DEPARTMENT OF THE INTERIOR
FRANKLIN K. LANE, SECRETARY
BUREAU OF MINES
VAN. H. MANNING, DIRECTOR

ABSTRACTS OF CURRENT DECISIONS
ON
MINES AND MINING

REPORTED FROM
JANUARY TO APRIL, 1916

BY

J. W. THOMPSON
The Bureau of Mines, in carrying out one of the provisions of its organic act—to disseminate information concerning investigations made—prints a limited free edition of each of its publications.

When this edition is exhausted copies may be obtained at cost price only through the Superintendent of Documents, Government Printing Office, Washington, D. C.

The Superintendent of Documents is not an official of the Bureau of Mines. His is an entirely separate office, and he should be addressed:

SUPERINTENDENT OF DOCUMENTS,
Government Printing Office,
Washington, D. C.

The general law under which publications are distributed prohibits the giving of more than one copy of a publication to one person. The price of this publication is 10 cents.

PREFACE.

This bulletin is the seventh of its kind to be published by the Bureau of Mines, the six preceding being Bulletins 61, 79, 90, 101, 113, and 118.

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.

GENERAL SUBJECTS TREATED.

Minerals and mineral lands .............................................................. 1
Mining corporations ........................................................................... 6
Mining claims .................................................................................... 11
Statutes relating to mining operations ............................................. 14
Mines and mining operations .............................................................. 28
Mining leases ..................................................................................... 50
Mining properties .............................................................................. 71
Damages for injuries to miners .......................................................... 78
Quarry operations .............................................................................. 82
Interstate commerce ........................................................................... 87

CONTENTS.

Minerals and mineral lands .............................................................. 1
    Sale and conveyance ...................................................................... 1
        Deed by Indian allottee of unsound mind—Bona fide purchaser ... 1
        Purchaser of mining claim—Right to fixtures ............................. 1
        Authority of grantee to extend lease ........................................... 1
    Surface and minerals—Ownership and severance .......................... 2
        Grant of school lands of Utah—Minerals not excepted .............. 2
        Reservations of minerals—Construction of deed ....................... 2
    Coal and coal lands .................................................................... 2
        Classification without discovery ............................................... 2
        Covenant against incumbrances—Damages ............................... 2
        Possession as notice to third persons ........................................ 3
        Deed of land procured by fraud—Equitable relief denied .......... 3
    Oil and oil lands ........................................................................... 3
        Owner's right to the oil and gas—Right to sell ............................ 3
        Sale of oil—Construction of contract ....................................... 4
        Conveyance of interest in land ................................................ 4
        Partition of oil lands ............................................................... 4
        Oil lands withdrawn from entry—Enjoining operations ............. 4
Mineral corporations .......................................................................... 6
    Right of directors to control corporation .................................... 6
    Mismanagement by directors—Right of minority stockholder to re-  
        ceiver ...................................................................................... 6
    De facto doctrine not extended to factional controversies ............ 6
    Act of de facto directors binding on third persons ....................... 7
    Power of directors to loan corporate funds ................................... 7
Mining corporations—Continued.

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interested director voting—Effect</td>
<td>7</td>
</tr>
<tr>
<td>Authority of president</td>
<td>7</td>
</tr>
<tr>
<td>Unauthorized assessment and appropriation of stock—Liability</td>
<td>8</td>
</tr>
<tr>
<td>Right of minority stockholder to sue</td>
<td>8</td>
</tr>
<tr>
<td>Sale of corporate property—Right of minority stockholders</td>
<td>8</td>
</tr>
<tr>
<td>Stockholder’s right to relief lost by laches</td>
<td>9</td>
</tr>
<tr>
<td>Knowledge of general manager imputed to corporation</td>
<td>9</td>
</tr>
<tr>
<td>Depository—Relief</td>
<td>9</td>
</tr>
<tr>
<td>Acts of bankruptcy—Appointment of receiver</td>
<td>10</td>
</tr>
<tr>
<td>Appointment of receiver—Practice</td>
<td>10</td>
</tr>
<tr>
<td>Action against foreign corporation—Service and process</td>
<td>10</td>
</tr>
<tr>
<td>Mining claims</td>
<td>11</td>
</tr>
<tr>
<td>Nature and general features</td>
<td>11</td>
</tr>
<tr>
<td>Location in Alaska under power of attorney—Record of power</td>
<td>11</td>
</tr>
<tr>
<td>Location notice and certificate</td>
<td>11</td>
</tr>
<tr>
<td>Unverified certificate—Effect of record</td>
<td>11</td>
</tr>
<tr>
<td>Description of claim</td>
<td>11</td>
</tr>
<tr>
<td>Description of claim—Reference to natural objects</td>
<td>11</td>
</tr>
<tr>
<td>Extralateral rights</td>
<td>12</td>
</tr>
<tr>
<td>Ownership of ores—Priority of location</td>
<td>12</td>
</tr>
<tr>
<td>Quieting title</td>
<td>12</td>
</tr>
<tr>
<td>Adverse claims</td>
<td>12</td>
</tr>
<tr>
<td>Effect of former adjudication</td>
<td>12</td>
</tr>
<tr>
<td>Mill site</td>
<td>13</td>
</tr>
<tr>
<td>Purchase by lode locator—Estoppel</td>
<td>13</td>
</tr>
<tr>
<td>Statutes relating to mining operations</td>
<td>14</td>
</tr>
<tr>
<td>Construction, validity, and effect</td>
<td>14</td>
</tr>
<tr>
<td>Object of statute—Effect of operator’s violation</td>
<td>14</td>
</tr>
<tr>
<td>Indiana employers’ liability act constitutional</td>
<td>14</td>
</tr>
<tr>
<td>Election of mine inspector</td>
<td>14</td>
</tr>
<tr>
<td>Defenses still open to mine operator</td>
<td>15</td>
</tr>
<tr>
<td>Application of statute prohibiting employees from riding on trips</td>
<td>15</td>
</tr>
<tr>
<td>Special trip of cars for haul...g miners</td>
<td>16</td>
</tr>
<tr>
<td>Signals for hoisting men—Effect of wrong signals</td>
<td>16</td>
</tr>
<tr>
<td>Use of other than statutory signals</td>
<td>16</td>
</tr>
<tr>
<td>Duties imposed on operator</td>
<td>16</td>
</tr>
<tr>
<td>Duty to inspect</td>
<td>16</td>
</tr>
<tr>
<td>Inspection of gaseous mine—Proof of presence of gas</td>
<td>17</td>
</tr>
<tr>
<td>Duty to guard machinery</td>
<td>17</td>
</tr>
<tr>
<td>Duty to furnish timbers after request and marking</td>
<td>17</td>
</tr>
<tr>
<td>Duty to adopt and promulgate rules—Tipple operation</td>
<td>18</td>
</tr>
<tr>
<td>When operator must construct refuge places</td>
<td>18</td>
</tr>
<tr>
<td>Duties imposed on miner</td>
<td>18</td>
</tr>
<tr>
<td>Duty of miner to discover danger after inspection</td>
<td>18</td>
</tr>
<tr>
<td>Keeping working place safe—Timbers furnished</td>
<td>19</td>
</tr>
<tr>
<td>Duty to select and mark props—Proof of custom</td>
<td>19</td>
</tr>
<tr>
<td>Failure of miner to select and mark props—Rule of mine</td>
<td>19</td>
</tr>
<tr>
<td>Dangerous place—Meaning and application of statute</td>
<td>20</td>
</tr>
<tr>
<td>Unlawful for miner to remain in dangerous place—Contributory negligence</td>
<td>20</td>
</tr>
<tr>
<td>Violation of statute not a proximate cause of injury</td>
<td>21</td>
</tr>
</tbody>
</table>
Contents.

Statutes relating to mining operations—Continued.

Operator's failure to comply with statute...21
Failure to furnish props on request...21
Failure to post danger signs—Question of fact...21
Duty to construct refuge places—Liability for failure...22
Negligence of mine superintendent or foreman...22
Duty of foreman—Making working place safe...22
Effect of contributory negligence...

Indians employers' liability act excludes the defense of contributory negligence...22
Defense of negligence of fellow servant abrogated...23
Texas workmen's compensation act...23
Miner working in dangerous place...23
Ventilation of mine—Failure of miner to obey instructions...23
Negligence of person entrusted with duty of keeping mine safe...

Negligence of person entrusted to keep mine in safe condition...24
Request for props not evidence of imminent danger...25
Violation of statute and contributory negligence—Questions of fact...

Effect on assumption of risk...

Failure of operator to furnish timber...26
Power of legislature to abrogate defense of assumed risk...26
Inspection...

Right of stockholder to take samples...26
Penalties imposed for failure to permit stockholder to inspect mine...

Statutory action for wrongful death...

Action by one parent...27
Defense of contributory negligence unavailable...27
Mines and mining operations...

Negligence of operator...

Question of fact for jury...28
Admissibility of expert evidence to show condition of mine...
Duty to furnish safe appliances—Injury from defective coal-cutting machine...

Corporation owning stock—Liability for negligence...29
Proof of custom—Effect on negligence...29
Failure to make rules—Operation of cars at tipple...
Permitting rules to be violated—Presumptions...30
Permitting rules to be violated—Liability for injury...31
Rule requiring miners to assume risk...31
Injury to miner from loose car...
Miner injured while being carried to work...
Proximate cause—Intervening agency...
Proximate cause of injury...
Dangers not anticipated...
Operator's knowledge of dangerous character of mules...
Substituted servant—Liability for death or injury...
Oil operator not liable for burning barge...

Pleading and proof of negligence...

Pleading negligence generally and specifically—Difference and effect...

Sufficiency of complaint for personal injuries...33
VIII CONTENTS.

Mines and mining operations—Continued...

Pleading and proof of negligence—Continued...

Proof of negligent acts not alleged inadmissible... 34
Distinct grounds of negligence—Proof of one... 34
Liability for burning barge—Insufficient proof... 35
X-ray photograph inadmissible in evidence... 35
Fraud in procuring judgment—Effect and proof... 35

Exercise of care...

Degree of care... 36
Use of ordinary care... 36
Loading barge with oil—Care required to avoid fire... 36

Duty to furnish safe place...

Operator not insurer of miner's safety... 36
Duty to furnish safe place—Power to delegate... 36
Meaning and limitation... 37
Application of rule to mines... 37
Extent of operator's duty... 37
Duty of operator to secure dangerous roof... 38

Liability based on failure to provide safe place...

Proof of failure to furnish safe place... 38

Duty to provide safe appliances...

Insecure ladder... 38
Miner's want of knowledge of vicious disposition of mules... 39

Duty to warn or instruct...

Failure to instruct inexperienced miner in use of coal-cutting machine... 39
Sufficiency of inspection—Expert evidence... 40
Failure to warn workmen... 40
Instruction of miners as to dangers... 40

Miner's scope of employment—Injury and liability...

Gas explosion causing death—Miner within scope of employment... 41

Miner's working place—Safe place...

Miner making his working place... 41
Miner's working place—Safe place doctrine... 41
Application of safe place doctrine... 42

Contributory negligence of miner...

Contributory negligence a question of fact... 42
Miner's knowledge of danger... 43
Violation of rules... 43
Miner's negligence prevents recovery... 43
Miner acting in sudden emergency—Application and limitation... 44

Freedom from contributory negligence...

Use of ordinary care... 44
Injury in collision—Negligence of fellow servant... 44
Miner acting under sudden fright... 44
Disobedience of rules—Effect of custom... 45

Effect on negligence of fellow servant or foreman...

Incompetency of fellow servant... 45
Pleading knowledge of incompetency... 45
Collision of motor cars in mine—Motormen not fellow servants... 45
Foreman injured by negligence of employee... 46
Negligence of vice principal... 46
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Risks assumed ..................................</td>
<td>46</td>
</tr>
<tr>
<td>Miner assumes risk of his own negligence but not that of fellow servants</td>
<td>46</td>
</tr>
<tr>
<td>Miner's knowledge of danger ..................</td>
<td>46</td>
</tr>
<tr>
<td>Miner obeying unauthorized person—Dangerous place</td>
<td>47</td>
</tr>
<tr>
<td>Knowledge of danger ...........................</td>
<td>47</td>
</tr>
<tr>
<td>Coal falling from self-dumping cage ..........</td>
<td>47</td>
</tr>
<tr>
<td>Risks not assumed ..................................</td>
<td>48</td>
</tr>
<tr>
<td>Miner riding on coal car—Injury from defects</td>
<td>48</td>
</tr>
<tr>
<td>Miner riding to work on coal car—Defective track</td>
<td>48</td>
</tr>
<tr>
<td>Liability for negligence of fellow servant</td>
<td>48</td>
</tr>
<tr>
<td>Injuries for negligence of fellow servant—Liability</td>
<td>48</td>
</tr>
<tr>
<td>Employment of incompetent engineer—Knowledge of operator</td>
<td>48</td>
</tr>
<tr>
<td>Independent contractor—Injury to employees</td>
<td>49</td>
</tr>
<tr>
<td>Liability for injury to employee of independent contractor</td>
<td>49</td>
</tr>
<tr>
<td>Lessor not liable to employee of lessee</td>
<td>50</td>
</tr>
<tr>
<td>Coal company not liable for injuries to contractor's employee</td>
<td>51</td>
</tr>
<tr>
<td>Duty and liability to trespasser, licensee or invitee</td>
<td>51</td>
</tr>
<tr>
<td>Trespassing children—Duty toward and liability for injury</td>
<td>51</td>
</tr>
<tr>
<td>Contracts relating to operations ..............</td>
<td>52</td>
</tr>
<tr>
<td>Recovery on verbal and written contracts</td>
<td>52</td>
</tr>
<tr>
<td>Liability of operator for extra work</td>
<td>52</td>
</tr>
<tr>
<td>Contract between coal and railroad company—Recovery of rebates</td>
<td>53</td>
</tr>
<tr>
<td>Nuisance .................................................</td>
<td>53</td>
</tr>
<tr>
<td>Pollution of water for period equal to statute of limitations</td>
<td>53</td>
</tr>
<tr>
<td>Pollution of water—Pleas of user insufficient</td>
<td>54</td>
</tr>
<tr>
<td>Pollution of water—Acquiescence by landowner</td>
<td>54</td>
</tr>
<tr>
<td>Mining leases ..........................................</td>
<td>56</td>
</tr>
<tr>
<td>Leases generally—Construction ..................</td>
<td>56</td>
</tr>
<tr>
<td>Construction of contract to lease</td>
<td>56</td>
</tr>
<tr>
<td>Profits not recoverable as damages</td>
<td>56</td>
</tr>
<tr>
<td>Construction—Liquated damages or penalties</td>
<td>56</td>
</tr>
<tr>
<td>Recovery of payment on failure to execute lease</td>
<td>57</td>
</tr>
<tr>
<td>Lease providing for royalties</td>
<td>57</td>
</tr>
<tr>
<td>Construction—Lease to work and lease to explore</td>
<td>57</td>
</tr>
<tr>
<td>Royalties due—Satisfaction of notes given for royalties</td>
<td>57</td>
</tr>
<tr>
<td>Representation as to boundaries—Estoppel</td>
<td>58</td>
</tr>
<tr>
<td>Agreement as to use of timber—Construction and effect</td>
<td>58</td>
</tr>
<tr>
<td>Action for accounting—Effect of release of claims</td>
<td>59</td>
</tr>
<tr>
<td>Lease of quarry—Abandonment</td>
<td>59</td>
</tr>
<tr>
<td>Right to remove all buildings and machinery—Fixtures</td>
<td>59</td>
</tr>
<tr>
<td>Ownership of fixtures</td>
<td>59</td>
</tr>
<tr>
<td>Right to remove machinery and buildings—Reasonable time</td>
<td>60</td>
</tr>
<tr>
<td>Mining machinery—Rights of mortgagee of lessee</td>
<td>60</td>
</tr>
<tr>
<td>Enjoining operations—Recovery of damages</td>
<td>61</td>
</tr>
<tr>
<td>Coal leases .............................................</td>
<td>61</td>
</tr>
<tr>
<td>Coal mined unequal to minimum royalty—Liability of lessee</td>
<td>61</td>
</tr>
<tr>
<td>Right to credit for excess</td>
<td>61</td>
</tr>
<tr>
<td>Practical construction adopted by court</td>
<td>61</td>
</tr>
<tr>
<td>Minimum royalty not payable after coal is exhausted</td>
<td>62</td>
</tr>
<tr>
<td>Conditional minimum royalty</td>
<td>62</td>
</tr>
<tr>
<td>Power of lessor to forfeit</td>
<td>62</td>
</tr>
<tr>
<td>Mining leases—Continued.</td>
<td>Page</td>
</tr>
<tr>
<td>-------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Oil and gas leases</td>
<td>62</td>
</tr>
<tr>
<td>Construction by courts</td>
<td>62</td>
</tr>
<tr>
<td>Independent covenants</td>
<td>63</td>
</tr>
<tr>
<td>Mining contract as lease</td>
<td>63</td>
</tr>
<tr>
<td>Interest of lessee in oil and gas—Power of lessor to release</td>
<td>63</td>
</tr>
<tr>
<td>Oil and gas as subject of lease or sale separate from land</td>
<td>63</td>
</tr>
<tr>
<td>Construction of lease—Absence of covenant to pay rental</td>
<td>64</td>
</tr>
<tr>
<td>Conveyance of oil in place is not a lease</td>
<td>64</td>
</tr>
<tr>
<td>Power of lessee to surrender lease</td>
<td>65</td>
</tr>
<tr>
<td>Lessee's right to damages without eviction</td>
<td>65</td>
</tr>
<tr>
<td>Compensation for postponement of operations—Effect</td>
<td>66</td>
</tr>
<tr>
<td>Rights and liabilities of assignee</td>
<td>66</td>
</tr>
<tr>
<td>Assignment of future rents and royalties by lessor—Parties</td>
<td>66</td>
</tr>
<tr>
<td>Conveyance of oil and gas in fee—Liability of assignee</td>
<td>66</td>
</tr>
<tr>
<td>Liability of lessee for negligence of sublessee</td>
<td>67</td>
</tr>
<tr>
<td>Receiver appointed to protect property and hold revenues</td>
<td>67</td>
</tr>
<tr>
<td>Sale subject to lease as an admission of its validity</td>
<td>67</td>
</tr>
<tr>
<td>Lessor can not annul after part performance</td>
<td>67</td>
</tr>
<tr>
<td>Performance by lessee—Right to remove machinery</td>
<td>68</td>
</tr>
<tr>
<td>Consideration for delay in development</td>
<td>68</td>
</tr>
<tr>
<td>Forfeiture—Express covenant includes implied covenant</td>
<td>68</td>
</tr>
<tr>
<td>Forfeiture—Acceptance of rental—Estoppel</td>
<td>68</td>
</tr>
<tr>
<td>Payment of rental by deposit in bank—Effect on rights of parties</td>
<td>69</td>
</tr>
<tr>
<td>Payment of stipulated amount prevents forfeiture</td>
<td>69</td>
</tr>
<tr>
<td>Violation of implied obligation to develop—Performance—Proof</td>
<td>69</td>
</tr>
<tr>
<td>Option to drill—Condition</td>
<td>70</td>
</tr>
<tr>
<td>Title of lessor—Right to partition</td>
<td>70</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Mining properties</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Statutory liens</td>
<td>71</td>
</tr>
<tr>
<td>Right to lien on placer claim</td>
<td>71</td>
</tr>
<tr>
<td>Lien on dredge boat</td>
<td>71</td>
</tr>
<tr>
<td>Machinery for dredge boat—Lien on title of placer claim</td>
<td>71</td>
</tr>
<tr>
<td>Liability of lessor and vendor</td>
<td>72</td>
</tr>
<tr>
<td>Foreclosure on leased mine—Liability of lessor</td>
<td>72</td>
</tr>
<tr>
<td>Foreclosure of lien—Sufficiency of complaint</td>
<td>72</td>
</tr>
<tr>
<td>Option sale—Owner's Interest subject to lien</td>
<td>72</td>
</tr>
<tr>
<td>Priority of mortgage</td>
<td>73</td>
</tr>
<tr>
<td>Suspension of business—Priority of liens</td>
<td>73</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Taxation</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Special tax on anthracite coal—Constitutionality of act</td>
<td>73</td>
</tr>
<tr>
<td>Classification and discrimination—Bituminous and anthracite coal</td>
<td>74</td>
</tr>
<tr>
<td>Personal property of oil company</td>
<td>75</td>
</tr>
<tr>
<td>Production tax on oil</td>
<td>75</td>
</tr>
<tr>
<td>Tax on production as substitute for other forms of taxation</td>
<td>75</td>
</tr>
<tr>
<td>Tax on oil production—Classification of subjects</td>
<td>76</td>
</tr>
<tr>
<td>Tax on result of business</td>
<td>76</td>
</tr>
<tr>
<td>Assessment of property—Construction of statute by assessing officers</td>
<td>77</td>
</tr>
<tr>
<td>Taxes on surface and minerals under different ownership</td>
<td>77</td>
</tr>
<tr>
<td>Income-tax law constitutional</td>
<td>77</td>
</tr>
</tbody>
</table>
CONTENTS.

Damages for injuries to miners.......................................................... 78
  Elements of damages................................................................. 78
  Mortality tables as evidence....................................................... 78
  Reasonable compensation........................................................... 78
  Disease existing or produced by the injury.................................... 78
  Failure to plead particular injuries.......................................... 79
  Damages excessive—Instances...................................................... 79
  Damages not excessive—Instances................................................ 80

Quarry operations.......................................................................... 82
  Duty of operator to furnish safe place........................................... 82
  Duty required in use of dangerous agencies.................................... 82
  Dangers from use of dynamite—Degree of care required.................... 82
  Unexploded dynamite in blast hole................................................. 83
  Duty of operator as to unexploded blasts...................................... 83
  Application of fellow-servant rule—Duty of operator to inspect........ 84
  Failure of lessee to operate—Nonacquiescence of lessor........................... 84
  Abandonment of lease by lessee—Acquiescence of lessor...................... 84
  Duty of operation imposed on lessee............................................. 85
  Liability of corporation operating through dummy............................. 85

Interstate commerce....................................................................... 87
  Credits on lease as rebates........................................................ 87

Publications on mining laws and methods of mining........................... 89
ABSTRACTS OF CURRENT DECISIONS ON MINES AND MINING,
JANUARY TO APRIL, 1916.

By J. W. THOMPSON.

MINERALS AND MINERAL LANDS.

SALE AND CONVEYANCE.

DEED BY INDIAN ALLOTTEE OF UNSOUND MIND—BONA FIDE PURCHASER.

The deed of an Indian allottee whose mind was unsound, but who was not entirely without understanding, is voidable if made before the grantor's incapacity has been judicially determined; and a purchaser of the original grantee who interposes the defense of a bona fide purchaser has the burden of showing a purchase for value and on failure to do so can not claim the benefit of a bona fide purchaser.


PURCHASER OF MINING CLAIM—RIGHT TO FIXTURES.

The purchaser of a mine equipped with an electric hoist, placed in the mine under a rental contract with the owner of the hoist and under an agreement to return it to the owner at the expiration of the term of hiring, can not claim and hold the hoist as against the owner where the agent of the seller explained to the purchaser that the hoist was not owned by the owner of the claim.


AUTHORITY OF GRANTEE TO EXTEND LEASE.

A deed conveying lands subject to an oil and gas lease under which the lessee had the right to drill or pay money in lieu of drilling at his option, and reserving to the grantor a share of the royalties under such lease, and expressly authorizing the grantee to lease the land for oil and gas purposes and to take the rentals, authorizes the grantee to extend the existing lease before the expiration thereof in consideration of the annual payment of money in lieu of drilling, as contemplated by the lease.

SURFACE AND MINERALS—OWNERSHIP AND SEVERANCE.

GRANT OF SCHOOL LANDS TO UTAH—MINERALS NOT EXCEPTED.

The Utah enabling act grants sections 2, 16, 32, and 36 in every township to the State for the support of its common schools, and contains no exception or reservation of mineral lands. A court has no power to amend the Utah enabling act by creating an exception of mineral lands from the grant of school sections, but it is the duty of a court to give effect to the statute as enacted.

Sweet v. United States, 228 Federal, 421, p. 423.

RESERVATIONS OF MINERALS—CONSTRUCTION OF DEED.

A deed conveying lands containing minerals contained a reservation as follows: "Also reserving and excepting such rights and privileges to operate said premises for oil and gas as are set forth in a certain lease made by said parties of the first part to" a certain named lessee, giving the date and stating the place of the record of the lease. Such a deed constitutes a reservation and exception of the oil and gas in place.


COAL AND COAL LANDS.

CLASSIFICATION WITHOUT DISCOVERY.

Public lands may be classed as coal land and excepted from a grant as such, though there has been no actual discovery of coal within their boundaries; but such lands may and often do become valuable for coal through adjacent disclosures and from surrounding and external conditions, and under such circumstances any evidence legally relevant to the issue is admissible.


COVENANT AGAINST INCUMBRANCES—DAMAGES.

In an action by a vendee of coal land for damages on account of the breach of a covenant against incumbrances, by the existence on the land at the time of the conveyance of a subsisting but unused easement, the fact that the vendee bought the servient land as an outlet for the coal in other lands can not be considered in estimating the damages, where there is no proof that the vendor knew the land was bought for such purpose and such damages were not contemplated by the contracting parties and therefore not recoverable.

Smith v. White (West Virginia), 87 Southeastern, 865, February, 1916.
POSSESSION AS NOTICE TO THIRD PERSONS.

The possession for more than 30 years by the grantor in a quit-claim deed alleged to have been procured by false and fraudulent representations of the agent of a coal company is sufficient to put another coal company as purchaser upon its inquiry as to the character thereof, and which inquiry would have developed the facts relative to the execution of the deed and would have shown that the grantor did not intend to convey the tract of land in dispute and that he had continued to occupy and possess the same under the belief that the deed did not include or cover the particular tract.


DEED OF LAND PROCURED BY FRAUD—EQUITABLE RELIEF DENIED.

A coal company can not maintain an action to recover possession of a tract of coal land under a quitclaim deed executed by the landowner through false and fraudulent representations of the agent of the coal company, though the grantor could read and write, yet relied on the representations of the agent. The failure of the grantor to read the deed before signing does not give the coal company the right to rely upon the maxim that equity aids only the vigilant, as the maxim is qualified by another principle of equity, to the effect that the person seeking to take advantage of the maxim must be free from fault, and must have done nothing to lull his adversary into repose, thereby obstructing and preventing vigilance on the part of the latter.


OIL AND OIL LANDS.

OWNER'S RIGHT TO THE OIL AND GAS—RIGHT TO SELL.

The doctrine that the owner of land has no property right in the oil and gas beneath the surface until he has reduced it to possession, in no manner denies to such owner the exclusive right to the use of the surface for the purpose of such reduction, or for any other purpose, not prohibited by law; but on the contrary concedes that right as inherent to the title to the land and subject only to the control of the State in the exercise of its police power; and this right may be sold as may be any other right, and may carry with it the right to the oil and gas that may be found and reduced to possession.

SALE OF OIL—CONSTRUCTION OF CONTRACT.

Under a contract for the purchase of all the oil produced by an oil company the price to be paid according to the contract was "the highest contract price then and in good faith being paid by either of the pipe-line companies," and the words "contract price" have no technical meaning in the sense used and are to be taken in their ordinary and popular sense, and the words mean a price fixed by contract and whether the contract is one previously made, governing past, contemporaneous, or future transactions, or is one presently agreed upon with reference to future transactions; and if at the time of the expiration of the period named in the contract $1 per barrel was in good faith being paid for similar oil by either of the pipe-line companies referred to, under any contract, the exercise of the option by the seller obligated the purchaser to pay the $1 per barrel.


CONVEYANCE OF INTEREST IN LAND.

An instrument reciting that the owner of a certain described tract of land "does hereby grant, sell, convey, and lease unto the said lessees all the oil and gas in and under" the land described, together with the right of ingress and egress and possession for operating the same, for the term of one year and as much longer thereafter as oil or gas is found in paying quantities, the lessee to deliver to the grantor or lessor one-eighth part of all the oil produced and binding himself to begin operations for drilling within six months or to pay the lessor 50 cents per acre in advance for one six months' extension in time, conveys a title in fee or a freehold interest in the land and a present grant of title in fee in the oil and gas in the ground, and is not a mere franchise or rental contract.

Pierce Fordyce Oil Association v. Woodrum (Texas Civil Appeals), 183 Southwestern, 12, p. 13, February, 1916.
See Strother v. Mangham (Louisiana), 70 Southern, 426, December, 1915.

PARTITION OF OIL LANDS.

Known oil lands, like mines, can not be judicially partitioned in kind at the suit of one of the coowners or by a creditor of a coowner.

OIL LANDS WITHDRAWN FROM ENTRY—ENJOINING OPERATIONS.

The United States may enjoin an oil company from operating and taking oil or petroleum from lands that were withdrawn by the Secretary of the Interior from entry and purchase under the nonmineral
laws and subsequently classified by the Secretary of the Interior as oil-bearing mineral land, and which on September 27, 1909, the President, acting by and through the Secretary of the Interior, withdrew and reserved, together with other contiguous public lands, from mineral exploration and all forms of settlement, entry, or disposal under any of the public land laws of the United States, where such defendant oil company wrongfully entered upon such lands and began operation subsequent to January 1, 1910, and in disregard of such withdrawal order of September 27, 1909, and where no work of exploration or development for the discovery of petroleum, mineral oil or gas, or other mineral was commenced or prosecuted by the defendant oil company on such lands prior to July 4, 1910, and after the act of Congress of June 25, 1910, and the proclamation of the President of July 2, 1910, ratifying, affirming, and continuing in force and effect the prior order of withdrawal of September 27, 1909.

El Dorado Oil Co. v. United States, 229 Federal, 946, p. 949.
See United States v. Midwest Oil Co., 236 United States, 459.

43162°—Bull. 126—16—2
MINING CORPORATIONS.

RIGHT OF DIRECTORS TO CONTROL CORPORATION.

Until otherwise determined by a competent tribunal, the board of directors of a mining corporation whose election was certified in due form and who are in the actual control of the affairs of the corporation must be recognized as its directors, and the validity of their election can not be adjudicated upon a petition for the removal of a case from a State Court to a Federal court.

Consolidated Interstate Callahan Mining Co. v. Callahan Mining Co., 228 Federal, 528, p. 530.

MISMANAGEMENT BY DIRECTORS—RIGHT OF MINORITY STOCKHOLDER TO RECEIVER.

A minority stockholder of a mining corporation is entitled to the appointment of a receiver to take charge of the affairs of the corporation where it appears that the directors of the corporation held but four meetings in four years, and the officers made no report to the stockholders, and no meeting of stockholders was called for more than three years, and all of the available funds were expended by the direction of the officers of the other companies controlled by the majority stockholders of another company, and nearly $200,000 were spent on a shaft and tunnels for the development of mines of other companies, and where no contract was entered into by the board of directors with such other companies for any contribution or sharing of expenses of such work, and where the stock of the company was sold for less than $50,000 by officers of other companies and not by the board of directors, and the stock in a short time was worth $500,000, and where all the evidence shows that the business of the corporation was not conducted by its board of directors.


DE FACTO DOCTRINE NOT EXTENDED TO Factional CONTROVERSIES.

The de facto doctrine as to acts of persons claiming to be directors of a corporation does not apply in favor of persons representing a minority of the stockholders in factional controversies between rival boards of directors, where a minority of the stockholders, for the purpose of affecting the property rights of, or imposing a liability upon, the majority stockholders, are attempting to appropriate the
name and right of a corporation which is without assets or business; and in such case stockholders are not estopped to assert the lack of authority of those who profess to act in the name of the corporation.


**ACT OF DE FACTO DIRECTORS BINDING ON THIRD PERSONS.**

The acts of de facto directors of a private mining corporation who have color of title to the office and who are permitted by the corporation to act in such positions and with the reputation of being directors, are valid as to third persons and as to persons who deal with them in ignorance of their want of legal title to the offices, and such persons are entitled to assume that there is no defect in the appointment of such de facto directors; and any such third person can not collaterally show the illegality of the election of such de facto officers, where no other persons are claiming the right to act as directors, and the incumbents are exercising the usual functions of the office.


**POWER OF DIRECTORS TO LOAN CORPORATE FUNDS.**

A mining corporation organized to purchase, locate, lease, or otherwise acquire mines, mining claims, mining rights, and to explore, work and develop the same, and to quarry, mine, smelt, and prepare for marketing ore, metal, and mineral substances of all kinds, is not empowered or authorized to loan the corporate funds and receive interest thereon.


**INTERESTED DIRECTOR VOTING—EFFECT.**

A resolution of a board of directors of a mining corporation passed at a meeting at which one of their number interested therein and necessary to a quorum is present and voting in favor thereof is prima facie fraudulent and void.


**AUTHORITY OF PRESIDENT.**

There is no inherent authority in the president of a mining corporation to execute notes on its behalf; and where no such express authority is shown and no implied authority from the course of
dealing sufficiently appears, such a note is not admissible in evidence against the corporation.


UNAUTHORIZED ASSESSMENT AND APPROPRIATION OF STOCK—LIABILITY.

A mining corporation which without lawful authority makes an assessment upon certain shares of stock and which thereupon by sale and purchase appropriates to itself the stock of an individual stockholder, thereby becomes liable at the option of the true owner to restore to him the stock or the interest therein and the dividends thereon, or to pay the damages caused by the taking, and the ignorance of the corporation of the law or its bona fide belief in its right to commit the wrong is no defense in an action to enforce its liability.


RIGHT OF MINORITY STOCKHOLDER TO SUE.

A minority stockholder is entitled to maintain a bill in equity for relief against the payment by the managing officers of the corporation for commissions upon sales of iron ore and pig iron, without making a request of the officers and directors to bring the action, where the bill alleges that such request was not made because it would be a useless and idle performance, and because the defendants who made the contract and who are benefited by it, are in the absolute control of the affairs of the corporation, and where the evidence fully sustains these allegations.


SALE OF CORPORATE PROPERTY—RIGHT OF MINORITY STOCKHOLDERS.

A mining corporation may sell its property and abandon the mining operations for which it was organized and may receive in exchange therefor a block of stock in another mining corporation, doing the same character of business and mining the same ground, and it is not subject to the charge of having deviated to any obnoxious extent from the purposes expressed in its articles of incorporation; but it can not do so over the objection and against the protests of a considerable number of minority stockholders, and any such complaining minority stockholders are entitled to such a measure of equitable relief as will require the mining corporation to reduce its capital stock to the extent required in order to enable it to distribute among the complaining minority stockholders, in exchange for the
surrender and cancellation of their share certificates, a proportionate share of the corporate assets, after all the corporate obligations are paid.


STOCKHOLDER’S RIGHT TO RELIEF LOST BY LACHES.

The silence and inactivity of a stockholder of a mining corporation for five years after an illegal sale by the company of its stock for an unpaid assessment, and until, upon the certificate of such sale to the purchaser, an innocent purchaser has bought the stock and received a certificate to himself, and a further delay of two years before bringing suit against such second transferee, a bona fide purchaser, estops the suing stockholder from obtaining any relief in equity against such bona fide purchaser.

Weniger v. Success Mining Co., 227 Federal, 548.

KNOWLEDGE OF GENERAL MANAGER IMPUTED TO CORPORATION.

A mining corporation accepting the assignment of a lease that had been amended and modified, and which had abrogated the privilege of cutting timber on the leased property before the assignment, is bound by such amendatory provision where the general manager of the lessee company had actual knowledge of the amendatory contract and such general manager continued to be the manager of the assignee corporation after it took charge of the property, as the knowledge of the general manager is imputed to the corporation.


DEPOSITORY—RELIEF.

A bank as a depository of an agreement, shares of capital stock and money to be paid therefor, may, on a disagreement of the parties as to the effect and rights of the parties, bring an action for the purpose of relieving it of responsibility and require the parties to the agreement to interplead and the court may, upon proper allegation, permit the depository to deposit the agreement, the shares of stock, and the money in court and thereby relieve itself from responsibility.


ACTS OF BANKRUPTCY—APPOINTMENT OF RECEIVER.

A receivership is not an act of bankruptcy unless created because of insolvency, as insolvency is defined by the bankruptcy act.

Butte-Duluth Mining Co., In re, 227 Federal, 334, p. 335.
APPOINTMENT OF RECEIVER—PRACTICE.

In Montana there is no such thing as an action for the appointment of a receiver. Receivership is a provisional remedy of ancillary character allowable in an action pending for some other purpose and one that can be litigated between the parties without reference to the question of the appointment of a receiver; and a complaint in an action must be sufficient to warrant the primary relief demanded aside from the appointment of a receiver. The relief sought in the action must be such as will be aided by the appointment of a receiver, and if the object of the suit can be attained as well without a receiver as with one, then none should be appointed.


Where a mining corporation has in fact ceased to exist, whether from lapse of time, voluntary dissolution, judgment of forfeiture for negligent abuse of its powers, or where it is insolvent, or in imminent danger of insolvency, a court of equity has the undoubted right in a proper proceedings instituted by a creditor or a stockholder to appoint a receiver to administer the property.


ACTION AGAINST FOREIGN CORPORATION—SERVICE AND PROCESS.

Under the general corporation law of New York (Consolidated Laws, Chapter 23), regulating foreign corporations and prescribing the method of obtaining service of summons upon foreign corporations, an action may be maintained against a foreign corporation, and a summons may be served upon the person designated by such foreign corporation as a person upon whom process against the corporation may be served within the State, although the action is based upon a contract that did not grow out of the business of such foreign corporation transacted in the State of New York, and is entirely without relation to such business.


MINING CLAIMS.

NATURE AND GENERAL FEATURES.

LOCATION IN ALASKA UNDER POWER OF ATTORNEY—RECORD OF POWER.

The location of a mining claim in Alaska under a power of attorney is valid if such power of attorney is duly recorded at any time before adverse rights accrue, or location is attempted to be made upon the same ground by another, and the statute does not require that the power of attorney shall be recorded before a location is made.


LOCATION NOTICE AND CERTIFICATE.

UNVERIFIED CERTIFICATE—EFFECT OF RECORD.

The session laws of Alaska, approved April 30, 1913, provide among other things that within 90 days from the date of discovery the locator shall record with the recorder of the precinct in which the claim is situated a certificate of location, and provide that the certificate shall not be accepted for record by the precinct recorder unless it is verified, and a failure to verify a location certificate is fatal to its validity, and the improper recording of an unverified certificate of location furnishes no basis for a mining claim, notwithstanding the rule that location notices are construed with extreme liberality by the courts.

Cloninger v. Finalison, 230 Federal, 98, p. 100.

DESCRIPTION OF CLAIM.

DESCRIPTION OF CLAIM—REFERENCE TO NATURAL OBJECTS.

The session laws of Alaska, approved April 30, 1913, provide that the certificate of location of a mining claim shall set forth among other things a description of the location with reference to "some natural object, permanent monument, or well-known mining claim," and a certificate is insufficient which declares that the name of the claim is "No. 1 Bear Creek Placer Mining Claim," and is situated
in the White River mining district, Territory of Alaska, and that "Bear Creek is tributary to Big Eldorado," for the reason that the name as given does not necessarily mean that the claim is located on Bear Creek, and if it were the description would be insufficient for the reason that a creek or river, without other description, will not answer for the natural objects required by the statute, so as to give the claim definite location, and meet the requirements of section 2324 of the Revised Statutes of the United States, which requires that the monument or natural object must be such as will identify the claim.

Cloninger v. Finalison, 230 Federal, 98, p. 100.

EXTRALATERAL RIGHTS.

OWNERSHIP OF ORES—PRIORITY OF LOCATION.

The ownership of ore in a vein below the point of union with another vein is determined by priority of the surface location and belongs to the senior location in which one of the veins above the point of union has its outcrop or apex, and the rule applies whether such a vein has a separate apex or unites with still a third vein having its apex in the senior location.

Anaconda Copper Mining Co. v. Pilot-Butte Mining Co. (Montana), 153 Pacific, 1006, p. 1008, December, 1915.

QUIETING TITLE.

The owner of a lode mining claim is entitled to have his title quieted to the vein or lode below the point of intersection with the defendant's vein, where the plaintiff's vein and the defendant's vein have each passed outside of the vertical planes of their surface locations, where it was expressly found by a jury that the vein below the point of intersection had its apex within the surface boundaries of the plaintiff's claim.

Square Deal Mining Co. v. Colomo (Colorado), 156 Pacific, 147, April, 1916.

ADVERSE CLAIMS.

EFFECT OF FORMER ADJUDICATION.

In an action on an adverse claim duly commenced, following the filing of a claim in patent proceedings, a plea of former adjudication is insufficient where no issue was made as to the conflict in the boundaries of the mining claims and the former judgment simply quieted title in the mining claims without delineation of boundaries, and where it appeared that the claims in controversy always overlapped.

MILL SITE.

PURCHASE BY LODE LOCATOR—ESTOPPEL.

The owner of a lode mining location, who purchased a mill-site location located by others upon the same land, is not estopped from subsequently claiming the mill site under the lode mining location, though the persons locating the mill site did so on representations that the land was nonmineral in character, as the representations of the mill-site locators can not be imputed to the owner of the lode location, unless it appeared that he had procured the mill-site location to be made.

STATUTES RELATING TO MINING OPERATIONS.

CONSTRUCTION, VALIDITY, AND EFFECT.

OBJECT OF STATUTE—EFFECT OF OPERATOR'S VIOLATION.

The passage of the New Mexico mining act and similar acts implies that the class of employees for whose protection it was intended had not been able to protect themselves, and the object, as indicated by the title of the act, is to provide for the health, safety, and comfort of the employees in mines. The constitution of New Mexico directs the legislature to enact laws that should provide for the adoption and use of appliances necessary to protect the health and secure the safety of employees, and this law was the result of an attempt on the part of the law-making power to comply with this constitutional mandate. Courts can not hold that the law-making power intended to do nothing more than to repeat in statutory form a duty already imposed upon the operator of a coal mine by the common law; but the act imposes upon the operator an absolute, specific duty, one which he can not delegate, and against his neglect of which he ought not to be allowed to contract, nor can the miner assume the risk of the operator's violation of the statute, and justice requires that the operator and not the miner should assume the risk of the operator's violation of the law enacted for the miners' protection.


INDIANA EMPLOYERS' LIABILITY ACT CONSTITUTIONAL.

The employers' liability act of Indiana, March 2, 1911, as applied to a mine operator, is not unconstitutional as being violative of the fourteenth amendment, or of either section 12 or section 23 of article 1 of the State constitution.

Vivian Collieries Co. v. Cahall (Indiana, 110 Northeastern. 672, p. 676, December, 1915.

ELECTION OF MINE INSPECTOR.

Under the Pennsylvania act of May 6, 1911 (P. L. 120), providing that the qualified electors of the several inspection districts shall elect qualified persons to act as mine inspectors of the Commonwealth, mine inspectors so elected are State officers and must be
elected at the general election in the even-numbered years, and can not be elected at the municipal elections held in the odd-numbered years.


DEFENSES STILL OPEN TO MINE OPERATOR.

Section 3910, Code of Alabama of 1907, page 602, provides that in no event shall it be contributory negligence or assumption of risk on the part of a servant or miner to remain in the employment of the master or employer after knowledge of the defect or negligence causing the injury, unless he be a servant whose duty it is to remedy the defect or who committed the negligent act causing the injury complained of. The purpose of this statute is to protect the employee against the special defenses growing out of, and incidental to, the relation of employer and employee, to take from the employer such special defenses, but to leave to him all the defenses which he had by the common law against one of the public, not a trespasser nor a bare licensee, and under this statute the defense of contributory negligence is open to the employer where, as the statute provides, the servant or employee whose duty it is to remedy the defect or who committed the negligent act causing the injury is himself suing to recover.


APPLICATION OF STATUTE PROHIBITING EMPLOYEES FROM RIDING ON TRIPS.

Section 98 of the Alabama act of 1911, page 534, prohibits all persons except those in charge of trips, superintendents and mine foremen, electricians, machinists, and blacksmiths. and others when required by their duties, from riding on haulage trips; and also provides that no persons excepting trip riders shall ride on a loaded car or cars, and they shall ride near the front or the rear end of the trip, but contains an exception to the effect that a special trip of empty cars may be operated for the purpose of taking employees into and out of the mine, when the distance to and from their working places exceeds 1 mile. This statute was intended for the protection and preservation of human life and should be so construed that the ends for which it was intended may be accomplished. It was also the intent of the legislature to discourage indiscriminate riding on haulage trips by workmen in a mine whose duties were not in any manner connected with such trips and thus lessen the chance for accident; but the section recognizes the propriety, if not indeed in some cases the necessity, of workmen being carried by cars to their working places and excepts "employees" being so transported.

SPECIAL TRIP OF CARS FOR HAULING MINERS.

Section 98 of the statute of Alabama (Acts of 1911, p. 534) prohibits miners generally from riding on haulage trips but provides that a special trip of empty cars may be operated for hauling miners under certain circumstances; and a special trip of cars hauling miners into the mine is none the less special because the cars, or some of them, were left at the working places and afterwards loaded with coal, after the miners had been transported by such special trip to their working places.


SIGNALS FOR HOISTING MEN—EFFECT OF WRONG SIGNALS.

The fact that signals given an engineer in hoisting a bucket in a mine carrying a miner were not the signals defined by the statute (Statutes of 1893, p. 82), but were the signals commonly used in the mine for this particular purpose and did convey to the engineer knowledge that a man was in the bucket, the engineer was not justified in ignoring the fact thus brought to his attention and hoisting the bucket at a speed in excess of that to be used when miners were carried.


USE OF OTHER THAN STATUTORY SIGNALS.

The California statute (Statutes of 1893, p. 82) providing a code of signals for mining operations does not prohibit the use of additional signals to indicate that men are to be hoisted or lowered; but if in fact such signals were used, the engineer operating the hoist was bound, in the exercise of due care, to act upon them when they were actually given him, and if by any means he was advised that a miner was about to ride up on the bucket it was his duty to act upon such information.


DUTIES IMPOSED ON OPERATOR.

DUTY TO INSPECT.

The statute of Illinois requires a mine operator to have the mine inspected at the close of each day's work, and a mine operator can not be held liable for the death of a miner that occurred on the morning following such an inspection where there is nothing to show what changes took place between the time of inspection and the time of the accident, except that a shot had been fired for the purpose of bringing down coal.

INSPECTION OF GASEOUS MINE—PROOF OF PRESENCE OF GAS.

Section 4374 of the Compiled Laws of Oklahoma provides that in all mines where explosive gas is generated, every working place and all roadways shall be carefully examined before each shift, and in no case shall such examination be begun more than three hours prior to the appointed time for each shift to begin work; and section 4359 of the Compiled Laws provides that the break throughs in mines where gas is generated in dangerous quantities shall not be more than 30 feet apart; and in an action for the death of a miner caused by an explosion of gas in the mine, where it is alleged in the petition that the operator had failed to comply with the statute in that he had driven a certain entry more than 30 feet beyond a break through, and where it was also alleged, as an act of negligence, that the operator had failed to inspect the mine for explosive gases, as required by the statute, evidence is admissible to show the presence of gas in the mine weeks and months before the accident for the purpose of showing that the mine generated gas.


DUTY TO GUARD MACHINERY.

The failure of a natural gas company to guard a shafting, set screws, and machinery used in operating its plant in violation of section 11 of the Pennsylvania statute of May 2, 1905 (P. L. 352), renders the company liable for the death of an employee, in the line of his employment, caused by his clothing becoming caught by the revolving shaft and set screws, where it appears that the death of the employee was due to the violation of the statute.


DUTY TO FURNISH TIMBERS AFTER REQUEST AND MARKING.

Section 2739b of the Kentucky statutes of 1909 requires each mine owner or operator to furnish to the miners a sufficient number of caps and props after the miner has selected and "worked" the same, but the evident reading should be "after the miner has selected and marked the same," and a mine operator is not required by statute to furnish props where it is not made to appear that the miner had selected and marked the props to be delivered to his room, and the mine operator is not liable for the death of a miner caused by a fall from the roof for failure to comply with this statute under such circumstances.

Stearns Coal & Lumber Co. v. Crabtree (Kentucky), 181 Southwestern, 615, p. 616, January, 1916.

DUTY TO ADOPT AND PROMULGATE RULES—TIPPLE OPERATION.

Section 493, Code of 1913 of West Virginia, requires the operator of every mine to adopt special rules for the government and operation of his mine, covering all the work pertaining thereto in and outside of the same, and provides for promulgating the same by printing and posting. Although this statute calls for special rules pertaining to all work, the proper construction of the statute limits it to all such reasonable rules as can be specially applied to coal operations and not that there should be special rules applicable to every conceivable form of work, whether reasonable or unreasonable; but the statute is held to require rules for the working of a coal mine in connection with its tipple, and the failure to adopt and promulgate rules with reference to the operation of coal cars at and about the tipple of a mine is such a violation of the statute as will render the mine operator liable for the injury or death of a carpenter due to such failure to make and promulgate the proper rules.


WHEN OPERATOR MUST CONSTRUCT REFUGE PLACES.

The Indiana statute of February 25, 1905 (Burns' Ann. St. 1914, section 8581), requires that a mine entry in which there is a single-track hauling road operated by power must have places of refuge not less than 3 feet deep, measuring from the side of a car, and not more than 20 yards apart, unless there is a clear space of at least 3 feet between the side of the car and the side of the wall, but it does not require a space of 3 feet between the side of the car and the wall of the haulageway, but provides only that if there is not a space of 3 feet then the refuge holes must be constructed. It is not a violation of the statute for the mine operator to provide a 3-foot space between the side of the car and the wall of the haulageway, nor is it a violation of the statute if a 3-foot space existed and the operator for any reason walls up or fills in such 3-foot space, but if there is not such 3-foot space, or if such 3-foot space has been walled up, then it is the duty of the mine operator to furnish the refuge places as required by the statute.


DUTIES IMPOSED ON MINER.

DUTY OF MINER TO DISCOVER DANGER AFTER INSPECTION.

Under the statute of Illinois requiring a mine operator to cause his mine to be inspected each evening at the close of the day's work it is the duty of the miner where the roof of his working place becomes dangerous after such inspection to discover the danger and to
protect himself from accident thereby; and a miner of 32 years' standing must be presumed to have appreciated the danger of a place in the roof which on testing sounded loose.


**KEEPING WORKING PLACE SAFE—TIMBERS FURNISHED.**

An adult miner who is skilled and intelligent can not recover for an injury caused by a fall from the roof in his mining place, under the statute of West Virginia making it the duty of each miner to properly prop and secure his place in order to make the same secure for him to work in, where it is shown that suitable props and timbers were furnished by the operator as required, but the miner himself had made no request for suitable props.


**DUTY TO SELECT AND MARK PROPS—PROOF OF CUSTOM.**

Under section 2739b of the Kentucky statutes of 1909, requiring mine owners and operators to furnish miners with props after the miner has selected and marked the same, a mine operator may require each miner to mark the props selected with his number in order to avoid confusion and to have the props delivered to the proper miner, and there can be no recovery for the death of a miner on the ground that the mine operator failed to furnish the props as requested, though not selected and marked, and in an action for the death of a miner under such circumstances proof of a custom of the miners to request props and have them sent in without marking is not admissible against the plain provision of the statute expressly requiring the miner to select and mark the props needed.


**FAILURE OF MINER TO SELECT AND MARK PROPS—RULE OF MINE.**

Section 2739b of the Kentucky statutes of 1909 requires every mine owner to provide and furnish to the miners in the mine a sufficient number of props after the miner has selected and marked the same. A mine owner can not be charged with the violation of this statute and be held liable for the death of a miner caused by a fall of slate, where a rule of the mine required that each miner should in selecting and marking his props place thereon his number and where the miner who desired the props and who intended to select and mark the same requested another miner with or near whom he worked and between whom there was often an exchange of props, to select and mark for him the props he needed and request their immediate delivery, and where the miner so requested did select and mark the props and place thereon his own number and not the number of the
miner who needed the props, and where the props were not sent in until the next succeeding day but one, for the reason that the miner so marking the props did not intend to and did not in fact work in the mine on the day following, and where the miner who needed the props to protect his roof continued working and was killed before the props were delivered.


DANGEROUS PLACE—MEANING AND APPLICATION OF STATUTE.

All coal mines are more or less dangerous, and notwithstanding that due and proper precautions may be taken to prop and secure the roof from falling there is always more or less likelihood of portions of the roof falling upon and injuring miners, and this is an ordinary risk of the business which can not be obviated and is a danger always present and which the ingenuity of man can not obviate without incurring unwarranted expenses. It was not the intention of the legislature, by section 3507, Code of 1915, of New Mexico, to make it a misdemeanor for a miner to remain or work in a mine because of these ordinary dangers, but the lawmakers power was trying to prohibit the heedless recklessness of some miners in knowingly working under a roof which required timbering in order to make it safe, or to make it as safe as it could be made by the use of timbers. To say that this section of the statute prohibits a miner from working in one portion of a room, because some other portion of the roof in the room might require timbering, would, if carried to its logical conclusion, prohibit a miner from working in any portion of a mine where some other portion of the mine required props and timbers in order to prevent the roof from falling. The statute was designed to prohibit a miner from, and punish him for, knowingly working under a defective roof which requires timbers and props in order to make it safe, and in order to violate this section the miner must be engaged at work or remain under that portion of the roof which he knows is defective and unsafe.


UNLAWFUL FOR MINER TO REMAIN IN DANGEROUS PLACE—CONTRIBUTORY NEGLIGENCE.

Under section 3508 of the Code of 1915 of New Mexico making it unlawful for a coal miner to work or remain in any unsafe or dangerous place in a coal mine knowing the same to be such, except for the purpose of remedying such condition, a miner whose injuries are the proximate result of his violation of this statute is, as a matter
of law, guilty of contributory negligence which precludes a recovery for the negligence of the operator which contributed to the injury.


VIOLATION OF STATUTE NOT A PROXIMATE CAUSE OF INJURY.

A miner injured while being hoisted in a bucket in the shaft of a mine because of the excessive speed at which he was carried, causing the bucket to jump from the skids, is not to be defeated in an action for damages for the injuries because he violated the statute requiring him to securely lash to the cable the upper end of a tamping stick being carried out of the mine by him, where it is made to appear that the dangerous speed of the bucket was the proximate cause of the injury, and the miner's failure to lash his tamping stick to the cable did not contribute as a cause to the injury sustained by him.

Gibson v. Kennedy Extension Gold Mining Co. (California), 156 Pacific, 56, p. 61, April, 1916.

OPERATOR'S FAILURE TO COMPLY WITH STATUTE.

FAILURE TO FURNISH PROPS ON REQUEST.

A request by a miner for props under section 8473 of the Missouri Revised Statutes of 1909 will cover any unsafe condition, present or in the reasonably near future, which the props if furnished would have rendered reasonably secure; but it is not meant by this to say that a miner's request for props not complied with might not, if an unreasonable length of time should expire, or if certain other circumstances or conditions should arise, come to mean that a necessity for the props called for had ceased and that, though new conditions arose, a new request would not be necessary. Such conditions are immaterial, however, where the miner continuously calls for or demands props.


FAILURE TO POST DANGER SIGNS—QUESTION OF FACT.

Whether the death of a miner resulted from a wilful failure of the mine owner to comply with the statute requiring inspection and posting of warning signs, and exclusion of miners from dangerous gaseous places, and whether a miner was rightfully at the place at the time the injury occurred, are questions that are proper to submit to a jury in an action for damages for the death of a miner caused by the alleged negligence of the operator in failing to place warning signs.

DUTY TO CONSTRUCT REFUGE PLACES—LIABILITY FOR FAILURE.

The provision of the Indiana statute of February 28, 1905 (Burns’s Ann. St. 1914, sec. 8581), requiring places of refuge to be provided in the side wall not less than 3 feet in depth, measured from the side of a car, and not more than 20 yards apart, unless there is a clear space of at least 3 feet between the side of the car and the side of the wall, is mandatory, and a complaint in an action by a miner for damages for an injury caused by being caught between the side of a car and the side walls of the entry need not aver that it was practical in the operation of a mine to construct the places of refuge contemplated by the statute.


NEGLIGENCE OF MINE SUPERINTENDENT OR FOREMAN.

DUTY OF FOREMAN—MAKING WORKING PLACE SAFE.

Section 483, Code of 1913 of West Virginia, makes it one of the statutory duties of a mine foreman to see to it that all loose coal, slate, and rock overhead in the working places and along the haul ways be removed or secured, and that sufficient props and timbers of suitable dimensions are delivered and properly placed, and makes it the duty of the miner to notify the mine foreman at least one day in advance of the props or timbers that will be required and their dimensions; and provides that in case of an emergency the timbers may be ordered immediately; and the statute makes it the duty of each miner to properly prop and secure his place in order to make it safe to work therein; and any failure to make the mine safe in the particulars covered by this section is the negligence of the miner or the mine foreman, who is held to be a fellow servant with the miner, for which the operator is not liable.


EFFECT OF CONTRIBUTORY NEGLIGENCE.

INDIANA EMPLOYERS’ LIABILITY ACT EXCLUDES THE DEFENSE OF CONTRIBUTORY NEGLIGENCE.

In the employers’ liability act of Indiana, of March 2, 1911, the defense of contributory negligence is excluded where the injury results from the obedience of “any” order, and it is immaterial under this act whether the order given to the employee is general or special; but an instruction limiting the order in controversy to a special order is harmless where the order in question was in fact a special order.

Vivial Collieries Co. v. Cahall (Indiana), 110 Northeastern, 672, p. 678, December, 1915.
DEFENSE OF NEGLIGENCE OF FELLOW SERVANT ABROGATED.

Section 1970 of the Civil Code of California as amended in 1907 took from an employer or a mine operator the benefit of the fellow-servant defense where the negligence was that of an employee having the right to direct and control the injured employee; and the statute of 1911, known as the "Roseberry Act," expressly provides that in actions by employees against employers to recover damages for injuries sustained in the course of the employment it shall not be a defense that the injury was caused by the negligence of a fellow servant.

Gibson v. Kennedy Extension Gold Mining Co. (California), 156 Pacific, 56, p. 60, April, 1916.

TEXAS WORKMEN'S COMPENSATION ACT.

A legislature has power to modify the common-law defense of contributory negligence; and the workmen's compensation act of Texas modifying the common-law defense of contributory negligence is not unconstitutional on the ground that it denies the equal protection of the law or would take property without due process of law, for the reason that no person has a property right or vested interest in the common-law defenses or in any rule of common law.

Consumers' Lignite Co. v. Grant (Texas Civil Appeals), 181 Southwestern, 202, p. 207, December, 1915.

MINER WORKING IN DANGEROUS PLACE.

Section 3508, Code of 1915, of New Mexico, does not prohibit a miner from remaining or working in a room where a portion of the roof requires timbers and supports in order to render it safe, so long as the particular place where he is working is a safe place, and does not require such timbers or supports; and he is not guilty of a violation of the section nor can he be charged with contributory negligence as a matter of law so long as he remains from beneath the particular portion of the roof which is unsafe and dangerous; and contributory negligence under such circumstances is an affirmative defense and the burden of proof is upon the operator to establish the fact.


VENTILATION OF MINE—FAILURE OF MINER TO OBEY INSTRUCTIONS.

The statute of Kentucky, section 2729, imposes upon a mine foreman the duty to see that no working place is driven more than 60 feet in advance of a break through or airway, and that all break throughs between entries, and when necessary between rooms, except those last made near the working place, are closed up and made
air-tight by brattices, trapdoors, or otherwise so that the currents of air in circulation in the mine may sweep to the interior of the excavations where the miners are at work. A mine operator is not to be held liable as a matter of law on the alleged violation of this statute and the consequent failure to properly ventilate its mine, where it had a rule that shots should be fired at a particular hour and that miners should not return into their working places for one hour after the shot was fired, thereby giving the air time to clear away the smoke, where it appeared that the suing miner had on separate occasions violated the rule and returned to his working place within 5 or 10 minutes after shots had been fired and was injured by inhaling the poisonous or impure air. Under such circumstances it was error for the trial court to refuse to instruct the jury to the effect that under the rules of the company it was the duty of the plaintiff to fire his shots at the stated hour and to remain out of his working place for the usual and appointed length of time, and that if they believed from the evidence that the plaintiff violated the rules of the operator by returning to his working place within less than the stated time after the shots were fired, and that by reason thereof he was injured in the manner complained of, they should find for the mine operator, though the court did give an instruction on the abstract subject of contributory negligence.


NEGLIGENCE OF PERSON INTRUSTED WITH DUTY OF KEEPING MINE SAFE.

Under the Alabama employers' liability act an employee or miner who is intrusted by a mine operator with the duty of seeing that the ways, works, machinery, or plant of the operator are in proper condition, and who breaches that duty by his own negligence and is injured as a consequence of his own wrong and not the wrong of the master or of a fellow servant, can not recover damages of the operator for the injury.


NEGLIGENCE OF PERSON INTRUSTED TO KEEP MINE IN SAFE CONDITION.

In an action under the employers' liability act of Alabama for the wrongful death of a miner, an answer by the defendant mine-operating company is sufficient to defeat the action on the ground of the contributory negligence of the intestate where the defendant mine operator alleged that it had intrusted to the intestate the duty of seeing that its ways, works, machinery, and plant in and about its mine were in proper condition, and where the alleged defect had not been discovered or remedied as a proximate consequence of the
negligence of the intestate, who negligently failed in the performance of his said duty, and where the intestate himself was the servant or agent of the defendant who was intrusted with the duty, the breach of which is complained of, and he himself was the person who was guilty of the negligence which caused the injury.


REQUEST FOR PROPS NOT EVIDENCE OF IMMINENT DANGER.

A request by a miner for props does not necessarily carry with it a suggestion that danger is glaring and imminent, but a request as contemplated by section 8473 of the Missouri Revised Statutes of 1909 is a precaution suggested by the care and prudence of an ordinarily careful man and is intended as a safeguard not against certain catastrophe, if not immediately complied with, but to make as secure as may be what otherwise is not certainly reasonably safe. Accordingly, when a request is made by a miner and not complied with, the mine operator is liable for the results which may follow such neglect.


VIOLATION OF STATUTE AND CONTRIBUTORY NEGLIGENCE—QUESTIONS OF FACT.

In a room in which a miner was at work there was a portion of the roof at one side that required timbers and supports in order to render it safe, but the miner did not timber and support such dangerous roof. for the reason that the operator had not complied with its statutory duty to keep him supplied with proper material on request previously made. Knowing such portion of the roof to be dangerous, the miner avoided it and went near the center of the room and while there working he heard the roof crack and felt stones fall upon his feet and legs and knew that some part of the roof was going to fall. In his excitement, and upon a sudden impulse, and prompted by that human impulse which told him that his life was in danger, he sprang directly under that part of the falling roof, the fall occasioned because the operator had not complied with its statutory duty to furnish timbers and supports. Under such circumstances the question of the violation of section 3508, Code of 1915, of New Mexico, by the miner and the question of the miner's contributory negligence are questions of fact to be determined by the jury.

EFFECT ON ASSUMPTION OF RISK.

FAILURE OF OPERATOR TO FURNISH TIMBER.

Under section 3507 of the Code of 1915, of New Mexico, a miner employed in a coal mine does not assume the risk of injury from the master's violation of a statutory duty to provide an ample supply of timbers and to cause the same to be delivered on the pit car, at the request of the miner, as nearly as practical to the place where the timbers are to be used.


POWER OF LEGISLATURE TO ABROGATE DEFENSE OF ASSUMED RISK.

A legislature has the power to abrogate the defense of assumed risk in actions for personal injury, and the Texas workmen's compensation act is not subject to the criticism that such legislation denies the equal protection of the law or takes property without due process of law, for the reason that no person has a property right or vested interest in the common-law defenses or in any rule of the common law.

Consumers' Lignite Co. v. Grant (Texas Civil Appeals), 181 Southwestern, 202, p. 207, December, 1915.

INSPECTION.

RIGHT OF STOCKHOLDER TO TAKE SAMPLES.

The purpose of section 588 of the Civil Code of California in giving a stockholder the right to examine the property of the mining company is to arrive at the value of the property in which the stockholder is interested, and that value is composed of two elements: Economical and uneconomical working of the mine, and the extent and richness of the ore body; and the statute expressly gives the right to take samples, as no valuation could be placed upon ore bodies in the absence of some test or assay.


PENALTIES IMPOSED FOR FAILURE TO PERMIT STOCKHOLDER TO INSPECT MINE.

Under section 5897 of the Civil Code of California, construed in connection with section 588, a stockholder of a mining corporation is entitled to recover the statutory penalty for the refusal of the officers of the mining company to permit him to take samples of the ore bodies for the purpose of testing and assaying, though they did permit him with an expert to inspect and examine the mine.

STATUTES RELATING TO MINING OPERATIONS.

STATUTORY ACTION FOR WRONGFUL DEATH.

ACTION BY ONE PARENT.

An action by the father alone for the wrongful death of his son under the Pennsylvania statute providing that the husband, widow, children, or parents may recover damages for any injury causing death, abates on the death of the father and there can be no valid action pending after his death, and his administrator can not be substituted to carry on the suit, nor can it be revived in the name of the mother.


DEFENSE OF CONTRIBUTORY NEGLIGENCE UNAVAILABLE.

In an action under the employers' liability act of Alabama for the wrongful death of a miner an answer on the part of the defendant operator, stating that when it employed the intestate it delegated to him the duty of providing a reasonably safe place for himself and other employees working in the mine with the intestate, and that the intestate negligently failed to exercise reasonable care to provide such place, and as a proximate consequence thereof received the injuries causing his death, is insufficient as not appropriate to the complaint or count declaring under the statute, being sufficient only in actions based on common-law liability.

MINES AND MINING OPERATIONS.

NEGLIGENCE OF OPERATOR.

QUESTION OF FACT FOR JURY.

The question of the operator's negligence is one of fact to be determined by the jury, where an injury caused by the sudden lowering or falling of the cage in a shaft of a mine would not have happened if the machinery installed had been properly used and the rule adopted by the operator followed by the plaintiff and a fellow servant, but where the accident could not have happened if the operator had provided additional apparatus easily installed or provided additional rules.

Ducktown Sulphur, Copper & Iron Co. v. Fortner, 228 Federal, 191.

Where miners are required to go in and out of the mine on and along the track and haulageway, and where there is not sufficient room between the track and the walls for a miner to walk and the miners were accustomed to walk along the middle of the track, and where a miner notified the rope rider on an empty trip of cars that he was going down the slope to his working place and the engineer saw a miner pass just before he gave the signal for the cars to move, and where it appears that the miner was keeping a lookout for the cars and heard no signals given for cars to move, the question of the negligence of the mine operator in an action by the miner for damages for an injury caused by being struck by the car, is a question of fact.


ADMISSIBILITY OF EXPERT EVIDENCE TO SHOW CONDITION OF MINE.

Coal mining is a special calling, and its requirements are not so obvious to one not versed in regard to them as to warrant the exclusion of expert evidence to elucidate them; and it is just as competent for a witness to be permitted to say that he considered the conditions existing in the mine as unsafe as it is to permit another witness to say that in his judgment they were safe; and a qualified expert may, in answer to a hypothetical question based on the evidence, give his opinion as to the safety of an entry and as to whether or not the use
of timbers was the proper method under the circumstances for the purpose of supporting the roof.


DUTY TO FURNISH SAFE APPLIANCES—INJURY FROM DEFECTIVE COAL-CUTTING MACHINE.

Where an inexperienced miner, a foreigner of limited education, operating a coal-cutting machine, with which he was unfamiliar, informed the superintendent of the mine that he feared there was something wrong with the machine and was afraid to work and wanted his pay so he could quit work and seek employment elsewhere; and where the superintendent assured him that he would send an electrician to make a thorough examination of the machine and if it needed repairs the electrician would repair it; and where, upon this assurance, the miner resumed his work and shortly thereafter the electrician examined the machine and told the miner to go on with it, that there was no trouble except one of the points or indicators for guidance of the controller was missing, and when moving the lever to jump it quickly to the next higher point and there would be no trouble; and where, relying upon the representations of the electrician, the miner continued to use the machine and was injured by reason of some defect in the machine, a recovery of damages must be sustained, and especially in the absence of evidence of the electrician or others familiar with the machine and who inspected it immediately after the injury complained of.


CORPORATION OWNING STOCK—LIABILITY FOR NEGLIGENCE.

A mining corporation owning a majority of the stock of another corporation operating a mine can not be held liable for injury to a miner on the ground of negligence because it dominated the operating company, where the miner at the time of his employment and during the course of his employment knew that he was employed by and was working for the operating company and not the dominating company.


PROOF OF CUSTOM—EFFECT ON NEGLIGENCE.

Evidence of the existence of a custom in a mine is not admissible for the purpose of excusing negligence of a mine operator in an action by a miner for damages for an injury due to the alleged negli-
gence of the mine operator; but for the purpose of ascertaining whether or not a given construction in a mine is reasonably safe the general custom and usage of others in the same situation and with reference to methods of construction is admissible as tending to show that the particular construction under investigation was not such as ordinary prudence would dictate. This rule is peculiarly applicable when applied to machinery and other appliances or places and work with which an ordinary jurymen is not familiar. Under this rule the suing miner was permitted to prove that it was the general custom or plan in other mines to construct doors in the haulage ways so that they would swing both ways, on the theory that had the doors been so constructed the injury would not have happened to the miner.


FAILURE TO MAKE RULES—OPERATION OF CARS AT TIPPLE.

It is generally the duty of a master to warn his servant against perils arising from the manner in which the instrumentalities are affected by isolated events which occur at more or less frequent intervals during the performance of the servant’s work, but which produced no permanent effect upon the intrinsic condition of the instrumentalities themselves. This rule applies in a case where a mine operator employed a carpenter to work on its tipple without warning him of the fact that cars were sent down an incline to the tipple at irregular intervals and of which the carpenter had no knowledge and by reason of which he was killed.


PERMITTING RULES TO BE VIOLATED—PRESUMPTIONS.

A corporation engaged in mining and removing coal adopted and posted a rule to the effect that all persons who rode upon the incline or upon any car, engine, or motor do so at their own risk, and another rule to the effect that no employee shall travel to or from his work upon any slope or motor road when any other road is provided or may be used; but where the corporation permits the rules to be violated and knowingly and habitually permits its employees to disregard the rules and to ride on the cars in going to and returning from their work in the mine, it may be presumed that the rules have been suspended.

PERMITTING RULES TO BE VIOLATED—LIABILITY FOR INJURY.

A mine operator has the right to prohibit anyone, whether an employee or not, from riding on its cars in the mine and to enforce such orders in a proper way; but the mine operator can not enforce compliance with such order by knowingly permitting it to be violated and at the same time absolve himself from injuries resulting from the violation of the rule; and in an action by an injured miner for damages caused while riding on a coal car it is proper to prove that employees of the operator frequently rode on the cars in going to and returning from their work in the mine, with the knowledge of and without objections from the operator.


RULE REQUIRING MINERS TO ASSUME RISK.

A mine operator engaged in mining and removing coal can not relieve itself from responsibility for damages sustained by a miner, caused by the negligence of the operator, by adopting and promulgating a rule to the effect that all persons who ride upon the incline or upon any car, engine, or motor do so at their own risk, and which does not expressly forbid miners riding on the cars while at work in the mine, but seeks to make the miners assume the risk, and thereby relieve the operator from responsibility for damages caused by its own negligence.

Petry v. Cabin Creek Consolidated Coal Co. (West Virginia), 88 Southeastern, 105, p. 107, February, 1916.

INJURY TO MINER FROM LOOSE CAR.

It is actionable negligence in a mine operator to so manage the operation of its mine as to negligently cause or permit a loaded car to run down the track in a mine and upon or against a miner engaged in placing loaded cars upon the cage to be hoisted to the surface.


MINER INJURED WHILE BEING CARRIED TO WORK.

It is the duty of a coal company furnishing the means by which its employees are carried to and from their work to exercise ordinary care to provide reasonably safe methods of transportation, and if an employee is injured by defects in the track, or by the unmanageable character of a mule, or by other causes attributable to the negligence of the coal company, he has a right to recover of the company for such injuries.

Taylor Coal Co. v. Miller (Kentucky), 182 Southwestern, 920, p. 921, February, 1916.
PROXIMATE CAUSE—INTERVENING AGENCY.

In an action by a miner for damages for injuries received because of the alleged negligence of the mine operator it must be shown that but for the operator's negligence in the respects charged the accident would not have happened, and the doctrine of intervening cause has primarily no reference to the conduct of the injured miner, but to some other responsible agency for which the operator was not responsible, intervening between the operator's negligence and the miner's injury, without which the accident would not have happened; but in such cases an intervening human agency may not relieve an intelligent operator, for if his original wrong concurred with such intervening cause, and both acted proximately at the same time in producing the injury, then either or both may be held liable.


PROXIMATE CAUSE OF INJURY.

The first requisite of proximate cause is the doing or omitting to do an act that a person of ordinary prudence could foresee might naturally or probably produce the injury, and the second requisite is that it did produce it. This rule was applied in an action for the death of a miner due to the alleged negligence of the operator in maintaining a defective switch, where it appeared that the switch, whether defective or not, was not an element in bringing about the accident.


DANGERS NOT ANTICIPATED.

It is not negligence for a mine operator to fail to take precautionary measure to prevent an injury which, if taken, would have prevented it, when the injury could not have reasonably been anticipated and would not have happened but for the occurrence of exceptional circumstances. This rule was applied in an action for the death of a miner caused by the alleged negligence of the mine operator in maintaining a defective switch.


OPERATOR'S KNOWLEDGE OF DANGEROUS CHARACTER OF MULES.

In an action by a miner for injuries caused by jumping from a car, induced by reason of the fact that the mules attached to the car were running away, there can be no recovery where the evidence fails to show that the mine operator had any knowledge of the dangerous
character of the mules or had such knowledge as to make it liable for
injuries resulting from their running away.

Mahan Jellico Coal Co. v. Bird (Kentucky), 181 Southwestern, 339, p. 341,

SUBSTITUTED SERVANT—LIABILITY FOR DEATH OR INJURY.

Where a master or mine operator, from custom, permits a servant
or miner to substitute another person temporarily in his stead, such
substituted person is the employee of the master and the master or
mine operator owes to such substituted person, during such tempo-
rary service, the same measure of protection as he owes to his regu-
larly employed servant and is liable for any negligence resulting in
the injury of such substituted servant.

Kali Inia Coal Co. v. Ghinelli (Oklahoma), 155 Pacific, 606, p. 608, February,
1916.

OIL OPERATOR NOT LIABLE FOR BURNING BARGE.

An oil company in undertaking to load a barge with oil for a con-
sideration, is not liable for the loss of the barge by fire supposed to
have been started by the fumes or gases from the oil being ignited by
a lantern carried by a person supposed to be engaged in assisting in
the loading, but where there was no evidence to show that the person
carrying the lantern was in the employ of the oil company on the
night of the fire.

Texas Co. v. Charles Clarke & Co. (Texas Civil Appeals), 182 Southwestern,
351, December, 1915.

PLEADING AND PROOF OF NEGLIGENCE.

PLEADING NEGLIGENCE GENERALLY AND SPECIFICALLY—DIFFERENCE AND
EFFECT.

In an action by a miner to recover damages for personal injuries
resulting from negligence of the mine operator, if the negligence
complained of is stated in general terms then any specific acts of
negligence may be proved and relied upon, but if the specific acts con-
stituting the negligence complained of are alleged then acts not
alleged in the pleading, though negligent in fact, can not be proved
or relied upon.


SUFFICIENCY OF COMPLAINT FOR PERSONAL INJURIES.

A complaint in an action by a miner against a mine operator for
personal injuries is sufficient where it demands damages for personal
injuries received by the complainant while working as the employee
of an independent contractor in the defendant operator’s coal mine
with the consent and at the invitation of the defendant, and avers that the injuries complained of were proximately caused by reason of the negligence of the defendant operator in failing to keep its mine in a reasonably safe condition.


PROOF OF NEGLIGENT ACTS NOT ALLEGED INADMISSIBLE.

In an action by a miner operating and driving a motor hauling trains of cars in and out of a mine, for injuries caused by jumping from a motor and slipping or falling back under the car and receiving the injuries complained of, where the jumping from the motor was to avoid collision with an empty car standing on the main track and where the negligence averred was that the mine operator had constructed its roadway with the track bed near the wall, negligently rendering the track defective and dangerous, it is not competent on the trial of the case to prove that the mine operator was negligent in permitting débris to accumulate between the track and rib, except in explaining why the miner's foot slipped back under the car, as the existence of such débris was not relied upon in the miner's complaint as an act of negligence contributing to the injury.


DISTINCT GROUNDS OF NEGLIGENCE—PROOF OF ONE.

A complaint in an action by a miner for damages for injuries caused by a fall from the roof averred that the accident resulted from the failure of the mine operator to furnish props when requested so to do by the miner, and also averred that the operator negligently failed to furnish the miner a reasonably safe place in which to work, but permitted the roof of the mine to be and remain in an unsafe condition and that the operator by its agent and servants in authority over the miner assured him that the roof at the place where the fall occurred was safe, and that relying upon such assurance the miner continued to work in his place and was injured. The action is not to be defeated nor is the defendant entitled to a peremptory instruction for a verdict because the miner on the trial failed to prove that the operator did not furnish proper props when requested and failed to show that the miner ever selected or marked any props, as he was required to do under the statute, where the miner by his own evidence fully sustained the allegations of his complaint as to the failure of the operator to furnish him a safe place in which to work and that the operator through its superior officers and agents assured the miner that the place was safe.

LIABILITY FOR BURNING BARGE—INSUFFICIENT PROOF.

When the evidence in a case is sufficient to show that the injury of which the plaintiff complains was due to one or another act or omission of the defendant and that either of such acts or omissions was negligent, a trial court may properly make a finding that the plaintiff's injury was due to the negligence of the defendant in one or the other respects shown by the evidence and render judgment for the plaintiff on such finding; but when the alternative finding of the court is conditioned upon the insufficiency of the evidence to sustain the first finding as to the cause of the accident, and the first finding is supported by the evidence, the alternative finding can not be considered. This rule was applied in an action by the owner of a barge against an oil company which had undertaken to load the barge with oil and during the process of loading the barge was destroyed by fire caused by the oil being ignited through the negligence of the oil company or a person in its employ or connected with it.

Texas Co. v. Charles Clarke & Co. (Texas Civil Appeals), 182 Southwestern, 351, p. 355, December, 1915.

X-RAY PHOTOGRAPH INADMISSIBLE IN EVIDENCE.

In an action for personal injuries to a miner whose arm was fractured by a shot of dynamite, an X-ray photograph can not be received in evidence where it is not properly accredited.

Indian Creek Coal Co. v. Walcott (Kentucky), 182 Southwestern, 631, p. 632, February, 1916.

FRAUD IN PROCURING JUDGMENT—EFFECT AND PROOF.

A driver of coal cars hauling coal from a mine had his ankle crushed in a collision and brought suit against the mine operator to recover damages in the sum of $2,000. His petition alleged that the injury was permanent, and he testified upon the trial that the injury was permanent and the ankle joint was stiff. A complaint and a petition for a new trial filed by the operator more than a year after the time of the injury, alleging as ground for the motion fraud and deception in obtaining the judgment, was properly dismissed where the mine operator introduced no evidence to show that the driver had practiced a fraud in securing the judgment, but the only question involved was whether or not the driver's ankle was in fact stiff at the time of the trial of the case, and where it appeared that the particular point was controverted and it was open for the mine operator by its physician and witnesses to contest the point.

Stearns Coal & Lumber Co. v. Tuggle (Kentucky), 180 Southwestern, 532, p. 533, December, 1915.

See Consumers' Lignite Co. v. Grant (Kentucky), 181 Southwestern, 202, p. 212, December, 1915.
EXERCISE OF CARE.

DEGREE OF CARE.

Negligence consists in the failure to exercise that degree of care which persons of ordinary prudence in the same occupation exercise under the same circumstances to protect others from injury; and the care required is a care adjusting itself to the circumstances of the case.


USE OF ORDINARY CARE.

Ordinary care is that degree of care which a person of ordinary prudence would exercise in the same or similar circumstances; and where the employees of a mine operator could and would, in the exercise of ordinary care, have so timbered the roof as to make and maintain it in a reasonably safe condition, then the failure to so timber the roof is a want of exercise of ordinary care.

Consumers' Lignite Co. v. Grant (Texas Civil Appeals), 181 Southwestern, 202, p. 210, December, 1915.

LOADING BARGE WITH OIL—CARE REQUIRED TO AVOID FIRE.

An oil company undertaking to load a barge with oil under ordinary circumstances and in a usual and proper manner can not be charged with negligence in permitting a stranger to come upon the barge and near the flowing oil with a lighted lantern, merely because it knew the inflammable character of the oil, where it can not reasonably be inferred from the evidence that ordinary care on the part of the oil company required that it keep some one constantly on the boat or barge to guard against the approach of strangers near the flowing oil, and especially where the barge itself was in the custody and control of a master who was the agent of the owner.

Texas Co. v. Charles Clarke & Co. (Texas Civil Appeals), 182 Southwestern, 351, p. 355, December, 1915.

DUTY TO FURNISH SAFE PLACE.

OPERATOR NOT INSURER OF MINER'S SAFETY.

A mine operator is not an insurer of the safety of its employees, and it is not incumbent upon it to make the roof in a working place absolutely safe for the protection of its miners.

Consumers' Lignite Co. v. Grant (Texas Civil Appeals), 181 Southwestern, 202, p. 210, December, 1916.

DUTY TO FURNISH SAFE PLACE—POWER TO DELEGATE.

In an action under the employers' liability act of Alabama for the wrongful death of a miner, an answer by the mine operator is insufficient where it avers that the mine operator had intrusted to the
deceased miner the duty of seeing that its ways, works, machinery, and plant, in and about its mine, were in proper condition and that it had delegated to the said deceased miner the duty of providing a reasonably safe place for himself and other employees in the mine in which to work, and the deceased miner negligently failed to exercise reasonable care to provide such place and as a proximate consequence thereof received the injuries causing his death, for the reason that the master can not delegate or avoid the common-law duty of providing a safe place, though he may delegate the duty of maintaining it after it is actually provided.


MEANING AND LIMITATION.

In the absence of evidence showing that a mine operator owed the driver of a coal car hauling coal out of a mine the duty to furnish him space or room to sprag the wheels of the cars, except at places where he would reasonably be expected to do such spragging, he can not recover for injuries received at a place at which spragging had not at any time been done.


APPLICATION OF RULE TO MINES.

It is the duty of a mine operator to use ordinary care to furnish his miners a safe place in which to work and to exercise the same degree of care to keep such working place in safe condition; and it is the duty of a mine operator to furnish the miners a safe mode of ingress and egress while on his premises and in passing in and out of the mine.


EXTENT OF OPERATOR'S DUTY.

A safe place to work in a mine where the miners are at work and continually changing the conditions, means only a safe place in the first instance. The owner or operator of a mine is not an insurer against personal injuries in the mine and he can not either by himself or by his agent be present every moment to see that the miners do their duty to prop the roof as the work progresses at the face of the coal; and the rule requiring the operator to furnish a safe place does not apply to a miner who is himself making his working place.


43162°—Bull. 126—16—4
DUTY OF OPERATOR TO SECURE DANGEROUS ROOF.

In an action by a miner for injuries caused by a fall from the roof where the evidence shows that the miner was engaged in shoveling loose coal from the floor of the room into a car and had been engaged in such work practically an entire day, and did not by his labor or otherwise in any manner cause or contribute to the falling of the coal from the roof that resulted in his injuries, the case is taken out of the rule that requires a miner to keep his working place safe where he is himself making the working place.

Consumers' Lignite Co. v. Grant (Texas Civil Appeals), 181 Southwestern, 202, p. 299, December, 1915.

LIABILITY BASED ON FAILURE TO PROVIDE SAFE PLACE.

A master's duty is to use ordinary care to provide a reasonably safe place in which his employee is to work, considering the character of the work in which the employee is engaged, and an employer is liable for injuries to his employee resulting from his failure to exercise such care; but as absolute safety is unattainable, employers are not held to be insurers, and can only be held liable in damages for an injury to an employee where the negligence of the employer is averred as the basis of the action and where such negligence is established by the proof.


PROOF OF FAILURE TO FURNISH SAFE PLACE.

In an action by a miner for damages for injuries caused by a fall from the roof where the complaint alleged that the mine operator negligently failed to furnish the miner a reasonably safe place in which to work and negligently permitted the roof of a mine to be and remain in an unsafe condition, and that the miner was assured by the defendant through its agent and servants over him that the roof at the place where the fall occurred was safe, the case was properly submitted to a jury, where the miner, the only witness who testified, by his evidence fully supported the allegation of his complaint.


DUTY TO PROVIDE SAFE APPLIANCES.

INSECURE LADDER.

An oil operating company is liable for injuries to an employee falling something over 50 feet from a ladder constructed in connection with a derrick, caused by a step on the ladder giving away,
where from the evidence it appeared that the steps of the ladder were 1\(\frac{1}{2}\) inches in thickness, nailed at each end with two 8-penny common nails about 2\(\frac{3}{8}\) inches long, and which extended into the upright pieces not more than 1\(\frac{1}{2}\) inches, and where it appeared that the dripping of oil had a tendency to loosen the steps of the ladder, and where there had been no inspection or examination of the ladder during a period of six or eight months, and where it was expressly found by the jury that the oil company was "guilty of negligence in the manner in which the step was affixed to the ladder."


MINER'S WANT OF KNOWLEDGE OF VICIOUS DISPOSITION OF MULES.

To entitle a miner to recover for injuries caused by the mules he was driving, in hauling coal out of a mine, running away, he must show that the mules were vicious or dangerous; that the mine operator knew, or by the exercise of ordinary care, could have known of the vicious or dangerous disposition of the mules; that the driver did not himself have such knowledge and could not have acquired it by the exercise of ordinary care on his part.


DUTY TO WARN OR INSTRUCT.

FAILURE TO INSTRUCT INEXPERIENCED MINER IN USE OF COAL-CUTTING MACHINE.

In an action for the death of a miner, caused by being caught in the cutter bar of a coal-mining machine he was at the time operating, and where it appeared that the miner was a foreigner and had been in the United States only about two months previous to the time of the accident and had used the cutting machine for less than five days before the accident, and where it appeared that he was not experienced in operating machines, it is proper to prove the danger incident to the operation of a coal-cutting machine and the extent of the instruction and training necessary to fit a person to operate such a machine in safety and to show whether the instruction given the deceased miner in the particular case was sufficient to enable a man of ordinary intelligence to safely operate a cutting machine, and to prove that according to experience in the use of such a machine that the usual time required to properly train and qualify a miner in the use of such machine is from five to six months.

SUFFICIENCY OF INSTRUCTION—EXPERT EVIDENCE.

It is the duty of a coal-mine operator to instruct an inexperienced employee or miner in the use of dangerous machinery, and this is a personal duty from which nothing but performance can relieve the operator; and if the duty is delegated to another the mine operator still remains responsible for its proper performance by such person; but this obligation does not require a mine operator to warn against such dangers as are open and apparent to the ordinary observer and the subject of common knowledge. However, between these extremes there necessarily arise many cases which are near the border line and are difficult to determine to which class they belong. Under such circumstances the testimony of persons experienced in the use of the particular device in controversy would aid both court and jury in determining the amount of instruction required to train the ordinary miner in its proper and safe operation, and any evidence relevant and useful in determining whether or not sufficient instruction was given should be received in order to aid the jury in arriving at a correct conclusion.


FAILURE TO WARN WORKMEN.

It is actionable negligence for a coal-mining company to put to work at or under its coal tipple, in a place of danger, a carpenter, not regularly employed there and who was ignorant of the custom or practice of the company of sending coal cars down an inclined track under the tipple at irregular intervals, without giving him notice and warning of the danger or without adopting and enforcing reasonable rules for his protection, or without notice or warning to the employees; and the mining company must respond in damages for the death of the carpenter under such circumstances.


INSTRUCTION OF MINERS AS TO DANGERS.

The Virginia act of 1912 (Laws of 1912, p. 419) makes it the duty of a mine foreman or his assistant to see that every person employed to work in a mine shall, before beginning work therein, be instructed as to any unusual or extraordinary dangers incident to his work in the mine; and in an action for the death of a miner, on the ground of alleged negligence in the failure of the mine foreman to properly instruct a flagman, there can be no recovery where it appeared that the flagman’s death resulted from his attempt to get on the motor while in motion, though not instructed as to such particular danger,
but where it did appear that the flagman was instructed and told a number of times always to catch the rear of the trip.


MINER’S SCOPE OF EMPLOYMENT—INJURY AND LIABILITY.

GAS EXPLOSION CAUSING DEATH—MINER WITHIN SCOPE OF EMPLOYMENT.

A miner who had quit work because of a cave-in or squeeze occurring in a main entry of a mine between the place where he worked and the shaft, and who returned to the mine eight days thereafter for the purpose of seeing the mine manager and getting his time check and for the further purpose of getting his tools which he had left there when he quit work, and who on returning to the mine obtained his time check from the mine manager, who told him to go get his tools and assured him there was no gas in that part of the mine through which he must pass, is entitled to the protection of the Illinois Mines and Miners act (Laws of 1907, p. 329), and the mine operator is liable in damages for the miner’s death occasioned by an explosion of gas while, under the direction of the mine manager, he was in the act of getting his tools and the mine manager gave him the assurance that the place was safe.


MINER’S WORKING PLACE—SAFE PLACE.

MINER MAKING HIS WORKING PLACE.

A miner working as an airman was directed to make a certain defective stopping air-tight and in doing so dug a hole some 2 feet deep which loosened a rock that fell and caused the injury complained of, and who admitted that the digging loosened the rock and caused it to fall, can not charge the operator with negligence and render him liable for failure to furnish a safe place for the miner to work.


MINER’S WORKING PLACE—SAFE PLACE DOCTRINE.

The safe place doctrine has no application to a miner’s working place where the conditions are constantly changing by reason of the removal of coal by the miner, and where the duty of propping the roof or removing dangerous slate is not upon the mine operator but upon the miner himself, and a mine operator is not liable for the death of a miner caused by a fall of slate at his working place.

Stearns Coal & Lumber Co. v. Crabtree (Kentucky), 181 Southwestern, 615, p. 616, January, 1916.

APPLICATION OF SAFE PLACE DOCTRINE.

The safe place doctrine applied to miners making their working places does not apply to an employee in a mine acting as a mere "loader," and not a miner, but who was working under the very eye of the superior and was assured by such superior that the roof of the mine in which they had discovered the crack was not dangerous, and the superior directed the loader to go ahead and shovel the coal from under the roof; and the employee will be entitled to recover damages for injuries caused by a fall from the roof under such circumstances, although he had misgivings as to the safety of the place, as he had a right to rely upon the superior knowledge of his superior, unless the danger was so obvious that a reasonably prudent person would have refused to go on with the work.


CONTRIBUTORY NEGLIGENCE OF MINER.

CONTRIBUTORY NEGLIGENCE A QUESTION OF FACT.

Where an employee was killed while attempting to remove an old wire and substitute a new one on an unprotected shaft that was revolving at a rapid rate, the question of the employee's contributory negligence is one of fact for a jury to determine and not for the determination by a court as a matter of law, where it did not appear that the danger was obvious or imminent.


In an action by a miner for injuries caused by a loose car running down the track in the mine to the shaft and injuring the miner who was engaged in placing loaded cars upon the cage to be elevated, the question of the contributory negligence of the miner in handling and adjusting the loaded and empty cars at the foot of the shaft is a question of fact to be determined by the jury.


The question of the contributory negligence of a miner in an action for damages for injuries caused by empty cars while he was walking into a mine down the track and haulageway, and where no other way was provided for miners to enter the mine, and where he notified the rope rider that he was going into the mine, is a question of fact to be determined by the jury under all the circumstances of the case.

MINER'S KNOWLEDGE OF DANGER.

An intelligent and skilled miner who knowingly continued to work in a dangerous place, and by what he did rendered it still more dangerous, was guilty of such contributory negligence as will preclude a recovery of damages from the mine operator.


A driver of cars hauling coal out of a mine can not recover for injuries caused by jumping from his car induced by the fact that the mules he was driving were running away, where the jumping from the car was not necessary to save his life or to prevent injury to his person and where had he remained on the car he could have disengaged the mules from the car by removing the pin, or where if he had jumped from the car to the path on the opposite side of the track and where he was familiar with the place and must have known the danger in jumping from the car where there was so little space between the wall and the car.


VIOLATION OF RULES.

A coal miner injured by inhaling impure and poisonous air in a mine can not recover damages where it appears that the injuries complained of were caused by the miner's violation of a rule of the operator in returning to his working place immediately or within a few minutes after shots were fired.


MINER'S NEGLIGENCE PREVENTS RECOVERY.

In an action by an injured miner for damages his conduct is relevant upon the question of his negligence, and if it be shown that the accident would not have happened except for his concurring fault, then he can not recover, because by his own negligent conduct he brought the wrong upon himself, and the wrongs can not be apportioned.


MINER ACTING IN SUDDEN EMERGENCY—APPLICATION AND LIMITATION.

In an action by a car driver for damages for injuries caused by the jumping from his car when the mules he was driving started to run away, where the injury resulted from his jumping from the car at a dangerous place and in close proximity to the wall or side of the haulageway, he can not claim the protection of the rule that
justifies the acts otherwise negligent when done in an emergency or in sudden fright or fear, where it appeared that he did not jump from the car to save his life or to protect himself from personal injury, but was acting under the belief that he could sprag the wheels of the car and thereby stop the runaway mules.


In considering the question of a miner's contributory negligence in an action for damages for injuries it is proper to take into consideration the circumstances under which he was required to act; that is, whether in an emergency or deliberately, whether he was under a duty to save the property in his charge, whether or not he was in peril, and from all these determine whether or not the miner acted with that degree of care and prudence an ordinary man would observe under similar conditions.


FREEDOM FROM CONTRIBUTORY NEGLIGENCE.

USE OF ORDINARY CARE.

Ordinary care is defined to be that degree of care which a person of ordinary prudence under the particular circumstances is presumed to exercise to avoid injury; and such care is required to be in proportion to the danger to be avoided, and the fatal consequences that may result from the neglect; and an instruction embodying such a definition of ordinary care is not an erroneous statement of the law, nor is it an invasion of the province of the jury.

Vivian Colleries Co. v. Cahall (Indiana), 110 Northeastern, 672, p. 676, December, 1915.

INJURY IN COLLISION—NEGligENCE OF FELLOW SERVANT.

A miner operating a motor car in hauling coal out of a mine, injured by a collision of his motor with another, is not to be charged with contributory negligence where the motorman on the other motor was violating instructions and where such motor was not sufficiently equipped with lights for the injured motorman to see and avoid the collision.


MINER ACTING UNDER SUDDEN FRIGHT.

A miner who is suddenly exposed to great and imminent danger is not expected to act with that degree of prudence which would otherwise be obligatory, and he is not, under such circumstances,
necessarily chargeable with negligence because he failed to select the best means of escape in an emergency.


DISOBEDIENCE OF RULES—EFFECT OF CUSTOM.

In an action for damages by any injured miner against a mine operator, the operator can not defeat a recovery on the part of the miner by showing that the miner had, in violation of a rule, "kicked" his machine and thereby caused the injury, where it was a known custom among the miners to move their machines by kicking, and it is proper under such circumstances for a miner to prove the custom of violating the rule.

Fluhart Collieries Co. v. Meek (Kentucky), 183 Southwestern, 469, p. 470, March, 1916.

EFFECT ON NEGLIGENCE OF FELLOW SERVANT OR FOREMAN.

INCOMPETENCY OF FELLOW SERVANT.

Incompetency in a fellow servant denotes the absence of reliability in all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those who are required to associate with such fellow servant.

Texas & Pacific Coal Co. v. Gibson (Texas Civil Appeals), 180 Southwestern, 1134, p. 1137, December, 1915.

PLEADING KNOWLEDGE OF INCOMPETENCY.

In an action by a miner against a mine operator for injuries caused by the negligence of a fellow servant employed as an engineer, an allegation in the plaintiff's petition of negligence on the part of the operator in retaining the incompetent engineer is not necessary where the date of the employment can fairly be held to be the date of the accident, where there is a sufficient allegation of negligence in the employment of the engineer.

Texas & Pacific Coal Co. v. Gibson (Texas Civil Appeals), 180 Southwestern, 1134, p. 1136, December, 1915.

COLLISION OF MOTOR CARS IN MINE—MOTORMEN NOT FELLOW SERVANTS.

A miner operating a motor car in a mine, who was injured by another motor colliding with the one he was operating, is entitled to recover, though the injury was caused by the ordinary negligence of the person operating the other motor, as the motormen were not fellow servants within the rule prohibiting a recovery for the negligence of either.

FOREMAN INJURED BY NEGLIGENCE OF EMPLOYEE.

An electrical engineer for a mine, who for some time had been acting as civil engineer for the mine and as such made a survey of an old entry and located a new entry which was being driven into the mine, and who as foreman in charge of a gang of men was their superior in directing them in firing shots of dynamite, can not recover from the mine owner for an injury resulting from a shot so fired.

Indian Creek Coal Co. v. Walcott (Kentucky), 182 Southwestern, 631, p. 632, February, 1916.

NEGLIGENCE OF VICE PRINCIPAL.

The duty resting upon a coal mining company to exercise ordinary care to furnish its miner a reasonably safe place in which to work is nondelegable, and the employee of a mine operator whose duty it was to supervise and have timbered the roof for the miner’s protection and who undertook, shortly before the miner was injured, to discharge that duty was the vice principal of the mine operator, and any negligence on his part, or of those engaged with him, in propping or timbering the roof was the negligence of the mine operator.

Consumers’ Lignite Co. v. Grant (Texas Civil Appeals), 181 Southwestern, 292, p. 208, December, 1915.

RISKS ASSUMED.

MINER ASSUMES RISK OF HIS OWN NEGLIGENCE BUT NOT THAT OF FELLOW SERVANTS.

In an action under the employers’ liability act of Alabama for injuries or death of a miner it can not be said that the injured or deceased miner assumed the risk of the negligence of a fellow servant, which the statute requires the master to assume, as this would be to disregard the statute; but the statute never intended to take away from the mine operator the defense of contributory negligence, or to require the master to assume the risk of the servant’s injuring himself by his own negligence, though it does require the master or operator to assume the risk of injuries to the servant or miner where the injuries suffered are caused by the negligence of a fellow servant in any one of the cases mentioned or covered by the five subdivisions of section 3910, Code of Alabama of 1907.


MINER’S KNOWLEDGE OF DANGER.

An adult miner who is skilled and intelligent and who understands and appreciates the fact that the place in which he is requested to
work by another servant is dangerous and unsafe, and who knows that the work he is requested to do will render the place continually more dangerous, assumes, if he elects to continue at work in such place, all risks of personal injuries resulting therefrom.


MINER OBEYING UNAUTHORIZED PERSON—DANGEROUS PLACE.

An intelligent and experienced miner who takes orders from one not in authority can not hold the mine owner or operator responsible for personal injuries sustained in executing such unauthorized order, especially so where such miner was directed to work in an unsafe place, of which he had knowledge and where he knew that the work he was required to do would increase the danger, as in executing and obeying the order under such circumstances he assumed the risk.


KNOWLEDGE OF DANGER.

A coal miner employed to work about the bottom of a shaft where coal is raised by a self-dumping cage, a standard apparatus of the pattern in general operation in such mines, and who has knowledge that pieces of coal will fall from such a cage while the coal is being elevated and who had in fact previously been injured by falling coal from the cage, and who with such knowledge continues to work at the sump, assumes the risk incident to such falling coal and can not recover for an injury received while so engaged.


COAL FALLING FROM SELF-DUMPING CAGE.

Where a coal mining company used a self-dumping cage for raising its coal and the cage and apparatus in use was standard equipment in general use in such coal mines, and falling of coal down the shaft in the unloading of the cage was an ordinary incident, and in the use of such apparatus in all cases some coal escaped and fell down the shaft, the falling of the coal down the shaft in the unloading of the cage was an ordinary risk of the employment which the miner assumed in working at the bottom of the shaft at the sump, knowing that coal would fall.

RISKS NOT ASSUMED.

MINER RIDING ON COAL CAR—INJURY FROM DEFECTS.

A miner riding to his work in a coal car furnished by the coal company drawn over its tracks by a mule does not assume the risk of any danger growing out of the misconduct of the mule, where the mule is not under his control and is not driven by him but was driven by a regular driver.

Taylor Coal Co. v. Miller (Kentucky), 182 Southwestern, 920, p. 921, February, 1916.

MINER RIDING TO WORK ON COAL CAR—DEFECTIVE TRACK.

A miner who with other miners is regularly hauled to his work by the mine operator in a car drawn by a mule over its track does not assume the risk of defects in the track, causing, in connection with the misconduct of the mule, a derailment of the car, where he had nothing to do with the repair of the track, as it was the duty of the coal company to keep the track in such repair as to make it reasonably safe for the use to which it is put.

Taylor Coal Co. v. Miller (Kentucky), 182 Southwestern, 920, p. 921, February, 1916.

LIABILITY FOR NEGLIGENCE OF FELLOW SERVANT.

INJURIES FOR NEGLIGENCE OF FELLOW SERVANT—LIABILITY.

The fact that a sweeper in a coal breaker, employed to clean out screenings between the tracks, was killed through the negligence of another employee in charge of coal cars and who directed the number of cars that should be brought down for loading each day will not prevent a recovery under the Pennsylvania statute expressly providing that the negligence of a fellow servant shall not be a defense where the injury was caused by the neglect of any person engaged as superintendent, manager, foreman, or any person in charge or control of the workings, plant, or machinery.


EMPLOYMENT OF INCOMPETENT ENGINEER—KNOWLEDGE OF OPERATOR.

In order for an injured miner to recover damages against a mine operator on account of the employment of an incompetent engineer, it must be alleged and proved that the operator knew of the incompetency of such engineer or by the exercise of reasonable diligence could have ascertained such fact; and while it must be alleged that the operator knew of the incompetency of such engineer, or by the exercise of reasonable care could have known of such incompetency,
yet it is sufficient where a complaint alleges that the operator owed
the miner the duty to employ and place in charge of the engine a
capable, competent, cautious, and prudent man and that the engineer,
employed and placed in charge of the engine by the operator, was
not a competent, cautious, or prudent engineer and was reckless, and
in this the operator was guilty of negligence and such negligence
was the direct and proximate cause of the injuries complained of.

Texas & Pacific Coal Co. v. Gibson (Texas Civil Appeals), 180 Southwestern,
1134, p. 1135, December, 1915.

INDEPENDENT CONTRACTOR—INJURY TO EMPLOYEES.

LIABILITY FOR INJURY TO EMPLOYEE OF INDEPENDENT CONTRACTOR.

An action by a miner injured while being hauled into a mine in a
special trip of cars provided by the mine operator for that purpose
by reason of rock negligently permitted by the operator to project
out and over the track, the presence of which was unknown to the
injured miner, can not be defeated on the ground that the injured
miner was in the employ of an independent contractor operating
in the mine; and it was not necessary for the injured miner to allege
in his complaint that he was an employee of the defendant operator,
but it was sufficient to allege that the trip was to the miner's working
place and that he was in the mine at the operator's invitation and was
to be carried to a place where he would work.

Empire Coal Co. v. Bowen (Alabama), 70 Southern, 283, p. 285, November,
1915.

A mine owner and operator employed a partnership or firm under
a special contract to cut and shoot down and load on its cars the coal
at a stipulated sum per ton. The partnership employed its own
miners, and one of such employees operated a machine for cutting
down the coal in the room and place where two miners were working;
the seams extended across the room and were divided by a seam of
rock called the "middleman," and the miner operating the machine
cut down the lower seam of coal, causing the seam of rock to crack
and become loose, and which subsequently fell, striking the other
miner and inflicting the injuries complained of and for damages for
which the action was brought. The projecting seam of rock was
not timbered and made safe as the miner operating the machine cut
away the seam of coal beneath it; and under these circumstances
there was no such relation of master and servant between the mine
operator and the injured miner that imposed upon the operator the
duty of timbering and propping the particular piece of rock, but the
relation existing between the operator and the injured miner was
that of licensor and licensee, and the duty owing on the part of the
operator extended no further than to have its coal mine in a rea-
reasonably safe condition when the work of mining the coal was com-
nenced by such partnership as an independent contractor, and it did
not extend to the duty of keeping the mine safe where it became
unsafe by reason, and as a result, of changes made in such condition
by the miners employed by such partnership and rendered necessary
in the carrying on of the work of mining the coal. The duty of
remedying conditions made dangerous in the carrying on of the
work of mining the coal rested on the partnership and not upon the
mine operator, at least so far as the injured miner was concerned,
who was an employee of the partnership and engaged in the partic-
ular work. The obligation that the mine operator as licensor assumes
to a licensee is merely that the premises are safe for the purpose
which the invitation was extended; and the invitation in this instance
was to the miner to work in the mine as an employee of the partner-
ship in mining the coal, whose duty it was to remedy conditions
made dangerous by them or other servants in the progress of the
work.

286, December, 1915.

Section 98 of the Alabama act (Acts of 1911, p. 538), prohibits
miners working in a mine from riding on haulage trips, but the sec-
tion contains an exception to the effect that a special trip of empty
cars may be operated for the purpose of taking employees into and
out of the mine when the distance to and from their work exceeds
1 mile; and the word “employees” as used in the section includes
employees of an independent contractor working in the mine, and it
is not a violation of the statute for the mine operator to haul the em-
ployees of an independent contractor in and out of the mine.

Empire Coal Co. v. Bowen (Alabama), 70 Southern, 283, p. 285, November,
1915.

LESSOR NOT LIABLE TO EMPLOYEE OF LESSEE.

The owner and lessor of a coal mine is not liable for injuries to a
miner employed by the lessee of the mine while engaged in removing
the stumps and pillars left to support the roof, as the relation of
master and servant did not exist, and it owed neither the lessee nor
any of his employees any duty of inspection, and was liable to the
lessee and his employee only in case the owner and lessor exercised
bad faith with reference to the matter that caused the injury to the
miner when the lessor leased the mine to the lessee.

Imperial Jellico Coal Co. v. Bryant (Kentucky), 182 Southwestern, 205, p.
206, February, 1916.

The owner and lessor of a mine is not liable to an employee of the
lessee injured while engaged in removing the stumps and pillars
left to support the roof unless such lessor knew of the defective con-
dition of the stump at the time of the lease and such definite condition was latent and could not have been discovered by the exercise of ordinary care, and having such information the lessor withheld it from the lessee; and the lessor's liability can not be based on the implied fraud of withholding from the lessee knowledge in its possession of the latent defect, where it is not made to appear that the lessor knew of such latent defect.

Imperial Jellico Coal Co. v. Bryant (Kentucky), 182 Southwestern, 205, p. 206, February, 1916.

COAL COMPANY NOT LIABLE FOR INJURIES TO CONTRACTOR'S EMPLOYEE.

A person employed by a coal company to cut and remove timber from its land in order to prepare the same for mining is an independent contractor, where such person furnished his own sawmill and hauled the timber to the mill, and the coal company exercised no control over the manner of doing the work but merely furnished such person a list of the various sized pieces of lumber it desired and inspected the timber after it was sawed, and the coal company is not liable to an employee of such third person for injuries received in the prosecution of such work.

Carter Coal Co. v. Howard (Kentucky), 183 Southwestern, 244, p. 245, March, 1916.

DUTY AND LIABILITY TO TRESPASSER, LICENSEE, OR INVITEE.

TRESPASSING CHILDREN—DUTY TOWARD AND LIABILITY FOR INJURY.

A coal-mining company opened a wagon road on the side of a hill and near the top, some 75 yards up the hill from a clump of trees at the foot of the hill, under which children were accustomed to play on warm days. An employee was engaged in driving a team for the coal company, hauling material over the road, and found it necessary to remove rocks from the road that obstructed and interfered with its use, and the easiest way of getting rid of the rocks was to pitch or roll them down the hillside, and it was the habit of the employee to do this; and when so engaged and as the result of rolling or throwing a large rock down the hill it struck and killed a child playing under the trees at the foot of the hill. The employee at the time he pitched the rock from the road down the hill did not know that children were playing at the base of the hill and below the point from which the rock was so pitched; but the employee and the superintendent of the coal company knew that the children were in the habit of playing under the trees at the place where the child was struck by the rock, and had been warned not to pitch from the road to the hillside below any large rocks or other things that might roll down and hurt the children. Under such
circumstances the coal company can not escape liability on the ground that the child at the time she was killed was trespassing on the premises of the coal company, where the coal company knew that it was the habit and custom of the children to play under the trees and had been warned to take care not to injure them and where it knew the custom of the employee in rolling or throwing large rocks down the hill at the foot of which children played, though the children could not be actually seen by the employee at the time he pitched or rolled the stone producing the injury. The rule is that a property owner may not be obliged to keep his eyes open to discover the presence of children on his premises, but when he does discover them habitually intruding at a place that is unsafe for them, and particularly where he is warned not to injure them, the plainest dictates of humanity require that he should do something or say something to save them from probable injury or death. This is merely a new application of what is known as the "attractive nuisance" doctrine, which may well be extended to embrace the circumstances of this case.

Lyttle v. Harlan Town Coal Co. (Kentucky), 180 Southwestern, 519, p. 520, December, 1915.

CONTRACTS RELATING TO OPERATIONS.

RECOVERY ON VERBAL AND WRITTEN CONTRACTS.

An action may be maintained by a drilling company for drilling oil wells under two separate and distinct contracts, one a verbal contract and the other a written contract, embodying the same terms, subject matter, and conditions, except they were made and executed by different persons and where each was upon a sufficient consideration, and where the written contract was guaranteed, and both were complied with in the drilling of the oil wells.

Pierce Fordyce Oil Association v. Woods (Texas Civil Appeals), 180 Southwestern, 1181, p. 1183, December, 1915.

LIABILITY OF OPERATOR FOR EXTRA WORK.

A mining company determined upon the construction of two slopes from the surface to the coal face and caused plans and specifications to be made and received bids for the work. A contract was entered into by which the contractor should perform the entire work for a stated sum, but later the engineer added to the specifications provisions for the construction of a large number of shelter or man holes in the slope, and these, with other additions, were to be paid for as extra work, the price to be fixed by the engineer, the contractor agreeing to abide by the price so fixed by the engineer, "provided he commence work with a full knowledge of the same." On the completion
of the work and on failure of the mining company to pay the contractor the value of the extra work for the construction of the shelter holes it was proper for the contractor in an action to recover the value of such services to testify to the value and price of the work in connection with the construction of such shelter holes, where there was nothing to show that before entering upon the construction of such holes he was advised of the prices he would be allowed or that would be fixed by the engineer, and where the engineer had never informed the contractor that he would be allowed a certain price and no more for the construction of such shelter holes, but, on the contrary, where the engineer told the contractor to proceed with the work and keep an account of the cost.


CONTRACT BETWEEN COAL AND RAILROAD COMPANY—RECOVERY OF REBATES.

A coal company entered into a verbal contract with a railroad company by which it agreed to build a railroad from its coal fields to connect with the railroad, and as a part of the contract the railroad company agreed that it would pay to the coal company the cost of the rails and fastenings used in the construction of the road by allowing the coal company $2 on each carload of coal shipped from its mine over the road after the mining road had been put in operation. In an action by the coal company against the railroad company to recover the rebate of $2 per car on each car shipped from the mine the railroad can not avoid liability on the ground either that it did not enter into such a contract or that it had made a new agreement with a purchaser of the coal company's property, where in the sale of the property of the coal company it expressly reserved the right to recover from the railroad company such rebates and where the railroad company's contract with the purchaser had reference wholly to after transactions.

Cumberland Railroad Co. v. Gibson-Carr Coal Co. (Kentucky), 182 Southwestern, 218, p. 219, February, 1916.

NUISANCE.

POLLUTION OF WATER FOR PERIOD EQUAL TO STATUTE OF LIMITATION.

The exclusive enjoyment of water or any other easement in a particular way for a length of time which is the period of the statute of limitations, enjoyed without interruption, is sufficient to raise a presumption of title as against the right of any other person which might have been, but was not, asserted. This rule applies to a pollution of the waters of a spring by reason of the operation of a coal
mine and deprives the land owner of a right to injunction or damages where he has acquiesced in such pollution for the period of the statute of limitations.


POLLUTION OF WATER—PLEAS OF USER INSUFFICIENT.

In order to establish a prescriptive right by a mining company to pollute the spring waters of an adjoining land owner, the user must be open, adverse, and continuous, and must be with the knowledge and acquiescence of the land owner whose right is invaded, and the use must be such as to produce a uniform result during the period of adverse claim or holding; but the mere use by one of another’s land or water by a pollution of the same or by overflowing the land for the period necessary to bar recovery, in such a way, a portion of the time, as not to be injurious or destructive to the owner, will not authorize the tacking to that period succeeding years in which the burdens upon the owner were increased or enlarged to the extent of producing injury or destruction, although the method of user by the adverse claimant of the cause producing the alleged pollution may be the same. The fact that a mine owner flowed water from its mine charged with filth, iron rust, alum, dynamite, and powder over the lands of an adjoining property holder and into his spring and branch water used for domestic purposes and for stock adversely for 10 years, as alleged and as claimed, does not show that the results to the land owner were uniform or the same during such period. While the use may have been the same, the results may have been different after a certain length of time. The spring may have been used all the time and in the same manner, but the pollution of the water may have greatly grown so as to render it unfit for use during the last period, but which was not the case during the first part of the time, and the deposits may have been harmless at first but greatly increased to the extent of injuring or destroying the value of the land upon which it was permitted to accumulate.


POLLUTION OF WATER—ACQUIESCENCE BY LAND OWNERS.

A complaint in an action for damages against a mining company for polluting and contaminating water, which alleges that for many years the plaintiff and his family had been possessed of and had resided upon a certain farm, and that in a certain field maintained for pasture there was a certain spring branch that prior to the acts complained of afforded abundant pure water for stock and domestic purposes, and that the defendant corporation in operating its mines and
mining coal from lands above and adjoining plaintiff's land permitted volumes of water charged with filth, iron rust, alum, dynamite, and powder to flow over and upon the lands of plaintiff and into such spring branch and thereby pollute and contaminate the water therein until the same was wholly unfit for use, either for stock or for domestic purposes, and by reason thereof the lands of plaintiff had been rendered greatly less in value and the rental thereof decreased, sufficiently shows but one continuous wrong as distinguished from separate and distinct overflow. A land owner suffering injury from a nuisance is not compelled to sue as for the creation of the same, but can recover for injury caused by the maintenance thereof; but if he sits supinely by and permits another to use his water or divert or pollute the same without taking action for 10 consecutive years, he is precluded from recovering damages growing out of the creation or maintenance of what is termed a private nuisance as contradistinguished from a public nuisance.

MINING LEASES.

LEASES GENERALLY—CONSTRUCTION.

CONSTRUCTION OF CONTRACT TO LEASE.

An instrument by which the parties named covenanted and agreed to bind themselves to lease to another party named, all the iron ore of every kind and being in and under any upon a certain described tract of land, together with all rights of way for railroads, tram-roads, and haul roads, and the privilege of building washers and a store and dwelling houses, and other buildings necessary for mining, removing and shipping ore, for a stated term with a stipulated royalty on each ton of ore, and further stipulating that the instrument was to become null and void in a stated time unless such second party commenced to develop the property, contains all the essential elements of a valid executory contract, being executed by competent parties, having a legal subject matter, and a valuable consideration and mutual assent, and is in no sense an option, nor is it a mere memorandum of incomplete negotiations, in which the minds of the parties never met, and from which either party could recede at will.


PROFITS NOT RECOVERABLE AS DAMAGES.

A lessee or a sublessee of a mine who was evicted therefrom by another claiming a superior right or title can not recover of the wrongdoer his anticipated profits where they are speculative and dependent upon uncertainties and changing circumstances.


CONSTRUCTION—LIQUIDATED DAMAGES OR PENALTIES.

A mining lease giving the right to dig, mine, prospect, and mill and remove all ores and minerals on a certain described tract of land, provided that the cessation of the work on the premises for a period of 30 days continuously by the lessee, unless unavoidably prevented, or the failure to pay the sum of $15 per day, payable each week, for each day's cessation over 30 days, should work a forfeiture of the lease, indicates that the $15 per day for cessation of work was in-
tended as a penalty and not as liquidated damages in the face of an express contract.

Ross Tin Mine v. The Cherokee Tin Mining Co. (South Carolina), 88 South-eastern, 8, p. 9, February, 1916.

RECOVERY OF PAYMENT ON FAILURE TO EXECUTE LEASE.

A prospective lessee may recover from a coal company a payment made at the time a lease was agreed upon and in part consideration of the execution of the proposed lease where, owing to some misunderstanding or lack of agreement, the lease never was completed and executed.

Raccoon Coal Co. v. Falkner (Kentucky), 181 Southwestern, 1106, February, 1916.

LEASE PROVIDING FOR ROYALTIES.

The coal industry recognizes two general classes of mining leases: (1) The lease which requires the lessee to pay the lessor a certain amount of money at stated intervals as a "dead rent" irrespective of the productiveness of the mine; and (2) the payment of royalty on the quantity of coal mined, with the requirement that the stipulated amount be mined within a stated period of time, or upon failure to do so pay a certain amount of money equal to the income that would have been received by the lessor had the coal been mined. A lease providing that the lessor should receive a stipulated sum on each ton of coal mined, the minimum production not to yield less than $600 per annum, with provisions for a like sum per annum for failure to mine, falls within the class that is based upon royalty.


CONSTRUCTION—LEASE TO WORK AND LEASE TO EXPLORE.

A lease executed for the purpose of exploring for, mining, and taking out merchantable mineral presupposes the existence of the same, and where it appears that no such mineral is to be found the purpose of the lease fails, and the lease implies that the mineral required to be mined exists in minable quantities, and when it does not the scheme fails and the lessee should not be charged with the consideration; but this rule does not apply where the leased premises merely proves to be less valuable than supposed.


ROYALTIES DUE—SATISFACTION OF NOTES GIVEN FOR ROYALTIES.

In an action on a note given by the lessee to the lessor of a coal mine representing past due royalties, the consideration being the acquisition or use by the maker of the notes of certain mining equip-
ment and improvements left on the mining premises by a former lessee, together with the execution of a new lease by the lessor to the lessee, it is proper for the lessee to prove the value of various improvements made by him on the mining property, including such as were not sold under execution and which passed into the lessor's hands as assets of the prior lessee, where by the terms of the lease they belonged to the lessee, though subject to the lessor's lien for royalties; and if the debt had in fact been satisfied by property of the former lessee, then the lessor has no right to recover.


REPRESENTATION AS TO BOUNDARIES—ESTOPPEL.

A lessee of mining property who represented to a lessee of adjoining mining property that his shaft was sunk in or near the center of his tract and which representations led such adjoining lessee to sink his own shaft in a place convenient for mining a strip of land believed to be covered by his lease, but which was in fact covered by the lease of the first lessee, is not estopped from enjoining such second lessee from mining the strip of land in controversy, as there was no intentional deception by the first lessee, or such gross negligence as to amount to fraud, and there was lack of knowledge on the first lessee's part as to the location of the lease and an intention to deceive the other lessee into acting to his injury, and the doctrine of estoppel can not be applied to the extent of transferring the title of the first lessee.


AGREEMENT AS TO USE OF TIMBER—CONSTRUCTION AND EFFECT.

A mining lease reserved to the lessor all timber on the leased land over and above a certain size or girth, and authorized the lessee to use all other timber on the premises for mining purposes, reserving to the lessor a certain stated time in which to remove the timber reserved. The lease further provided that in the event the royalties on coal mined should amount to $400 per month, then the lessee should be entitled to all the timber upon the leased premises. Subsequently the lease was changed by abrogating the provision as to royalties reaching $400 per month, and the amended lease provided that the lessor should only cut and remove such timber from the leased premises as he might need for his own use in buildings and provided that the lessee might use such of the timber as it should need, the purpose of the change in the lease being to supply the lessee in his mining operation with timber within convenient reach and that he could purchase when needed, and for this purpose restricted the right of
general sale by the lessor. An assignee of the lessee succeeds to all his rights and may enjoin the original lessor from cutting and selling timber on the leased premises in violation of the terms of the lease.


ACTION FOR ACCOUNTING—EFFECT OF RELEASE OF CLAIMS.

In an action for an accounting under a lease for the operation of certain coal lands, a release of all claims and damages executed by the complainant in favor of the defendant mining company is prima facie a complete bar to the action.


LEASE OF QUARRY—ABANDONMENT.

The failure of a lessee under a lease to operate a quarry for a period of 20 years, which could reasonably be said to be a working of the quarry or the making of preparations to that end, is sufficient to justify a court in concluding that there was an intention on the part of the lessee to abandon the lease, but an abandonment can not be brought about by the action or inaction of the lessee alone, as there must be some act or attitude on the part of the lessor indicating his acquiescence in the abandonment.


RIGHT TO REMOVE ALL BUILDINGS AND MACHINERY—FIXTURES.

Under a lease giving the right to remove any and all buildings and machinery from the leased premises within a reasonable time after the termination of the lease, any property placed on the premises by the lessee remains personal property and does not become a fixture, though actually affixed to the soil.


OWNERSHIP OF FIXTURES.

A lessor of mining premises can not hold and retain certain mining machinery placed on the premises for the purpose of improving the mining operations by a sublessee, under an agreement between the lessee and such sublessee on the abandonment of such property by the sublessee, where the original lease provided that the lessee should have a reasonable time after forfeiture of the lease in which to remove all buildings and machinery placed thereon.

RIGHT TO REMOVE MACHINERY AND BUILDINGS—REASONABLE TIME.

A mining lease provided that the lessee was to have a reasonable time after the termination of the lease for the removal of all buildings and machinery from the leased premises. On the abandonment of mining operations by the lessee, the lessor notified the lessee of his intention to forfeit the lease and that the lessee must vacate the premises and remove all buildings, mining machinery, and other structures thereon, and that upon failure to remove the same within 60 days from the date of notice, the property would become the property of the lessor and the lessee would be prohibited from there-after removing the same. Owing to the fact that there was but little demand for such mining machinery in the particular mining district where the premises were located, and there was a dispute between the lessor and the lessee as to the ownership of a part of the machinery on the premises, and for these reasons the lessee was delayed in making a sale of the mining machinery, a delay of 62 days on the part of the lessee before commencing to remove such mining machinery is not an unreasonable time under the circumstances, and especially where the leased premises were of no rental value and the lessor was in no wise injured by the failure of the lessee to remove the mill and machinery from the premises. The lessor could not arbitrarily fix a time within which the machinery must be removed as against the provisions of the lease itself.


MINING MACHINERY—RIGHTS OF MORTGAGEE OF LESSEE.

A mining lease provided among other things that the lessee was to have the right to remove any and all buildings and machinery from the leased premises within a reasonable time after the termination of the lease, whether by forfeiture or otherwise. Subsequently the lessee, a mining corporation, sublet the leased premises to another mining corporation in consideration of the payment of a royalty of 5 per cent and in further consideration of the promise on the part of the sublessee to furnish additional equipment, including a boiler and engine, to operate or to mine the premises. The sublease also provided that such additional equipment should at the expiration of the sublease become the property of the original lessee mining company. Some time thereafter the sublessee surrendered its lease and abandoned the property, leaving all machinery and equipment on the premises, and thereafter the original lessor served notice on the original lessee that its rights under the lease were forfeited and that it must vacate the premises and remove all buildings, mining machinery, and other structures belonging to it, and that
upon failure to remove the same within 60 days such property should become the property of the lessor and the lessee would be prohibited from thereafter removing such property. Under such circumstances a mortgagee of the mining machinery and equipment has no greater rights in the property than his mortgagor, the original lessee.


ENJOINING OPERATIONS—RECOVERY OF DAMAGES.

A lessee of mineral land operating under his lease, who made a statement to a subsequent lessee as to the location of his shaft that induced such subsequent lessee to construct a shaft at a place most convenient for mining a particular strip of land, which subsequently proved to be included in the lease of the first lessee, can not after an action in trespass to have the boundaries determined, in an action to enjoin such subsequent lessee from mining the particular strip, recover damages for the value of the ore mined by such second lessee prior to the trial of the action for trespass, though he may enjoin further operations by such second lessee.


COAL LEASES.

COAL MINED UNEQUAL TO MINIMUM ROYALTY—LIABILITY OF LESSEE—RIGHT TO CREDIT FOR EXCESS.

Where the royalty per ton on coal actually mined under the provisions of a coal lease does not produce the minimum royalty in any one year, the payment of the gross sum required by the lease may be enforced, together with the royalty per ton on the coal actually mined during any such year; and the lessee is entitled to credit under such circumstances for the excess paid only in a subsequent year where the royalty per ton produced does exceed the stated sum, and when it does the excess over the stated sum paid in the previous year must be credited to the lessee.


PRACTICAL CONSTRUCTION ADOPTED BY COURT.

When the provisions of a coal lease are so ambiguous as to make it impossible from the language of the lease to determine from what date a stipulated gross amount in lieu of royalty was to be paid, and where within a short time after the first year elapsed and less than a year from the completion of the shaft the lessee paid the lessor such stated sum, the interpretation thus placed on the lease by the parties before the litigation arose is entitled, under the circumstances, to
great weight and will be treated by a court as a construction placed thereon to the effect that the lease was to yield such stated sum in lieu of royalties to the lessor from the date of its execution.


MINIMUM ROYALTY NOT PAYABLE AFTER COAL IS EXHAUSTED.

A coal lease provided among other things that it was to continue for 15 years unless the minable coal on the leased premises would be sooner exhausted and the annuity stipulated for was not to be paid after the exhaustion of the coal, and provided for the payment of a stipulated amount annually, on failure of the lessee to mine sufficient coal to pay royalties equal to such stated sum, does not require the lessee to pay such stipulated sum after the minable coal in the land is mined out.


CONDITIONAL MINIMUM ROYALTY.

A distinction is made between a lease of a workable and a marketable mine and a lease to explore for minerals. As to the workable and marketable mine the only elements of uncertainty is the quantity of mineral, and the lessee takes the risk by an unqualified covenant to pay a fixed minimum royalty; but under a covenant to pay a fixed minimum royalty unless the minable mineral be sooner exhausted, the minimum royalty is not payable after the exhaustion of the mineral and can not be enforced by the lessor.


POWER OF LESSOR TO FORFEIT.

A mining lease to continue for a period of 15 years, unless the minable coal in the leased premises and in adjoining lands held under lease by the lessee can not be forfeited in an action by the lessor for a failure to pay the annual minimum royalty after the minable coal in the leased premises has been exhausted, where the minable coal in the adjoining lands has been exhausted.


OIL AND GAS LEASES.

CONSTRUCTION BY COURTS.

In determining the scope and legal effect of an instrument giving rights and privileges to take oil and gas, it is immaterial by what name it is called, whether a lease, license, sale, contract, grant, deed
or conveyance, a right to land, or other name, a court, in an action involving the construction of the instrument, will look to the language used aside from the terms used and determine its legal effect. Oil and gas contracts and leases are apart by themselves and partake of the nature of both sale and lease and have features which may not be applied to either, and the code law referring to sales and leases can not be unreservedly applied to leases of this class.


**INDEPENDENT COVENANTS.**

A covenant in an oil and gas lease for quarterly delay rentals, performed in part only, is separate, distinct, and dissociated from a covenant to drill or pay rentals, and performance or part performance of the former covenant does not excuse nonperformance of the latter.


**MINING CONTRACT AS LEASE.**

Mineral leases, including oil and gas leases, will be construed as leases and not sales, and the law with reference to leases will be applied thereto in so far as it may be applied. Until the legislature shall have passed laws specially applicable to the industry of mining, which is a new one in this State, the parties engaged in these pursuits and the courts of the State will adhere to the jurisprudence on the subject and treat mineral contracts as leases.


**INTEREST OF LESSEE IN OIL AND GAS—POWER OF LESSOR TO RELEASE.**

A lessee in an oil and gas lease has no vested interest in the oil and gas contained within the land leased where there has been no actual production, but he has the exclusive right to enter thereon and explore therefor during the term granted, and if oil or gas is obtained the lessee has the right to appropriate to its own use the oil and gas according to the terms of the lease; and the lessor can not re-lease the land for the same purpose, so long as the lessee complies with the provisions of the lease.


**OIL AND GAS AS SUBJECT OF LEASE OR SALE SEPARATE FROM LAND.**

A landowner who by a written instrument grants, bargains, sells, conveys, and delivers all the oil and gas under a certain described tract of land, together with the right of ingress and egress for the
purpose of drilling, mining, and operating for the oil and gas, for a certain stated valuable consideration, can not on an assignment of such instrument by the grantee or lessee maintain an action to cancel and set aside such lease or conveyance and have the same declared null and void on the ground that oil and gas can not be made the subject of sale and that they are not susceptible of ownership and sale separate and apart from the land sold, where there was none discovered at the time of the execution of the instrument.


CONSTRUCTION OF LEASE—ABSENCE OF COVENANT TO PAY RENTAL.

A gas lease provided that the lessor was to have one-eighth of all the oil produced from the premises and $100 a year for each gas well drilled, and provided that one well should be drilled every 60 days after the completion of the first well until the six wells were completed; and if no well was completed within 60 days from the date of the lease then the lease should become null and void, unless the lessee pay the lessor at the rate of $15 for each month such completion is delayed, does not give the lessor or his assignee the right to sue and recover rentals for delay in putting down any additional wells, where less than six were drilled, as the lease contained no absolute requirement that the lessee should pay any rent, the lease only to be void unless rent should be paid.


CONVEYANCE OF OIL IN PLACE IS NOT A LEASE.

A written instrument recited that the "lesser does hereby grant, sell, convey, and lease unto the lessee all the oil and gas in and under" the lands described, together with the right of ingress and egress, and possession for the purpose of operating the same, and contained an agreement on the part of the lessee to deliver to the lessee one-eighth of all oil produced, and stated further that "lessee agrees to begin operations for the drilling of a well upon the above-described premises within six months from the date hereof, or thereafter to pay to the lessee the sum of 50 cents per acre for one six months' extension of the time for beginning such operations, said payment to be made in advance, and such payment to be made six months from this date, unless operations for a well have been begun at said time. Said payment to be accepted as a rental and complete remuneration to lessor for a delay of six months in beginning said operations." Such an instrument is not in fact a lease contract, but is a present grant of
title in fee in the oil and gas in the ground; and an assignee of the lessee who has not expressly assumed the obligations or covenants of such original instrument is not bound by the terms thereof. The agreement on the part of the original lessee to pay the sum of 50 cents per acre for the six months' extension of time for beginning operations is not a covenant running with the land and is not obligatory upon the assignee, and can not be recovered in an action by the lessor against the lessee; but upon the failure of either the original lessee or an assignee of the lessee to develop the land according to the agreement, or on failure to pay the sum stipulated as a consideration for the extension of the rights to the original grantee, or for a failure to account for the one-eighth part of the oil, the grantor may forfeit the lease and by proper action free his land from the incumbrance as the covenant to deliver one-eighth of the oil is a covenant running with the land and is binding on the assignee.

Pierce Fordyce Oil Association v. Woodrum (Texas Civil Appeals), 183 Southwestern, 12, p. 17, February, 1916.

See Strother v. Mangham (Louisiana), 70 Southern, 426, December, 1915.


POWER OF LESSEE TO SURRENDER LEASE.

A lessor may refuse to accept a surrender of an oil and gas lease, though the lease contains a clause giving the lessee the right to surrender, when the lessee denies liability on an unperformed covenant of the lease to be performed by him in lieu of development, but in postponement of operations; and the lessor's refusal is justified when the lessee denies liability on the covenant broken, and where the surrender expressly states that the acceptance thereof will operate as a waiver of performance of the covenants and conditions broken.


LESSEE'S RIGHT TO DAMAGES WITHOUT EVICTION.

A lessee in an oil lease can not maintain an action against the lessor for damages on a covenant in the lease to the effect that the lessor will protect the lessee against the claims of any party, should any contest ever arise as to the ownership of the premises, where it appears that the lessee abandoned the leased property on the commencing of an action by a third person against the lessor to quiet his title to the leased premises, and where there had been no actual eviction of the lessee.

COMPENSATION FOR POSTPONEMENT OF OPERATIONS—EFFECT.

Payments made pursuant to the stipulations of an oil and gas lease, as compensation for periodical postponements of operations of the leased premises, will bar a recovery for such delay, but do not preclude recovery for the breach of other independent covenants of stipulations in the lease.


RIGHTS AND LIABILITIES OF ASSIGNEE.

While the assignee of an oil and gas lease is not liable for the consequences of the failure by his assignor to drill a well on the leased premises before the assignment of the lease, yet if the assignee continues to pay the stipulated delay rental in lieu of drilling after the acceptance of the assignment after he acquires title, he is liable for the consequence of his own failure.


ASSIGNMENT OF FUTURE RENTS AND ROYALTIES BY LESSOR—PARTIES.

Where the lessor in an oil and gas lease assigned all the delay rentals and oil and gas royalties provided for by the lease, and authorized the lessee to pay all such rentals and royalties to such assignee, such assignee is a necessary party to a subsequent action by the lessor, whereby he seeks an adjudication limiting the oil and gas interests to one only of several parcels of leased premises.


CONVEYANCE OF OIL AND GAS IN FEE—LIABILITY OF ASSIGNEE.

A conveyance by which a land owner grants and conveys unto a person designated as "lessee" all oil and gas in and under the described land together with the right of ingress and egress and the necessary possession for operation, and in consideration of which the lessee is to deliver to the grantor or lessor one-eighth part of all the oil produced, stating the time in which the lessee shall begin drilling operations and requiring a payment in advance for a certain stated period on failure of the lessee to drill, and containing a defeasance clause to the effect that the failure on the part of the lessee in any material way to comply with the terms of the lease gives the grantor or lessor the option to terminate it, is in effect a conveyance of an interest in the land and a present grant of title in fee in the oil and gas in the ground, and an assignee of the lessee who has not assumed
any of the obligations or covenants of the original instrument is not bound thereby.

Pierce Fordyce Oil Association v. Woodrum (Texas Civil Appeals), 183 Southwestern, 12, p. 15, February, 1916.

LIABILITY OF LESSEE FOR NEGLIGENCE OF SUBLESSEE.

A lessee under an oil and gas lease who enters into a contract with an independent contractor for the drilling of an oil well upon the leased premises is liable to the lessor for damages to the leased property caused by the negligence of such independent contractor in drilling such well.


RECEIVER APPOINTED TO PROTECT PROPERTY AND HOLD REVENUES.

A court is justified in appointing a receiver in a suit to determine the validity and the priority of oil and gas leases, for the purpose of protecting the property and holding the revenues from production, pending the final result of the case.


SALE SUBJECT TO LEASE AS AN ADMISSION OF ITS VALIDITY.

The fact that a lessor, pending an appeal by him from an adverse judgment in an action brought to annul an oil and gas lease, sold to a third person an undivided one-half of the oils and minerals under a part of the land in controversy and conveyed the same by an instrument specifying that the land had been leased to the defendant named in the action and judgment, from which he had appealed, and the fact that the sale was made subject to the lease so mentioned and included an undivided interest in the royalties due under such lease, will not authorize a dismissal of the appeal on the ground that the lessor had acquiesced therein, though an admission of the validity of the lease and the correctness of the judgment appealed from is ground for confirming the same, but is not ground for the dismissal of the appeal.


LESSOR CAN NOT ANNUL AFTER PART PERFORMANCE.

Where the lessee or grantee holding under an oil and gas lease has complied with his obligation to drill a well and the lessor has accepted the rent or royalty according to the terms of the contract
or lease, he can not annul the contract or lease because of its failure to stipulate the time within which the lessee was to commence drilling the well.


PERFORMANCE BY LESSEE—RIGHT TO REMOVE MACHINERY.

Where a lessee has performed his obligations expressed in an oil and gas lease, the lessor can not annul the lease merely because it contains the potestative condition that the lessee should have the right at any time to remove from the leased premises the machinery and improvements placed thereon by him.


CONSIDERATION FOR DELAY IN DEVELOPMENT.

A lessee in an oil and gas lease, as a consideration for the option to drill for oil and gas upon improved lands, paid cash in advance an amount equal to 3 per cent of the market value of the lands for one year’s time within which to exercise his option, and paid a like amount in quarterly payments in advance during four years for quarterly extensions of time. In an action by the lessor to cancel the lease it can not be said that the consideration is not “serious” or that it is “out of all proportion to the value of the thing,” within the meaning of the Louisiana Civil Code. Whether under such circumstances the consideration is adequate or inadequate is a question with which the courts have no concern, where neither error nor fraud is alleged and shown.


FORFEITURE—EXPRESS COVENANT INCLUDES IMPLIED COVENANT.

There can be no implied covenant as a ground of forfeiture for an oil and gas lease, where under the express terms of the lease the right to declare a forfeiture should arise upon the failure of the lessee to drill or pay rental, and therefore a forfeiture can be enforced only where the lessee neither drills nor pays the stipulated rental in accordance with the terms of the lease, as a cause of forfeiture being expressly mentioned none other can be applied.


FORFEITURE—ACCEPTANCE OF RENTAL—ESTOPPEL.

A lessor in an oil and gas lease who has received a substantial cash consideration as the consideration for drilling on the leased premises as many oil and gas wells as the lessee may desire can not
retain the money as the consideration for one well that has been drilled and demand that the lease be annulled or forfeited as to the undeveloped area of the leased premises, on an allegation that the lessee has violated an implied obligation by failing to develop the premises fully.


PAYMENT OF RENTAL BY DEPOSIT IN BANK—EFFECT ON RIGHTS OF PARTIES.

An oil and gas lease expressly provided that the lessee should pay the lessor the sum of $50 for each and every year that the drilling of a well was delayed and that the lessee should deposit the stipulated sum in a certain bank to the credit of the lessor. The deposit of such payment in the bank named according to the terms of the lease prevents a forfeiture, and when so made the money becomes the property of the lessor and can not be lawfully paid to any other person except upon his order, and the lessor can not avoid the effect of such payment or deposit by refusing to withdraw the same from the bank in which it was so paid by the direction of the lease.


PAYMENT OF STIPULATED AMOUNT PREVENTS FORFEITURE.

A lease of land for 10 years for oil and gas purposes provided that the lease should be void if no well was drilled within four months from the date of the lease, unless the lessee should pay the lessor the sum of $50 for each and every year that the drilling of such well was delayed; and payment of such sum by the lessee to the lessor according to the terms of the lease will prevent a forfeiture and continue the lease in force during the year for which such payment was made.


VIOLATION OF IMPLIED OBLIGATION TO DEVELOP—PERFORMANCE—PROOF.

The lessor of an oil and gas lease is not entitled to a cancellation or forfeiture of the lease or contract for the violation of an implied obligation on the part of the lessee to develop the leased premises, in the absence of an express provision for such forfeiture; and where the lessor had received an adequate consideration for the lease; and especially where the lessee had fulfilled the implied obligation and had developed the land to a reasonable extent, and the questions whether the premises have been developed and the implied condition has been complied with are questions of fact for a court to decide from the evidence in the case, and the rights of the lessee
can not be divested merely because of a difference of opinion on that subject between the lessor and the lessee, in the absence of proof or allegation of fraud or bad faith.


OPTION TO DRILL—CONDITION.

A contract lease by which the owner of land granted to a lessee for certain stated considerations the right to drill for oil or gas within one year and to extend the time thus granted, quarter by quarter, until it should reach a limit of five years, contains no potestative condition by reason of its failure to impose upon the lessee any obligation to drill, as it is not within the contemplation of the lease that he should drill unless he so elects; and the purpose of the lease is to confer the right to drill without imposing the obligation, and such a lease does not contravene the law of the State.


TITLE OF LESSOR—RIGHT TO PARTITION.

A lessee in an oil and gas lease can not contest the title of his lessor as an owner in indivision with others and compel him and his co-owners to make a judicial partition in kind of the leased property.

MINING PROPERTIES.

STATUTORY LIENS.

RIGHT TO LIEN ON PLACER CLAIM.

Under section 4028, Colorado Revised Statutes of 1908, the words "deposit yielding metals or minerals," clearly include gold-bearing sands or gravels, which are commonly known as placers, and the provisions of the section giving liens to persons of designated classes are, by this section, made to apply to persons who shall furnish materials or machinery "upon, in, or for" any improvement, "of or upon such mine, deposit," etc., and this includes placer mines.


LIEN ON DREDGE BOAT.

A dredge boat measuring 85 feet long, 30 feet wide, and 6 feet deep, and weighing with its machinery 725,000 pounds, floated in an artificial pond, and from one side or under which it took sand, gravel, and rocks from a placer mining claim, and these after being washed were deposited at the rear of the dredge, which moved forward as the work progressed, is a structure intended for the permanent working of the deposit and is an improvement "of and upon" the gold-bearing deposit essential to working it and as much a part of it as is a mill on a lode claim, and a person furnishing machinery for such dredge boat is entitled to a lien thereon under section 4028, Colorado Revised Statutes, 1908.


MACHINERY FOR DREDGE BOAT—LIEN ON TITLE OF PLACER CLAIM.

A person furnishing machinery or material for a dredge boat used in working and developing a placer mining claim is entitled to a lien on the claim itself, as well as on the boat, where the owner of the claim in a lease with an option contract to purchase required the lessee to construct the dredge boat with which to mine the placer claim, and the court under such circumstances is justified in assuming that the placer claim is of greater value with the dredge boat on it and equipped for recovering the gold than it was before the dredge boat was built.

LIABILITY OF LESSOR AND VENDOR.

Under the mechanics' and miners' lien law of Washington, Remington and Ballinger Code, sections 1129 and 1130, where the owner requires his vendee to improve the property and where he is to enjoy some of the profits, he must either take indemnity against liens or bear the burden; and if laborers' liens under such circumstances can be defeated a numerous class of both laborers and supply men must suffer loss, and mine and land owners will be enabled to develop or improve their properties through third persons, under contracts of which the principal feature is their development or improvement. Such was not the intention of the legislature.


FORECLOSURE ON LEASED MINE—LIABILITY OF LESSOR.

In an action to foreclose a miner's lien taken for services the court may presume that the lessor or the owner of the land is exempt from liability and that the lessee's interest only is liable; but though the instrument is a lease in fact, it may contain provisions that ought to be construed as making the lessee or vendee an agent to create something which the owner or lessor himself desires for the property, and which tends to bind his own interest; and in such case a court is justified in making the lien bind the lessor's interest as well as that of the lessee.


FORECLOSURE OF LIEN—SUFFICIENCY OF COMPLAINT.

Section 2491 of the Kentucky statutes requires that a petition to foreclose a miner's lien must show that it was filed within 60 days after the mine was suspended, and it must show that the claim was for wages due within six months before that time.

Gugenheim v. Watkins (Kentucky), 181 Southwestern, 357, p. 359, January, 1918.

OPTION SALE—OWNER'S INTEREST SUBJECT TO LIEN.

An owner of a mining claim who gave an option on the mining property at a stated sum and the purchasers in return obligated themselves to begin mining with a certain number of shifts of miners per month, and to pay to the seller as royalty a certain stated per cent of the gross receipts until the first installment of the purchase price was paid, the contract also providing for the usual forfeitures in case of failure to pay the royalty or to perform other conditions of the contract, and containing an agreement on the part of the purchasers to execute a bond against liens, thereby makes his title to such
MINING PROPERTIES.

mining property subject to the liens of miners employed by the purchaser, though the contract was recorded and a notice posted on the property by the owner disclaiming any liability for liens.


PRIORITY OF MORTGAGE.

Section 2487 of the Kentucky statutes provides that laborers shall have a lien upon the property of a mining corporation when the corporation has made an assignment for the benefit of creditors, or when the property has come into the hands of any executor, administrator, commissioner, receiver, trustee or assignee, or has in any way come to be distributed among creditors, and judgments in favor of laborers, enforcing their liens against the property of the mining corporation, are prior and superior to a mortgage executed by the mining corporation.


SUSPENSION OF BUSINESS—PRIORITY OF LIENS.

Where the property of a mining company that has suspended becomes subject to the liens of miners for labor performed during the six months preceding, such liens are prior and superior to a mortgage executed by the mining corporation, under section 2487 of the Kentucky statutes giving laborers a lien upon the property of a mining corporation, when the property of the corporation in any wise comes to be distributed among creditors whether by operation of law or by the act of the owner or operator; and under section 2490, providing that when a mining corporation shall suspend, sell, or transfer its business, or when the property shall be taken in attachment or execution, the liens of laborers shall attach as fully as under section 2487.


TAXATION.

SPECIAL TAX ON ANTHRACITE COAL—CONSTITUTIONALITY OF ACT.

The act of the Pennsylvania Assembly of June 27, 1913 (P. L., 639), levying a tax of $2 1/2 per centum of the value of every ton of anthracite coal of the weight of 2,240 pounds, the same to be settled and collected as provided by law for other taxes, is in violation of the constitutional provision which directs that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax," as it makes an artificial and arbitrary dis-
tion and discrimination between anthracite and bituminous coal, subjecting the former to a tax for public purposes and not the latter.


CLASSIFICATION AND DISCRIMINATION—BITUMINOUS AND ANTHRACITE COAL.

In the taxation of mining property differences which make classification for some purposes proper, may furnish no reasonable basis for classification for taxation. That differences, real and substantial, exist between anthracite and bituminous coal, such as amply justify their separate classification for certain purposes, is conceded. While both are natural products and the chief use of each is the development of heat by combustion, yet they are distinguishable in so many ways, not only in their efficiency, but in respect to conditions under which they are severally made marketable, that if both were to be subjected in all respects to the same legislative requirements and restrictions entirely proper and necessary in the case of one, they would be wholly unnecessary and oppressively burdensome upon the other; and the legislature has, for the particular purpose before it, placed the variety calling for the legislation in a class by itself and legislated with respect to it to the exclusion of the other; but whatever distinction is made between the two it is based upon a substantial difference, one so marked as to call for separate legislation, and in either case there is correspondence between the difference which is made the basis of the classification and the object and purpose of the statute. But the legislature can exercise this right of classification only in subordination to certain constitutional restrictions and can no longer by arbitrary discrimination subject certain property to taxation and exempt other property of the same kind and class, similarly situated, from an equal burden. The classification for this purpose must rest on a difference which bears a natural, reasonable, and just relation to the act in regard to which the classification is proposed. But there can be no reasonable classification between anthracite and bituminous coal that makes the anthracite when prepared for market a proper subject for taxation and not bituminous coal when likewise prepared for market. Accordingly the act of June 27, 1913, laying a tax of $1\frac{1}{2} per centum of the value of each ton of anthracite coal only when prepared for market is unconstitutional.


PERSONAL PROPERTY OF OIL COMPANY.

The personal property owned and operated by an oil and gas company acting as a public-service corporation is assessable by the board of public works under the statute of West Virginia, without regard to the situs of such property, whether connected with or dissociated from the immediate use and operation of the property employed by it in serving the public; but when such property is assessed by the board of public works the local assessing authorities can not lawfully alter or modify the assessment so made, as it is final and conclusive, unless appealed from in the manner and within the time provided by statute.

Ohio Fuel Oil Co. v. Price (West Virginia), 87 Southeastern, 202, p. 203, November, 1915.

PRODUCTION TAX ON OIL.

Section 7464, Revised Laws, 1910, of Oklahoma, does not materially differ from section 6 of the act of 1898 (Laws of 1908, chapter 71, article 2), authorizing the levy and collection of a gross revenue tax from persons, firms, corporations, or associations engaged in the production of petroleum or other mineral oil or natural gas, and which act was amended by section 1 of the act of March 27, 1909 (Laws of 1909, chapter 38, article 2). Under this latter act the tax intended to be assessed and collected thereby is construed and characterized as an occupation tax and not a tax on property as such.


The gross production tax imposed by subdivision A of the act of March 11, 1915, is not a property tax, but is a tax on the business or occupation named therein, the amount of which is determined by the value of the gross production of oil and other commodities named, produced during the last preceding quarter annual period and is authorized by section 12, article 10 of the constitution.


TAX ON PRODUCTION AS SUBSTITUTE FOR OTHER FORMS OF TAXATION.

That portion of the act of March 11, 1915, which provides that the tax levied shall be “in lieu of any other taxes that might be levied and collected upon an ad valorem basis upon the equipment and machinery in and around any well producing natural gas or petroleum or other mineral oil, and used in such actual operation of such producing well,” is not an attempt to exempt the equipment and machinery from taxation, but it provides that the payment of the gross production shall be in lieu of any other tax that might be levied and
collected on such property upon an ad valorem basis; and while not an exemption from taxation within the meaning of the constitutional inhibitions, yet it is a substitution of one form of taxation for another upon the terms and conditions named. The equipment and machinery referred to is confined to that used in the actual operation of producing wells, hence does not include equipment and machinery on hand and not so used. By the act a tax is levied that is based upon the value of the gross production, and this can only arise through the discovery and production of oil or gas, and the equipment and machinery owned by the producer, and which is an indispensable agency in the discovery and production of the commodity, forms a part of the property out of which the production arises, as without these, production is impossible.


TAX ON OIL PRODUCTION—CLASSIFICATION OF SUBJECTS.

The power of the legislature to distinguish, select, and classify objects of taxation has a wide range of discretion, and while the classification must be reasonable, yet there is no precise rule of reasonableness and there can not be an exact exclusion or inclusion of persons and things. However, the classification adopted must always rest upon some difference which bears a reasonable and just relation to the act, in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. Accordingly a statute levying one rate of tax on oil and gas and a lesser rate on ores bearing lead, zinc, jack, gold, silver, copper, or asphalt, and which omits a gross production tax on coal, is not repugnant to the provision of the constitution to the effect that taxes shall be uniform upon the same class of subjects. That mining property or the business of mining may be placed in a class by itself and taxed by some method peculiarly appropriate to that class is a valid exercise of a constitutional right on the part of the legislature, and it is competent for the legislature to arrange and divide the various subjects of taxation into different classes, providing the tax is uniform upon all those belonging to the same class and upon which it operates.


TAX ON RESULTS OF BUSINESS.

A tax levied on a mining corporation under the income-tax law of 1913 is not a direct tax on property because of its ownership where adequate allowance is not made for the exhaustion of the ore body,
resulting from working the mine, but is in fact a true excise levied on the results of the business of carrying on mining operations.

See Brushaber v. Union Pacific Railroad Co., 240 United States, 1.

ASSESSMENT OF PROPERTY—CONSTRUCTION OF STATUTE BY ASSESSING OFFICERS.

The rule adopted by assessing officers in the assessment and valuation of property, while of no binding force on the courts, yet if it is the correct rule the courts will follow it and will assess and tax all of the estates in any particular description together; and it is unimportant whether such assessment is made to all or to but one of several owning interests or estates therein; and it would be presumed that the assessing officers, in obedience to the statute, each year included in the assessment the value of the estate owned by all the joint owners; and under such circumstances it is no more the duty of one such owner to pay the entire tax than it is that of the other; but the owner of neither estate can protect his own property without paying an obligation properly chargeable against the owner of the other and on payment of either he can pursue the other for contribution.


TAXES ON SURFACE AND MINERALS UNDER DIFFERENT OWNERSHIP.

Under the statute of Michigan providing that separate estates in land may be assessed jointly, the separate owner of the mineral rights in a tract of land cannot, on refusal to pay his just or fair proportion of the taxes, purchase and obtain title to the surface at a sale of the land for delinquent taxes, but his remedy under the statute is to pay the taxes assessed and compel the surface owner to contribute his share of such taxes.


INCOME-TAX LAW CONSTITUTIONAL.

The income-tax law of 1913 is not unconstitutional, on the ground that it is not within the purview of the sixteenth amendment, on the ground that it is not a tax on the net product but in a sense somewhat equivalent to a tax on the gross product of the working of a mine by a corporation.

Stanton v. Baltic Mining Co., 240 United States, 103, p. 112.
See Brushaber v. Union Pacific Railroad Co., 240 United States, 1.
DAMAGES FOR INJURIES TO MINERS.

ELEMENTS OF DAMAGES.

MORTALITY TABLES AS EVIDENCE.

In an action by a miner for damages for a personal injury which impaired his power to earn money it is competent to use mortality tables in proof of the number of years which the claimant may be reasonably expected to live, although such tables do not prove how many years the miner would have been able to earn money.


REASONABLE COMPENSATION.

In an action by an injured miner for damages the jury trying the case should be instructed that if they find for the plaintiff the measure of his recovery is such a sum in damages as they may believe from the evidence will fairly and reasonably compensate him for any mental or physical suffering and for the impairment or destruction of his ability to earn money that may have resulted directly from his injuries, if they were caused by the ordinary negligence of the defendant, but such damages can not exceed in all the sum of $10,000.

Taylor Coal Co. v. Miller (Kentucky), 182 Southwestern, 920, p. 922, February, 1916.

DISEASE EXISTING OR PRODUCED BY THE INJURY.

In an action by a coal miner injured by the derailment of a car upon which he was riding and without any fault on his part, and in which he claimed damages for permanent injury, the jury should be instructed that while they may believe from the evidence that the miner was permanently injured through the negligence of the defendant, and his power to earn money was diminished or destroyed thereby, yet if they believe from the evidence that the miner was afflicted with tuberculosis which diminished or destroyed his power to earn money, and the disease was not caused by or directly attributable to the injuries he received, they should not, if they find
for the plaintiff, allow anything for the impairment or destruction of his earning capacity caused by the disease; but if they believe that the tuberculosis was solely caused by and directly attributable to the injuries received, then the finding should not be diminished on account of the disease.

Taylor Coal Co. v. Miller (Kentucky), 182 Southwestern, 920, p. 922, February, 1916.

FAILURE TO PLEAD PARTICULAR INJURIES.

A court on appeal will not reverse a judgment recovered by a miner for personal injuries on the ground that proof was admitted of particular injuries that were not specified or stated in the plaintiff's complaint, where the defendant made no objection to the evidence at the time it was admitted.

Woodward v. Daly-West Mining Co. (Utah), 154 Pacific, 782, p. 783.

DAMAGE EXCESSIVE—INSTANCES.

A court should not set aside a verdict returned by a jury in an action for damages for personal injuries to a miner unless it finds that the verdict was unduly affected by sympathy, passion, or prejudice and that the verdict was clearly excessive in view of all the evidence. Where it appears that sympathy, passion, or prejudice has affected the result, a Federal court will sometimes order that the verdict be set aside and a new trial granted, unless the plaintiff will permit judgment to be rendered for some smaller amount, for which, in the opinion of the court, the verdict may be sustained; and it is the duty of a court under such circumstances to permit a verdict for the largest amount which the testimony will support.


A verdict for $10,000 for fractures to one arm of a miner is so flagrantly excessive as to furnish ground for reversal.

Indian Creek Coal Co. v. Walcott (Kentucky), 182 Southwestern, 631, p. 632, February, 1916.

In an action by a miner for damages for personal injuries, where the evidence showed that certain parts of the pelvic girdle had been broken and parts thereof remain out of position and there is a dislocation of bone in the region of the sacrum, a considerable area of anesthesia in one of the plaintiff's legs and atrophy in the other, and the functional activities of his bladder are considerably impaired, subjecting him to great inconvenience and more or less humiliation, and where it appears that he was required to use a crutch and where, in the estimation of physicians, the plaintiff will never be able to resume his former occupation and will never be able to do anything more than light work, a verdict for $19,100 is excessive, though the
plaintiff was but 19 years old; and the court accordingly reduced the verdict to $15,000.


**DAMAGES NOT EXCESSIVE—INSTANCES.**

A judgment in favor of a miner for damages for injuries caused by being struck on the head by a falling prop while he was in the act of mining coal, and where paralysis resulted from such injury, is fully sustained by the evidence of the miner to the effect that he was knocked some 15 feet against the rib of coal by the falling prop; that the top of his head was affected and his skull fractured; that after continuing work for seven or eight days he became so he could not walk, was subsequently taken to a hospital, where pieces of his skull and some bruised blood were removed; that the injury caused all his strength to leave him and that he was not able to use his right hand or right leg, and that the right side of his body was paralyzed; and the proof is sufficient under the Illinois workmen's compensation act to entitle him to the benefits of the act and to a judgment and order directing the payment of $636 in cash, the same due since the last payment had been made, and that the remainder of $2,374.12 be paid at the rate of $12 per week from the date of the judgment.


In an action by an injured miner for damages a judgment will not be reversed on the ground that the damages are excessive, though somewhat larger than should have been assessed, but not so flagrantly excessive as to justify a court in interfering with the finding of the jury.

Fluhart Colleries Co. v. Meek (Kentucky), 183 Southwestern, 469, p. 470, March, 1916.


In an action by an injured miner where the evidence shows that he was a strong and healthy young man earning about $3 a day, that a heavy piece of coal fell on his back and hips, while he was in a stooping position, rendering him for a time insensible, that the blow thus received injured the vertabrae and connecting nerves so as to cause an enlargement extending inward from the spine and resultant irritation of the nerves of the diaphragm producing almost constant hic-coughing, much physical pain, and mental suffering, and paralysis of the legs, that these conditions are permanent, will render the miner a cripple for life and incapable of earning a livelihood, a judgment for $11,000 is not excessive.

Consumers' Lignite Co. v. Grant (Texas Civil Appeals), 181 Southwestern, 202, p. 211, December, 1915.
A verdict for $5,000 is not excessive where the proof showed that the injured miner was 40 years of age at the time of his injury and was earning about $75 per month, that he suffered a compound fracture of one leg, endured much pain, and the broken leg was some shorter than the other, and he could not bear any weight on such injured leg, and that the knee joint at the time of the trial was stiff, and since the injury he had not been able to do any considerable work.

QUARRY OPERATIONS.

DUTY OF OPERATOR TO FURNISH SAFE PLACE.

In the operation of a stone quarry the owner or operator is under a duty to exercise ordinary care to furnish employees a reasonably safe place in which to work, and considering the dangerous nature of dynamite and the fact that an owner or operator of a stone quarry knew that dynamite had been used a few days before for blasting at a particular place where employees were sent to work, the duty was upon the owner or operator of making a very careful examination after such explosion to ascertain whether or not all the charges of dynamite had exploded; and the failure to perform this duty or the failure to warn the employees of the probable presence of dynamite is sufficient to render the owner and operator liable in case of injury to an employee.


DUTY REQUIRED IN USE OF DANGEROUS AGENCIES.

It is the duty of a quarry operator who keeps in his possession or employs in his business that which unless carefully guarded and cautiously used is dangerous to others, to exercise such care to see that the dangerous agency is so kept and used as not to inflict injury upon others as an ordinarily prudent person would be expected to exercise in the use and keeping of such dangerous agencies. This rule applies to the use of dynamite in a stone quarry and an operator who fails to discharge the measure of duty required is liable for the consequences.


DANGERS FROM USE OF DYNAMITE—DEGREE OF CARE REQUIRED.

Dynamite is an inherently dangerous agency and persons who use it must exercise care corresponding with the danger; and when dynamite in the course of quarry work is put into holes for the purpose of being exploded, and is attempted to be exploded, the employer or quarry operator must make a very careful examination for the purpose of ascertaining whether all the charges have exploded
before he sends other men in to work at the place where the dynamite was used with implements that might cause an explosion by coming in contact with any charge that had not exploded. The kind of an inspection he should make or what efforts he should resort to, or what methods he should use for the purpose of definitely ascertaining whether the dynamite has been exploded, are questions that must be settled according to the nature and circumstances of the surrounding conditions; but whatever effort or method or whatever inspection is resorted to, it must be sufficient to meet the high degree of care exacted, and this degree of care is the highest degree of care practicable under the surrounding circumstances; and a failure to adopt such method or make such inspection or to exercise such degree of care that results in injury to an employee from an unexploded charge of dynamite will render the operator liable for damages.

Chesapeake Stone Co. v. Holbrook (Kentucky); 181 Southwestern, 953, p. 954, January, 1916.

UNEXPLODED DYNAMITE IN BLAST HOLE.

A common laborer in a stone quarry may recover for injuries where it appeared that he had not been directed to work in any particular spot or place in the quarry, nor was he warned or forbidden to go to or about the place where blasts had been previously fired in the operation of the stone quarry; and being ignorant of the presence of unexploded dynamite in a drill hole, he had the right to assume that it was safe for him to go in and about the quarry at any place near the place at which he was assigned to work; and under such circumstances he was performing service in the course of his employment, when, while properly using a pick, he struck an unexploded stick of dynamite in a blast hole, thereby causing an explosion, resulting in his injury; and the owner and operator of the stone quarry can not escape liability on the ground that the workman whose duty it was to fire off dynamite in a large number of drill holes actually thought that all the separate blasts had in fact exploded.


DUTY OF OPERATOR AS TO UNEXPLODED BLASTS.

It is the duty of a stone-quarry operator to furnish his employees a reasonably safe place in which to work and to supply the employees with reasonably safe and suitable tools and appliances to perform work required of them and to see that the place and the tools and appliances are kept safe; and if a stone-quarry operator knows, or by the exercise of ordinary care could have known, of the presence of unexploded dynamite at a place at which employees were directed
to work, it was the duty of the quarry operator to exercise the highest degree of care practicable under existing conditions for the purpose of discovering whether any of the dynamite had been left unexploded; and if the operator knew, or by the exercise of ordinary care could have known, of the presence of unexploded dynamite, it was its duty to remove the cause of the danger or warn the employees of such danger; and any failure to exercise this high degree of care will render the operator liable for the resulting injuries.


APPLICATION OF FELLOW-SERVANT RULE—DUTY OF OPERATOR TO INSPECT.

An employee in a stone quarry whose duty it was to place sticks of dynamite in a group of holes drilled in the stone for the purpose of blasting out large pieces of the stone is not a fellow servant with a common laborer performing labor in the quarry within the rule that will relieve the quarry operator from liability for injury to such laborer by reason of the accidental explosion of a stick of dynamite that had not exploded in one of such drill holes when the blast for the group of holes was discharged, where the quarry operator made no inspection after the blast to determine whether or not there were unexploded sticks of dynamite and where the operator failed to warn the laborer either as to the particular place where the blast was fired or as to the probability of unexploded dynamite in the drill holes.


FAILURE OF LESSEE TO OPERATE—NONACQUIESCENCE OF LESSOR.

A failure on the part of the lessee to operate a quarry for a period of 20 years may be taken as evidence of an abandonment; but such intention of abandonment will be overcome where the lessor makes a demand for rent and on receiving a check returned the same on the sole ground that it did not include interest, as these acts of the lessor manifest a desire and intention on his part to hold the lessee to the terms of the lease and to exact from him the payment of the rent specified therein; and these acts on the part of the lessor are sufficient to overcome any alleged acquiescence in the abandonment of the lease.


ABANDONMENT OF LEASE BY LESSEE—ACQUIESCENCE OF LESSOR.

Where there was an abandonment of quarry operations by the lessee under the terms of his lease for a period of four years or more and where there had been a failure on the part of the lessee to operate the quarry for a prior period of 14 years or more, the filing
of a bill in equity by the lessor for the purpose of having the lease canceled and removing a cloud upon the title is sufficient to show his acquiescence in the abandonment and to entitle him to the relief prayed for.


DUTY OF OPERATION IMPOSED ON LESSEE.

A lease of a quarry for a period of 99 years with the privileges necessary to successfully operate and work the same, the lessee to pay therefor during the term the sum of 1 cent per cubic foot of all stone used for monumental work, provided the sum should not exceed $25 for any one year when the quarry is worked, and when the quarry is not worked the payment to be $1 per year, and providing further that there should be no forfeiture of the lease until made in writing by the lessee, his heirs or assigns, does not fix a minimum rental of $1 per year, as it might be less if the stone quarried for monumental work did not amount to 100 cubic feet; but the payment of $1 per year was only to be made when the quarry was not worked at all. The provision for a rental of $1 per year was intended to cover periods of necessary inactivity, or such emergencies as might arise temporarily preventing the prosecution of the work, and it was not the intention of the parties that the lessee should enjoy the privilege of keeping the quarry idle during the term of the lease, on the payment of $1 per year, as this would be so unreasonable that it can not be presumed to express the intent of the parties executing the lease. The lease imposed upon the lessee the duty of working the quarry within a reasonable time after the execution of the lease and to continue to work it except during such periods as might be impracticable, and the lease must be considered in the light of the fact that the only advantage or adequate compensation which could come to the lessor must necessarily arise in and flow from the working of the quarry and that the purpose of the entire transaction was to benefit the lessor as well as the lessee, and that the lease imposed upon the lessee both a privilege and a responsibility.


LIABILITY OF CORPORATION OPERATING THROUGH DUMMY.

A corporation owning and operating a stone quarry can not escape liability for negligence resulting in an injury to an employee by its stockholders organizing a dummy corporation with a nominal capital stock and leasing its quarry to such dummy corporation at such a high rental rate that the dummy corporation could not make or accumulate any profits; and in an action against the original and the dummy corporations it was held proper for the court to submit

43162°—Bull. 126—16—7
the question of liability to the jury under an instruction to the effect that if they believed from the evidence that the dummy corporation was not operating the property in good faith, but solely for the purpose of permitting the original corporation to escape liability for injuries from negligence, they should find against the original corporation.

INTERSTATE COMMERCE.

CREDITS ON LEASE AS REBATES.

A railroad company leasing a railroad owned by a mining company for 999 years, and in consideration of which it agreed to pay as rental a certain stated sum annually and to give the mining company certain advantages in rates over other shippers by charging it only the rates in force from a designated point, being less than the entire distance the coal was to be shipped, by returning a portion of the charges in monthly settlements, violates the interstate commerce act, as such allowances are illegal as a rebate and the effect being to give the mining company an advantage over other and competing shippers.

PUBLICATIONS ON MINING LAWS AND METHODS OF MINING.

Limited editions of the following Bureau of Mines publications are temporarily available for free distribution. Requests for all publications can not be granted, and applicants should select only those publications that are of especial interest to them. All requests for publications should be addressed to the Director, Bureau of Mines, Washington, D. C.


BULLETIN 45. Sand available for filling mine workings in the northern anthracite coal basin of Pennsylvania, by N. H. Darton. 1913. 33 pp., 8 pls., 5 figs.

BULLETIN 48. The selection of explosives used in engineering and mining operations, by Clarence Hall and S. P. Howell. 1913. 50 pp., 3 pls., 7 figs.

BULLETIN 60. Hydraulic mine filling; its use in the Pennsylvania anthracite fields; a preliminary report, by Charles Enzian. 1913. 77 pp., 3 pls., 12 figs.

BULLETIN 69. Coal-mine accidents in the United States and foreign countries, compiled by F. W. Horton. 1913. 102 pp., 3 pls., 40 figs.


BULLETIN 121. The history and development of gold dredging in Montana, by Hennen Jennings, with a chapter on placer-mining methods and operating costs, by Charles Janin. 1916. 60 pp., 29 pls., 1 fig.


TECHNICAL PAPER 17. The effect of stemming on the efficiency of explosives, by W. O. Snelling and Clarence Hall. 1912. 20 pp., 11 figs.

TECHNICAL PAPER 18. Magazines and throw houses for explosives, by Clarence Hall and S. P. Howell. 1912. 34 pp., 1 pl., 5 figs.


TECHNICAL PAPER 22. Electrical symbols for mine maps, by H. H. Clark. 1912. 11 pp., 8 figs.


TECHNICAL PAPER 44. Safety electric switches for mines, by H. H. Clark. 1913. 8 pp.
DECISIONS ON MINES AND MINING.

Technical Paper 61. Metal-mine accidents in the United States during the calendar year 1912, compiled by A. H. Fay. 1913. 76 pp., 1 fig.
Technical Paper 95. Mining and milling of lead and zinc ores in the Wiscon- sin district, Wisconsin, by C. A. Wright. 1915. 39 pp., 2 pls., 5 figs.
Technical Paper 111. Safety in stone quarrying, by Oliver Bowles. 1915. 48 pp., 5 pls., 4 figs.
Technical Paper 129. Metal-mine accidents in the United States during the calendar year 1914, compiled by A. H. Fay. 1916. 96 pp., 1 pl., 3 figs.


PUBLICATIONS OBTAINABLE FROM THE SUPERINTENDENT OF DOCUMENTS.

The following publications may be obtained by sending the price in cash (exact amount) or by postal or express money order payable to the Superintendent of Documents.

The Superintendent of Documents is not connected with the Bureau of Mines. His address is Superintendent of Documents, Government Printing Office, Washington, D. C.

Bulletin 94. United States Mining Statutes Annotated, by J. W. Thompson. Two volumes, 1,875 pages, bound in cloth, price $2.50. Containing all United States statutes relating to mines and minerals, annotated with abstracts of all decisions construing the same.
Technical Paper 24. Mine fires, a preliminary study, by G. S. Rice. 1912. 51 pp., 1 fig. 5 cents.
Technical Paper 41. Mining and treatment of lead and zinc ores in the Joplin district, Mo., a preliminary report, by C. A. Wright. 1913. 63 pp., 5 figs. 5 cents.
Technical Paper 94. Metal-mine accidents in the United States during the calendar year 1913, compiled by A. H. Fay. 1914. 73 pp. 10 cents.