPS.

JOINT OWNERSHIP AND OPERATION.

Under the Civil Code of California (section 2511), a mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the minerals therefrom actually engage in working the same; but the actual working of the mine by the joint owners is essential to the mining partnership.

Peterson *v.* Beggs (California Appeals), 148 Pacific, 541, p. 542, March, 1915.

JOINT VENTURE AND OPERATION.

Persons who enter into a joint venture for the purchase and operation of mining property and who understand and act upon the understanding that each of the parties shall pay an equal amount of all expenses incident to the venture, likewise understanding that they would share equally in the proceeds of the enterprise, are partners and the arrangement constitutes a partnership.

Galbraith *v.* Develin (Washington), 148 Pacific, 589, p. 591, May, 1915.

AGREEMENT TO ACQUIRE AND DEVELOP MINES.

An agreement among certain persons creating an association of the parties for the purpose of acquiring, developing, and dealing in mines would not create a mining partnership, unless it further provided that when the mining property was acquired and developed it should then be worked on general account.

Peterson *v.* Beggs (California Appeals), 148 Pacific, 541, p. 542, March, 1915.

WHAT CONSTITUTES—COOPERATION IN WORKING MINE ESSENTIAL.

The actual working of a mine by the owners together for their mutual benefit seems to be essential to the existence of the partnership relation, the parties to contribute to the expenses of the work and to share in the profits according to their respective interests, and the partnership arises only when the coowners unite and cooperate in working the mine.

Peterson *v.* Beggs (California Appeals), 148 Pacific, 541, p. 542, March, 1915.

VERBAL AGREEMENT AS TO JOINT VENDOR—PERFORMANCE—STATUTE OF FRAUDS.

An agreement between three persons to procure an option to further develop a mine and to form a corporation and issue stock, to be equally divided among them, while not in writing, amounted to a joint venture or partnership and is not within the statute of frauds; and the procurement of the option, the formation of the corporation, and the issuance of the stock is such performance as to render the statute of frauds inapplicable, even if the original agreement had been void under the statute.

Kent *v.* Costin (Minnesota), 153 Northwestern, 874, p. 875, July, 1915.

CONTRACT INSUFFICIENT TO CREATE.

A contract by which one of the parties holding the legal title to certain mines and mining properties in trust for all was to sell such property or any portion of it and from the purchase price from

time to time deduct a sum sufficient to repay him for all sums paid out by him for the benefit of the mining properties and to compensate him for his personal services, the sums remaining to be divided equally among the parties, does not constitute a mining partnership.

Peterson *v.* Beggs (California Appeals), 148 Pacific, 541, p. 542, March, 1915.

MINE WORKED BY ONE COOWNER.

Where one coowner of mining property engages in working it for ore, the remaining owners or cotenants not so engaged do not thus become partners but will be left to their rights and are chargeable according to their duties as cotenants only.

Peterson *v.* Beggs (California Appeals), 148 Pacific, 541, p. 542, March, 1915.

COTENANT SEPARATELY WORKING MINES.

Where a joint owner of mines and mining property who held the title in trust for all the owners under an agreement by which he was to sell the mining property and from the purchase price deduct sums sufficient to pay the expenses incurred, engaged in working the mine and himself compensated the laborers employed, and where in his absence another one of the joint owners took possession and worked the mine, this does not constitute a partnership, and neither of the coowners is liable for espenses incurred by the other.

Peterson *v.* Beggs (California Appeals), 148 Pacific, 541, p. 542, March, 1915.

ONE PARTNER PURCHASING INTEREST OF ANOTHER—FRAUD AND CONCEALMENT—LIABILITY.

Good faith requires that every mining partner in the purchase and disposal of mining property should not make any false representations to his partners as to the sale and purchase of the interests of other partners, and likewise he should abstain from all concealments which may be injurious to the partnership business; and if any such partner is guilty of concealment and derives a profit and benefit therefrom, he may be compelled in equity to account to the other partners; and if in the purchase by one partner of the interests of others and in the purchase misrepresented and concealed the conditions existing at the time and subsequently sold the interest so purchased at a much larger sum, he may in equity be required to account for the excess received by him.

Galbraith *v.* Develin (Washington), 148 Pacific, 589, p. 592, May, 1915.

RIGHTS OF PARTNERS TO BUY AND SELL.

Any one of several partners engaged in the purchase and operation of mining properties has the right to purchase the interest of any of

the other partners and acquire the same for himself, and if he subsequently sells the interests so purchased at considerable profit, without any previous arrangement made therefor, his selling partners have no right to complain.

Galbraith *v.* Develin (Washington), 148 Pacific, 589, p. 591, May, 1915.

STATUTES RELATING TO MINING OPERATIONS.

CONSTRUCTION, VALIDITY, AND EFFECT.

PURPOSE AND APPLICATION OF ACT REGULATING COAL MINING.

The manifest purpose of the act of April 18, 1911 (Acts of Alabama, 1911, p. 500), is to reduce to a minimum the dangers incident to the hazardous occupation of mining coal and thus conserve the life and limbs of those engaged in this occupation. Its provisions are not only for the benefit of those occupying the relation of servants or employees but for the protection of all persons engaged in working in mines, whether under contract as an employee or independent contractor.

Stith Coal Co. *v.* Harris (Alabama), 68 Southern, 797, p. 798, May, 1915.

EXAMINATION AND CLASSIFICATION—MANDAMUS TO COMPEL EXAMINING BOARD TO ISSUE CERTIFICATE.

The act of Pennsylvania of June 8, 1901, provides that every applicant for a certificate as mine inspector must have knowledge of the different systems of work in coal mines and must produce satisfactory evidence to the board of examiners of experience in mines where noxious and explosive gases are evolved, and must have had at least five years' practical experience in the anthracite mines of Pennsylvania; but, in addition to this, the board of examiners may exercise discretion in performing their duty, and at least four members of the board must be convinced that an applicant has passed a satisfactory examination before he is entitled to a certificate of qualification; and if the board fails to agree that a particular applicant has passed "a successful examination" and four members are not willing to sign the certificate, the matter there ends, and the applicant can not by mandamus compel the board to issue a certificate, especially where his petition makes no averment as to fraud or misconduct in the refusal to award him a certificate and where he fails to allege that he correctly answered 90 per cent of the questions stated in his written examination.

Reese *v.* Pollard (Pennsylvania), 94 Atlantic, 246, p. 247, March, 1915.

STATUTE REQUIRING OPERATOR TO FURNISH PROPS—REASONABLE COMPLIANCE.

While the statute of Alabama (section 38, act of April 18, 1911) imposing the duty on the mine operator to furnish props to a miner

on proper request is mandatory and places an imperative duty upon the owner or operator of a mine and should be construed that the ends for which it was intended may be accomplished, yet it must receive a reasonable construction, and its purpose is to have furnished at a convenient place a sufficient supply of props and other timbers useful for propping in the mine and of suitable lengths and sizes when needed and requested by the miners; but there is nothing in the section indicating that the mine operator is required to furnish props of the exact length demanded by a miner, but the demands of the statute are complied with where the operator furnishes props entirely suitable for the purpose for which they were ordered and which require no unusual effort or inconvenience in setting them, although they may vary an inch from the exact length ordered; and evidence is admissible to show that props an inch or two inches shorter or an inch or two inches longer than the length requested by the miner are suitable in connection with the methods of mining and the particular conditions of the mine where the props are to be used and the circumstances surrounding their use.

Stith Coal Co. *v.* Sanford (Alabama), 68 Southern, 990, p. 992, May, 1915.

SCOPE OF EMPLOYMENT—MINER WITHIN PROTECTION OF STATUTE.

Where all the men employed in a mine, including the boss driver and his assistant, are subordinate to the bank boss and subject to his orders and control; and where in case of a wreck of trip cars in a mine the bank boss ordered all persons within hearing to assist in cleaning up the wreck and getting the cars running, and the boss driver being present thereupon ordered his assistant boss driver to aid in cleaning up the wreck, such assistant boss driver is then within the protection of the statute protecting employees against the negligence of an employer, though the particular service is foreign to his regular work.

Republic Iron & Steel Co. *v.* Quinton (Alabama), 69 Southern, 604, p. 605, July, 1915.

AMENDATORY ACT INVALID—EFFECT.

The act of 1907, chapter 540, attempting to amend chapter 237 of the acts of 1903, of the Tennessee statutes, declaring that the mine foreman should be considered the agent and representative of the owner or operator in the discharge of the statutory duties of such foreman, being invalid by reason of the failure of the legislature to observe the constitutional requirements in the manner of its passage, leaves the provisions of the original act in force, and under such original act a mine owner or operator was not liable to a miner injured by the negligence of such statutory foreman.

Tennesse Coal, Iron & Railroad Co. *v.* Hooper (Tennessee), 175 Southwestern, 1146, May, 1915.

See Roame Iron Co. *v.* Francis, 130 Tennessee, 694; 172 Southwestern, 816.

EMPLOYERS' LIABILITY ACT—APPLICATION AND LIABILITY.

In an action for damages for injuries by a miner under the employers' liability act of Alabama (code section 3910), the injured miner can not recover without showing the relation of employee to the defendant operator, as this section imposes no duty upon a mine operator to any but his employees.

Stith Coal Co. *v.* Harris (Alabama), 68 Southern, 797, p. 798, May, 1915.

EXERCISE OF CARE

The statute of Missouri (Revised Statutes of 1909, section 7828), requiring certain machinery dangerous to employees when engaged in their ordinary duties to be guarded, does not exempt the employees from the duty to exercise reasonable care to avoid injury from such machinery. Nor does it deprive the employer of the defense of contributory negligence to actions for injuries caused thereby.

Northern Central Coal Co. *v.* Hughes, 224 Federal, 57, p. 59, May, 1915.

DUTIES IMPOSED ON OPERATOR.

DUTY TO PROVIDE SAFE APPLIANCES.

Under the statute of West Virginia it is the nonassignable duty of the owner or operator of a coal mine, and not of his foreman, to maintain the motor tracks, motor, and other appliances with which the miners are required to work in a reasonably safe condition, and for any failure in this respect resulting in an injury to a miner, such owner or operator is liable for actionable negligence.

Gray *v.* Pocahontas Consolidated Collieries Co. (West Virginia), 85 Southeastern, 551, p. 552, May, 1915.

DUTY TO FURNISH PROPS—COMPLIANCE AS TO LENGTH OF PROPS.

An action by a miner injured by a fall of rock from the roof of a mine in his working place, based on the alleged violation by the mine operator of the statute of Alabama (section 38, act of April 18, 1911), imposing upon the operator the duty of furnishing needed props or timbers when properly requested by the miner, can not be maintained, and a recovery can not be had where it appears from the evidence that the vein of coal in the room where the rock fell was 3 feet and 5 inches high, and where on demand the operator furnished the miner with props 3 feet and 4 inches, 3 feet and 6 inches, and 3 feet and 8 and 10 inches, and where the evidence shows that a prop 3 feet and 4 inches and props 3 feet and 6 inches are suitable and proper to be used in propping the roof of a mine where the vein of

coal is 3 feet and 5 inches high, though the operator did not in fact furnish props cut 3 feet and 5 inches; and on the trial of the case it was proper for the operator to show that for coal veins of the alleged thickness a prop 3 feet and 4 inches was suitable because such props were ordinarily used with a cap board, an instrument in general use in mines, and about 4 or 5 inches wide, about 12 inches long, and about 1 inch thick, and that if a prop is a little short of the required length, the use of such cap board in connection with the props is a better method of propping the roof of a mine; and it was also proper for the operator to show that a prop 3 feet and 6 inches was suitable and was used in well regulated mines for propping purposes in veins of the alleged thickness, and that such props were set, under such circumstances, by digging an inch or more into the floor of the mine, and that the furnishing of such props was a compliance with the imposed statutory duty.

Stith Coal Co. *v.* Sanford (Alabama), 68 Southern, 990, p. 991, May, 1915.

APPLIANCES—ABSENCE OF PROOF OF NOTICE OF DEFECTS.

A coal-mine operator is not liable under the Alabama employers' liability act (section 3910, subdivision 1, Code of 1907), to an employee employed as a coupler on a motor car used for hauling trips of cars out of the mine where, at the time of the injury complained of, the plaintiff was riding on a motor car, engaged in the line of his employment in coupling the power car to a trip of coal cars to be hauled out of the mine, and where the averments of negligence relied upon are to the effect that the bumpers on the tram car that caught the plaintiff's hand and inflicted the injury complained of were "broken off," and where such fact is averred as constituting the defect in the ways, works, machinery, or plant, of the defendant that was the proximate cause of the injury, and had not been discovered or remedied owing to the negligence of the defendant, and where it appears from the evidence that the car had had bumpers and where there was nothing to show for what length of time immediately before the accident the bumpers had been broken off, as the bumpers must have been broken off the car a sufficient length of time to charge the mine operator with negligence in failing to discover the defect and remedy it, in the absence of actual knowledge of the defect.

Sloss-Sheffield Steel & Iron Co. *v.* Westbrook (Alabama), 69 Southern, 311, June, 1915.

VIOLATION OF STATUTORY DUTIES—LIABILITY.

PLEADING NEGLIGENCE—SUFFICIENCY OF COMPLAINT FOR INJURY.

In an action by a miner for damages for injuries he must, under the Pennsylvania act of May 25, 1887, aver facts sufficient to show

that a duty required by law has been breached or neglected by the mine operator, and the averments must be sufficient to indicate the causal connection between such breach or neglect and the injury complained of and must be sufficient to give the defendant clear and exact information of the charges against him; and while he need not anticipate defenses or aver mere underlying evidentiary facts, yet the elementary facts relied upon to show negligence must appear in unequivocal language and these facts must be such as, standing alone, if not controverted, would entitle the plaintiff to a verdict in his favor; and if many separate grounds of complaint are laid in a declaration each must be examined with like care, and a multitude of charges, none of which aver facts sufficient to make a case against the defendant, are no stronger than one insufficient averment would be.

Charnogursky *v.* Price-Pancoast Coal Co. (Pennsylvania), 94 Atlantic, 451, p. 452, March, 1915.

A complaint in an action by a miner for personal injuries is sufficient where it avers that the injuries complained of were received by reason and as a proximate consequence of the negligence of an employee of the defendant operator, and intrusted by the defendant with superintendence while in the exercise of such superintendence, in this, that such person negligently permitted the top or roof of the mine where plaintiff was so engaged in the discharge of his duties to be defective or to be improperly supported where plaintiff was at work; or negligently permitted plaintiff to work in a dangerous part of such mine, where rock was liable to fall on plaintiff, without warning or notifying him of such danger, as it sufficiently shows a relation between the parties out of which arises a duty owing from the operator to the plaintiff, and it sufficiently avers that the operator negligently failed to do and perform the act or acts imposed by that duty; and it is not necessary and the plaintiff is not required to define the quo modo or to specify the particular acts of diligence which should have been performed in the discharge of the duty, and what the defendant did and how he did it and what he failed and omitted to do are generally better known to him than to the plaintiff; neither was it necessary to aver that the defendant knew of the alleged defective condition of the top or roof of the mine.

Tennessee Coal, Iron & Railroad Co. *v.* Moore (Alabama), 69 Southern, 540, June, 1915.

The duty of the operator to warn and the knowledge of the operator, under the superintendent subdivision of the Alabama statute, is embraced in the words "negligently caused," "negligently allowed," "negligently permitted," and "negligently failed to warn"; and where a complaint by a miner for injuries caused by the fall of a roof charges the operator with negligent failure to properly sup-

port the roof, or that the operator negligently permitted it to be and remain defective, or that the operator negligently permitted plaintiff to work in the dangerous place without warning him of the dangers, are sufficient allegations of the negligent failure of the operator, through its superintendent, to discharge such duty to the plaintiff.

Tennessee Coal, Iron & Railroad Co. *v.* Moore (Alabama), 69 Southern, 540, p. 541, June, 1915.

EMPLOYERS' LIABILITY ACT—NEGLIGENT ORDER GIVEN BY OPERATOR—BURDEN OF PROOF.

In an action under the employers' liability act of Alabama (Code of 1907, section 3910, subdivision 3), by an experienced miner for injuries received while working in defendant's mine by a rock falling from the roof, due to the alleged negligence of the superintendent of the defendant operator in ordering the complainant to put an entry in which he was working on center, the burden of proof is on the injured miner to show that the order, in the execution of which he was injured, was a negligent order under the circumstances and that it must have been reasonably apparent to the superintendent, under the condition as he knew or ought to have known it, that the miner's execution of his command would expose the miner to some peril beyond the ordinary risks of his service, and against which ordinary and reasonable care on his part would probably not suffice to protect him.

Woodward Iron Co. *v.* Wade (Alabama), 68 Southern, 1008, p. 1010, June, 1915.

FAILURE TO FURNISH PROPS—LIABILITY.

A complaint in an action by an injured miner against a mine operator for damages for injuries received while mining coal in a room in the defendant's mine, caused by a rock falling upon the miner from the roof, is sufficient where it further avers that the miner demanded and requested of the person whose duty it was to deliver or have delivered certain props or timbers needed in the mine, and that it was the duty of the defendant operator to promptly deliver the props as requested and demanded, and that as the proximate consequence of such failure the miner was injured.

Stith Coal Co. *v.* Sanford (Alabama), 68 Southern, 990, May, 1915.

ORDERING MINER INTO DANGEROUS PLACE—FAILURE TO WARN.

Where a miner is directed by the mine operator to conduct mining operations in a place in the mine that is dangerous, and where the danger or peril is not obvious, but is inherent in the conditions necessarily surrounding the miner while executing the order of the

operator, and where the conditions are such that the operator could and should have known of the danger, and of which, if not remedied, the miner could expect the operator to seasonably inform him, then in such case the operator's order without such warning is negligent and the miner may recover for an injury proximately resulting therefrom under the employers' liability act of Alabama.

Woodward Iron Co. *v.* Wade (Alabama), 68 Southern, 1008, p. 1010, June, 1915.

FAILURE TO INSPECT MINE.

Under section 5006, General Statutes of Kansas, 1909, it is the duty of mine operators whose mines generate fire damp to keep them free from standing gas, and to examine every working place carefully each morning with a safety lamp by an examiner or fire boss before miners are permitted to enter their working places; and a failure to make such inspection of a mine shown to have generated fire damp or gas will render the operator liable to a miner injured thereby.

Hartman *v.* Dickinson (Kansas), 148 Pacific, 743, May, 1915.

EMPLOYMENT OF MINOR.

In an action in trespass to recover damages for physical injuries to a boy employed in a coal operator's coal breaker where the petition averred that the injuries complained of resulted from the defendant's violation of duties and regulations prescribed by the laws of the Commonwealth for the safety of laborers and employees, and showing by averment the boy's age and that he was injured while in the service of the defendant company, is sufficient to show a liability and to sustain a recovery grounded on the employment of a minor under the age of 16 in violation of the act of May 1, 1909, though the better practice would have been to aver the specific violation of the act.

Krutlies *v.* Bulls Head Coal Co. (Pennsylvania), 94 Atlantic, 459, April, 1915.

UNLAWFUL EMPLOYMENT OF MINOR—EVIDENCE OF NEGLIGENCE—STATUTORY DEFENSE—PLEADING.

When the employment of a minor is shown to be illegal, because forbidden by a statute, this in itself is sufficient evidence of the defendant's negligence, and where the injury complained of occurred in the course of the plaintiff's service under such unlawful employment, that is enough to show causal connection, and the law will refer the injury to the original wrong as its proximate cause. To employ a minor under the age of 16 in a coal breaker is made

unlawful by the statute of Pennsylvania, unless the employer procures and keeps on file the certificate required by the act, and when an action for damages is brought grounded on such employment, a procurement of the certificate and a copy of the same on file as required by the act is a matter of justification or defense to be shown by the employer, and as a lack of compliance with the terms of the statute in this respect on the part of the defendant need not be shown by the injured minor, it is therefore not required to be averred in his statement of claim.

Krutlies *v.* Bulls Head Coal Co. (Pennsylvania), 94 Atlantic, 459, p. 460, April, 1915.

EMPLOYMENT OF BOY UNDER 16—FALSE REPRESENTATION AS TO AGE—LIABILITY.

A mine operator employing a boy under 16 years of age to work in its coal breakers and who fails to procure the certificate and keep the same on file as required by the act of May 1, 1909, is liable in damages for an injury sustained, though the boy falsely represented his age at the time of the employment, as a false statement by the boy in regard to his age will in no sense bar a recovery for subsequent injuries.

Krutlies *v.* Bulls Head Coal Co. (Pennsylvania). 94 Atlantic. 459, p. 461, April, 1915.

EMPLOYMENT OF MINOR—COMPLIANCE WITH STATUTE—PROCURING AND FILING CERTIFICATE.

Under the Pennsylvania statute of May 1, 1909 (P. L. 375), a coal operator who employs in his coal breakers a minor under 16 years of age does so at his own risk, so far as the question of age may enter into a subsequent liability, unless he shows compliance with the act and has obtained and kept on file a certificate as required by the act.

Krutlies *v.* Bulls Head Coal Co. (Pennsylvania). 94 Atlantic, 459, p. 460, April, 1915.

EMPLOYMENT OF YOUTHFUL MINER NOT NEGLIGENCE.

Under the statute of West Virginia it is not negligence per se for a mine operator to employ a boy over 14 years of age in a coal mine, but, on the contrary, the statute permits such employment.

Gray *v.* Pocahontas Consolidated Collieries Co. (West Virginia). 85 Southeastern, 551, p. 552, May, 1915.

LIABILITY FOR INJURIES TO EMPLOYEE OF INDEPENDENT CONTRACTOR.

The act of Alabama regulating the mining of coal (act of 1911, 500, p. 514) is for the benefit of miners, whether an employee of the mine operator or of an independent contractor, and if, as a proxi-

mate consequence of a breach of duty imposed by the statute on a mine operator a miner is injured, he is entitled to recover; and it is immaterial in this case whether he was an employee of the owner and operator, or an independent contractor, or an employee of an independent contractor, and any averments in his complaint as to his relation to the mine owner and operator will not require strict proof.

Stitch Coal Co. *v.* Harris (Alabama), 68 Southern, 797, p. 798, May, 1915.

DUTIES IMPOSED ON MINER.

FAILURE TO SELECT AND MARK PROPS—PROOF OF CUSTOM.

Section 2739b of the statutes of Kentucky makes it the duty of a mine owner to furnish props and caps to the miner only after the miner has selected and marked the same, and the statutory duty thus imposed on the miner can not be abrogated by a custom of merely requesting props and caps.

Peerless Coal Co. *v.* Taylor (Kentucky), 176 Southwestern, 1002, p. 1003, June, 1915.
See Palmer *v.* Empire Coal & Coke Co. (Kentucky), 162 Ky. 130, 172 Southwestern, 97.

SELECTION OF PROPS—FAILURE OF OPERATOR TO PROVIDE PROPS.

Under section 2739b of the statutes of Kentucky, making it the duty of a mine owner to furnish props and caps only after the miner has selected and marked the same, if the mine owner fails to supply props at a place in the mine, or within a reasonable distance therefrom, so that they can be conveniently reached by the miner, then the miner is not required to select and mark the props, but a mere request on his part will be sufficient to impose on the owner the duty of furnishing props, and the failure of the mine owner or operator to so furnish the props may make him liable for an injury to the miner resulting proximately from such failure.

Peerless Coal Co. *v.* Copenhaver (Kentucky), 176 Southwestern, 1002, p. 1003, June, 1915.

DUTY OF MINER TO AVOID PERILS—ASSUMPTION OF COMPETENCY BY OPERATOR.

Where an experienced miner is directed to conduct mining operations at a particular and perilous place in the mine, and where the peril is obvious to the miner and might readily be avoided by him by fully discharging his duty in conformity with the order given, the operator has the right to assume that the miner will both observe the peril and avoid it, and under such circumstances it can not be said that the order was negligently given within the employers' liability act of Alabama.

Woodward Iron Co. *v.* Wade (Alabama), 68 Southern, 1008, p. 1010, June, 1915.

NEGLIGENCE OF MINE SUPERINTENDENT, FOREMAN, OR BOSS.

LIABILITY WHERE MINE OPERATIONS ARE PLACED IN THE HANDS OF STATUTORY FOREMAN.

Under a statute requiring a mine operator to employ a statutory mine foreman and depriving the owner or operator of any control of such foreman as to the internal operations of the mine, the relation of master and servant does not exist, and it would be unreasonable and against conscience to hold the owner or operator responsible for the consequences of an act of such foreman, the doing of which had been, by the express provision of the statute, taken out of his hands and placed beyond his control.

Tennessee Coal, Iron & Railroad Co. *v.* Hooper (Tennessee), 175 Southwestern, 1146, May, 1915.

NO LIABILITY IN ABSENCE OF RELATION OF MASTER AND SERVANT.

A mine foreman under the Tennessee statute (Acts of 1903, ch. 237) is charged with the duty of keeping watch over entries and traveling ways so that as the miners advance their excavations all dangerous coal, slate, or rock overhead is taken down or secured against falling, and the statute prescribing the qualifications of mine foremen compels the operator to employ them and expressly provides that such foremen shall not be subject to the control of the operator or owner in the discharge of their statutory duties and the performance of these duties is secured by the imposition of a fine and imprisonment upon any foreman neglecting them; and by reason of this statutory provision the relation of master and servant does not exist between the foreman and the mine owner or operator, and the owner or operator is not liable to an injured miner by reason of the negligence of such a statutory foreman.

Tennessee Coal, Iron & Railroad Co. *v.* Hooper (Tennessee), 175 Southwestern, 1146, May, 1915.

REQUIRING EXPLOSIVES TO BE KEPT IN DAMP PLACE.

A fire boss has no right under the Pennsylvania statute to say that a miner's box containing explosives should remain in a particular place where it was damp, and where all that he did say was that the place was all right and the box good enough, and the miner could not under such direction leave his box where it was exposed to dampness, relying upon the judgment of the fire boss, and, even if the fire boss had the power and was negligent, the mine owner under the Pennsylvania statute would not be liable for an injury to the miner resulting from the negligence of the statutory fire boss.

Lehigh Valley Coal Co. *v.* Calausky, 222 Federal, 664, p. 666, April, 1915.

NEGLIGENCE OF MINE BOSS—SELECTING DANGEROUS METHODS.

The statute of Indiana, section 8580, Burns's, 1914, makes it the duty of a mine boss to visit and examine every working place in a mine at least every alternate day while the miners are at work and to examine and see that each working place is properly secured by tamping, and shall see that a sufficient supply of timbers are on hand, and shall also see that all loose coal, slate, and rock overhead wherein miners have to travel to and from their work are taken down or carefully secured; and a complaint in an action for damages for the death of a miner which avers that the deceased miner was ordered by the mine boss and his assistant to repair the timber and entry in a particular manner, and that the way selected was dangerous and known to them to be so, but nevertheless they negligently selected the unsafe way of propping the roof when they could have selected the safe way of taking down the loose slate and rock, and that the deceased miner, while obeying the order and directions of the mine boss and his assistant and while attempting to perform the work in obedience to such order, was killed by a fall of the loose slate, is sufficient, for the reason that the statute recognizes two ways of making such places safe; and if the mine boss and his assistant negligently selected the unsafe way, as alleged, and ordered the deceased miner to work in that particular manner, and he lost his life while obeying such order, the mine operator is liable.

Vandalia Coal Co. *v.* Alsopp (Indiana Appellate), 109 Northeastern, 421, p. 422, June, 1915.

EVIDENCE—ADMISSIBILITY OF DECLARATIONS.

Under the Pennsylvania law a fire boss is not a fellow servant of the mine owner's employees, and the employers' liability act does not apply to such a foreman; and where it was not made to appear that a fire boss represented the mine owner in any respect or performed any duties except those imposed upon him by statute, a conversation between him and the injured miner did not affect the mine owner, and is not admissible in evidence in an action by an injured miner.

Lehigh Valley Coal Co. *v.* Calausky, 222 Federal, 664, p. 666, April, 1915.

EFFECT ON CONTRIBUTORY NEGLIGENCE.

DEFENSE OF CONTRIBUTORY NEGLIGENCE NOT ABROGATED.

The statute of Missouri (Revised Statutes of 1909, sec. 7828), requiring certain dangerous machinery used by employees to be guarded, does not deprive the employer of the defense of contributory negligence to actions for injuries caused by a failure to guard dangerous machinery.

Northern Central Coal Co. *v.* Hughes, 224 Federal, 57, p. 59, May, 1915.

CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK NOT DEFENSES—EXCEPTIONS.

In an action for damages by an injured miner negligence or assumption of risk can not be interposed as a matter of defense under section 3910 of the Code of Alabama, unless the miner is the one whose duty it is to remedy the defect, or who committed the negligent act causing the injury complained of. The statute does not prohibit the defense of contributory negligence or assumption of risk in three distinct classes of cases: (1) Where the miner knows of the defect or negligence and fails to give information thereof within a reasonable time to the operator or to a superior in the service, unless the operator or such superior knows of the defect or negligence; (2) where the injured miner, whose duty it is to remedy the defect alleged to have caused the injury, knew of the existence of the defect or the negligence and thereafter remained or continued in the service and was injured; and (3) where the injured miner himself committed the negligent act causing the injury complained of, and by this meaning a breach of some duty by the miner whereby the defect, or negligence predicable of it, was caused by the act or omission of the servant suffering the injury, thus negativing in that respect the existence of a defense based on assumption of risk or contributory negligence other than may arise from the breach of duty by the miner.

Clinton Mining Co. *v.* Bradford (Alabama), 69 Southern, 4, p. 7, May, 1915.
See Warrior River Coal Co. *v.* Thompson (Alabama), 69 Southern, 76, p. 79, June, 1915.

MINER REMAINING IN EMPLOYMENT—MEANING.

The expression "to remain in the employment" as provided in section 3910, Code of Alabama, with reference to the defenses of contributory negligence and assumption of risk, signifies continuing in the service or work of the mine operator in the zone of possible danger of injury to the miner, who then knows of the existence of the defect or negligence to which under other sections of the act his injury is attributed in his pleading.

Clinton Min. Co. *v.* Bradford (Alabama), 69 Southern, 4, p. 7, May, 1915.

DAMAGES DIMINISHED BY CONTRIBUTORY NEGLIGENCE.

An action by a miner instituted in the State courts of Nevada, or in a Federal court in Nevada, for injuries received by him in the State of California, is governed by the laws of the latter State, and under the statute of California contributory negligence will not bar a recovery where the miner's contributory negligence was slight and

that of the mine operator gross in comparison, and in such case the damages may be diminished by the jury in proportion to the amount of negligence attributable to the injured miner.

Keane Wonder Mining Co. *v.* Cunningham, 222 Federal, 821, p. 824, May, 1915.

FAILURE TO TAKE PRECAUTION FOR PROTECTION OF LIFE NOT A DEFENSE—DIMINISHING DAMAGES—INSTRUCTIONS.

A complaint in an action by an injured miner against a coal-mining company averred that the company was engaged in mining coal at such a depth as to render the work inherently dangerous on account of the liability of noxious and combustible gases to accumulate, which could have been guarded against by the exercise of reasonable care and diligence, and that the company failed to install in its mine sufficient ventilating fans and air shafts to dissipate such gases, by reason of which the complainant, employed in the mine, was, on entering a room of the mine as directed by the company, severely burned and injured as the result of a violent explosion occurring at that time, brings the cause of action within the provisions of the statute of Oregon (sec. 6 of the employers' liability act), to the effect that the contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of damages, and shows that the mine operator did not comply with section 1 of the statute by using every device, care, and precaution practical to use for the protection and safety of life and limb; and an instruction to the effect that, notwithstanding the negligence or carelessness of the mine operator, if the plaintiff himself has been guilty of contributory negligence, such negligence as proximately contributes to the injury, then the plaintiff can not recover, notwithstanding the negligence of the defendant, is erroneous as not stating the correct rule of law under the statute.

Raiha *v.* Coos Bay Coal & Fuel Co. (Oregon), 149 Pacific, 940, June, 1915.

APPORTIONMENT OF DAMAGES ACCORDING TO WANT OF CARE.

Under the employers' liability act of Oregon (General Laws of Oregon, 1911, chapter 3, section 6) contributory negligence of an injured miner is not a bar to a recovery of damages by a miner for an injury resulting from the alleged negligence of the mine operator, but the measure of the loss occasioned by the injury is apportioned ratably between the parties according to their respective want of ordinary care.

Raiha *v.* Coos Bay Coal & Fuel Co. (Oregon), 151 Pacific, 471, p. 472, September, 1915.

PRIMARY AND CONTRIBUTORY NEGLIGENCE—DISTINCTION A QUESTION OF FACT.

Under a constitutional provision requiring it, contributory negligence is a question which the court must never decide, but it must be submitted to a jury for their consideration; but contributory negligence on the part of a plaintiff presupposes negligence on the part of a defendant, and before the question of contributory negligence on the part of the plaintiff can arise negligence of the defendant must first be shown; and if there is no negligence upon the part of the defendant shown, and the negligence of the plaintiff only, or of his fellow servant, caused the injury, then such negligence is primary and not contributory negligence on the part of the employee, and there is no case to come to the jury where the primary negligence was caused by the plaintiff or by his fellow servant.

Barnsdall Oil Co. *v.* Ohler (Oklahoma), 150 Pacific, 98, p. 103, June, 1915.

ACTION FOR INJURY TO MINER—SUFFICIENCY OF ANSWER PLEADING CONTRIBUTORY NEGLIGENCE.

In an action by a miner for personal injuries occasioned by the alleged negligence of the mine operator under section 3910 of the Alabama Code of 1907, making a mine operator liable for injuries to a miner caused by any defect in the condition of the ways, works, machinery, or plant of the operator, and providing also that it shall not be contributory negligence or assumption of risk on the part of the miner to remain in the employment of the operator after knowledge of the defect or negligence causing the injury, unless it is his duty to remedy the defect or unless he committed the negligent act causing the injury complained of, an answer or a pleading by the operator to the action is insufficient where it avers that the miner was himself guilty of negligence which proximately contributed to the injury and that at the time he sustained the injuries complained of he was engaged in mining in a certain heading in the defendant's mine, in the roof of which near the place at which he was at work there was loose rock or slate likely to fall, which fact and the danger to plaintiff arising therefrom was known, or should have been known to him in the exercise of due care, notwithstanding which plaintiff went under such rock or loose slate and the same fell, striking him and causing the injury complained of, is insufficient for failing to aver that the plaintiff was under the duty to remedy the defect described, or for failing to aver that he himself committed the alleged negligent act causing the injury complained of, as the question of contributory negligence under such circumstances is a defense and

must be specially pleaded, under the rule that where there is an exception in a subsequent clause or a subsequent statute it is a matter of defense, to be pleaded and proved by the defendant.

Clinton Mining Co. *v.* Bradford (Alabama), 69 Southern, 4, p. 7, May, 1915. See Warrior River Coal Co. *v.* Thompson (Alabama), 69 Southern, 76, p. 79, June, 1915.

INJURY FROM FALLING ROCK—ASSURANCES OF SAFETY BY MINE BOSS.

A miner injured by a fall of rock from the roof of an entry at a roadway in a mine is entitled to recover under the Alabama statute (section 3910, subdivision 1, code of 1907) where it appears from the evidence that the miner called the attention of the mine boss to the dangerous condition of the roof under the roadway and the mine boss, after an examination of the roof at the particular place, assured the miner that the place was safe and that supports by means of collars were not required, and where on such assurance the miner continued work and was injured by the fall of rock, and in such case the defense of contributory negligence is not available to the operator.

Warrior River Coal Co. *v.* Thompson (Alabama), 69 Southern, 76, page 80, June, 1915.

EFFECT ON ASSUMPTION OF RISK.

MINER CAN NOT WAIVE VIOLATION OF STATUTE.

It may well be doubted whether a miner in a coal mine can assume the risk incident to a noncompliance with the act of April 18, 1911, of Alabama (Acts of 1911, p. 500), even by a special contract supported by sufficient consideration, and whether such a contract would not be void as contravening the public policy of the State; but it is clear that in the absence of such contract a miner does not assume the risk by continuing at his work, even in violation of rules promulgated by the mine owner for the purpose of evading the statute.

Stith Coal Co. *v.* Harris (Alabama), 68 Southern, 797, p. 798, May, 1915.

ACTION TRANSITORY—STATUTE GOVERNING AS TO ASSUMPTION OF RISK.

An action by a miner for personal injuries is transitory and maintainable wherever a court may be found that has jurisdiction of the parties and the subject matter; and such an action brought in a State court of Nevada upon a cause of action that arose in California, subsequently removed to the United States district court of Nevada, is to be governed by the statute of California, which provides that assumption of risk is no defense to an action of such nature.

Keane Wonder Mining Co. *v.* Cunningham, 222 Federal, 821, p. 824, May, 1915.

MINER'S DUTY TO PROP ROOF—ANSWER OF ASSUMPTION OF RISK.

In an action by a miner for injuries caused by a fall of rock from the roof of an entry or room where he was working, based on the statute of Alabama (section 3910, subdivision 1, Code of 1907), an answer or pleading by the defendant operator is sufficient where it directly avers that the plaintiff himself, on the occasion of which he complained, was the particular miner or servant to whom was entrusted the duty of seeing that the roof of the entry or room at the particular place was in proper condition and that the plaintiff undertook to perform the duty so entrusted to him.

Warrior River Coal Co. *v.* Thompson (Alabama), 69 Southern, 76, p. 79, June, 1915.

LIABILITY OF OPERATOR FOR INJURY TO MINER—ASSURANCES OF SAFETY.

In an action by a miner for injuries caused by a fall of rock from the roof, on the ground of the alleged negligence of the superintendent in negligently causing or permitting the roof to fall upon and injure the miner, the plaintiff is entitled to recover under the employers' liability act of Alabama (section 3910, Code of 1907), abrogating the defenses of assumption of risk and contributary negligence, and especially where there was evidence to show that the rock fell from above a roadway and which roadway ought, for safety, to have been supported by a cross collar, and where it appeared that the injured miner and other miners were prevented from putting in such collars without the order or approval of the mine boss, and where the injured miner had reported to such boss the absence and need of collars at the particularly roadway, and where after the mine boss examined and inspected the place informed the miner that it was a good prop and that collars were not needed.

Warrior River Coal Co. *v.* Thompson (Alabama), 69 Southern, 76 p. 79, June, 1915.

See Clinton Coal Co. *v.* Bradford (Alabama), 69 Southern, 4, May, 1915.

GRATUITOUS SERVICE—SCOPE OF EMPLOYMENT.

There can be no recovery in an action for the death of a person or employee in a mine employed in the capacity of assistant boss driver, who gratuitously, or without proper authorization, undertook to aid in the work of repairing a wreck in the mine, and in so doing handled an electric wire which shocked and killed him.

Republic Iron & Steel Co. *v.* Quinton (Alabama), 69 Southern, 604, p. 605, July, 1915.

STATUTORY ACTION FOR WRONGFUL DEATH.

ELECTION TO ACCEPT UNDER COMPENSATION ACT—DEFENSE.

In an action for the wrongful death of a miner, under the provisions of the statute of Arizona giving a right of action for injuries resulting in death, where there is no averment in the complaint as to whether or not the deceased miner had elected to accept compensation under the provisions of the workmen's compulsory compensation act of Arizona, the fact of such election is a defensive matter; and if not raised by a plea or answer, it is waived by the defendent, the mine operator.

Behringer *v.* Inspiration Consolidated Copper Co. (Arizona), 149 Pacific, 1065, July, 1915.

ACTION UNDER ARIZONA WORKMEN'S COMPULSORY COMPENSATION LAW—EMPLOYERS' LIABILITY ACT—ELECTION OF REMEDIES.

Under the Constitution of Arizona, commanding the legislature to pass a law by which compulsory compensation shall be required to be paid to certain workmen for personal injuries, but leaving it optional with the workmen to settle for such compensation or retain the right to sue as otherwise provided, the legislature does not possess power to enlarge the mandate of the constitution so as to authorize the personal representative of a deceased miner to impose on his heirs and dependents a remedy made by the constitution open to the workman only; but if the workman, prior to his death, should elect to settle for compensation and thereafter die pending the settlement with the employer, his personal representative could enforce the contract; but unless there was an election of this remedy in the lifetime of the deceased miner by him, the personal representative can not maintain an action for compensation, as the employee himself must elect that remedy, and in such case the personal representative is relegated to an action for damages under the statute of Arizona giving a right of action for injuries resulting in death, or an action under the employers' liability act, according as the facts fall within the one or the other of these acts.

Behringer *v.* Inspiration Consolidated Copper Co. (Arizona), 149 Pacific, 1065, p. 1066, July, 1915.

SETTLEMENT PROCURED BY FALSE REPRESENTATIONS.

Where a miner was killed through the negligence of a mine boss in selecting the more dangerous of two ways in attempting to make safe the roof of an entry, a settlement and release of the claim against the mine operator by the widow of the deceased miner is invalid and

fraudulent as against an action for damages where the agent and representative of the mine operator falsely and fraudulently represented to such widow that the mine operator had evidence to show that the deceased miner knew the dangers of the roof and went to work under it; that the attorneys representing the widow in an action for damages wholly failed in other similar cases within the knowledge of such agent and that the services of such attorneys were of practically no value, where the agent and representative of the operator knew that at that time she was in great distress on account of the death of her husband and her destitute condition with six small children to support, and further represented that if she went to law and recovered a judgment it would be six or seven years before she would receive anything, and that her lawyers would take most of it if she recovered a judgment, and where before the bringing of the action she repudiated and rescinded the settlement and tendered back the uncashed check.

Vandalia Coal Co. *v.* Alsopp (Indiana Appellate), 109 Northeastern, 421, p. 422, June, 1915.

FAILURE TO USE APPLIANCES TO PREVENT THE ACCUMULATION OF GASES.

It is the duty of a mine operator to use all appliances readily obtainable for the prevention of accidents arising from the accumulation of gas or other explosives, and a failure on the part of the operator to observe that duty constitutes negligence on his part for which he is liable for an injury resulting proximately from such failure.

Raiha *v.* Coos Bay Coal & Fuel Co. (Oregon), 151 Pacific, 471, September, 1915.

MINES AND MINING OPERATIONS.

NEGLIGENCE OR OPERATOR.

NEGLIGENCE DEFINED.

Negligence is the failure to do what a reasonably prudent person would ordinarily have done under the same or similar circumstances, or in doing what a reasonably prudent person under the same or similar circumstances would not have done.

Consolidated Kansas City Smelting & Refining Co. *v.* Schulte (Texas Civil Appeals), 176 Southwestern, 94, p. 95, May, 1915.

FAILURE TO FURNISH PROPS—QUESTION OF FACT.

Where it appeared that a miner marked timbers necessary for his use on the morning of the day before he was injured, and that if the timbers had been promptly delivered the roof from which the rock

fell and injured the miner would have been made safe, and that the timbers were not delivered until the afternoon of the next day after they were ordered, and the miner, on starting to move the timbers in place for setting them, was injured by the fall of the roof, it becomes a question of fact for the jury as to whether the operator was guilty of negligence with reference to delivering the timbers and as to whether such negligence was the proximate cause of the injury.

Stith Coal Co. *v.* Harris (Alabama), 68 Southern, 797, p. 799, May, 1915.

In an action by a miner for injuries caused by slate falling from the roof of the room of an entry where he was mining coal, and where there is conflict in the evidence as to whether it was the duty of the miner to prop the roof at the place of injury or to sound the roof and take down the slate if he found it loose, and if the conditions were such that it was his duty to prop the roof, and he would have propped it if props had been furnished, and the mine operator, after the miner had taken proper steps to obtain the props, failed to furnish them, and by reason of such failure the miner was injured, then he would be entitled to recover, unless the danger from lack of props was so obvious and imminent that an ordinarily prudent person would have worked under the circumstances.

Peerless Coal Co. *v.* Copenhaver (Kentucky), 176 Southwestern, 1002, p. 1003, June, 1915.

DUTY TO KEEP ROOF SAFE CAN NOT BE DELEGATED.

A mine owner and operator can not relieve himself of liability by committing to an independent contractor the performance of a specific duty it owes a miner employed by such independent contractor to maintain the roof of an entry in a reasonably safe condition; and whether an alleged independent contractor was such or whether he was an employee of the owner and operator, the owner and operator would be liable for an injury to an employee if, as a proximate consequence of his negligence in leaving the roof in a dangerous condition, it resulted in the injury to the miner, as the person upon whom a positive duty is imposed by law can not delegate in any manner the performance of that duty so as to relieve himself from responsibility for the condition thus created, and the duty and the responsibility rest where the duty is imposed, and a principal is liable for any injury that arises from the nonperformance of the duty or in consequence of it having been negligently performed either by himself or by an independent contractor.

Sloss-Sheffield Steel & Iron Co. *v.* Hubbard (Alabama), 68 Southern, 571, p. 572, May, 1915.
Stith Coal Co. *v.* Harris (Alabama), 68 Southern, 797, p. 798, May, 1915.

FAILURE TO INSTRUCT—MASTER'S KNOWLEDGE OF SERVANT'S INEXPERIENCE.

In order to hold a mine operator liable for injuries to a miner following a failure to warn and instruct the miner, there must be some evidence tending to show that the mine operator knew, either actually or constructively, that the miner was not experienced; and in order to hold an employer negligent on constructive knowledge of inexperience there must be something to suggest that warning and instruction were necessary.

Batesel *v.* American Zinc, Lead & Smelting Co. (Missouri Appeals), 176 Southwestern, 446, p. 448, May, 1915.

BLASTING—FAILURE TO GIVE WARNING.

In an action by a miner for damages caused by injuries received through the alleged negligence of a mine operator in blasting it is error as a matter of law for the court to instruct the jury trying the case that the failure of the operator to give warning that the blast was about to be fired constituted negligence on its part, as the question of negligence is a question of fact to be determined by the jury; and where all the evidence together shows that the blasts were fired before the miners came to work in the morning, or at noon, when they were away from work, or in the evening after they quit work, and that such blasts were always fired in the daytime because it was dangerous to work with dynamite by artificial light, and that warning was given to miners and employees who worked in the immediate vicinity, thus showing that the time selected for blasting was such that it was not reasonable to anticipate that miners would be in the vicinity; and where it also appears that the injured miner did not work at the place where the blasting was done, but only passed in going to and from his work, it can not, therefore, be said as a matter of law that the operator should have reasonably expected the miner to be within range of the explosion, and the entire question should be submitted to the jury for its determination.

American Bauxite Co. *v.* Dunn (Arkansas), 178 Southwestern, 934, p. 935, July, 1915.

OPERATOR DIRECTING EMPLOYEE TO WORK IN DANGEROUS PLACE.

A mine operator who directs a miner or employee to work in a trench in connection with the improvement and operation of the mining property and fails to take the proper steps to prop the bank of the trench to prevent caving, is guilty of negligence and liable for an injury to the employee if the conditions were such that an ordinarily

prudent man would have taken steps to obviate the fault; and in such case the question of negligence is one of fact for a jury to determine.

Barnhart *v.* Waverly Brick & Coal Co. (Missouri Appeals), 176 Southwestern, 1108, p. 1110, May, 1915.

LAYING PIPE LINES ON SURFACE OF GROUND—LIABILITY FOR INJURY.

A person or corporation transporting natural gas in pipe lines laid on the ground in a public highway must exercise the highest degree of care to avoid injuries to those using the highway; and where an explosion was caused by a traction engine being driven over the pipe line and breaking it, and where the pipe line, covered with growing grass and weeds, was laid on the ground in the highway some 7 feet from a hedge fence, a court may refuse to admit evidence tending to show that other persons and corporations engaged in the transportation of natural gas did so by the means of pipe lines laid on the ground in public highways, as a person or corporation who maintains an exposed gas pipe through which natural gas is flowing on the surface of the ground within the limits of the public highway does an unlawful act and is liable in damages to one who without his fault breaks the pipe by driving a traction engine over it and is injured by an explosion of escaping gas.

Murphy *v.* Ludowici Gas & Oil Co. (Kansas), 150 Pacific, 581, p. 584, July, 1915.

EMPLOYMENT OF DISEASED CONVICT—LIABILITY FOR DEATH.

In an action for damages for the death of a convict employed by a mine operator, where it was averred in the complaint that the servants of the operator, within the line and within the scope of their duties, negligently put the intestate to work in mines while his feet were sore and the skin on his feet and ankles broken and punctured, and his feet thus exposed to dirt and cold and water, by reason of which and as a proximate result thereof he became sick and died, the plaintiff, in order to show the negligence charged as a proximate cause of the death of the convict, must show that the servants and agents of the operator knew of the condition of the convict's feet and ankles, or that they were guilty of negligence in not first ascertaining the condition of his feet and ankles, and where it appears that the condition of his feet and ankles was not open to ordinary observation. It was not the duty of the mine operator or of its servants and agents to make daily or frequent inspection of the convicts for the alleged ailments or troubles, and the operator and its agents had the right to assume that if the convict's feet and ankles were sore or swollen or pained him, he would have made the fact known to them.

Pratt Consolidated Coal Co. *v.* Bozeman (Alabama), 68 Southern, 887, May, 1915.

RIGHT OF INJURED RESCUER TO RECOVER.

A person who attempts to rescue another who has been put in peril by the negligence of a third person may maintain a cause of action against such third person for injuries sustained in attempting the rescue; but this right of action rests entirely upon the ground that the peril to which the person was exposed was caused by the negligence of such third person sought to be made liable in damages.

Taylor Coal Co. *v.* Porter (Kentucky), 175 Southwestern, 1014, p. 1017, May, 1915.

SCOPE OF EMPLOYMENT—MINER KILLED WHILE WORKING OUTSIDE OF EMPLOYMENT.

While the boss driver can not be presumed to have any right to order his assistant to take part in the work of repairing a wreck of trip cars, this being a distant branch of the mining service and outside of the scope of the boss driver or his assistant, yet a court may presume that the boss driver had authority to suspend his assistant from his regular employment and place him under the orders of a bank boss, a common superior, for any particular service for which he might be needed and as to which such bank boss might command or expect his service, and where such assistant boss driver was killed while aiding in such work outside of the scope of his employment the operator may be liable for his death, if it is shown that the bank boss ordered such assistant boss driver to perform the service he was rendering at the time he was killed, or if the bank boss impliedly authorized it by knowingly accepting the service, then the operator would be liable for the death of such assistant boss driver.

Republic Iron & Steel Co. *v.* Quinton (Alabama), 69 Southern, 604, p. 606, July, 1915.

INJURY TO SERVANT—THEORY OF CASE NOT CHANGED ON APPEAL.

Where a case was tried on the theory that the plaintiff, an injured miner, was an employee in the capacity of a servant of the operator and where the defendant procured the court to instruct the jury on the theory that the plaintiff was such servant, the operator can not, on appeal from a judgment for damages, insist that the injured miner was an independent contractor.

Clinton Mining Co. *v.* Bradford (Alabama), 69 Southern, 4, page 6, May, 1915.

ACTIONS FOR DAMAGES FROM ASSAULT AND BATTERY—GUARDS ACTING WITHIN SCOPE OF EMPLOYMENT.

In an action by a person injured by an assault made by agents, employees, and guards of a mining company, the mining company may be held responsible in damages if the guards and employees

acted within the general scope of their authority, although they acted wantonly; and when the evidence and circumstances were open to conflicting inferences the question whether their acts were within the scope of the agents' authority is one of fact for the jury.

Pennsylvania Mining Co. *v.* Parnigan, 222 Federal, 889, p. 891, March, 1915.

LIABILITY FOR SLANDER UTTERED BY OFFICER.

A mining corporation is not liable for a slander uttered by an officer, though he is acting honestly for the benefit of the company and within the scope of his duties, unless the evidence shows that the corporation expressly ordered and directed the officer to say the particular words used, as a slander is the voluntary and tortious act of the speaker.

Republic Iron & Steel Co. *v.* Self (Alabama), 68 Southern, 328, April, 1915.

ACTIONS—PLEADING AND PROOF OF NEGLIGENCE.

PLEADING NEGLIGENCE—SUFFICIENCY OF COMPLAINT.

In an action for damages for the death of a miner, caused by the alleged negligence of a mine operator, the declaration is insufficient where there is no averment of any particular act or acts of omission to perform a duty required by law which, either singly or concurrently, can, within the established law upon the subject, be properly counted the proximate cause of the injury complained of, and where it is impossible to tell whether the liability, in the mind of the pleader, is of statutory or common-law origin, whether founded on defects inherently in the plan, construction, or equipment of the colliery, or one arising from wear and tear, or whether the case intended is one of improper supervision, and if the latter, whether the deficiency in that respect lay in the number, fitness, or inattention of the servants in charge, and the identity of the servants is not made to appear; and especially where the pleading proceeds upon the theory that the law requires the operator to give his miners an absolutely safe place in which to work and immediately to warn them of any impending danger, overlooking the fact that the requirement is reasonable, safety only to be secured by reasonable care under the circumstances.

Charnogursky *v.* Price-Pancoast Coal Co. (Pennsylvania), 94 Atlantic, 451, p. 452, March, 1915.

PLEADING—DEFECTIVE TRACKS—ALLEGATION SUFFICIENT TO SHOW NEGLIGENCE.

A complaint in an action by a miner for injuries which averred that the injuries were caused by a defect in the ways, works, machinery, or plant of the defendant operator, and averred that the

track of a tram-car road used by the operator at or near where the plaintiff was injured was defective and that the defect arose from or had not been remedied owing to the negligence of the operator or of some person in the service or employment of the operator and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition is sufficient to show to a common intent that the gravamen of the pleading is the negligence of the operator or his servants to whom has been committed the duty of maintaining such tram track on which the plaintiff was working and limits the proof to the question of negligence with reference to maintaining the tram track and sufficiently states a cause of action.

Birmingham Fuel Co. *v.* Stocks (Alabama), 68 Southern, 568, May, 1915.

ACTION AGAINST CORPORATION FOR PERSONAL INJURIES—VENUE.

Section 6112 of the Code of Alabama authorizes all suits against mining corporations or corporations generally in any county where they do business by an agent, except as to actions for personal injuries, and these must be brought in the county in which the injury occurred or in the county in which the plaintiff resides, if the offending corporation does business by an agent in the county of the plaintiff's residence; and this section authorizes an action by an injured miner to be brought in the county where the injury occurred, whether the corporation did business other than by an agent or not.

American Coal Corporation *v.* Roux (Alabama), 68 Southern, 970, May, 1915.

NEGLIGENCE OF OPERATOR OR INDEPENDENT CONTRACTOR—QUESTION OF FACT.

In an action against a coal-mine operator for the death of a miner caused by the fall of rock from the roof of the mine, it becomes a question of fact to be determined by the jury trying the case whether the proximate cause of the miner's death was due to the negligence of the mine operator or whether the mine was operated by an independent contractor and for whose negligence the mine operator was not responsible; and where the evidence shows a written lease from the mine owner by which the mine was leased to a third person named, to be operated by him, but where the evidence shows also that the mine operator issued checks to the miners in its own name in payment for labor and that such checks were good in the purchase of merchandise at the commissaries of the mine operator and that the mine operator deducted from the miners' wages certain insurance premiums, as shown by the records of the timekeeper of the mine operator, and that the checks for time or wages were turned in at the office of the mine operator and the money was paid thereon by the

operator, and that the mine was in fact owned by the defendant operator, and that the mules and cars used for hauling coal belonged to the operator and that the alleged lessee had before that time been employed by and worked for the mine operator, though at the time of the alleged injury he had an office next to the office of the mine operator where the time of the miners was turned in and kept, and that the miners went directly from such office to that of the mine operator and got checks in payment for time employed or labor performed, it was error for the court to charge the jury that such lessee was an independent contractor.

Amerson *v.* Corona Coal & Iron Co. (Alabama), 69 Southern, 601, June, 1915.

COMPLAINT FOR DAMAGES FOR ASSAULT—ADMISSIBILITY OF EVIDENCE.

In an action by a union leader and organizer against a mining company for damages for injuries caused by an assault by the defendant's employees where the complaint charged that the defendant stationed at his mine certain named persons, agents, and employees for the purpose of guarding and protecting the property, and while such agents and employees were acting within the general scope of their employment, assisted by and under the personal guidance and direction of the defendant superintendent, they waylaid the plaintiff while on the public highway and with deadly weapons unlawfully, wantonly, wickedly, and maliciously beat, bruised, and wounded him, an objection to the introduction of evidence on the ground that the complaint failed to state a cause of action is unavailing as against such an attack, every reasonable intendment will be indulged.

Pennsylvania Mining Co. *v.* Jarnigan, 222 Federal, 889, p. 890, March, 1915.

MAINTAINING DANGEROUS PLACE.

DUTY TO FURNISH SAFE PLACE—NONDELEGABLE DUTY.

The duty of a master or mine operator to provide a safe working place and machinery for his employees can not be delegated so as to absolve him from liability in case of failure of a vice principal to perform such duty.

Mace *v.* Carolina Mineral Co. (North Carolina), 85 Southeastern, 152, p. 154, May, 1915.

SAFE PLACE AND APPLIANCES FURNISHED—PERSONAL SUPERINTENDENCE NOT REQUIRED.

A mine operator who furnishes a safe place, proper machinery and appliances, and competent men to perform the work, is not required to personally superintend all the details of the work and can not be

held liable for every negligent act of his employees in the use of such machinery and appliances.

Lathi *v.* Tamarack Mining Co. (Michigan), 152 Northwestern, 907, p. 910, June, 1915.

OPEN SHAFT—DUTY AND LIABILITY.

A coal company is not guilty of negligence, in the absence of a statute, in failing to have a shaft of an abandoned mine filled up or covered where it was sufficiently inclosed to prevent persons from falling into it. Section 4359 of the Kentucky statutes providing that wells and pits sunk for salt water, or for any other purpose, when abandoned or not in use, shall be filled up or inclosed, applies only to salt or saltpeter works, as shown by the title and body of the act, and does not apply to shafts in abandoned coal mines.

Taylor Coal Co. *v.* Porter (Kentucky), 175 Southwestern, 1014, p. 1016, May, 1915.

SAFETY OF PLACE A QUESTION OF FACT.

Where it is made to appear that a rock which fell from the roof and injured a miner was loose and dangerous when he went to the entry or station to go to work, and was not in fact loosened by the very work which the miner was doing, then the miner would be entitled to recover for the alleged injury; but if the miner either by a shot or otherwise made the rock loose and dangerous by the work which he did, then the mine operator would not be liable for the resulting injury; but neither of these conditions is a question of law for a court to determine, but is one of the fact for the jury on the trial of the case.

Zelavin *v.* Tonopah Belmont Development Co. (Nevada), 149 Pacific, 188, p. 190, June, 1915.

DEATH OF RESCUER—LIABILITY OF MINE OPERATOR.

The fact that a coal company knew, or in the exercise of ordinary care could have known, that black damp had accumulated in a shaft into an abandoned mine is not sufficient to establish negligence and render the company liable for the death of a person occasioned by an accumulation of such black damp and poisonous gas in the shaft, where the person losing his life voluntarily entered and went down the shaft for the purpose of rescuing a fellow workman who had gone into the shaft and had been overcome by the poisonous gas, as the coal company could not have anticipated that the accident in which such person lost his life would have happened in the manner it did, and as the character of the accident was such that no amount of care short of filling up or cleaning the shaft could have guarded

against it, and the coal company, so far as the evidence showed, was under no duty to do either.

Taylor Coal Co. *v.* Porter (Kentucky), 175 Southwestern, 1014, p. 1016, May, 1915.

DEFECTIVE APPLIANCES.

FAILURE TO INSPECT—PROXIMATE CAUSE.

In an action by a miner for injuries caused by a defective skip or improper operation of a skip, and where there was an averment in the declaration to the effect that it was the duty of the mine operator to provide and maintain a proper and suitable signaling apparatus, including a reasonably safe signal-bell line and bell, for the purpose of notifying and conveying signals from the men underground to the engineer, and alleging a negligent failure to furnish and maintain such suitable signaling apparatus, and negligently failing to inspect and repair the same, these are sufficient allegations to admit testimony relative to the inspection of the signaling apparatus by the mine operator. But conceding that the signaling apparatus should have been inspected from time to time and conceding a failure to so inspect, yet in the absence of testimony tending to prove that it was not in working order, or that the failure to so inspect caused or contributed to the injury, and where, on the other hand, the testimony shows the signaling service to have been in working order and that the skip was operated in obedience to signals, the plaintiff under such allegations in his declaration is not entitled to recover.

Paskovan *v.* Allouez Mining Co. (Michigan), 153 Northwestern, 684, p. 685, July, 1915.

USING DEFECTIVE SKIP.

A mine operator can not escape liability for damages for the death of a miner caused by the use of a skip while carrying miners out of a mine on the ground that a rule existed prohibiting miners from riding out of the mine on the skip, where the testimony of the employees is to the effect that they knew nothing of the existence of a rule forbidding them to use the skip and where the mine owner himself and his foreman set the example and rode in the skip several times, using the same signals which had been used for a bucket previously in use and where it also appears that the skip could easily have been made safe and thereby prevented the accident.

Hardister *v.* Richardson (North Carolina), 85 Southeastern, 304, p. 305, May, 1915.

FAILURE TO DISCOVER DEFECTS IN TRAM TRACKS—LIABILITY.

In an action by a miner for injuries caused by tramcars, and because of a defect in the tram track that rendered its use hazardous, proof of notice of such defect to the mine operator is not essential

to liability, as it is the duty of the operator to discover and remedy such defects, and negligent failure to discover is as potent in sustaining the plaintiff's case as negligent failure to remedy, and either is sufficient to sustain a cause of action by a miner for injuries caused by tramcar on such defective track.

Birmingham Fuel Co. *v.* Stocks (Alabama), 68 Southern, 568, May, 1915.

DEFECTIVE LINK—FAILURE TO INSPECT.

In an action by a miner for personal injuries caused by a broken link in a chain and where there are certain signs on the exterior of the link indicating imperfect welding and the real fault would have been fully exposed by a due inspection and test before the accident, the fault or defect is a structural defect of which the employer is presumed to have knowledge, and if the defect shows exterior signs which render it ascertainable by reasonable inspection it is to all intents and purposes patent and the rule applicable to that class of defects governs.

Case *v.* Lehigh Valley Coal & Navigation Co. (Pennsylvania), 94 Atlantic, 252, p. 253, March, 1915.

FAILING TO EQUIP CARS WITH AUTOMATIC COUPLERS.

A mine owner and smelter operator using locomotives and cars running on tracks can not avoid a charge of negligence in failing to use automatic couplers, because such locomotives and cars are operated entirely in his own yards and by him as a private carrier, or because of the fact that its locomotives and cars were smaller and the track narrower than standard gage, as it is in all essential respects a railroad.

Consolidated Kansas City Smelting & Refining Co. *v.* Schulte (Texas Civil Appeals), 176 Southwestern, 94, p. 95, May, 1915.

LIABILITY FOR NEGLIGENCE OF FELLOW SERVANT.

NEGLIGENCE OF TRIP DRIVER—QUESTION OF FACT.

Where a track repairer in a mine was directed to get his tools, put them on a trip, and bring them to a certain designated place, and while so doing and while riding on the bumpers of the rear car was injured by reason of the sudden stopping of the trip traveling at a high rate of speed, and the car thereby caused to kick up so suddenly that his head came in contact with the roof of the mine, and was thereby injured, the question of the negligence of the trip driver in running the cars at too great a rate of speed and in suddenly stopping the motor, causing the car to kick up, is to be

submitted to and tried by a jury, and a court will approve a finding of a jury on the question of negligence under such circumstances.

St. Bernard Mining Co. *v.* Ashby (Kentucky), 175 Southwestern, 626, April, 1915.

EMPLOYEES MAKING THEIR WORKING PLACE AND APPLIANCES.

Where an oil-drilling company did not undertake the duty of furnishing such a structure as a tubing board, but merely supplied suitable materials and reasonably competent fellow servants by which a tubing board could be constructed and reasonably adapted to the work, and where the duty of installing such tubing board as an appliance for use was intrusted or assumed by the employees themselves, the employer is not answerable to one of such employees for the negligence of himself or of a fellow employee in the construction of such tubing board; but if the employee had been sent upon a tubing board already fixed and placed in the derrick, or if he had been sent to use a tubing board in his work which the oil company undertook to install, or where the oil company undertook either in person or through another employee to supervise the installation, and an injury resulted, the rule would be otherwise.

Barnsdall Oil Co. *v.* Ohler (Oklahoma), 150 Pacific, 98, p. 100, June, 1915.

MINERS MAKING THEIR OWN APPLIANCES.

Where an oil company provided an adequate and readily accessible stock of appliances in good condition from which to make a selection, and the imperfection of an instrumentality selected therefrom was or ought to have been apparent to the employee who selected it, the oil company can not be held responsible for injuries which were caused by the instrumentality, whether the injured person was himself the employee who made the selection or whether it was done by a coemployee.

Barnsdall Oil Co. *v.* Ohler (Oklahoma), 150 Pacific, 98, p. 101, June, 1915.

FAILURE OF TRIP DRIVER TO LIGHT CARS—INJURY TO MINER IN HAULAGEWAY.

A crosscut in a mine was used as a haulageway for hauling ore from the working places in the mine to the foot of the shaft and also for a passageway for the miners going from the shaft to their place of work and was unlighted except by miners' lamps. The cars were drawn by a cable which ran over a series of rollers at stated distances along the track and also over or around a wheel at the base of the shaft, and the loaded cars when drawn by this cable traveled ordinarily at a speed somewhat faster than a man walks. The conductor,

the man accompanying each trip of cars, was required to display a light as a warning to the miners of the approach of the cars, and it was customary for the conductor to have a light on the front end of the front car as a signal to miners using the passage. While this crosscut was straight, so that a light could be seen through its entire distance, yet a miner passing from the shaft into the crosscut could ascertain whether or not cars were running by looking at the wheel around or over which the cable ran and could tell the direction in which the cars were running by feeling the rope back of the wheel or by putting his foot on it, as well as by watching the light. The light used as a signal was not permanently attached to any car, but there was a little hole on the end of the car to hook on the lamp, and it was the duty of the conductor accompanying the trip to attach the light to the car by placing the hook on the lamp in the hole; the conductor also carried a lamp of his own on his hat. On a particular trip the lamp placed by a conductor on the front end of the head car was broken at or near the point where he started with the loaded trip, and he ran the cars into the crosscut without renewing the light at the front end of the car. During this time two miners entered the crosscut from the base of the shaft, one of them feeling the rope with his hand and the other with his foot, and discovered that it was not moving and proceeded through the crosscut, and while so doing were met and injured by the trip of loaded cars without any light or signal on the front car and with no light other than that on the hat of the conductor, who at the time was on the rear end of the second car with his head or hat but slightly above the top of the car. Under such circumstances and this state of facts the negligence of the conductor in failing to renew the light or in failing to place a light on the front end of the head car was the negligence of a fellow servant and for which the mine operator was not liable to the injured miner.

Lahti *v.* Tamarack Mining Co. (Michigan), 152 Northwestern, 907, p. 908, June, 1915.
See Kaukola *v.* Oliver Mining Co., 159 Michigan, 689; 124 Northwestern, 591.

FAILURE OF MINERS TO BLAST ROCK FOR TRAMMER—POWER TO GIVE ASSURANCES OF SAFETY.

A mine operator is not liable for the death of a trammer in a stope in the process of development by miners who excavated the ore and passed it down from openings in the stope to the level where it was loaded on the cars by the trammers, and where the deceased trammer and others working with him requested the miners to blast a large rock discovered by them and which the miners promised to do "in about 15 minutes," but before the time had elapsed the rock fell and killed the miner, as the miners under the circumstances shown were

fellow servants of the trammers and the duty of the miners among others was to blast such rocks when requested to do so by the trammers, and the blasting of such rocks was done by the miners for the safety of the trammers, because they were not possessed of sufficient ability or training to use explosives; and it can not be said that the mine operator undertook to protect the trammers against injury from such large rocks, and especially where the particular rock had remained in the same position for four days, and where the danger of working below the rock was apparent and readily comprehended by the trammers, and the neglect of the miners, if it can be called neglect, not to blast instantly, when requested by the trammers to do so, can not be charged to the operator, nor can it be said to have been the proximate cause of the trammer's death; and if the miners under such circumstances gave any statement of assurances of safety to the trammers, it can not be deemed to have been given in a representative capacity and in fact can only be given by a person representing the master, such as a vice principal.

Lesh *v.* Tamarack Mining Co. (Michigan), 152 Northwestern, 1021, p. 1024, June, 1915.

MINER'S WORKING PLACE—SAFE PLACE.

SAFE-PLACE DOCTRINE—MINER'S WORKING PLACE.

Where the place to be furnished by a mine operator is not furnished as in any sense a permanent place of work, but is a place in which surrounding conditions are constantly changing, and instead of being a place furnished by the master or mine operator for employees within the above rule, it is a place the furnishing and preparation of which is in itself a part of the work which the miners are employed to perform, then the rule as to the duty to furnish a safe place does not apply, but the duty of the master or mine operator is performed by using reasonable care or furnishing suitable material and employing capable and efficient men to do the work.

Mace *v.* Carolina Mineral Co. (North Carolina), 85 Southeastern, 152, p. 154, May, 1915 .

See Consolidated Coal & Mining Co. *v.* Floyd, 51 Ohio St. 542, Northeastern, 610, 25 L. R. A. 848.

Petaja *v.* A. J. Mining Co., 106 Michigan, 463, 64 Northwestern, 335, 58 Am. St. 505, 32 L. R. A. 435.

SAFE PLACE—MINER'S DUTY TO MAKE PLACE SAFE.

Where a miner or servant is employed in performing labor which necessarily changes the character of the place for safety where the work is being done as the work progresses, and consequently is likely

to become dangerous at any moment, the miner assumes the risk incident to such work, and the general rule that a master must furnish his servant a reasonably safe place in which to work, does not apply.

Zelavin *v.* Tonopah Belmont Development Co. (Colorado), 149 Pacific, 188, p. 189, June, 1915.

MINER MAKING PLACE SAFE—DUTY TO REMOVE ROOF.

A miner injured by slate falling from the roof of the room in which he was at work can not recover from the operator for injuries received where it was his duty to sound the roof and take down the slate if he found it loose, and where it is shown that he did sound the roof and found it loose, but failed to take down the slate that fell and caused the injury.

Peerless Coal Co. *v.* Copenhaver (Kentucky), 176 Southwestern, 1002, p. 1003, June, 1915.

INJURY FROM FALL OF ROOF—DUTY OF INSPECTION.

Where the respective duties of a miner and the mine operator in regard to roof inspection were governed by unwritten rules of the operator, and where there is a sharp conflict in the evidence as to what such rules were, an injured miner contending in an action for damages for an injury caused by the fall of the roof, that after the room neck was excavated and the operator placed its tracks for hauling therein, the operator assumed the duty of inspecting and keeping such room neck in a reasonably safe condition so that rock would not fall from the roof; and where other miners employed in the same mine at the same time testified that it was not the duty of the operator to inspect the room necks, but that a miner working in a room was required to inspect the neck of his room the same as the body, admitting that it was the duty of the operator to repair room necks when notified by miners that they were dangerous, and where other miners testified that it was the custom and duty of the operator to inspect the room necks each morning before the miners began work to ascertain if there was in the roof thereof any loose rock, a court may under such circumstances properly refuse to direct a verdict for the defendant operator, as the weight of the evidence on the controverted point is properly for the jury, and the court on appeal must be bound by its determination.

Matthews *v.* Central Coal & Coke Co. (Missouri), 177 Southwestern, 650, p. 651, June, 1915.

MINER DRIVING ENTRY AND MAKING HIS WORKING PLACE.

The duty resting upon a mine operator to furnish safe ways, works, and machinery does not apply, and the operator is not liable for an injury to its employee, where a mine operator employs an independ-

ent contractor who is an experienced miner to drive a heading in the mine and put down tracks for the operation of the mine, under the rule that where the instrumentality causing the injury was still incomplete at the time of the injury and the injured miner was engaged in the work of bringing it to completion and where the unsafe condition from which the injury arose was incidental to the work thus undertaken by him.

Woodward Iron Co. *v.* Wade (Alabama), 68 Southern, 1008, p. 1010, June, 1915.

CONTRIBUTORY NEGLIGENCE OF MINER.

CONTRIBUTORY NEGLIGENCE DEFINED.

Contributory negligence in its legal significance is such an act or omission on the part of the person injured, amounting to a want of ordinary care, as concurrent or cooperating with some negligent act or omission of another person, approximately causes or contributes to cause the injury complained of.

Consolidated Kansas City Smelting & Refining Co. *v.* Schulte (Texas Civil Appeals), 176 Southwestern, 94, p. 95, May, 1915.

CONTRIBUTORY NEGLIGENCE DEFEATS RECOVERY.

In an action for damages for injuries received by a miner the miner can not recover if he himself was guilty of negligence which proximately contributed to the injury, as such contributory negligence is a complete defense to such an action.

Birmingham Fuel Co. *v.* Stocks (Alabama), 68 Southern, 568, p. 569, May, 1915.

RECOVERY NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

A miner injured by an explosion of fire damp or gas, the presence and extent of which were not properly noted but only guessed at by the fire inspector, notwithstanding the fact that he was guilty of contributory negligence in fanning or blowing the gas toward an open and lighted lamp, may recover damages for such injuries.

Oplotnik *v.* Cherokee & Pittsburg Coal & Mining Co. (Kansas), 148 Pacific, 616, May, 1915.

MINER'S KNOWLEDGE OF DANGER—CONTRIBUTORY NEGLIGENCE.

An action against a coal-mine operator for the death of a miner caused by being caught between a loaded coal car and a prop near the track, and caused presumably by the miner being caught between the car and the prop by attempting to sprag the car to prevent its running too fast down the track, can not be maintained where the miner had knowledge of the position of the props, had passed them

many times, and where he had in fact assisted in placing the props, and where it appeared that there was another and safer way to prevent the car from running too fast.

Bon Jellico Coal Co. *v.* Walker (Kentucky), 175 Southwestern, 629, p. 630, April, 1915.

DANGER IMMINENT.

Where an injury to a miner arose out of the negligence of a mine operator or master, yet if the danger from such negligence was so great that the miner or servant could not hope to escape injury by the exercise of reasonable care, then he will be guilty of contributory negligence and can not recover, notwithstanding the operator's negligence.

Peerless Coal Co. *v.* Copenhaver (Kentucky), 176 Southwestern, 1002, p. 1110, June, 1915.

KNOWLEDGE OF DANGER—MINER CREATING DANGEROUS CONDITION.

In an action by a miner for damages for injuries caused by slate falling from the roof of the room in which he was working and where the evidence was conflicting as to whether it was the duty of the miner to prop the roof at the place of the injury or to sound the roof and take down the slate if he found it loose, it was held to be error for the trial court to refuse at the request of the defendant the following instruction:

If you believe from the evidence plaintiff removed the coal from under the slate which afterwards fell on and injured his leg, thereby taking from under said slate its natural support, and thereafter, and before said slate so fell, he tested it and ascertained that it was loose, and you also believe from the evidence that it was the duty of the plaintiff, under the contract he had with defendant company, to take down such loose slate, but that he went under said slate, and while under it it fell on and injured him, you ought to find for defendant company.

The reason given is that such an instruction was necessary to present the defendant's side of the case, where without such an instruction the jury might conclude that the facts relied upon did not constitute contributory negligence or assumed risk, and where the defense relied upon in the instruction was actually pleaded and sustained by the proof and where the trial court gave no instructions presenting to the jury the duty of the miner with reference to the overhanging slate when the conditions were such as to make it impractical to prop the roof.

Peerless Coal Co. *v.* Copenhaver (Kentucky), 176 Southwestern, 1002, p. 1003, June, 1915.

MINER PLACING HIMSELF IN DANGEROUS POSITION.

A mine operator is not liable for the death of an experienced miner employed as a foreman because of his experience, where the work he was to do on the day of and at the time of the accident, was left, in

respect to the method and manner of doing it, to his own judgment, and where he was perfectly free to exercise his own common sense and skill in the mining operation, and where, from the description of the condition immediately before he was killed, he must have known that by digging under a projecting or overhanging bank of dirt or rock he was placing himself in a dangerous position, as the unsupported bank would necessarily cave in, and a man of ordinary sense and of prudence would know of such dangers and appreciate the risk of cutting out the foundation upon which a bank of dirt rests and leaving it overhanging without any support, brace, or prop to prevent its falling in and crushing him; and the danger of such a place was so imminent that any ordinarily prudent man would not have so cut underneath the bank as to weaken its support and cause it to fall, or if this was necessary to be done, he would have taken measures to brace it in some way as the work progressed.

Mace *v.* Carolina Mineral Co. (North Carolina), 85 Southeastern, 152, p. 153, May, 1915.

KNOWLEDGE OF DANGER—MINER'S OPTION AS TO METHOD OF WORK.

Where the danger is obvious and is of such a nature that it can be appreciated and understood by the miner as well as by the operator, or by anyone else, and where the miner has as good an opportunity as the operator or anyone else of seeing what the danger is and is permitted to do his work in his own way and can avoid the danger by the exercise of reasonable care, the operator is not liable for injuries received by the miner in consequence of the condition of things which constitute the danger, and the resulting injury must be regarded as due to his own want of care.

Mace *v.* Carolina Mineral Co. (North Carolina), 85 Southeastern, 152, p. 154, May, 1915.

DRIVING TRACTION ENGINE OVER PIPE LINE LAID ON SURFACE.

A person driving a traction engine on a highway has the right to assume that the highway is safe from one side to the other, and is under no obligation to make an examination for the purpose of ascertaining whether or not the gas pipes were laid thereon; and it is not contributory negligence for the driver to fail to look for hidden pipe lines, although in a community where natural-gas pipe lines are known to be laid in the public highways; and the driver of the engine would not be subject to the charge of contributory negligence even if he had knowledge of the presence of the pipe line, if he had exercised care and adapted his conduct to the existing condition and employed such care as may justly be regarded as ordinary, in view of the knowledge of the existence of the obstruction.

Murphy *v.* Ludowici Gas & Oil Co. (Kansas), 150 Pacific, 581, p. 585, July, 1915.

EFFECT OF INTOXICATION.

The mere fact that a miner was intoxicated at the time he received an injury does not of itself show such contributory negligence as will defeat his recovery in damages for the injury, but it is a circumstance to be considered in determining whether or not his intoxication contributed to the injury.

American Bauxite Co. *v.* Dunn (Arkansas), 178 Southwestern, 934, p. 935, July, 1915.

ASSUMPTION OF RISK.

RISKS ASSUMED.

ASSUMPTION AS TO EMPLOYEE'S COMPETENCY.

A master or mine operator may assume that an adult person in accepting or engaging employment is competent to perform the particular work in which he engages, and that he assumes the dangers ordinarily incident to the carrying on of the work.

Batesel *v.* American Zinc, Lead & Smelting Co. (Missouri Appeals), 176 Southwestern, 446, p. 448, May, 1915.

RISKS OF EMPLOYMENT—MINER'S KNOWLEDGE OF MINING.

It is necessary in mining operations for mine operators to employ skilled miners, and such miners are frequently better informed of the risks and necessities of the particular branch of the mining than the employer himself; and to hold that such a miner with full knowledge of the dangers and attendant risks could rely upon his own judgment as to the liability of a given slab or bowlder to fall, and then, after an injury, hold the mine operator liable for the resulting injury, would be to make the operator responsible for the lack of judgment of the miner. In other trades and callings it is elemental law that if an employee possesses equal or superior information to the employer in regard to the danger from a given place or appliance, then in case of injury the employee is held in law to have assumed the risk as an incident to his employment, and this rule of law applies to injuries received by experienced miners resulting from falls or slabs and bowlders in mines, as well as other injuries from different causes in mining operations.

Woodward Iron Co. *v.*. Wade (Alabama), 68 Southern, 1008, p. 1011, June, 1915.

KNOWLEDGE OF PHYSICAL INFIRMITIES—INJURY TO EPILEPTIC.

An epileptic who is subject to fits and who is injured by falling into a dangerous place when stricken with a fit can not recover for the injury without proving that he was subject to such fits and that he himself did not know it and that the employer did know it, and

knew, or had cause to know, that the plaintiff did not know his condition; but if the plaintiff knew that he was subject to fits and that such a fit might cause him to fall into a dangerous place, then he can not recover. An employee laboring under any physical disability of which he has full knowledge, who accepts employment with another, can not recover damages of the employer in the event he sustains personal injuries during the employment, where such injuries were directly caused by his physical disability, and the fact that the employer directed the plaintiff to work in a dangerous place will not create a liability under such circumstances, as persons not under contractual disability should be and are permitted to determine for themselves whether their physical infirmities, known to themselves, shall debar them from any particular employment, and such persons must estimate for themselves the chances of injury, and it would be unjust as well as illogical to visit the consequence of their choice upon their employers; it may be a matter of delicacy as well as difficulty for an employer to undertake in each case to determine the nature and extent of the malady or infirmity of one who offers to work, or the likelihood of injury resulting therefrom, and an employer may, without legal liability, accept the judgment of a person offering to perform services who knows his own condition, and under such circumstances the employee assumes the risk of injury when he undertakes to do the work for which he was employed.

Tennessee Coal, Iron & Railroad Co. *v.* Moody (Alabama), 68 Southern, 274, p. 275, April, 1915.

SHOVELER FIRING POP SHOTS.

A person employed in a mine as a shoveler is supposed to know that bowlders are to be broken up by the use of dynamite fuses and caps and that men are specially employed to perform such work, and he must therefore know that this is a special employment outside of what he contemplates when he goes into a mine to work as a shoveler, and that there is a certain skill or experience necessary, and that the exploding of the dynamite is necessarily accompanied with certain risks and dangers; but if as a shoveler he had been informed that shovelers in a particular mine must also engage in the work of shot firing and he accepted the employment, the duty of the operator or employer would be satisfied, because by knowing that he would be required to handle and explode dynamite as a shot firer, and after becoming aware of such fact he accepted the employment and engaged in the work of shoveling and shot firing, he would thus have held himself out as experienced and able to perform the work, and the master would not have been required to give warning or instruction; and when the injured miner did go into the mine

to work and on the first night, while there, discovered that the shovelers fired their own shots, he realized what his duties under his employment would require him to do, and the shoveler thus had constructive knowledge of what was required of him, and being an adult of ordinary intelligence he must be held to have assumed the risk incident to the undertaking.

Batesel *v.* American Zinc, Lead & Smelting Co. (Missouri Appeals), 176 Southwestern, 446, p. 449, May, 1915.

KNOWLEDGE OF DANGER—RESCUE OF ANOTHER FROM PERIL.

A mine operator who is himself free from negligence can not be made liable in damages on account of injuries sustained by a person who, at his request, comes to the assistance of one who is in danger or exposed to peril; but in order to render the person making the request liable for damages he must by his own negligence have produced the peril. In the absence of such negligence and in the presence of the peril the rescuer, whether acting voluntarily or on request, assumes the risk incident to the attempted rescue.

Taylor Coal Co. *v.* Porter (Kentucky), 175 Southwestern, 1014, p. 1017, May, 1915.

KNOWLEDGE OF PROPS DANGEROUSLY NEAR A TRACK.

A miner who assists in placing props supporting the roof near the track over which the coal is hauled out of his entry and who has many times passed such props and who well knew the dangerous situation and the danger in attempting to pass between a loaded car and the props, assumes the risk incident to the undertaking and there can be no recovery for his death caused by being caught between a loaded car and a prop, presumably in attempting to sprag the wheel to prevent the car from running too fast down the track, when there was another and safer way to prevent the car running down the incline.

Bon Jellico Coal Co. *v.* Walker (Kentucky), 175 Southwestern, 629, p. 630, April, 1915.

RISKS NOT ASSUMED.

OPERATOR'S NEGLIGENCE.

A miner never assumes a risk arising from the operator's negligence.

Matthews *v.* Central Coal & Coke Co. (Missouri), 177 Southwestern, 650, p. 653, June, 1915.

DANGER NOT IMMINENT.

Where an injury arises out of the negligence of a mine operator or a master, then the mere knowledge of the condition on the part of the miner or servant will not bar him from recovery on the ground

of assumption of risk; but if the danger is not glaring and imminent then even if the miner or servant has knowledge of the situation he does not assume the risk arising from the operator's negligence.

Barnhart *v.* Waverly Brick & Coal Co. (Missouri Appeals), 176 Southwestern, 1008, p. 1110, May, 1915.

FAILURE TO EQUIP CARS WITH AUTOMATIC COUPLERS.

A miner employed by a smelter company does not assume the risk of the negligent failure of the company to equip its cars with automatic couplers; and the failure to equip its cars with automatic couplers is a defect within the meaning of section 6645 of the Revised Statutes of Texas.

Consolidated Kansas City Smelting & Refining Co. *v.* Schulte (Texas Civil Appeals), 176 Southwestern, 94, p. 96, May, 1915.

MINER WORKING UNDER DIRECTIONS OF FOREMAN—ASSURANCES OF SAFETY.

A miner or employee working in a trench at the direction of a mine foreman is not to be charged with the assumption of risk as a matter of law from the mere fact that he made no complaint and received no express or affirmative assurance from the operator that the place was safe, and where he testified that he was watchful of danger or that there was none; and in such case he had a right to rely on the superior judgment of the foreman and the presence and direction of such foreman to go into the trench and work were equivalent to an assurance on the foreman's part that the employee could safely proceed. The operator under such circumstances can not escape liability on the ground that the danger was as well known to the employee as to the foreman, and while the employee could see the conditions present as well as the foreman, there is nothing that can justify a court in saying that he was well aware of the danger where the employee had not dug in the trench and was not an experienced trench digger; but in such case the foreman is presumed to have a superior knowledge and his position and authority imply this.

Barnhart *v.* Waverly Brick & Coal Co. (Missouri Appeals), 176 Southwestern, 1108, p. 1110, May, 1915.

USE OF EXPLOSIVES.

INJURY FROM UNEXPLODED BLAST.

A certified miner who kept his explosives in a box with his tools in the mine is not entitled to recover for injuries caused by an explosion where he drilled a hole in a seam of coal and inserted a stick of dynamite with a detonating cap attached properly covered and tamped with a squib attached in a blasting barrel for the purpose of

firing the charge, and where on a particular occasion the charge did not explode because the powder used in connection with the dynamite was damp and moist, and where on the following day the miner with a pick attempted to break up a large lump of coal blown down by a subsequent blast, and where while striking the lump of coal with the pick an explosion occurred causing the injuries complained of, as under such circumstances the mine owner had no greater reason to anticipate that water dripping on the miner's box wet the powder, and he should not therefore be held liable for a consequence not fairly to be expected.

Lehigh Valley Coal Co. *v.* Calcausky, 222 Federal, 664, April, 1915.

USE OF DANGEROUS EXPLOSIVES.

Where a mine operator furnished for use a more powerful and sensitive explosive which was not suitable to the accomplishment of the work which a miner was employed to do, thereby creating abnormal risks to which the miner became exposed without giving him notice of the fact so that he could guard himself against them, the mine operator may be liable for resulting injuries; but if the operator gave the miner notice of the change of explosives, or if he had knowledge of it, obtained in any manner, then the miner assumes the risk incident to it and can not recover of the operator for injuries resulting. And in an action by a miner for injuries caused by improper explosives, a general verdict in favor of the plaintiff can not stand as against an answer by the jury to a special interrogatory in which it is expressly found that the miner had been warned by the operator and that he knew of the stronger explosive, and that the use of such explosive under the particular circumstances and for the purpose required was proper.

Johnson *v.* Butte Elex Scott Copper Co. (Montana), 149 Pacific, 717, p. 719, June, 1915.

INJURY TO TRESPASSERS—LIABILITY.

CARE REQUIRED TOWARD TRESPASSERS.

The right of dominion and use of property can not be made a shield or cover for malicious acts on the part of the owner, but owners owe no duty to strangers on their lands without right except abstention from intentional injury, and such strangers are classified as trespassers and bare licensees and can not recover for injuries caused by excavations, defects in the premises, contact with running machinery, or the like, as the proprietor owes them no active duty and so long as he does them no intentional injury he is not liable for anything that may befall them; but in order to create

a liability for injuries in favor of one who comes upon the premises of another on business, in some sense of the term, there must be an invitation to come upon some matter or occasion of material interest or benefit to the owner, and not a mere curiosity or other considerations exclusively personal to such trespasser or licensee.

Dickinson *v.* New River & Pocahontas Consolidated Coal Co. (West Virginia), 85 Southeastern, 71, p. 72, April, 1915.

DUTY TO TRESPASSING CHILDREN.

A coal-mine operator ordinarily is under no duty, in the handling of its coal cars and motors on its private railway between the mouth of its mine and its yards or tipple, to keep a lookout for children of employees on its tracks, although they reside in houses of the corporation on its premises and near its tracks.

Dickinson *v.* New River & Pocahontas Consolidated Coal Co. (West Virginia), 85 Southeastern, 71, p. 72, April, 1915.

METHODS OF OPERATING.

FREEDOM IN THE USE OF PROPERTY—LIMITATIONS.

Out of the dominion and use of private property incident to the ownership thereof, limited only by the right of the property of others to freedom from injury from such use, springs the principle of immunity from liability for injuries to trespassers and bare licensees and only upon the highest and most imperious considerations is this right of dominion and use limited, and it is with great caution that courts and legislatures impose restraints upon the use of property and none are ever laid thereon without careful definition of their extent.

Dickinson *v.* New River & Pocahontas Consolidated Coal Co. (West Virginia), 85 Southeastern, 71, p. 72, April, 1915.

RESTRAINTS IN USE OF PROPERTY—APPLICATION TO PERSONS.

A legislature may, under the police power of the State, impose limited restraints upon the use of private property, in the form of regulations thereof, and it may authorize municipal corporations to do the same; but the Constitution withholds from the legislature power to deprive a citizen of his property or its use, except for public purposes, and only on payment of just compensation; and the common law imposes an obligation upon a property owner to use it in such manner as not to injure that of another; but this obligation is in favor of other property and not in favor of persons disassociated from the property, and a stranger's right under this principle

pertains to his property and the enjoyment and use thereof and not to his person.

Dickinson *v.* New River & Pocahontas Consolidated Coal Co. (West Virginia), 85 Southeastern, 71, p. 72, April, 1915.

RIGHTS OF OWNER OF COAL TO MINE AS AGAINST SURFACE OWNER.

A mine operator having the exclusive right to mine coal upon or under a certain described tract of land has the right of possession even as against the owner of the soil, so far as is reasonably necessary to carry on his mining operations, and has, as grantee of the minerals, the right to dig and carry away so much of them as he can excavate from the soil without injury to the surface owned by the grantor, the mining right being servient to the surface to the extent of sufficient support to sustain it in its natural state; and such operator is not liable for any incidental damages necessarily occasioned by the ordinary and careful operation of his mine, and may occupy so much of the surface, adopt such machinery and modes of mining, and establish such auxiliary appliances and instrumentalities as are ordinarily used in such business and as may be reasonably necessary for the profitable and beneficial enjoyment of his property, and he is not limited to such appliances as were in existence when the grant was made to him, but may keep pace with the progress of society and with modern invention.

Bagley *v.* Republic Iron & Steel Co. (Alabama), 69 Southern, 17, p. 19, June, 1915.

See Schobert *v.* Pittsburg Coal & Mining Co., 254 Illinois, 474, 98 Northeastern, 945, 40 L. R. A. (N. S.), 827.

Moore *v.* Indian Camp Coal Co., 75 Ohio State, 493, 80 Northeastern, 6.

Webber *v.* Vogel, 189 Pennsylvania, 156, 42 Atlantic, 4.

USE OF HAULAGEWAYS AND SHAFTS FOR MINING OPERATIONS ON OTHER LANDS—INJUNCTION.

A coal-mine operator who under certain deeds owns the coal thereby conveyed and the right to the possession of the haulageway and the air shaft used in the mining of such coal can not, while continuing the mining, be guilty of a trespass or other wrong by mere occupancy of the haulageway or the shaft or by any use thereof which does not injure or interfere with the use of the nonmineral part of the land in which such coal is found, and can not, therefore, be enjoined in a suit by the surface owner from using the haulageway and air shaft where there is no evidence to show that the injury complained of resulted from the haulage of coal from other lands owned by the operator through the passageway or from the ventilation through the shaft of mines on such other land so owned by the operator.

Bagley *v.* Republic Iron & Steel Co. (Alabama), 69 Southern, 17, p. 18, June, 1915.

EXPERT EVIDENCE AS TO OPERATIONS.

In an action by an injured miner for damages and in controversies over mining property the conditions may be such that experts will be allowed to give expert testimony by way of opinion, because they are presumed to have acquired peculiar skill and knowledge and are more capable of forming a correct opinion as to the subject matter of the question under discussion than inexperienced persons, and their opinions are admitted in evidence for the purpose of aiding the jury in understanding questions which inexperienced persons are not likely to decide correctly without such assistance; but the testimony of such experts may receive only such consideration by the jury as the testimony may appear to the jury to deserve.

American Bauxite Co. *v.* Dunn (Arkansas), 178 Southwestern, 934, p. 936, July, 1915.

RULES REGULATING OPERATIONS—ADMISSIBILITY IN EVIDENCE.

In an action by a miner for injuries received while working in a mine a set of rules promulgated and posted at the mine by the State mining inspector several months after the injury are not admissible in evidence from the mere fact that they were similar to those posted by the defendant prior to the injury, the purpose of which was to show the reasonableness of the rules so posted.

Zelavin *v.* Tonopah Belmont Development Co. (Nevada), 149 Pacific, 188, p. 189, June, 1915.

SURFACE SUPPORT.

MINING AND REMOVAL OF COAL BY OWNER—SUPPORT OF SURFACE.

The owner of an entire estate may grant the surface of the land and reserve the mineral estate, with the right to mine and remove the minerals without liability for injury or damage done to the surface, and in such case the grantor, or those claiming through him, may mine and remove all the coal without being compelled to support the surface.

Kirwin *v.* Delaware, Lackawanna & Western Railroad Co. (Pennsylvania), 94 Atlantic, 468, p. 469, April, 1915.
See Graff Furnace Co. *v.* Scranton Coal Co., 244 Pennsylvania, 592, 91 Atlantic, 508.

DUTY OF OPERATOR TO SUPPORT SURFACE—ARTIFICIAL WEIGHT.

Props sufficient to support the surface of the soil in its original state are all that is required of a mine owner and operator; and where the subsidence of the surface was caused by artificial weight upon the surface of the soil, this is a matter of defense, and it is incumbent

upon the defendant to allege such facts if he desires to rely upon them as a defense to the action.

Jackson Hill Coal & Coke Co. *v.* Bales (Indiana), 108 Northeastern, 962, p. 963, May, 1915.

MINING AND REMOVING COAL—LIABILITY FOR INJURY TO SURFACE.

Under a deed conveying the surface of land and reserving the coal and minerals beneath the surface, with the right to mine and remove the same, as well as coal from adjoining lands by any subterranean passage or process for the benefit of the grantor, without incurring in any event whatsoever any liability for any injury or damage which may be caused or done to the surface of such premises, or to any buildings or improvements now erected or which at any time hereafter may be erected thereon, neither the grantee of the surface nor anyone holding under him can recover either from the grantor or from any subsequent grantee of the minerals damages to a house and lot based upon alleged disturbances of the surface caused by mining operations, in the absence of averments and proof that the owner of the mineral was guilty of negligence in the manner of mining and removing the underlying mineral.

Kirwin *v.* Delaware, Lackawanna & Western Railroad Co. (Pennsylvania), 94, Atlantic, 468, p. 469, April, 1915.
Kirwin *v.* Delaware, Lackawanna & Western Railroad Co. (Pennsylvania), 94 Atlantic, 469, p. 470, April, 1915.

FAILURE TO SUPPORT SURFACE—MEASURE OF DAMAGES.

In an action by the owner of the surface against a mine operator for damages caused by the operator's failure to furnish sufficient props to support the surface the measure of damages is the difference between the value of the real estate immediately before and immediately after the subsidence complained of.

Jackson Hill Coal & Coke Co. *v.* Bales (Indiana), 108 Northeastern, 962, p. 964, May, 1915.

LESSEE LIABLE TO SURFACE OWNER.

The person whether owner or lessee who takes the coal out of the mine without leaving proper support for the surface, is the one that is liable for damages to the owner of the surface if the same subsided by reason of his failure to properly support it.

Jackson Hill Coal & Coke Co. *v.* Bales (Indiana), 108 Northeastern, 962, p. 964, May, 1915.

INDEPENDENT CONTRACTOR.

DUTY OF OPERATOR TO EMPLOYEE OF INDEPENDENT CONTRACTOR.

A miner employed by an independent contractor stands to the operator in the relation of an invitee upon the operator's premises to

whom, in general, the operator owes only the duty of ordinary care and prudence to keep the premises under his control reasonably safe and under such circumstances the operator assumes to all who accept the invitation the duty to warn them of any danger in coming which he knows of or ought to know of, and of which they are unaware.

Republic Steel & Iron Co. *v.* Luster (Alabama), 68 Southern, 358, April, 1915.
See Sloss-Sheffield Steel & Iron Co. *v.* Hubbard (Alabama), 68 Southern, 571, April, 1915.
Stith Coal Co. *v.* Harris (Alabama), 68 Southern, 797, April, 1915.

RELATION TO OPERATOR A QUESTION OF FACT.

Where a complaint in an action by an injured miner for damages shows that he was engaged in mining coal for the defendant operator and was assisted by others employed by him and that the operator paid him monthly a certain rate for coal mined; that the plaintiff was driving a heading and also keeping up a room, so that when he could not get work in the heading he worked in the room, and where the proof shows that the instrumentalities used in the work, beside the men, were blasting materials, picks, shovels, axes, cars on which the coal was loaded and moved out of the room by the operator onto the main entry tracks, tracks and motors for moving cars; and where it appears that it was the duty of the operator's mine foreman to see that the plaintiff and his assistants were furnished with proper timbers for propping their working places and such mine foreman controlled the miners and looked after the entire mine; and where it was the duty of the superintendent to inspect the roof of the mine at the point where the plaintiff was injured, it becomes under such circumstances, a question of fact for a jury to determine whether the operator had control and supervision of the plaintiff and agencies by which the mining within the area of the plaintiff's labor was accomplished, or whether the plaintiff was rendering service in the course of an independent occupation, and whether the relation was that of master and servant or contractor and contractee.

Stith Coal Co. *v.* Harris (Alabama), 68 Southern, 797, p. 799, May, 1915.

LIABILITY OF OPERATOR FOR INJURY TO CONTRACTOR'S EMPLOYEE.

Where a mine operator employs an independent contractor to mine and remove coal from a completed mine and where such contractor furnishes his own tools, explosives, and employs and discharges at pleasure his own help, and is paid for the coal mined by the town, such operator is not liable for an injury to an employee of such independent contractor, where the injury was caused by a defect in the appliance used by such independent contractor, though the operator furnishing a hoisting engine and cable and a car, for the purpose of hauling the coal out of the mine, but where the manner of operating

and adjusting and connecting the engine and cables and car was left to such independent contractor and where the injury was not caused by any defect in the appliances so furnished by the operator.

Republic Steel & Iron Co. *v.* Luster (Alabama), 68 Southern, 358, p. 359. April, 1915.
See Stith Coal Co. *v.* Harris (Alabama), 68 Southern, 797, p. 799, April, 1915.

An experienced coal miner employed by a mine operator under a contract to drive a certain heading from the main entry, and for which he was to be paid by the year for the rock and coal removed, and who hired his own help and did the work in his own way, except that he was responsible to the operator for performing the work according to the rules and regulations of the mine, and who, as a part of the work, was to lay the tracks for the operation of the mine, is an independent contractor, and the operator is not liable to him for an injury received while performing the work under his contract.

Woodward Iron Co. *v.* Wade (Alabama), 68 Southern, 1008, p. 1010, June, 1915.

OPERATOR NOT LIABLE TO CONTRACTOR OPERATING UNDER GENERAL ORDER.

Where an experienced miner was employed by an operator to drive a certain heading from the main center, and for which he was to be paid by the year for rock and coal removed, and where, as a part of his contract, he was to lay the tracks for the operation of the mine, and where such tracks were to be laid on centers, and where it appeared that a part of such tracks was off center, a general order or instruction on the part of the mine operator or its superintendent to such employee to the effect that he must place the tracks on centers as furnished by the engineers and to make the tracks conform to the contractual requirements is a very different thing from ordering a dependent servant to do a particular act of service, and the operator is not liable under such circumstances to the employee for an injury received by him while changing the entry and tracks and making the tracks conform to the contractual requirements.

Woodward Iron Co. v. Wade (Alabama), 68 Southern, 1008, p. 1010, June, 1915.

DUTY OF OPERATOR TO KEEP ROOF OF ENTRIES SAFE—LIABILITY FOR INJURY.

A mine owner and operator is liable for an injury to a miner employed by an independent contractor, caused by a fall of rock from the roof, where the proof shows that the rock which fell upon and injured the miner was from the roof of an entry to the heading in which the contractor and his miners were engaged in mining, and where it appears that the contractor had neglected to prop the roof of the entry in that part of the mine as his miners proceeded with

the work of driving the heading, but thereafter it was the operator's duty to look after the condition of the roof and keep it safe; and where it is further shown that the work the operator was engaged in doing had proceeded until this point had been passed a considerable distance and the miner's injuries were caused by the condition of the entry and not the work the independent contractor and his miners were engaged in doing. Under such circumstances it was the operator's duty to maintain the entry where the miner was injured reasonably safe for the benefit of a class of persons to which the miner belonged, and if the miner's injuries resulted from a condition in the roof that was dangerous and could have been made reasonably safe by the exercise of ordinary care, the operator would be liable, whether the injured person was an employee of such independent contractor, as the liability in such case arose out of the breach of duty the operator owed the miner to maintain the roof in a reasonably safe condition and to guard him against unnecessary dangers and not by virtue of any privity of contract between the miner and the operator.

Sloss-Sheffield Steel & Iron Co. *v.* Hubbard (Alabama), 68 Southern, 571, p. 572, May, 1915.

NEGLIGENCE OF OPERATOR OR INDEPENDENT CONTRACTOR—QUESTION OF FACT.

Where it appears that a mine operator furnished the tools, machinery, and other instrumentalities used in the work of mining by an independent contractor, and that the operator's foreman and superintendent reserved the right to discharge such independent contractor or his men at pleasure, and the operator maintained a regular gang of workmen and miners to keep up the entries and maintain the safety of the ways of the mine, and the mine foreman directed the work, the question as to whether an injury to an employee of such independent contractor was proximately caused by negligence and the question as to whether the negligence was that of the mine operator or its servants are questions of fact to be determined by the jury trying the case.

Sloss-Sheffield Steel & Iron Co. *v.* Hubbard (Alabama), 68 Southern, 571, p. 573, May, 1915.

CONTRACTS RELATING TO OPERATIONS.

AGREEMENT FOR ARBITRATION—CONSTRUCTION AND ENFORCEMENT.

An agreement contained in a contract between two mining corporations to the effect that any dispute arising under a contract or charter should be settled at a certain place by arbitration and specifying the method of selecting the arbitrators relates to the law of

remedies and not of right, and the law that governs remedies is the law of the forum, and where the forum is a Federal court such court is not bound to follow or conform to the decisions of the State jurisdiction in which it may happen to sit.

United States Asphalt Refining Co. *v.* Trinidad Lake Petroleum Co., 222 Federal, 1006, p. 1011, January, 1915.

AGREEMENT TO WORK A CERTAIN NUMBER OF MINERS—BREACH.

A contract for the transfer of and to work and operate a mine, by which the transferee agrees to work and to have employed in the construction of a tunnel provided for at least four men per day, working 20 days per calender month, is not complied with where less than four men were employed in working in a tunnel, as the agreement to employ at least four men per day does not mean that the transferee can employ two men, each of whom should work 16 hours each day for 20 days in each month, or if they work 30 days of proportionately less hours, as the contract expressly provides for at least four men per day working 20 days in each month and not for 80 shifts to work in each month by less than four men.

Arkoosh *v.* Sorrenson (Utah), 150 Pacific, 959, p. 960, August, 1915.

CONSTRUCTION OF CONTRACT—RIGHT OF OPERATOR TO ORE.

A contract to dig and construct a tunnel provided that the operator was entitled to all the ore he encountered and excavated within the four lines of the tunnel and was given the right to drive other and similar tunnels in any and all portions of the claims described, and to stope any and all veins, lodes, and ledges encountered, does not give the operator the right to ore taken from an old tunnel or stope which had long previously existed on the mining claim and especially where the operator did not claim the ore under a clause in the contract giving him a certain share of the ore mined.

Arkoosh *v.* Sorrenson (Utah), 150 Pacific, 959, p. 961, August, 1915.

NUISANCE—POLLUTION OF WATER.

INJURIES FROM NUISANCE AS CAUSE OF ACTION—PLEADING.

In actions for damages caused by an alleged nuisance maintained by a mine operator, the injurious consequences resulting from the nuisance, rather than acts which produced the nuisance, constitute the cause of action, and the cause of action does not arise until harmful consequences occur, and negligence of the operator is not ordinarily an essential element in such actions. But where the facts are so stated that the conclusion arises as a logical sequence that the harmful consequences complained of proximately resulted from the acts of

the owner in the operation of his mines, and the maintenance and use of his washers, is sufficient to show a liability as a matter of pleading.

Yolanda Coal & Coke Co. *v.* Pierce (Alabama), 68 Southern, 563, p. 595, May, 1915.

INJURY TO CATTLE—DUTY TO LESSEN DAMAGES.

In an action against a coal mine operator for damages for polluting a stream and by reason of which the plaintiff's cattle were diseased and many of them died from the effects of drinking polluted water, the plaintiff is entitled to recover such damages as proximately resulted to him in the use of his property for the purpose for which he was using it; and if he was unreasonably deprived of the use of the water, and if his cattle were poisoned by deposits of deleterious matter in the stream by the defendant, and if the death of the cattle proximately resulted therefrom, he would be entitled to recover the reasonable market value of any animals that died from such cause; and if the remaining herd of cattle were, as a proximate result of the defendant's wrong, depreciated in value, he would be entitled to recover whatever such depreciation in value was. But the law imposed upon the plaintiff the duty of taking steps to minimize the damages which were being done to him on account of the nuisance complained of, and if the plaintiff knew that his cattle were being injured by drinking the poisoned water and could have reasonably secured water elsewhere and thereby lessened the damages that were being done, it was his duty to secure such water and lessen such damages, and he can not recover on account of any damages which he could have lessened.

Tenessee Coal, Iron & Railroad Co. *v.* Wright (Alabama), 68 Southern, 339, p. 340, April, 1915.

POLLUTION OF WATER AND INJURY TO LAND—ELEMENTS OF DAMAGES.

Where a mine operator in the operation of its mine places in a stream and the tributaries thereof large quantities of waste, refuse, débris, tailings, culm, and other deleterious or poisonous matters and substances from its mines and other industries, and by reason of which the substances pollute the water of the stream and are washed down into and upon the lands of a lower owner, such landowner may recover damages under an allegation of permanent injury to his land from impairment of water supply, impoverishment of the soil, resulting in depreciation in value, depreciation of rental value, impairment of the right of comfortable enjoyment, injuries to crops, and sickness from noxious odors and poisonous gases.

Yolanda Coal & Coke Co. *v.* Pierce (Alabama), 68 Southern, 563, p. 565, May, 1915.

DAMAGES TO REAL ESTATE—INCONVENIENCES AS PERSONAL INJURIES.

It is sufficient to show a cause of action for damages and to render a mine owner and operator liable, where in an action for damages against such mine owner and operator for the pollution of the waters of a stream, and where the plaintiff's evidence tended to show that from the use of the washers at the mines of the operator and other conditions maintained in the mining operations the water in a stream running through the premises of the plaintiff were polluted; that refuse matter from the mines settled in the bed of the stream; that the water before its pollution was pure and fit for domestic use, and that by the pollution of the stream the water was rendered unfit for use and emitted noxious gases and disagreeable odors that rendered the use of the plaintiff's property less comfortable as a home, depreciated the rental and market value greatly, and put the plaintiff and his family to great inconvenience in obtaining pure water for drinking and laundry purposes and for watering stock, and caused sickness in the family; under the rule that a person who with foul odors and noxious gases renders a man's life unendurable in his home and thus annoys and inconveniences him does him a personal injury as surely as one who commits a battery upon him, and damages thus suffered, like mental pain and anguish, are not the subject of proof by monetary standard but must be left to the sound judgment and discretion of a jury trying the cause, and in assessing damages under such circumstances much latitude and discretion are allowed to the jury, and it is not for the court to say, under such circumstances, that a verdict is excessive.

Yolanda Coal & Coke Co. *v.* Pierce (Alabama), 68 Southern, 563, p. 566, May, 1915.

RIGHT OF ACTION IN THE ABSENCE OF NEGLIGENCE.

It is a matter of common knowledge that pure and wholesome water for domestic purposes and in farming operations is a valuable asset, and its presence or absence materially affects the value of residence and farm properties, and the law is that such rights can not be destroyed by a superior riparian proprietor in the conduct of his mining operations by the pollution of the water in the stream to such extent as to render the water in the stream unfit for domestic use; and to so pollute the stream by such mining operations that waters are impure and unfit for domestic use and from which noxious gases and disagreeable odors arise, rendering the property used as a residence less comfortable, gives a right of action for damages, regard-

less of the methods of operation, and negligence as applied to the operation is not a necessary predicate to the cause of action.

Yolanda Coal & Coke Co. *v.* Pierce (Alabama), 68 Southern, 563, p. 565, May, 1915.

DEPOSITING SLACK IN STREAM—LIABILITY FOR DAMAGES TO LANDOWNER.

In an action by a landowner against the owner and operator of a coal mine for damages caused by the washing down of slack and fine coal from deposits negligently placed on the bank of a stream by the coal operator, it was not incumbent upon the plaintiff, the landowner, to produce witnesses who could testify that they saw the slack and coal and followed it as it washed down the creek and saw it fill up the channel and cause the injury to the complainant's land as complained of; but it is sufficient to prove that the defendant operated the coal mine on the creek or its tributaries above the complainant's land, and that the defendant, the coal-mine operator, dumped the slack and fine coal into the stream, and that slack and fine coal obstructed the bed of the stream near the complainant's land, thereby causing the water to overflow and damage complainant's land; and the fact, if such fact existed, that other mine operators located between the mine of the defendant and the complainant's land deposited slack or fine coal in the bed of the stream would not relieve the defendant from liability, as the defendant can not escape liability merely because the complainant does not or can not apportion the damages between the wrongdoers.

North Jellico Coal Co. *v.* Trosper (Kentucky), 177 Southwestern, 241, p. 243, June, 1915.

SUCCESSIVE ACTIONS FOR LOSS OF RENTS—RENTS MERGED IN DAMAGES FOR TOTAL INJURIES.

Where as the result of the permanent injury to real estate caused by the operation of coal mines and the dumping of slate and shale from the mine and discharging thereon quantities of contaminated and poisonous water, resulting in the pollution of the waters of a stream, spring, and well on the premises and impoverishing the soil, rendering it less fertile and productive, the rental value of such property has depreciated or has been destroyed, and where the owner has not recovered damages for the permanent injury caused by the nuisance, the loss of rents is a constantly recurring injury and may be recovered in repeated actions until the nuisance is abated; but if the nuisance has resulted in the total destruction of the estate, rendering it worthless, and damages for the permanent injury have been recovered and the owner made whole, his loss by way of rents is merged in

the recovery for the permanent injury, and he can not recover in any subsequent action.

Pratt Consolidated Coal Co. *v.* Morton (Alabama), 68 Southern, 1015, p. 1016, April, 1915.

DAMAGES FOR PERMANENT OF TEMPORARY INJURIES—PROOF OF VALUE AND DAMAGES.

Where real estate is permanently injured by a nuisance resulting from the operation of coal mines, damages for the permanent injury are recoverable in the same action with injuries of a temporary nature such as rents or profits, and where the nuisance is a continuing one and damages for permanent injuries may be barred by the statute of limitations, proof of the value of the property before any injury resulted to it from the nuisance is admissible, and its value after the injury as a predicate for the recovery of the constantly recurring damages resulting from the nuisance; but it is not permissible to prove, as showing the market value of the land, the price paid several years prior to the alleged injury, but the criterion in establishing permanent injury is the difference in the market value before the injury and after the lands had suffered the injury.

Pratt Consolidated Coal Co. *v.* Morton (Alabama), 68 Southern, 1015, p. 1016, April, 1915.

PREVENTING OPERATIONS—INJUNCTIONS.

INJUNCTION AGAINST OPERATING—DISSOLUTION ON FILING BOND.

An injunction obtained by the owner of land against a railroad company by which the company is enjoined from boring oil wells on its right of way, on allegations that the railroad company has only a right of way and not a fee in the land, and that such boring is a trespass and a disturbance of the oil under adjoining lands of complainant, and that the complainant will be injured by the continued boring, will be dissolved on bond properly executed by the defendant railroad company, in the discretion of the trial court, where the bond is conditioned for all damages sustained by the plaintiff in case of a definitive judgment against the defendant in the final trial of the suit.

Natalie Oil Co. *v.* Louisiana Railway & Navigation Co. (Louisiana), 69 Southern, 146, June, 1915.
See Hayne *v.* Edenborn (Louisiana), 68 Southern, 737, May, 1915.

NO RIGHT TO JURY TRIAL.

An action by a mine owner and operator to enjoin an adjoining owner from mining and removing ore of a vein apexing in the plaintiff's mining claim is equitable in character, and the damages

sought are merely incidental. The cause is properly triable to the court, and neither party has a right to demand or have a jury; and where the issue is a question of apex right, involving a question of fact and no question of law, except in so far as the determination of what constitutes a vein might be so considered, and where the court made its finding and entered judgment after hearing the evidence and on an inspection of the premises, a court on appeal will not disturb the verdict and judgment.

Esselstyn *v.* United States Gold Corporation (Colorado), 149 Pacific, 93, page 94, June, 1915.

DUMPING REFUSE ON SURFACE—INJUNCTION—REMEDY AT LAW.

Where a coal-mine operator has been dumping refuse from other mines upon the lands of the complainant, and where the operator ceased such work on the request of the landowner and there was no intention or danger shown of a repetition of the injury, there can be no injunction granted, as the remedy in such case is complete and adequate at law.

Bagley *v.* Republic Iron & Steel Co. (Alabama), 69 Southern, 17, June, 1915.

NEGATIVE COVENANTS—IMPROPER USE OF SURFACE BY LESSEE—INJUNCTION.

A lease of Indian lands for mining coal and asphalt in compliance with an act of Congress relating to mining leases in the Creek Nation in addition to the ordinary provisions for mining and the usual stipulations and covenants, contained a provision to the effect that the demise and lease was for the sole purpose of prospecting for and mining coal and asphalt, and the lessee was to occupy so much only of the surface of land as might be reasonably necessary to carry on the work of prospecting for, mining, storing, and removing the coal and asphalt mined, with an agreement on the part of the lessee to commit no waste, and to suffer no waste to be committed, upon the premises, and that the lessee would not use the premises, nor suffer them to be used, for any other purpose than that authorized in the lease. The lease, by its provisions, did not become valid until approved by the Secretary of the Interior, and was at all times subject to his rules and regulations relative to mineral leases in the Creek Nation. The lease contained no provision, either express or implied, giving the lessee the right to use the surface of the demised premises as a dumping ground for shale and other waste taken from mines upon premises other than those described in the lease, nor is it reasonable that the Secretary of the Interior would approve a lease which, properly construed, would permit a lessee to use the premises for such purposes, and where it appeared that the lessee had sunk

shafts upon the premises and had extended tunnels from these into adjacent lands from which it was mining large quantities of coal on the leased premises and was dumping large quantities of shale and waste brought from such adjacent lands upon the surface of the leased premises and was occupying a large part of such surface with buildings and dwellings for the use of employees engaged in such outside mining operations. The use of the premises leased was restricted by the express terms of the lease to prospecting for and mining coal and asphalt on the premises, and in such case the law implies a negative covenant not to use the premises for any other purposes than those specified; and a court of equity will, by injunction, protect the lessor against the use by the lessee of the premises in violation of such negative covenant.

Sharum *v.* Whitehead Coal Mining Co., 223 Federal, 282, page 289, April, 1915. See Consolidated Coal Co. *v.* Mary Ann Schmisseur, 135 Illinois, 371, 25 N. E., 705.

The execution of a lease to mine coal and asphalt under the lands described will not authorize the lessee to dump slate and refuse upon the surface of the demised lands unless the right is expressly granted; and where such a lease does not authorize the lessee to use the openings, shafts, and tunnels on the demised lands to mine adjoining property not belonging to the lessor, the lessee takes no right except under the lease, and the failure of the lease to grant such privilege impliedly negatives the privilege, thus raising an implied negative covenant which is analogous to specific performance that will be enforced by injunction.

Sharum *v.* Whitehead Coal Mining Co., 223 Federal, 282, page 290, April, 1915. See Brasfield *v.* Burnwell Coal Co., 180 Alabama, 185, 60 Southern, 382.

MINING LEASES.

LEASES GENERALLY—CONSTRUCTION.

FALSE REPRESENTATIONS TO AGENT—RIGHT TO RESCIND.

An action to rescind a contract of purchase of a mining lease on the ground of fraud and false representations can not be maintained and the contract can not be rescinded where it is shown that the negotiation for the contract and an examination in the purchaser's behalf was made by an expert miner of long and varied experience, and where it clearly appears that the representations in part did not deceive the agent and where other representations were not relied upon by the agent, and where it clearly appears that the agent acted on his own judgment and did not accept "seriously" the statements and representations made to him by the seller, as the rule is that an

attempt to fraudulently deceive must be so far successful as to have induced belief and reliance on the part of the person claiming to be injured.

Greenstreet *v.* Walsch (Missouri Appeals), 176 Southwestern, 1062, page 1063, May, 1915.

DIAMOND LEASE—ACTION TO RECOVER DIAMONDS ON GROUND OF FRAUD.

The lessor of lands leased for the purpose of mining for diamonds can not in an action of replevin recover possession of diamonds mined by the lessee and belonging to him under the lease, on the ground that the lease was procured for the fraudulent purpose of discrediting the mine and keeping the lessor in the dark as to the value of diamonds discovered and to stifle the business of mining, depress the value of the land and buy it for a minimum price, in the absence of proof of the alleged fraudulent acts by the preponderance of the testimony; and the mere failure of the lessee to perform some stipulations and conditions of the lease, in the absence of proof of fraud, would not entitle the lessor to recover in such an action.

Mauney *v.* Millar (Arkansas), 175 Southwestern, 402, March, 1915.

COAL LEASES.

PRACTICAL CONSTRUCTION—MINIMUM AMOUNT OF DIFFERENT GRADES.

A coal lease provided that the lessee should pay for all coal mined above the size of pea coal at the rate and price of 25 cents per ton of 2,240 pounds, and for pea coal 12½ cents per ton royalty until it is worth within 25 cents per ton of chestnut coal, and then to be 25 cents per ton, payments of royalty to be quarterly for the first two years and for not less than 4,500 tons each year; for the third year, 9,000 tons; for the fourth year, 13,500 tons; and for each year thereafter, 18,000 tons; and it was agreed that if the lessee in any one year paid for more coal than mined he had the right at any time thereafter to mine the coal paid for without further charge. There was no provision specifying what proportion of the several sizes should compose the minimum quantity to be mined annually by the lessee, and the contract in this respect was left ambiguous, and the lease must be construed in this doubtful aspect as to what proportion of the several sizes shall compose the minimum quantity to be mined annually; and the parties in this respect have the right to invoke the aid of contemporaneous construction; and, applying this rule, the minimum product was to be determined by the quantity of coal of ordinary size produced at the mine, and for more than 30 years the lessee paid to the lessor and the lessor received and receipted for

the royalty on the minimum product on this basis, the parties thereby placing their own interpretation upon the lease; and they have thus determined by their long course of conduct what was in their minds when they wrote and signed the lease; and a court is not at liberty after a period of more than 30 years to declare that the parties had a different intention from that shown by their own interpretation of the lease; and a court must conclude that the parties intended that the minimum amount of royalty should be computed on coal of prepared size and not on such size and pea coal.

Lehigh Valley Railroad Co. *v.* Searle (Pennsylvania), 94 Atlantic, 74, p. 75, March, 1915.

DISAGREEMENT AS TO ROYALTIES DUE—FORFEITURE NOT PERMITTED.

A coal lease providing that on failure to pay any installment of royalty for 90 days, the lease and all rights under it shall, at the option of the lessor, become forfeited, can not be, at the option of the lessor, forfeited for a small amount of royalty due under the lessor's construction of the lease; and where the failure to pay arose from the difference in the interpretation put upon the lease by the parties, and where the interpretation by the lessor was contrary to the practical construction placed upon the lease by the parties for a period of over 30 years, as the forfeiture clause manifestly never was intended to enforce a forfeiture under such circumstances, and it would be against reason and good conscience to permit the annulment of a lease where the forfeiture clause was intended to enforce payment of royalty due by the terms of the lease, and until that was legally ascertained, if reasonably in doubt, there could be no just nor conscionable ground on which it could be permitted to operate. Equity will not permit a party to a contract to enforce it or to compel the forfeiture by means manifestly never intended and such as are clearly harsh and oppressive, and the rule in equity is that where a penalty or forfeiture clause is designed merely as a security to enforce the principal obligation, it is as much against conscience to permit a party to pervert it to a different and oppressive purpose as it would be to allow him to substitute another for the principal obligation.

Lehigh Valley Railroad Co. *v.* Searle (Pennsylvania), 94 Atlantic, 74, p. 77, March, 1915.

OIL AND GAS LEASES.

NATURE OF LEASE—RECORDING NECESSARY.

An oil and gas lease is a chattel real as contradistinguished from real property, and while it merely grants the right to prospect for oil and gas, vesting no title in the land itself and no title to the oil

and gas until reduced to actual possession, it is required by the statute to be in writing, acknowledged and recorded in order to be valid against third persons.

Tupeker *v.* Deaner (Oklahoma), 148 Pacific, 853, May, 1915.

CONSTRUCTION—AREA FOR OPERATING WELL—PAROL PROOF INADMISSIBLE.

In an action involving the construction and the rights of the parties under an oil and gas lease and for a forfeiture of the same which gave to the lessee the necessary space to operate a well, in a case of forfeiture the lessee is not entitled to prove a parol agreement to the effect that he should be entitled to an acre of land for each well opened.

Moore *v.* Decker (Texas Civil Appeals), 176 Southwestern, 816, p. 817, May, 1915.

CONSTRUCTION AND CONSIDERATION—IMPLIED COVENANT TO OPERATE—FORFEITURE.

A lease or conveyance of all the oil and gas and other minerals in and under certain described lands for a stated consideration, giving the right to enter and drill and operate for oil, and providing for a stipulated royalty or portion of the oil produced, and providing that in case operations are not commenced and prosecuted with due diligence on or before a certain stated date, then the grant should immediately become null and void as to both parties, and if oil and gas or other minerals shall be discovered the grant or conveyance shall be in full force and effect for 25 years from the time of discovery and as much longer as oil, gas, or other minerals can be produced in paying quantities, is satisfied by commencement of operations within the stated time, and the discovery of oil by an assignee of the grantee or lessee inured to the benefit of both assignee and lessee and to the benefit of the tract of land subleased as well as to the remaining original leased tract, and to that extent had the effect of vesting the right of the original grantee or lessee in the assignee or sublessee, and the assignee of the lessee thereby became the tenant of the lessor by agreement for the specified term of 25 years and not at will and could not be divested of this vested right at the will of the lessor. But the conveyance or lease must be held to contain an implied obligation, if not expressed, that the lessees would continue to mine and operate the lease for the production of oil and gas during the time of its continuance, and that as a part of the consideration for the lease, one-eighth of the oil produced should be delivered to the lessor; and this and other provisions clearly evidence the purpose not only to prospect for and discover oil but to produce, transport, and drill for oil, and pipes

were to be laid for such purpose, and the mere discovery of oil did not require the performance of all the provisions set out. The agreement implies that the lessee or his assigns will produce oil upon the discovery during the term and will pay the stipulated royalty, and a failure on the part of the lessee or his assigns to perform this implied obligation or condition subsequent would work a forfeiture of the lease. But a mere temporary cessation of work in operating or drilling on the land for oil should not work a forfeiture of the lease in consideration of the very large sum paid in the first instance and large expenditures made by the assignees in drilling wells; and the evidence to justify a forfeiture should show more than the abandonment of the wells when they ceased to produce and it would be unreasonable to require a continued pumping of a well which had ceased to pay anything or to leave the casing in a well in which there had never been any oil. But if the lessee or his assigns discovered oil and prosecuted their discovery with diligence and in good faith, though they should exhaust their well or abandon one producing no oil, a forfeiture should not be declared as a matter of law, and the mere cessation alone ought not to produce a forfeiture unless the proof clearly showed an abandonment of the lease.

Fisher *v.* Crescent Oil Co. (Texas Civil Appeals), 178 Southwestern, 905, June, 1915.

CONSTRUCTION—RIGHTS AND LIABILITIES OF LESSOR AND LESSEE.

An oil-and-gas lease containing a provision of forfeiture on failure of the lessee to perform its conditions is for the benefit of the lessor only, and he can either avail himself of such failure under the lease or he can waive the forfeiture and collect the rentals stipulated in the lease unless there is an express stipulation to the effect that the lease shall become null and void unless the lessee shall either drill within the stated time or pay the rental, or words of similar import.

Cohn *v.* Clark (Oklahoma), 150 Pacific, 467, p. 471, June, 1915.

LESSEE PROTECTED BY JUDGMENT.

Where an oil-and-gas lease gave to the lessee the use of such space as is necessary to operate a well the lessee can not complain of a judgment giving the possession of the land upon which the well was drilled to the lessor, the judgment expressly recognizing and giving to the lessee the use of such space as is necessary to operate the well drilled by the lessee.

Moore *v.* Decker (Texas Civil Appeals), 176 Southwestern, 816, p. 817, May, 1915.

LESSOR ENJOINED FROM EXECUTING SECOND LEASE.

Where the holder of a valid oil-and-gas lease has obtained vested rights by drilling wells and by the production of oil and gas, equity will enjoin the lessor from creating a cloud on his title by executing to a stranger another lease on the same property where it appears to be reasonably certain that such cloud will be created unless enjoined.

Castlebrook Carbon Black Co. *v.* Ferrell (West Virginia), 85 Southeastern, 544, p. 546, May, 1915.

ASSIGNEE ACCEPTING ASSIGNMENT WITH NOTICE OF PRIOR LEASE.

In the assignment of an oil-and-gas lease of all the right, title, and interest of the lessee, an assignor therein, there is no implied warranty of title, and an assignee who accepts such assignment with knowledge of an existing prior lease on the same premises can not complain and can not recover the money paid for the assignment or damages because of the existence of such prior lease.

Tupeker *v.* Deaner (Oklahoma), 148 Pacific, 853, May, 1915.

ASSIGNMENT—EFFECT AND LIABILITY OF ASSIGNEE.

Under an assignment of an oil-and-gas lease, stating that it is intended to convey and does convey to the assignee an undivided one-eighth interest in the working interest of the lease without any obligation on the part of the assignee to the assignor, by virtue of a certain prior contract and assignment, and reciting further that the assignment is made subject to the terms and conditions of the lease, the words "subject to" are words of classification and not of contract, and the assignee did not enter into a personal obligation to fulfill any of the terms of the lease but simply took a one-eighth interest charged with the burden placed upon him by the terms of the lease and was not liable personally for any more than one-eighth of the expenses incurred in development of the oil-and-gas lease.

Cox *v.* Butts (Oklahoma), 149 Pacific, 1090, p. 1091, June, 1915.

LIABILITY OF ASSIGNEE FOR RENT.

Where a lease of land for oil and gas provides that a certain sum shall be paid each year as royalty on the gas produced from each well and marketed off the premises, and where it appears that the lessee operates the lease, markets the gas from wells thereon for a portion of the year, and thereafter assigns the lease, the assignee, in the absence of a special contract, is not liable for the royalties accruing on the wells,

the product of which was marketed prior to such assignment of the lease, regardless of the particular time when such royalties became due and payable under the terms of the lease, but in such case the original lessee and assignee is liable for the royalties that accrued during the time he so marketed the product and enjoyed the estate.

Columbus Gas & Fuel Co. *v.* Knox County Oil & Gas Co. (Ohio), 109 Northeastern, 529, p. 530.

LIABILITY OF ASSIGNEE FOR RENTS—RELATION AND LIABILITY OF LESSEE.

The lessee of an oil and gas lease may be liable by the terms of the lease for the rents and royalties accruing during the entire term of the lease; and if the lease is assigned, in the absence of a contract assuming further liability, the assignee is liable only for the rent accruing after the assignment; and as to such rent or royalty accruing after assignment the original lessee stands in relation of surety to the assignee, and under the statute of Ohio may maintain an action against such assignee for any rent or royalty accrued and due and unpaid after the assignment of the lease.

Columbus Gas & Fuel Co. *v.* Knox County Oil & Gas Co. (Ohio), 109 Northeastern, 529, p. 530.

ACTION BY ASSIGNEE TO QUIET TITLE—ASSIGNOR NOT NECESSARY PARTY.

The original lessee and assignor of an oil and gas lease is not a necessary party defendant to an action by the assignee of an ordinary oil and gas lease, brought to quiet his title and to enjoin the lessor from executing a second lease on the same land, where the assignment is absolute and unconditional, under the rule that where an assignment is absolute and unconditional leaving no equitable interest whatever in the assignor, and the extent and validity of the assignment is neither doubted nor denied and there is no remaining liability in the assignor to be affected by the decree, he is not a necessary party.

Castlebrook Carbon Black Co. *v.* Ferrell (West Virginia), 85 Southeastern, 544, p. 545, May, 1915.

COVENANT TO DRILL WELLS OR PAY FORFEIT—SINGLE PENALTY.

A covenant in an oil and gas lease absolutely binding the lessee to complete a well on the premises within four months and providing conditionally that he should complete three more within successive periods of three months, unavoidable delays after starting to drill excepted, and providing that upon failure to drill and complete the wells or any of them the lessee shall pay $100 forfeit for each well specified which he had not then completed, or surrender the lease for

cancellation, imposes one penalty for the nondrilling of each well and not successive penalties for each failure to be paid every three months.

Petty v. United States Fuel Gas Co. (West Virginia), 85 Southeastern, 523, May, 1915.

FAILURE TO OPERATE—RECOVERY OF RENTAL.

Under an oil lease providing that the lessee should commence operations in drilling for oil at a particular date, or thereafter pay to the lessor a stipulated sum per acre per annum until a well is drilled, or the lease shall be null and void, the lessor may, upon the lessee's failure to begin operations by drilling for oil within the stipulated time, maintain an action for the stipulated rental until a well is drilled or until the lease is terminated or canceled under the surrender clause contained therein.

Cohn *v.* Clark (Oklahoma), 150 Pacific, 467, p. 469, June, 1915.

DAMAGES FOR FAILURE TO DELIVER LEASE—INSUFFICIENT FINDINGS.

In an action for damages by a complainant against an oil company as the owner of lands for the failure of such oil company to deliver to the complainant a lease supported by a fee title to certain oil lands, together with an oil well assumed to be located thereon, wherein the complainant alleged that the defendant landowner represented that it was the owner in fee simple title of the real estate described and that there was located thereon a certain oil well capable of producing 50 barrels per day and representing that there was located adjacent to such land, and which would be available for the complainant's use, a standard drilling rig, boiler, and engine in good condition, with a complete outfit of drilling tools and a large footage of casing; and alleging further that he had paid on account of the rental reserved a large sum of money, and that the drilling rig, boiler, engine, and drilling tools were not in good condition and that the oil company refused to deliver a lease to 160 acres of proven oil land of which it was vested with a fee simple title, a judgment for $5,200 damages can not be sustained where the findings of the court are not definite and do not show the separate items of damages making the sum total, although the findings are definite as to some of the particular items of damages; and the judgment for the return of the money paid as part consideration of the lease can not be upheld where the action did not proceed upon the theory of rescission, and where there was no offer to rescind or return the consideration and where it is not alleged that the lease which the complainant obtained was without value.

Hullinger *v.* Big Sespe Oil Co. (California), 151 Pacific, 369, August, 1915.

NO TIME FIXED FOR PAYMENTS—REASONABLE TIME IMPLIED.

An oil and gas lease providing that in case no well is commenced within 90 days the lease should be null and void, unless the lessee should pay for the delay at the rate of 50 cents a day until a well was commenced, can not be canceled by the lessor where he had accepted payment after the default of 101 days and the payment of 50 cents a day fixes the rate and not the times of payment, and under such an agreement payments at reasonable times for a default in the failure to drill is sufficient to preserve the lease; and payments quarterly are to be regarded as reasonable.

Smith *v.* Steele (Kansas), 150 Pacific, 519, p. 520, July, 1915.

APPLICATION OF FORFEITURE CLAUSE—RENTALS DISTINCT FROM ROYALTIES.

A clause in an oil and gas lease to the effect that the failure of the lessee to complete a well upon the premises described within the time specified or to pay the rentals at the time and in the manner as therein provided shall ipso facto work a forfeiture of the lease without notice applies only to rentals provided to be paid for delay in drilling and not to rentals or royalties to be paid for gas from a producing well.

Castlebrook Carbon Black Co. *v.* Ferrell (West Virginia), 85 Southeastern, 544, p. 545, May, 1915.

ABANDONMENT AND FORFEITURE.

The distinction between "forfeiture" and "abandonment" as applied to oil and gas conveyances and leases is so shadowy that in discussing the one necessarily the conditions of the other are involved; but one distinction is that "abandonment" rests on the intention of the parties, while forfeiture does not rest upon intent to release the premises, but is an enforced release, and abandonment in this sense is the relinquishment of a right, and a vested title can not ordinarly be lost by abandonment unless there is satisfactory proof of an intention to abandon, and the existence of an intent to waive or abandon the right to drill for oil and gas under the lease is a question of fact, and the lessor must show an intention on the part of the lessee to abandon the lease; and if the proof would authorize the conclusion that there was no such intention, then a court would not be justified in decreeing a forfeiture of the lease. The fact that a lessee had abandoned work on a dry well and removed therefrom the casing is not sufficient evidence of the abandonment of a vested right under a voidable lease, nor is the intention to abandon established by the further fact that the lessee was afterwards unfortunate enough to drill a dry hole. Under a lease for a specified term and a stated valuable consideration paid the lessee may continue his efforts to discover

oil and gas or mineral by continued diligent drilling during the entire term of the lease.

Fisher *v.* Crescent Oil Co. (Texas Civil Appeals), 178 Southwestern, 905, p. 908, June, 1915.

RIGHT OF LESSEE TO DRILL ON RAILROAD RIGHT OF WAY—APPEAL FROM INJUNCTION.

An oil and gas lessee authorized to drill and operate for oil and gas on the right of way of a railroad company is entitled to appeal from a judgment enjoining operations under the allegation that the lessee is the lessee of the railroad company which acquired its rights and its right of way only by virtue of the power of eminent domain and for railroad purposes, and that the drilling of an oil well for personal gain is not for such a purpose and will inflict injury upon the complainant by draining oil from his adjoining lands.

Hayne *v.* Edenborn (Louisiana), 68 Southern, 737, p. 738, May, 1915.

LEASE EXECUTED PENDING SUIT—RIGHTS OF LESSEE.

An oil and gas lessee who acquires his lease from a party to a pending suit can not acquire any interest in the land during the pendency of such suit from a party to the suit that would defeat any decree the court might make, but such lessee is bound by the court's decree as if a party to the cause, and the fact that he may have acquired the lease without actual notice of the claim of the plaintiff in the pending suit is not effective as a matter of law, and such lessee is not entitled on his application to be made a party to the suit for the alleged purpose of protecting his interest.

Taylor *v.* Taylor (West Virginia), 85 Southeastern, 652, p. 654, June, 1915.

MINING PROPERTIES.

TAXATION.

MINING CLAIMS SUBJECT TO TAXATION.

The land upon which an unpatented lode-mining claim is located may not be taxed, for the title to the land is in the United States; but the right of possession of such a mining claim is property of great value and is distinct from the land itself, and is therefore subject to taxation. In such case the land on which such mine is located is not assessed for taxes, but the claim itself, the right of possession of the land for mining purposes is the property that is assessed, and a State has the power to tax such interest in a mining claim and to enforce the collection of the tax by a sale.

Earhart *v.* Powers (Arizona), 148 Pacific, 286, p. 287, May, 1915.

MINING CLAIMS AS PERSONAL PROPERTY.

For the purpose of taxation the term "personal property" includes any interest or equity in a valid claim to nonpatented mining claims, either lode or placer.

Earhart *v.* Powers (Arizona), 148 Pacific, 286, p. 288, May, 1915.

RIGHT OF POSSESSION AS DISTINCT FROM LAND.

The inclusion of a "mining claim" in the term "personal property" as provided by section 4847 of the statutes of Arizona (Civil Code of Arizona, 1913) is clearly a recognition by the legislature that the right of possession, as distinct from the land itself, is made the subject of taxation and must be assessed at its full cash value, and there is no provision either in the constitution of Arizona or in the legislative enactments that makes this species of property called "mining claims," which is capable of private ownership, not taxable.

Earhart *v.* Powers (Arizona), 148 Pacific, 286, p. 288, May, 1915.

MINES AND MINING CLAIMS—POSSESSORY RIGHT.

By the term "mining claim" the possessory title is indicated, and by the term "mine" the title to the land as distinguished from the mere possessory right thereto is shown; and the use of the words "mines and mining claims" in the statute governing the subject of taxation distinguishes between the cases in which there is ownership of land, and therefore perfect title to the land, and those cases wherein the miner has the exclusive possession and enjoyment of the land for mining purposes.

Earhart *v.* Powers (Arizona), 148 Pacific, 286, p. 287, May, 1915.

FRANCHISE TO PROSPECT METAL LAND TAXABLE.

A conveyance by which the grantor conveyed to the grantee all the oil, gas, coal, and other minerals in and under a particular tract of land described for a valuable consideration in a stated amount and certain stipulated royalties, with the exclusive right of ingress and egress for the purpose of drilling, mining, and operating for such minerals and the conduct of all operations, and the erection of appliances and structures, the laying of all pipe lines necessary for the production, mining, storing, and transportation thereof, and providing further that the grantee should begin operations within one year from the time of the delivery of the instrument, creates an estate that is subject to taxation against the owner of the fee as a part of the land, the same as any other valuable right or privilege

under the statute of Texas (Art. 7504), making taxable all the rights and privileges belonging to or in any wise appertaining to real property, and of mines, minerals, quarries, and fossils in and under the same.

Texas Co. *v.* Daugherty (Texas), 176 Southwestern, 717, May, 1915.

EXEMPTIONS TO STIMULATE MINING.

Article 10, section 1, of the constitution of Nevada, as originally adopted, exempted all mines from taxation; but this section was amended so as to permit assessments for taxation of all patented mining claims, but any patented mining claim upon which $100 worth of work is annually done is made exempt from taxation, and the purpose of this change was to stimulate mining.

Goldfield Consolidated Milling, etc., Co. *v.* Old Sandstrom Annex Gold Mining Co. (Nevada), 150 Pacific, 313, p. 316, July, 1915.

CONSTITUTIONAL PROVISIONS—CLASSIFICATION.

Article 10, section 3, of the constitution of Colorado, adopted in 1876, provided that mines bearing precious metals should be exempt from taxation for 10 years from the adoption of the constitution, and subsequently subject to taxation. Subsequently the legislature, after obtaining the opinion of the supreme court, in 1887, passed an act providing for the taxation of mines and for this purpose divided them into two classes, producing and nonproducing, and all mines producing mineral exceeding in value $1,000 per annum were arbitrarily classed as producing mines. The statute also provided that all producing mines should be valued for revenue purposes at a sum not to exceed one-fifth of the gross proceeds from any mine during the preceding year; and this act was declared constitutional and remained the law until 1902.

Tallon *v.* Vindicator Consolidated Gold Mining Co. (Colorado), 149 Pacific, 108, p. 113, June, 1915.

CONSTRUCTION AND VALIDITY OF STATUTE—ARBITRARY RULE.

The legislature of Colorado, in 1902, amended the act of 1887 providing for the taxation of mines and provided that all mines whose gross production exceeds $5,000 per annum should be classed as producing mines and all others as nonproducing, and that all producing mines should be valued for taxation at a sum equal to one-fourth the gross proceeds for the preceding year, unless the net proceeds exceeded one-fourth of such gross proceeds, and in that event the mine should be valued at an amount equal to the net proceeds for the fiscal year. This statute changed the act of 1887 in three particulars:

1. Producing mines were raised from $1,000 to $5,000. 2. The fraction was raised from one-fifth to one-fourth. 3. Where the net exceeded one-fourth the gross proceeds, then the mine was to be assessed at a sum equal to the net instead of a fraction of the gross proceeds; and this arbitrary rule as to both the acts of 1887 and 1902 has been held constitutional and valid.

Tallon *v.* Vindicator Consolidated Gold Mining Co. (Colorado), 149 Pacific, 108, p. 113, June, 1915.

CONSTITUTIONALITY OF ACT—METHOD OF FIXING VALUE FOR TAXATION.

The legislature of Colorado, in 1913 (Laws of 1913, p. 566, sec. 2), amended the act of 1902, providing for the taxation of mines and required the local assessor to value each producing mine at a sum equal to one-half of the gross proceeds, plus all the net proceeds for the preceding year; and, if it was constitutional in 1887 for the legislature to choose one-fifth of the gross and in 1902 one-fourth of the gross, unless the net exceeded one-fourth of the gross, in which event all the net should be used, it was constitutional in 1913 for the legislature to adopt one-half the gross and all the net proceeds as the criterion or basis for the assessment of producing mines. The legislature did not intend that the fractions mentioned in these different statutes should arbitrarily represent the net proceeds, as in the act of 1902 it provided that the net proceeds should be taxed only if it exceeded one-fourth the gross proceeds, and the act provides the gross proceeds shall be obtained by deducting the cost of transportation and treatment, and the net proceeds shall be ascertained not by an arbitrary fraction of the gross but by deducting from the gross the cost of reduction, and then that a fraction of the gross plus all the net obtained in this way shall be a sum equal to the value of the mine for taxation; and, while the legislature could not say that one-half the gross proceeds plus all the net in fact equals the net proceeds, yet it could lawfully say that the amount so determined should represent the value of the mine for taxation, and in this way it provides a rule for arriving at the value of producing mines for taxation and is constitutional.

Tallon *v.* Vindicator Consolidated Gold Mining Co. (Colorado), 149 Pacific, 108, p. 114, June, 1915.

CONSTITUTIONALITY OF STATUTE—DISCRIMINATION IN TAX SALES OF MINERAL LANDS.

The statute of Wisconsin, section 1042j, Laws of 1913, provides for the taxation of all rights and reservations to enter upon and take away any mineral from any described lands where the title to such right of reservation is vested in any person or corporation other than

the owner of the fee and requires the same to be separately assessed for taxation; and provides also that any such reservations and rights may be sold for nonpayment of taxes, but limits the purchasers at such tax sale to the owner of the fee to which the right or reservation is attached or to the State; and provides also that the right or reservation acquired by the State shall not be completely alienated or sold, but may be leased for limited periods of time on a royalty basis. This statute must be treated as a taxing statute enacted for the purpose of raising revenue for governmental purposes and as including within its scope all cases in which by exception, reservation, or express grant the title to ores and mineral land, together with the right of exploring for and mining the same, are vested in some person or persons other than the person or persons who own title to the land and its beneficial use for any and all purposes. The existence of valuable ores or minerals beneath the surface undisclosed is not easily ascertainable but may be known to the owner by drilling and testing the land; and this is a distinction cognate to the purpose of the statute which would support the discrimination found in the statute requiring such owner to furnish the assessor an affidavit of value, while the owners of other estates in the same tract of land are not required to do so. If this were the only objection to the statute, it would be held valid either under the Federal or State Constitution. But the fatal defect in the statute is in the method of acquiring title at tax sales. By other statutes sales of real and personal property of a delinquent taxpayer are subject to competitive bidding at public auction, but under the statute in review the property mentioned is returned delinquent, advertised for public sale, bidders are invited, and the property in all respects, except with reference to the mode of assessment, as other real property; but the invited bidders are prohibited from bidding because they can not become purchasers, and no one but the State or county or the person who owns the remaining interest in the land can bid at the sale. Accordingly, if this is a taxing statute, the purpose of which is to raise revenue for the State expenses, this limitation of bidders is not germane to but in contravention of the purpose of the statute, and discriminates unjustly against the holder of the particular property described, because he loses the advantage of having some one purchase his mineral rights without limitation or restriction. This discrimination is wholly arbitrary and is without legitimate classification on which it can rest, as it does not aid the State in collecting its revenue to limit the number of bidders, nor to require the whole land to be sold, instead of the smallest area, as required by other statutes. While the rule of taxation does not extend to all steps in enforcing collection of the tax, yet it does extend to those essential steps which are necessary parts of the tax

proceedings and collection by demand or collection by enforcement process are necessary steps in enforcing the collection of the tax.

State *v.* Donald (Wisconsin), 153 Northwestern, 238, p. 239, June, 1915.

TAXATION OF MINES AND NET PROCEEDS—CONSTITUTIONALITY.

The Colorado statute of 1913 is not unconstitutional on the ground that it results in inequality and injustice between the owners of producing mines as a class because of the method of arriving at the proceeds; but it is neither the net nor the gross proceeds that are taxed, and these are only employed in formulating a rule by which the value of the mine, the only thing taxed, may be established or approximated for the purposes of taxation, and the fact that there may be low-grade and high-grade mines and the difference in the cost of production and extraction are too remote to annul the statute. The fact that mining operations are attended with so many intricate difficulties, uncertainties, and complications, any mode provided for taxation may produce many inequalities and hardships in particular cases, and the ingenuity of man can not devise a system for the taxation of mines in which this will not be the case. The very character of the property is such that there can be no system evolved that in some instances will not produce inequality and lack of uniformity in taxation, and these inequalities must be treated as an unavoidable incident to the ownership of such property. It follows that the act of 1913 is constitutional and provides the rule for establishing the value of producing mines for taxation in the State of Colorado.

Tallon *v.* Vindicator Consolidated Gold Mining Co. (Colorado), 149 Pacific, 108, p. 115, June, 1915.

GROSS PROCEEDS.

The words "gross proceeds" as applied to the taxation of mines and as a basis of taxation mean the amount of money actually received by the mine owner for his ore after deducting the cost of transportation to the place of sale or reduction, and the cost of sale, treatment, or reduction.

Tallon *v.* Vindicator Consolidated Gold Mining Co. (Colorado), 149 Pacific, 108, p. 116, June, 1915.

RELATIVE VALUATION OF MINING AND OTHER PROPERTIES.

Under the statutes of Michigan (act No. 114, Public Acts of 1911), the owner of a mine or mining property that has been assessed according to the provisions of the statute for assessing mining property for taxation can not have the assessment set aside and the taxes declared invalid on the ground that his property was valued

relatively at too large a sum contrasting with valuation of other classes of real property and with the valuation of personal property.

Newport Mining Co. *v.* City of Ironwood (Michigan), 152 Northwestern, 1088, p. 1094, June, 1915.

INVALID ASSESSMENT—INJUNCTION.

An assessment of mining property for taxation is not fraudulent merely because of being excessive if the assessors have not acted from improper motive; but if purposely made too high through prejudice or a reckless disregard of duty in opposition to what must necessarily be the judgment of all competent persons, then a case is made for the equitable remedy of injunction, as the tax in such case is necessarily invalid.

Sunday Lake Iron Co. *v.* Wakefield Township (Michigan), 153 Northwestern, 14, p. 16, June, 1915.

METHODS OF ASSESSING MINES AND MINING PROPERTIES.

The statute of Michigan (Act No. 114, Public Acts of 1911), makes it the duty of the State tax commissioner to investigate, examine into, inventory, and appraise all mining properties in the State and all mineral rights which are subject to taxation and gives the commissioners authority to inspect the books and papers of any person, firm, or corporation owning, operating, or interested in mining properties or mineral rights, and also to examine under oath officers and agents of any such person, firm, or corporation, and to employ the assistance of expert engineers, and directs that the quantity and value of minerals, when known to be available therein, must be considered by the assessor in determining the value of land for taxation; and while the availability and value of minerals, unmined, are not matters of common knowledge, nor to be correctly ascertained or estimated, except by men possessed both of certain particular information and of expert knowledge, yet a number of factors must be considered in determining whether, it being apparent that there is a deposit of ore in a given locality, it is available where no mine or mining is carried on; and in such case its availability, meaning its commercial value and the ease and cost of obtaining it, must be considered as well as its quality and quantity, and accordingly if the extent and quantity of the ore body is known or estimated one important factor in determining taxable value or cash value is secured. Another factor is the price to be paid for the mining and usually this price would be a fixed price per ton during the continuance of mining operations, or a variable price, depending upon the quantity or selling price, of ore mined and shipped or both; and to obtain this price the expense of opening

a mine and conducting mining operations would be incurred, and if the adventure was successful the owner of the ore mined must be paid his royalties, his selling price of the ore; but for purposes of taxation the State is not bound to accept the amount of royalty bargained for by the owner of the land and mineral as controlling its valuation, as it not infrequently occurs that where the ore body is once developed the lessee may be able to sell it upon a royalty basis in excess of the royalty provided in the lease; but in any event the miner pays the royalty, and if successful in his operations makes a profit on the ore mined. But many of these difficulties are eliminated where a mine is opened and in operation and where the quality of ore s assured and the quantity to a certain point is determinable and measurable, and where with the equipment a definite quantity of ore can be and has been mined and marketed annually and the cost of mining and the market price of the ore thus definitely fixed, and where with such equipment and operation at a given rate of mining the known ore body would be exhausted in a determinable period and during which the value of the ore would be recovered in installments. The remaining difficulty, for the purpose of assessment, is the quantity of ore or mineral not in sight and the present value of the land. If under such circumstances a rule or method exists by which mining engineers and business men ascertain the value of ore bodies for the purpose of buying and selling them, and if no better rule is or can be suggested, there is no reason why the State, for the purposes of taxation, may not use the methods of business to ascertain such values, and in thus doing the State treats the peculiar subject of taxation as the subject requires, and does not change or modify a cardinal rule of taxation, but only applies it; and the legislature has provided as an aid to assessing officers expert judgment upon the subject and the fact that experts and business men do estimate and deal in mining properties with reference to the future cost of mining and with reference to the future price of ore as well as the estimated quantity and value of the ore body, and do not regard these estimates as too uncertain to be made the basis for present valuation of a mine as a matter of business, and accordingly the State is justified in acting upon considerations upon which business men act, so long, at least, as these considerations appear to universally affect and determine, for business purposes, for buying and selling, the value of mining properties, and where such methods appear to be scientific and the result is justified by experience.

Newport Mining Co. *v.* City of Ironwood (Michigan), 152 Northwestern, 1088, p. 1094, June, 1915.

See Sunday Lake Iron Co. *v.* Wakefield Township (Michigan), 153 Northwestern, 14, June, 1915.

VALIDITY OF ASSESSMENT—GOOD FAITH OF STATE ROARD.

Where a State board of tax commissioners in fixing the value of a mine for the purpose of taxation used the information produced for it by disinterested experts of high standing in accordance with authority granted by an act of the legislature, and where one of the commissioners who had charge of the review was familiar with the development of such mines and the ore formation, acted honestly, fairly, and in good faith upon all the information at hand and made a proper and legal assessment in fixing the value of the particular mine, it can not be said that the State board acted in reckless disregard of duty, and in opposition to what must necessarily be the judgment of all competent persons, and that the assessment under such circumstances was fraudulent and the tax void, so as to entitle the owner to injunctive relief, though the assessment may in fact be too high or too low.

Sunday Lake Iron Co. *v.* Wakefield Township (Michigan), 153 Northwestern, 14, p. 17, June, 1915.

INEQUALITY OF ASSESSMENTS.

While in the assessment of property for taxation, and particularly the assessment of mining property, equality in taxation can never be achieved, yet intentional inequality of assessment will invalidate a tax.

Newport Mining Co. *v.* City of Ironwood (Michigan), 152 Northwestern, 1088, p. 1095, June, 1915.

ERRONEOUS AND VOID ASSESSMENT—DISTINCTION.

Where a local assessor has the constitutional power to assess mining property of a mine and follows the correct rule in making an assessment, he is acting within his jurisdiction; and the fact that he erred in judgment in a proper construction of the rule adopted does not show such a lack of jurisdiction as would render the tax void, but makes it merely an error in assessment. The difference consists in the absence of authority and a mistake in its exercise, and comes under the general head of irregularity, defect, omissions, mistakes, or errors of judgment and does not render the tax prima facie void; and when a tax is erroneous or illegal for the reason that the assessment is erroneous, the mine owner has an adequate legal remedy provided by the statute and can not invoke the jurisdiction of equity to have the tax declared void.

Tallon *v.* Vindicator Consolidated Gold Mining Co. (Colorado), 149 Pacific, 108, p. 116, June, 1915.

BASIS FOR DETERMINING VALUE OF MINES.

The evident purpose of section 4983 (Civil Code of Arizona, 1913) is to afford the basis for a determination of the value of a nonproducing mine or mining claim for the purpose of taxation, just as the gross product and net proceeds in dollars and cents of a producing mine or mining claim are by other sections of the statute made the basis for a determination of the value of such producing mines or mining claims for the purposes of taxation.

Earhart *v.* Powers (Arizona), 148 Pacific, 286, p. 288, May, 1915.

CORPORATION TAX—DOING BUSINESS—WHAT CONSTITUTES.

Where a mining company leased its mines and mineral lands and sold and assigned its personal property and choses in action to a lessee corporation, and for which the stockholders were to receive a certain annual stated per cent on the amount of stock, and the corporation was to be paid a certain stated sum for the purpose of maintaining its corporate existence as landlord and lessor, and held the remainder of its mineral lands for the purpose of supplying from time to time the lessee lands and mines in lieu of lands and mines described in the lease and which may from time to time be surrendered by the lessee to the lessor, is not doing business within the meaning of the corporation tax act of August 5, 1909 (36 Stat., 112), and is not subject to an excise tax under the statute, as the corporation in such case falls within the distinction that the right of income from outside property or investments of a corporation that is otherwise engaged in business, in which event the investment income may be added to the business income in order to arrive at the measure of the tax; and the right of income from property or investments of a corporation that is not engaged in business, except the business of owing property, maintaining the investments, collecting the income, and dividing it among its stockholders, and in the former case the tax is payable, while in the latter it is not.

Cambria Steel Co. v. McCoach, 225 Federal, 278, p. 282, July, 1915.

CORPORATION NOT SUBJECT TO TAX AFTER LEASE OF PROPERTY.

Where a mining corporation, with the approval of its stockholders, leased to another corporation for a term of 999 years all its property consisting of a manufacturing plant, together with the occupied and unoccupied grounds connected therewith, its mines and quarries, and roads and ways connecting the same, and an amount in acreage of coal lands and other lands connected with its mines and

works, not to exceed in the aggregate 10,000 acres, and assigned and transferred to the lessee all its cash, bills receivable, accounts, licenses, leases, contracts, agreements, judgments, mortgages, stocks and bonds, and where the lessee agreed to pay as rental a sum equal to 4 per cent upon the outstanding capital stock of the lessor, together with a further sum not exceeding $5,000 to cover the cost of the maintenance of the organization of the lessor corporation, the rentals, except such cash sum, to be paid direct to the stockholders of the leasing corporation; and where the lessor corporation has maintained its corporate existence merely that it may exist as landlord and lessor, and to this end its stockholders have annually elected a board of directors and other officers and maintained books for the transfer of its capital stock, but has received no income other than as above set forth, and has done nothing else whatsoever in its corporate capacity, and has no quick assets, cash, or bank account, such lessor corporation is not liable for a special excise tax, under the corporation tax act of August 5, 1909 (36 Stat., 112), assessed against it as a corporation having a capital stock and engaged in business; and where the lessee corporation paid the tax levied under protest and to prevent the leased property from being levied upon and sold at tax sale, it may maintain an action to recover the same.

Cambria Steel Co. *v.* McCoach, 225 Federal, 278, p. 279, July, 1915.

LICENSE TAX—PERSONS SEVERING NATURAL PRODUCTS—OIL LESSEES.

The statute of Louisiana (Act No. 209 of 1912), levying an annual license tax upon each person or corporation pursuing the business of severing natural products, including all forms of timber, turpentine, and minerals, including oil and gas, sulphur, and salt from the soil, and levying a penalty for failure to report and pay the license tax, does not impose such license tax upon the owner of land who is not engaged in the business of severing the natural products from the soil, but who has leased his land and receives a royalty from the lessee who is himself engaged in the business of severing the natural product from the soil; and where a landowner has given a gas and oil lease on his land and is not in any way connected with the management or operation of the lease, and has nothing to do with the location or marketing of the oil produced from the land and does not himself operate any drilling apparatus or machinery and who does no more than receive a royalty on the oil produced, is not subject to such license tax; but in such case the license tax must be imposed upon the lessee and operator.

State *v.* Stiles (Louisiana), 68 Southern, 947, p. 948, June, 1915.

STATUTORY LIENS.

FAILURE OF OWNER TO GIVE STATUTORY NOTICE—MINER'S KNOWLEDGE OF OPERATIONS.

The failure of the owner of a mine or mining claim to give the notice required by the statute (California statutes of 1911, p. 1318), showing that a mine owned by him was operated by an independent lessee and disclaiming liability for work on the property, can not affect the rights of a miner or operator to give him a lien on the mine, where such miner has actual knowledge that the owner is not operating the mine, as the purpose of the notice was accomplished by the actual knowledge of the miner.

Street *v.* Hazzard (California Appeals), 149 Pacific, 770, p. 772, April, 1915.

RELIANCE ON EMPLOYER—KNOWLEDGE OF OPERATION BY OPTION PURCHASER.

A miner employed to work in a mine with knowledge that his employer held an option contract for the purchase of the mine, and who looked entirely to such employer for his wages, giving no credit whatever to the owner of the mine, is no more entitled to file and enforce his lien against the mine than if he had expressly agreed to waive any claim or lien against the property or any cause of actions against the mine owner.

Street *v.* Hazzard (California Appeals), 149 Pacific, 770, p. 772, April, 1915.

MINER'S RIGHT TO LIEN.

Under the California Code of Civil Procedure, section 1183, a contractor, subcontractor, superintendent, or other person in charge of any mining or work or labor in and about a mining claim, either as lessee or under a working bond or contract thereon, shall be held to be the agent of the owner for the purpose of giving workingmen and miners a lien on the mine; but this presumption raised by the statute as to the agency of the contractor or superintendent may be rebutted; and a miner or employee performing work in such a mine or upon such a mining claim, with knowledge that the persons having charge of the mine or mining operations does not own the property and was not working the mine as the owner's agent or representative, is not entitled to a lien thereon on the theory of the employer's agency.

Street *v.* Hazzard (California Appeals), 149 Pacific, 770, p. 771, April, 1915.

PERIOD OF DURATION OF MINER'S LIEN.

Section 5110 of the Idaho Revised Code gives to every person performing labor upon or furnishing materials to be used in the construction, alteration, or repair of any mining claim, flume, or tun-

nel a lien upon the same for work done or materials furnished; and section 5115 provides that no such lien shall bind any structure for a longer period than six months after the claim has been filed, unless proceedings be commenced in a proper court within that time to enforce the lien, and the remedy in such case is by the statute made a part of the right created and the suit must be within the time limit or the lien ceases to exist.

Continental & Commercial Trust, etc., Bank *v.* Pacific Coast Pipe Co., 222 Federal, 781, p. 784, May, 1915.

FORECLOSURE OF LIENS ON MINING PROPERTY—RANK AND PRIORITY.

The statute of Nevada regulating liens on mines and making it the duty of the court on the foreclosure of such liens to declare the rank of each lien and the class of such liens means that in each particular suit for the foreclosure of mechanics' liens on mining property the court in the judgment must declare the rank or the order of the liens; and if a party to a suit fails to exhibit his lien, he waives his rights as to any priority and to have the rank of his claim determined and stated in the judgment.

Daly *v.* Lahontan Mines Co. (Nevada), 151 Pacific, 514, p. 516, September, 1915.

FORECLOSURE OF MECHANICS' LIENS—PARTIES.

The statute of Idaho in relation to the enforcement of mechanics' liens does not in terms prescribe who shall be made parties to an action to enforce a lien, but it necessarily means that such an action must be tried against all persons whose rights, assets, or interests are claimed to be adverse and subordinate, as this is necessary in order to include such persons.

Continental & Commercial Trust, etc., Bank *v.* Pacific Coast Pipe Co., 222 Federal, 781, p. 788, May, 1915.

DAMAGES FOR INJURIES TO MINERS.

ELEMENTS OF DAMAGE.

SPECIAL DAMAGES SHOULD BE PLEADED.

In an action by an injured miner for damages, special damages by way of compensation for lost time, or expenses incurred in effecting a cure should be specially pleaded, and in such case the recovery for such items is limited to the amount stated in the pleading, and it is reversible error for a court to instruct a jury that they may allow compensation for the lost time when no claim for lost time is made in the petition.

McHenry Coal Co. *v.* Taylor (Kentucky), 176 Southwestern, 976, p. 977, June, 1915.

LOSS OF TIME—PLEADING SPECIAL DAMAGES.

In an action by a miner for personal injuries caused by slate that fell from the roof of the entry, an instruction to the effect that the jury if they find for the plaintiff should give him such sum as will reasonably and fairly compensate him for the mental pain and anguish, if any, suffered by him, which were the direct and proximate results of his injury, and for the value of the time lost by him, if any, is erroneous, where there was no claim for damages on account of the loss of time pleaded, and where the instruction did not limit either the amount to be allowed or the time for which it should be awarded.

McHenry Coal Co. *v.* Taylor (Kentucky), 176 Southwestern, 976, June, 1915.

DOUBLE DAMAGES—LOSS OF TIME AND IMPAIRMENT OF EARNING CAPACITY.

In an action for personal injuries to a miner a jury can not award damages for time lost by reason of the injuries received and at the same time give the plaintiff for a permanent impairment of his ability to earn money; but in such case the defendant may protect himself from the probable imposition of such double damages when there is a claim made in the pleadings, and request the court to instruct the jury that the allowance for any impairment of power to earn money should begin when the allowance for lost time ended, and in the absence of such request, the court of its own motion should so advise the jury in order that double damages may not be awarded.

McHenry Coal Co. *v.* Taylor (Kentucky), 176 Southwestern, 976, p. 977, June, 1915.

SETTLEMENT AND COMPROMISE.

A miner who accepts from the mine operator a sum of money in settlement of his claim for damages by reason of personal injuries received while in the course of his employment is not entitled to recover damages in an action subsequently instituted.

Tennessee Coal, Iron & Railroad Co. *v.* Moody (Alabama), 68 Southern, 274, p. 276, April, 1915.

DAMAGES NOT EXCESSIVE—INSTANCES.

A judgment in the sum of $850 for personal injuries to a miner caused by the negligence of a trip driver will not be reversed because of an erroneous instruction on the subject of punitive damages, where the evidence is convincing that the damages allowed were no

more than sufficient to compensate the injured miner for the actual injuries sustained.

St. Bernard Min. Co. *v.* Ashby (Kentucky), 175 Southwestern, 626, p. 627, April, 1915.

A judgment for $800 for a miner seriously injured by an explosion of gas is not to be regarded as excessive though the miner was guilty of contributory negligence.

Oplotnik *v.* Cherokee & Pittsburg Coal & Mining Co., 148 Pacific, 616, May, 1915.

A judgment for $3,000 in favor of a miner injured by an explosion of gas is not excessive where the evidence showed that the plaintiff's sight and hearing were permanently affected.

Hartman *v.* Dickinson (Kansas), 148 Pacific, 743, May, 1915.

Where a boy fifteen and one-half years old was severely injured by being burned, his pain intense, and he was permanently disfigured and probably will never entirely recover, a court can not say that a verdict for $12,000 is excessive.

Murphy *v.* Ludowici Gas & Oil Co. (Kansas), 150 Pacific, 581, 584, July, 1915.

WATER RIGHTS.

RIGHT OF TUNNEL OWNER TO APPROPRIATE WATER.

The owner of a tunnel constructed for mining purposes and carrying water for such purposes can not maintain an action to quiet title to water flowing from a tunnel constructed by him where the evidence shows that a considerable portion of the water encountered and collected in the driving of the tunnel found its way from the openings, fissures, crevices, and seams in the rock into a creek before it was distributed or interfered with in its underground course or flow by the driving of the tunnel; and the question of whether its supply or precipitation within the surface area of a particular watershed is of no consequence; and if the tunnel owner drove his tunnel into a mountain or watershed drained by a stream, the waters of which have been appropriated and put to a beneficial use by others, and immediately under or in close proximity to such stream collects water which he claims to be "developed water," he must make satisfactory proof that such water is in fact "developed water," and it is immaterial whether the water when encountered is flowing in well defined subterranean channels or is percolating through the soil, gravel, and the fissures and crevices of the rock, as in either event the presumption is, until overcome, that the water is contributory to the main stream,

and that the right to its use is vested in the prior appropriator of the stream.

Mountain Lake Mining Co. *v.* Midway Irrigation Co. (Utah), 149 Pacific, 929, 933, June, 1915.

VESTED RIGHTS PROTECTED.

A corporation organized for the purpose of ditching and conveying water for mining and other purposes over Government lands before their sale to private persons will be protected in its vested possessory title under the act of Congress of 1866 (14 Stat., 253), and such possessory title requires no further or other record title in support of the vested right of the corporation.

Happy Valley Land & Water Co. *v.* Nelson (California), 147 Pacific, 966, April, 1915.

INTERSTATE COMMERCE.

FAILURE OF CARRIER TO SUPPLY COAL CARS—JURISDICTION OF COURT.

A railroad company doing business as an interstate carrier is liable for damages caused by its failure to furnish a coal miner and operator with cars in which to load coal for shipment to points within and without the State, where it is charged that the railroad company unjustly discriminated against the coal operator in failing to distribute cars in accordance with its own rule applicable in times of shortage. The act to regulate commerce (24 U. S. Stats. at L., 379; 34 U. S. Stats. at L., 584) does not give shippers any new right but preserves existing causes of action and does not supersede the jurisdiction of State courts in any case where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission or relate to a subject as to which the jurisdiction of the Federal courts has otherwise been made exclusive; and in actions against railroad companies for unjust discrimination in interstate commere where the rule of distribution itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the authority of the Interstate Commerce Commission; but if the action is based upon a violation or discriminatory enforcement of the carrier's own rule for car distribution, no administrative question is involved, and such an action, although brought against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in a State or the Federal courts, and the action may be based either on the common law rule or on a State statute.

Illinois Central Railroad Co. *v.* Mulberry Hill Coal Co., 238 U. S., 275, p. 282, June, 1915.

See Pennsylvania Railroad Co. *v.* Puritan Coal Mining Co., 237 U. S., 121, p. 127, April, 1915.

DUTY OF CARRIER TO FURNISH COAL CARS—LIABILITY UNDER CARRIER'S RULE FOR DISTRIBUTION.

Ordinarily a coal operator and shipper on reasonable demand is entitled to all the cars which he can promptly load with coal to be transported over the carrier's line; but this is not an absolute right, and a carrier is not liable if its failure to furnish cars was the result of sudden and great demand, which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full, as under the common law a carrier was not required to receive all goods and passengers "if his coach be full," and the same rule applies to transportation in freight cars drawn by steam locomotives, and the law exacts only what is reasonable from such carriers, but requires that carriers should be equally reasonable in the treatment of their patrons; and in case of car shortage occasioned by unexpected demands, carriers are bound to treat shippers fairly if not identically; but in determining how an inadequate supply shall be distributed, and especially in the distribution of cars to coal companies, it may be necessary to determine whether account should be taken of system cars, foreign cars, private cars, and the company's own coal cars; but these considerations are not involved where a shipper complains that he was damaged by reason of the carrier's failure to furnish cars for the shipment of coal and did not receive the number to which it was entitled under the carrier's own rule, and that damages were sustained because of the failure of the carrier to supply cars under its own rule of distribution in case of shortage.

Pennsylvania Railroad Co. *v.* Puritan Coal Co., 237 U. S., 121, p. 133, April, 1915.

SHIPPING RATE ON CARGO COAL.

Under the Interstate Commerce Commission tariffs a certain fixed rate was placed on cargo coal from West Virginia to Toledo when for lake shipment beyond and a different tariff rate was fixed on cargo coal for Toledo only. Under these rates a cargo of coal intended for shipment beyond Toledo but which was in fact sold and delivered to lake vessels at Toledo as bunker coal, is not entitled to the tariff rate for cargo coal for shipment beyond Toledo, but is subject to the proportional rate for cargo coal to Toledo only. The reasonableness of these rates is a question for the commission and not for the court, and while the rate stands in the published tariffs of the carrier it is the only legal rate and is binding on shippers and carriers alike.

Hocking Valley Railroad Co. *v.* Lackawanna Coal & Lumber Co., 224 Federal, 930, p. 931, May, 1915.

PROPORTIONAL RATES.

A proportional rate is a part of a through rate and is the share of the aggregate charge from origin to destination for the shipment of coal which one or more of the carriers accepts for performing a definite portion of the whole transportation service, and the Interstate Commerce Commission recognizes the propriety and lawfulness of proportional rates to a point of transfer which are less than local rates to such points.

Hocking Valley Railway Co. *v.* Lackawanna Coal & Lumber Co., 224 Federal, 930, p. 931, May, 1915.

MONOPOLY—RAILROAD COMPANY ENJOINED FROM OPERATING COAL COMPANY.

The United States, under the commodity clause of the Hepburn Act (34 U. S. Stats. at L., 585), may enjoin a railroad company and a coal company from operating a coal mine and shipping the coal where it appears that the railroad company occupies the dual and inconsistent position of public carrier and private shipper and where the evidence is sufficient to show that the railroad company originally owned and operated the coal mines, for a pretended compliance with the Hepburn Act caused to be organized, through its own stockholders and officers, the coal company, and entered into a contract—restrictive contract—with its creature, neither reciprocal nor mutual, and which, in effect, prohibited the coal company from competing with the railroad company for the purchase of coal mined on the railroad lines, and considering the financial strength of the railroad company, its control of the means of transportation, its power to fix the time when transportation of coal purchased from the contracting company was to begin, its power in furnishing cars to favor those from whom it bought or to whom it sold, and the contract restraining the coal company from buying from anyone else, the contract permitting the railroad company to control or influence the price of coal, is sufficient to show a contract in restrain of trade and not a sufficient compliance with the commodity clause of the Hepburn Act as to show an absolute disassociation of the carrier from the coal company before the transportation should begin and does not leave the buyer absolutely free to dispose of and have absolute control of the coal.

United States *v.* Delaware, Lackawanna & Western Co., 283 U. S., 516, p. 525, June, 1915.

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