The Extralateral Right: Shall It Be Abolished?

II. THE ORIGIN AND DEVELOPMENT OF THE EXTRALATERAL RIGHT IN THE UNITED STATES.

The discovery of gold in California in January of 1848, brought about the birth of a distinctive American mining law. Theretofore, no general mining law was in force in the United States and the few Acts of Congress on the subject were local in character, applying only to the lead and copper deposits of the Middle West, and were not based on any well defined policy. The general tendency was to place mineral lands on the same basis as agricultural lands. There was no trace of any exercise of an extralateral right to be found in any of these early laws.

The news of the finding of the fabulous gold fields of California spread around the world like wildfire and miners from every part of the globe flocked to the new Eldorado to share in its treasure. Miners came from the lead mines of Illinois and Wisconsin, from the copper mines of Michigan, from the gold mines of Virginia, Georgia and the Carolinas, from the tin mines of Cornwall, the lead mines of Derbyshire, the silver and copper mines of Germany, the silver and gold mines of Mexico and Peru, and in fact from every known mining community. They brought their varied experience and were joined by countless others who had no previous mining experience of any sort. It must be borne in mind that no general mining law was in force in this new territory. Colonel Mason, the military governor of California in 1848, issued

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2 The fascinating history of the days of '49 is outlined in Lindley on Mines, (3rd ed.) chapter 3, §§ 40-40, and Crane, Treatise on Gold and Silver, pp. 54-62. Also see Browne, Mineral Resources, 1857, pp. 15-16, 38.
a proclamation abolishing "the Mexican laws and customs now prevailing in California relative to the denouncement of mines." His action was unnecessary, however, since the Supreme Court of the United States later held that the Mexican law relating to the acquisition of mining property was not operative in California because of the absence of any mining officials required by the Mexican law.

This situation is important to bear in mind, for one would naturally suppose that the mining laws which developed in this territory would have borne the distinct impress of the Mexican and Spanish mining laws which were, theoretically, at least, in force throughout the greater part of the West while it remained under the sovereignty of Mexico. As a matter of fact, with the exception of a small amount of placer mining for gold in the vicinity of Los Angeles and mining for quicksilver at New Almaden, Santa Clara County, there was no mining of any noteworthy character being carried on in this vast and largely unexplored domain. This accounts for the absence of Mexican mining deputations with whom mining claims were required to be registered under Mexican law.

With the Mexican law of mines inoperative, with no existing congressional legislation on mines applicable, with state government in the West either non-existent or in its infancy, the field was open for the adoption of that form of mining law which might best fit the new conditions. As already noted, there had been no federal mining law of any consequence in the older portions of the United States which might serve as a pattern. The common law of England which was in force in most of the Eastern states had little bearing on mining problems. As a consequence, those who came from other parts of the United States, and who constituted the major part of the army of gold seekers, and even those who had previous experience in the mines of the Middle West and Georgia, brought with them little knowledge of a suitable mining

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3 Yale, Mining Claims (1867), p. 17.
5 Browne, Mineral Resources (1867), pp. 13-14, 38; Crane, Gold and Silver, p. 54.
6 United States v. Castellero, supra, n. 4.
7 Josiah Royce says "The effective majority in all the chief communities was formed of Americans..." Royce, California, p. 225. They were "educated, intelligent, civilized and elevated men of the best classes of society." California Herald (New York) Jan. 16, 1849.
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code. There were, however, thrown into this melting pot of nations, foreigners who arrived with a knowledge of the mining laws in force in other parts of the world. Germans, Cornishmen, Mexicans, Peruvians, came from countries in which complete mining codes were operative. It would be strange indeed if these experienced miners did not take an active part in the councils which followed and to some degree, at least, influence the shaping of the laws which emerged from this chaotic condition.

Going out into the wild and uninhabited mountains and canions of the Sierras, these pioneers found no laws in force or which could be made applicable to the new conditions they had to meet. The necessities of the situation and the absence of any effective sovereign authority to impose laws and enforce obedience on this army of gold seekers, who suddenly overran the rugged slopes of the Sierras like a swarm of ants, brought about one of the most remarkable and purely democratic governmental institutions in the history of the world. Wherever there was a mining center of any importance a meeting was called and the miners of the vicinity assembled, organized a mining district, elected officers and adopted a brief and usually rather crude code of laws by which the district was to be governed. These district rules and regulations constituted the miners' laws and customs and were mainly devoted to the regulation of mining, though in the early days before the State had assumed the effective administration of justice, these laws frequently dealt with other civil rights and the punishment of crimes.

8 "A special kind of law, a sort of common law of the miners, the offspring of a nation's irrepressible march,—lawless in some senses, yet clothed with dignity by a conception of the immense social results mingled with the fortunes of these bold investigators,—has sprung up on the Pacific Coast, and presents in the value of a 'mining right' a novel and peculiar question of jurisdiction for this Court." Sparrow v. Strong (1865), 70 U. S. 97, 18 L. Ed. 49.

9 The following extracts are taken from editorials of the Evening Picayune of San Francisco:

"The rules by which the rights of discoverers are defined and protected among those concerned in mining operations, have thus far, we believe, been as much respected as legislative enactments would be. (December 11, 1850).

"The fact was, and still is, in respect to the great mass of American citizens engaged in practical mining, that they have very little care for the creation, support, or character of any government in the State. The rules of their mutual adoption, by which their rights of property are protected, answer quite well the purposes for which they would desire any legislation, and their own mode of securing justice under those rules, is probably more instant and certain than such as would be prescribed by
It would be out of place here to discuss in detail the nature of these interesting rules. For present purposes it is sufficient to quote the following classic and concise statement of the situation by the Supreme Court of the United States speaking through Justice Field:

"The discovery of gold in California was followed, as is well known, by an immense immigration into the State, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open, by law, to occupation and settlement. Little was known of them further than that they were situated in the Sierra Nevada mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches and caions, and probing the earth in all directions for the precious metals. Wherever they went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining, such as placer mining, quartz mining, and mining in drifts or tunnels. They all recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been laws of the legislature. . . ." (December 14, 1850).

". . . for the present we know of no class of people who are better able to regulate the disposition of the mineral lands of California than the miners themselves, at any rate they have done very well so far." (January 31, 1851).

Those who are interested in the subject will find these miner's laws elaborately treated in Lindley on Mines, Chapter 3; Browne, Mineral Resources, (1867), pp. 225-264; Yale, Title to Mining Claims, etc., (1867), pp. 58-88; Bancroft's Handbook of Mining (1861), pp. 189-203; Morton v. Solambo M. Co. (1864), 26 Cal. 527, 532-533; Shinn, Mining Camps (1885); Royce, California (1886). A veritable mine of original information is to be found in Vol. XIV of the Tenth U. S. Census (1885), which gives in full the miner's rules of most of the districts of the West. This invaluable compilation was made through the wise foresight of Clarence King, who was prominently identified with the mining industry.

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tolerated by the miners, who were emphatically the law-
makers, as respects mining, upon the public lands in the State. The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies, except as against the government, he was regarded as the original owner, from whom title was to be traced."

The Supreme Court of California had earlier commented on this unique condition, saying: 12

"Courts are bound to take notice of the political and social condition of the country, which they judicially rule. In this State the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right or intent of disposition of these lands has been shown either by the United States or the State governments, and with the exception of certain State regulations, very limited in their character, a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government, and heartily encouraged by the expressed legislative policy of the other. If there are, as must be admitted, many things connected with this system, which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of res judicata. Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. So fully recognized have become these rights that without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of the Legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the law-makers. . . ."

The main objects of the regulations were to fix the boundaries of the districts, the size of the claims, the manner in which the claims were to be marked and recorded, the amount of work which was required to keep the title alive and the circumstances under

12 Irwin v. Phillips (1855), 5 Cal. 140, 146.
which the claim was to be considered as abandoned or forfeited.\textsuperscript{13}

As far as the regulation of mining was concerned they became "the law of the land." Their observance was general and the Legislature of the State of California recognized them as being of controlling effect in the absence of congressional or state action.\textsuperscript{14}

Other Western states and territories also gave them similar recognition and the courts upheld them as being of controlling force.\textsuperscript{15}

Water rights necessary for working placer claims also became a subject of considerable importance as the placer mining increased and many districts had rules governing the acquisition of these rights.\textsuperscript{16}

The early mining, following the discovery of gold, was, for a considerable time, confined to the placers. There was an abundance of virgin ground and the gold in the form of dust or nuggets when separated from the gravels required no further treatment but became the medium of exchange and to a great extent took the place of coin. On the other hand, quartz mining involved the more difficult extraction of vein material and treatment of the ores when extracted. A quartz mine took time to develop in order to determine whether the quantity and grade of the ore available justified the great expense of erecting a mill. The mining regions were remote from centers of civilization and the lack of facilities for making mining machinery and the prohibitive cost of transporting it to the mines when made, also tended to delay quartz mining. This accounts for the fact that many months elapsed before it assumed any considerable importance.

\textsuperscript{13}Browne, Mineral Resources (1867), p. 226; Yale, Mining Claims (1867), p. 61.

\textsuperscript{14}Section 621 of the California Practice Act of 1851 provided that: "In actions respecting 'mining claims', proof shall be admitted of the customs, usages or regulations established and in force at the bar or diggings embracing such claims; and such customs, usages or regulations, when not in conflict with the Constitution and laws of this State, shall govern the decision of the action."

\textsuperscript{15}"A series of wise judicial decisions moulded these regulations and customs into a comprehensive system of common law, embracing not only mining law (properly speaking), but also regulating the use of water for mining purposes. The same system has spread over all the interior states and territories where mines have been found, as far east as the Missouri river." (Remarks of Senator Stewart before the U. S. Senate, June 18, 1866). Appendix No. 1, 70 U. S. 778.

\textsuperscript{16}See: Wiel, Water Rights in the Western States, §§ 66-91. The doctrine of prior appropriation as applied to water is not the unique creation of the miners of the West as many have supposed. This doctrine had
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There is some difference of opinion as to when quartz mining began in California. There is no doubt but that in 1850 rich outcrops of gold-bearing quartz had been discovered and located.\(^\text{17}\)

The Morgan Mine on Carson Hill in Calaveras County is reported to have been discovered in February, 1850, and over two million dollars taken out in a little over a year. The ore was so rich that much of it was treated in hand mortars. The remainder was ground in arrastras, as most of the miners employed by the owners were Mexicans and this was the old Spanish method of treating ore.\(^\text{18}\)

In Mariposa County on the Jackson lode, fifteen Cornish miners were employed and a steam quartz mill was erected in September, 1850, having been purchased in San Francisco in May.\(^\text{19}\)

“Highgrade” quartz showing free gold was found at Gold Hill near Grass Valley in Nevada County in October, 1850. Other discoveries were made immediately following this one. A quartz mill was erected at Grass Valley by two Germans during this same year.\(^\text{20}\)

It is quite evident that quartz mining had become common by the end of 1850, and these reports of the earliest operations are particularly interesting to those seeking the source of our quartz mining laws, as indicating that Germanic, Cornish and Spanish influence were each intimately associated with this early quartz mining.

Following closely on the discovery of quartz veins which could

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\(^\text{17}\) Browne, Mineral Resources (1867), p. 20.

\(^\text{18}\) Browne, Mineral Resources (1868), p. 59. The ore in this mine near the outcrop was so fabulously rich that a band of ruffians under the leadership of Billy Mulligan drove the owners away by force and worked it themselves until ejected by Court. Cases involving this mine were appealed to the Supreme Court of the State on six different occasions and in none of these cases was the question of extralateral rights raised, indicating that there are other prolific sources of litigation. The first suit which is reported was brought upon a contract of limited partnership entered into March, 1850, in Alabama and which contemplated the erection of a quartz mill which appears to have been accomplished in the Fall of 1850 at Carson Hill in order to treat ores from the Morgan Mine. Ross v. Austill (1852), 2 Cal. 183. This mine was subsequently acquired by James G. Fair and is now owned by one of his heirs.

\(^\text{19}\) Gregory Yale states in his work on “Titles to Mining Claims, Etc.” (1867), that he was one of the victimized shareholders in this company p. 58, note.

\(^\text{20}\) Crane, Gold and Silver, pp. 59, 122.
be profitably worked, we find that district rules and regulations were adopted governing their acquisition. The earliest set of rules of which we have any record was adopted December 30th, 1850, by the Gold Mountain Mining District, Nevada County, California. These provided that "thirty by forty feet shall constitute a full claim." 2 On February 3oth, 1851, the neighboring Union Quartz Mountain Mining District adopted an identical provision and in May, 1851, claims sixty feet square were authorized on Kentucky Hill. 21a These rules were doubtless patterned after placer district regulations which in many instances allotted a small, rectangular, superficial area to each claimant. 2 There was clearly no attempt to confer an extralateral right or right to follow a vein indefinitely on its downward course. 22

The first appearance of the extralateral right in any district regulations that has come to the writer's attention is to be found in those adopted June 6th, 1851, in the Saunerd's Ledge Mining District also situated in Nevada County. Article 3rd of these local laws states that "One hundred feet on the ledge with the dips and angles shall constitute a claim." 24 Here we have a typical grant of the right expressed in its simplest form. If there were only an opportunity to examine the miners who attended that meeting and ascertain the reason which prompted the selection of this form of measurement, the question as to the origin of our extralateral right might be easily solved. Did they have in mind the mining laws of Germany or Derbyshire, England, or merely the simple idea that the vein and not the surface ground was the thing of value which they were seeking to acquire a right to and that to divide it up into segments along its length was the only obvious way to apportion it? Probably this question will never be conclusively answered. The time has long since elapsed when any persons who took part in that meeting can be interviewed and

21a Id. pp. 332-333.
22 In his report of 1867 on Mineral Resources, p. 231, J. Ross Browne states that the early quartz regulations were framed "under the influence of persons familiar only with small claims customary in the placers."
23 This is explained in part, at least, by Mr. Arthur Foote of Grass Valley who has informed the writer that the ledge on Gold Mountain where the earliest regulations were framed is flat lying and the exercise there of an extralateral right would be much less appropriate than on veins with a steeper dip.
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unless some diary or other private records exist, of which there is no great likelihood at this late date, the matter will be left to speculation and conjecture.

Reasoning from the facts presented on the face of the provision itself, there is considerable circumstantial evidence to sustain the generally accepted view that the source of this regulation is to be found in the mining law of Derbyshire. The linear measurement of one hundred feet is practically the same as that of the Derbyshire claims which varied from twenty-seven to thirty-two yards in length. The words "dips and angles" are old English terms such as would naturally be used in Derbyshire and the simple manner of marking off lengths along the ledge is peculiar to the Derbyshire extralateral right which is one of the purest and simplest forms of this right. On the other hand, we have ample evidence that German miners were already mining in this vicinity and that they had constructed a quartz mill at Grass Valley.

If these miners from Germany were responsible for the adoption of the extralateral right in Saunder's Ledge Mining District, they could only have suggested the general idea, for the Germanic extralateral right was of an entirely different character, giving the right to mine between parallel planes following the vein in depth on each side with all of its turnings and variations.

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26 The writer has read many of the published diaries of "Forty-niners" and local newspapers of that period and finds ample evidence to support the statement that skilled miners from Germany were in California in considerable numbers by 1850. He possesses a curious little book entitled, "The German Emigrants or Voyage to California," published about 1851 in Germany which contains the following interesting statement: "In the Spring of the year 1851, there was an unusual stir and bustle in the village of Joachimsthal. [This is the famous silver mining district of the Middle Ages and our word "dollar" is derived from this valley or Thal, so intimately associated with silver.] The rage for emigration and a restless longing to try their luck beyond the seas, had attained a height bordering on frenzy. . . . The excitement was daily gaining ground to such an extent, that the agent of an American Emigration Company was welcomed and honored as a special messenger sent by Providence."

27 Strictly speaking, these are not true planes since they conform to all of the rolls and curvatures of the vein. They are, properly speaking, surfaces, but the use of the latter term might lead to confusion with the surface of the ground.

28 Though mining claims to which the extralateral rights attached were abolished in most of the Germanic States by the time of the gold rush to California, yet all vested rights were recognized and thousands of the oldest and best known mines in Germany were still entitled to, and did exercise this right, as many of them have continued to up to the present time. 4 California Law Review, 368-369.
It is a noteworthy coincidence that on June 7th, 1851, on the day following the Saundcr's Ledge meeting, the quartz miners of Drytown Mining District, Amador County, "Resolved, 3rd: That the size of a claim in quartz veins shall be two hundred and forty (240) feet in length of the vein without regard to the width to the discoverer or company and one hundred and twenty (120) feet in addition thereto for each member of the company, etc." On June 25th, 1851, or only nineteen days after the Saundcr's Ledge rules were adopted, the miners of Mariposa County met at Quartzburg and framed a set of local laws which provided:

"That all quartz veins now owned or occupied in the County of Mariposa, or which may be hereafter discovered or claimed, shall be governed by the following rules, to-wit: The interest of a party making a discovery of quartz shall be five hundred feet in length, and the entire width of the vein, be that more or less. The interests of all persons claiming subsequently to the discovery shall be two hundred and fifty feet in length, and the entire width of the vein."

Here we have a distinct use of language to convey the same idea of an extralateral grant. The phrases "without regard to the width" and "the entire width of the vein, be that more or less," are clearly to remove any idea of lateral limitation from the prescribed linear measurement. Here again one might argue that the influence of the Derbyshire law is evident, for in Derbyshire the discoverer of any "new Rake or vein" was entitled to two "meers" or measures of length along the vein. While both the Spanish-Mexican and Germanic laws rewarded the discoverer with additional ground, so that this feature of mining law had become quite universally accepted throughout the world, yet it was only in Derbyshire that two full claims were allowed him.

On October 1st, 1851, the Day's Ledge Mining District in Nevada County adopted by-laws, article first of which provided that "Claims shall be fifty feet along the course of the ledge, with its

29 Vol. XIV, Tenth U. S. Census, p. 271. In adopting these resolutions "it was urged that fifty feet of a vein which probably had no bottom, was quite enough to satisfy any reasonable man." Gold-bearing quartz was first discovered in Amador Creek in February, 1851. A mill was erected but proved a failure till an experienced German miner came upon the scene. The historian says "the number of talented men in this convention was noted although it was not unusual for such bodies in the early fifties to be composed of men who might have sat in legislative halls with credit to themselves and all concerned." History of Amador County (1881), pp. 145-146.

30 Id., p. 272.

31 4 California Law Review, 375.
dips, breadths, and angles." Following in rapid succession in 1851, and particularly in 1852, and even as late as 1855, new mining districts were formed in Nevada County, most of which provided that claims should be one hundred feet along the ledge with the "dips and angles.” Some of the regulations added the words "breadths,” others “depths” and it is particularly noteworthy that the Grass Valley Quartz Mining District regulations of December 20th, 1852, used the language “dips, angles and variations” of the vein, which is the identical language later adopted by Congress in the first general mining act of 1866. The regulations of Grizzly Flat Mining District of El Dorado County passed February 4th, 1852, provided that “One hundred and fifty feet in length and the dip or inclination of said lead to any depth and its width constitute one claim.” The use of the term “spurs” appears in the local rules of Angel’s Mining District, Calaveras County, adopted July 20th, 1855, which granted one hundred feet on the length of a vein and, “all the dips, spurs or angles.” This also is of interest, for the Sutro Tunnel Act passed by Congress July 25th, 1866, uses the terms “dips, spurs and angles” as applied to the veins that might be encountered by the tunnel and these terms were in common use in written conveyances of quartz claims.

Other terms which are distinctly Cornish in origin and also in use in Derbyshire are found, such as “slides” meaning cross fissures, “Fitters” which is undoubtedly a corruption of the Old Eng-

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33 Id. pp. 330-345.
34 Id. p. 330.
35 This language was carried by the Nevada County miners to the Comstock and vicinity and adopted by Senator Stewart in framing the Act of 1866.
36 Id. p. 275. The word “lead” is an old English term from which the word “lode” was derived and both were in common use in Cornwall and to some extent in Derbyshire. (Bullion M. Co. v. Croesus M. Co. (1866), 2 Nev. 168, 176, says lode is “a Cornish word nearly synonymous with vein.”) De la Beche says in his masterly work on the Geology of Cornwall, (1839), that lode “is a leading body traversing rocks” and “is a term employed in Cornwall and Devon for a mineral vein.” (pp. 283 note, 343). The widespread use of this term in the early days of mining here establishes the influence of miners from England.
37 Id. p. 285.
38 14 U. S. Stats. 242.
39 As a matter of fact, the term “spurs” was in common use in the early days of quartz mining. The writer has a copy of a record of a location of the Morgan Mine on Carson Hill dated October 12, 1850, calling for a certain length of the main ledge “with the branches or spurs of said ledge.”
40 De la Beche, Geology of Cornwall, p. 313; Tapping, Customs of Derbyshire, (1851), p. 31.
lish term “Flitters,” meaning fragments of the vein, indicated that the influence of miners from England in framing these regulations was very decided. “Flatt” diggings are mentioned in the rules of Mt. Pleasant Mining District of El Dorado County. This is an unusual term used in the laws of Derbyshire. The wording of the extralateral grant became very complex in the case of later regulations and we find the terms “dips, angles and spurs, offshoots, outcrops, depths, widths and variations” used to express this idea.

One hundred linear feet along the ledge was during the fifties the commonest length in California for a quartz claim, but during the early sixties two hundred feet along the ledge or lead became the rule for the newer districts. A few districts were formed from time to time in which square measurement of quartz claims with vertical boundaries was adhered to, but these were in the small minority. In surface width no lateral measurement whatever was specified in the earlier regulations, leaving the acquisition of sufficient surface area for convenient working of the lode to the individual locator. In fact, most of the early rules expressly prescribed a certain length of claim “without regard to width.” In the late fifties and early sixties a definite width was usually prescribed but this varied from fifty feet in some districts to six hundred feet in total width in others. The latter measurement was designated in El Dorado Mining District, El Dorado County, April 7th, 1863 and is noteworthy because the Mining Act of 1872 adopted this as the maximum width for lode claims. Probably two hundred and fifty feet “on each side of the center of the lead” became the commonest lateral measurement in California.

The mining regulations of the various districts of Nevada are of special interest to us because it is generally conceded that Senator Wm. M. Stewart, who represented Nevada in Congress, in framing the Act of 1866 was profoundly influenced by the miners’

42 See Mander’s Glossary of Derbyshire Mining Terms, etc. (1824), p. 12.
43 Vol. XIV, Tenth U. S. Census, 310-311, 500.
44 “Quartz claims are usually two hundred feet long following the course of the lode.” Hittel, Resources of California, (1866).
44a Id. p. 312.
45 This language is also of interest because the Act of 1872 provides that lode claims shall not “extend more than three hundred feet on each side of the middle of the vein at the surface.” U. S. Revised Stats., § 2320.
regulations of his state. He was ably assisted by Senator Conness of California. As mining spread from California into the other parts of the West, the miners carried with them to the new "diggings" the same general ideas, organized mining districts and adopted rules and regulations similar to those existing in California. As might be expected, coming at a later period when many of the divergent views which sprang up simultaneously in different parts of the pioneer camps of California had become harmonized, the rules adopted in other Western States and territories conformed in a remarkable degree to a general type. This is particularly true of Nevada. Most of its district regulations were adopted between the years 1859 and 1866. With very few exceptions these rules prescribed claims of two hundred feet in length on the lead or ledge, which, as we have seen, had become the prevailing length of lode claims in mining districts of California of the same period. The extralateral grant in the Nevada regulations was also described in the same language that had originated in California. The miner was entitled to his two hundred feet along the vein together with all its "dips, spurs and angles." The term "variations" was also added in some instances as well as other words such as "strings and feeders" to express the idea of the all-inclusiveness of the grant. In Nevada the extralateral feature was practically universal, a notable exception being in Eureka.

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46 Vol XIV, Tenth U. S. Census, pp. 508-554.

47 In Arizona claims of two hundred feet in length were quite common but the majority of the districts specified three hundred feet. Vol. XIV, Tenth U. S. Census, pp. 247-266. The districts of Utah, formed in 1863-1864, prescribed two hundred feet as the lawful length in any district noted. Id. pp. 614-625. In Colorado the customary length was one hundred feet. Colorado was further removed from the influence of the Pacific Slope and had elaborate regulations of a unique type providing for tunnel claims and possessing many features not found in the regulations of other states. Id. pp. 365-472. Neither were the words "dips, spurs, angles and variations," etc., commonly used in Colorado though they were used in all of the other States noted. The width of lode claims in these States varied as in California. Colorado already showed the tendency toward narrow claims now characteristic of that State and as early as August 21st, 1862, the rules of Bevan Mining District, Summit County, provided that lode claims shall be "twenty-five feet wide on each side of the wall rock of the crevice of said lode." Id. p. 462; see also p. 466. The Castle Dome District regulations of Yuma County, Arizona, in 1862, provided for a width of one hundred yards on each side of the vein which is the same width specified in the Act of 1872 passed by Congress ten years later.

48 This is quite natural, for miners from California migrated, in large numbers, to Nevada and particularly to the Comstock Lode and vicinity. Lord, Comstock Mining and Miners, U. S. G. S. (1883); Browne, Mineral Resources, (1867), p. 27.
Mining District, where in 1869 the miners attempted to abolish the extralateral right and prescribed that, because of the peculiar nature of the deposits, claims should be one hundred feet square in order to avoid "expensive litigations." 49

During most of this period, from 1850 to 1866, the state and territorial governments as already noted were satisfied to allow the miners to determine for themselves the laws which controlled their acquisition and working of mining claims. California did not legislate on the subject at all, except to approve of what the miners had done.

The legislature of Idaho, February 4, 1864, passed an act providing: 49a

"That any quartz claim shall consist of two hundred feet in length along the lead or lode, by one hundred feet in breadth, covering and including all dips, spurs and angles, etc."

This right was later expressly confined to the one lode claimed. The act was silent as to placers. 50

A statute of Arizona effective January 1st, 1865, provided that:

"Every mining claim or pertenencia is declared to consist of a superficial area of two hundred yards square, to be measured so as to include the principal mineral vein or mineral deposits, always having reference to and following the dip of the vein so far as it can or may be worked, etc."

The act was quite comprehensive and somewhat complex and shows very strong influence of the Mexican-Spanish laws, many terms of the latter being employed. It expressly excluded placer mining from its operation. 51

A statute of Oregon of October 24, 1864, provided:

Section I. "That any person or company of persons establishing a claim on any quartz-lead containing gold, silver, copper, tin or lead, or a claim on a vein of cinnabar, for the purpose of mining the same, shall be allowed to have, hold and possess the land or vein, with all its dips, spurs and angles for the distance of three hundred feet in length and seventy-five feet in width on each side of such lead or vein."

This statute also provided that only one claim on each lead

51 Browne, Mineral Resources, (1867), pp. 249-257; Yale, Mining Claims, p. 84.
or vein could be held by location and expressly left the acquisition of title to placer claims to the miners' local laws.\footnote{Vol. XIV, Tenth U. S. Census, pp. 200-201. Yale says this Oregon statute "is a mere transcript of the miners' laws regulating claims upon lodes, noticed as in force in California, and which may be found elsewhere." Yale, Mining Claims, p. 84.}

The territorial legislature of Washington on January 29th, 1863, adopted the following statute:

Section I. "That the extent of a quartz mining claim shall not exceed \textit{two hundred feet} of the lead, including \textit{all the dips, spurs and angles} embraced within said two hundred feet."

The territorial legislature of Montana on December 26th, 1864, enacted the following:

Section III. "Claims on any lead, lode or ledge, either of gold or silver, hereafter discovered, shall consist of not more than \textit{two hundred feet} along the lead, lode or ledge, together with \textit{all dips, spurs and angles} emanating or diverging from said lead, lode or ledge, as also fifty feet on each side of said lead, lode or ledge, for working purposes, etc."

The amount of ground which could be taken up on the lode was limited to one thousand feet in each direction from the discovery claim.

Colorado on November 7th, 1861, adopted a statute limiting the length of a lode claim to one hundred feet. By Act of March 11, 1864, sixteen such claims could be consolidated under one discovery and on February 9th, 1866, the length of a claim for each person was changed to fourteen hundred feet.\footnote{Morrison's Mining Rights, (14th ed.) p. 21; 1 Copp's Land Owner, 84.}

New Mexico, on January 18th, 1865, passed an act which from the evidence at hand, appears to have limited claims to two hundred feet for each person of the length of the lode "of its entire width, including \textit{all its dips, openings, spurs, angles and variations}, with a right to follow such vein to any depth, etc." and a total limit of one thousand five hundred feet for a company claim.\footnote{Vol. XIV, Tenth U. S. Census, p. 184.}

A Nevada statute approved February 27th, 1866, provided that:

Section 23. "... No person shall be entitled to hold by location more than \textit{two hundred feet} of any one ledge except by virtue of discovery of the same, for which he shall be entitled to hold two hundred feet additional ... No claim shall, in the aggregate, exceed in extent two thousand feet on any one ledge."

Section 24. "Any location made on a ledge by authority..."
of this act shall be deemed to include all the dips, spurs, angles and variations of said ledge.

“The locators of any ledge shall be entitled to hold one hundred feet on each side of the same, etc. . . .”

This act expressly provided that placer mining should be “subject to such regulations as the miners in the several mining districts shall adopt.” 55

It is quite evident that these state statutes were based on the local miners' laws and were merely declaratory of the existence of an extralateral right on quartz veins which right, as has been observed, had already been fully developed in the various mining districts by the miners themselves.

The Federal Mining Act of 1866. 56

During all these years the Federal Government had remained silent on the question of the disposition of these mineral lands. 57

56 14 U. S. Stats. at L. 251.
57 "... this system of free mining fostered by our neglect, and matured and perfected by our generous inaction." Remarks of Senator Stewart, Appendix No. 1, 70 U. S. 779. There was indirect recognition of these possessory rights of miners in a number of earlier Congressional statutes:
An Act of Congress establishing federal courts for the District of Nevada approved February 27, 1865, provided: § 9, “That no possessory action . . . for the recovery of a mining title . . . shall be affected by the fact that the paramount title to the land on which such mines lie is in the United States, but each case shall be adjudged by the law of possession.” 13 Stats. at L. 440.
An Act of Congress of March 3, 1865, regulating the sale of town lots provided: § 2, “That where mineral veins are possessed, which possession is recognized by local authority . . . town lots . . . shall be subject to such possession . . . . Provided, however, that nothing herein shall be construed as to recognize any color of title in possessors for mining purposes as against the government of the United States.” 13 Stats. at L. 529.
An Act of Congress of May 5, 1866, concerning the boundaries of the State of Nevada provided that: “All possessory rights . . . to mining claims discovered, located and originally recorded, in compliance with the rules and regulations adopted by miners in . . . Nevada, shall remain as valid, subsisting mining claims; but nothing herein contained shall be so construed as granting a title in fee to any mineral lands held by possessory titles in the mining states and territories.” 14 Stats. at L. 43.
Treaty with Peru: Art. XIV. “Peruvian citizens shall enjoy the same privileges, in frequenting mines, and in digging or working for gold, upon the public lands situated in the State of California, as are, or may be hereafter, accorded by the United States of America to the citizens or subjects of the most favored nation.” 10 U. S. Stats. at L. 926, 932. July 26, 1851.
Treaty with Tabeguache Indians: Art. III. “The right of any citizen of the United States to mine without interference or molestation in any part of the country hereby retained by said Indians [in Colorado], where gold or other metals or minerals may be found, is hereby also conferred and guaranteed.” 13 U. S. Stats. at L. 673, 674. Oct. 7, 1863.
They were a part of the public domain and Congress was alone empowered by the Federal Constitution to dispose of the territory belonging to the United States.\textsuperscript{58} Acquiescence in the extensive mining operations of these years was presumed because of this failure to act and what would otherwise have been a clear trespass on the part of the horde of invading miners was recognized by the courts as establishing a right through sufferance.\textsuperscript{59}

There had been various attempts to induce Congress to legislate on the subject of these mineral lands and there were plans to lease them, reserving a royalty for the government,\textsuperscript{60} and also to sell them outright at public auction to the highest bidder, thus enabling the government to pay off a portion at least of the vast debt inherited from the Civil War.\textsuperscript{61} The miners of the West were jealous of any interference with the authority and control over the mining regions which they had been exercising for so many years.\textsuperscript{62} But the day arrived when action by Congress could no longer be prevented, and Senator Stewart of Nevada and Senator Conness of

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\textbf{Treaty with Shoshonee-Goship Indians: Art. IV.} "It is further agreed by the parties hereto that the country of the Goship tribe [in Montana] may be explored and prospected for gold and silver, or other minerals and metals; and when mines are discovered they may be worked, and mining and agricultural settlements formed and ranches established wherever they may be required." 13 Stats. at L. 681, 682. Oct. 12, 1863.

\textsuperscript{58} U. S. Const. Art. IV, §3, subd. 2.

\textsuperscript{59} We cannot shut our eyes to the public history, which informs us that under this legislation (in re the State of Nevada recognizing the validity and binding force of the rules, regulations and customs of the mining districts) and not only without interference by the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country." Sparrow v. Strong (1865), 70 U. S. 97, 104, 18 L. Ed. 49. "For eighteen years—from 1848 to 1866—the regulations and customs of miners, as enforced and moulded by the courts and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands. Until 1866, no legislation was had looking to a sale of the mineral lands." Jennison v. Kirk (1878), 98 U. S. 453, 458-459, 25 L. Ed. 240.

\textsuperscript{60} When Senator Stewart's bill came before the Senate it contained a clause providing for payment to the government of a royalty of three per cent of the output of the mines. This was eliminated before the bill was finally passed. See Congressional Globe Debates of 1866.

\textsuperscript{61} See Yale, Mining Claims, pp. 340-354.

\textsuperscript{62} Whereas; since the discovery of gold in California it has been the policy of the General Government and of the different state and Territorial legislatures upon the Pacific slope (except the last legislature of this state) not to interfere with the laws and regulations of the miners in the different districts, but to permit them to enact such laws as to them seemed proper and just in regard to the government of the mines, such laws having always when tested been sanctioned and approved by the highest judicial tribunals, and,
California, realizing that they must take affirmative action if they would forestall adverse legislation by those of the Eastern States who were not in sympathy with the Western problems, prepared and introduced the bill generally known as the mining Act of 1866.63

This act established the free right to mine on the public domain and legalized what had theretofore been a technical trespass. Senator Conness stated in his report on the bill as chairman of the Committee on Mines and Mining:

"By this bill it is only proposed to dispose of the vein mines. . . . It is not proposed to interfere with, or impose any tax upon, the miners engaged in working placer mines, as those mines are readily exhausted, and not generally remunerative to those engaged in working them. . . . (It is) an act to provide for investing the miners of the country with the fee simple to their vein mines. . . .

Whereas; under this liberal policy the development of mineral wealth upon the Pacific Slope has been unparalleled in the history of the world, and possessing the utmost confidence in the intelligence in the mining population of this state, and their capacity for creditably continuing the time honored custom of enacting their own laws for the government of the mines free from legislative interference and,

Whereas; believing as we do that no general mining laws could be enacted that would meet the requirements of the different districts, as the varied character, size and location of the ledges in the different districts require different laws and believing that the action of the last legislature of this state, will have a tendency to bring about what we are so anxious to avoid viz:—Congressional interference by still more general legislation; and,

Whereas; many of the provisions of the state mining law are utterly impracticable in the Reese River Mining District besides placing upon us additional burthens in incresced expenses and trouble in locating and recording our claims, therefore

Resolved, that the state mining law is utterly impracticable in many of its provisions, obnoxious and burthensome to the mining population generally, and especially so to the miners of Reese River District, where the peculiar formation and close proximity of the ledges render many of its provisions totally impracticable.

Resolved, that the last legislature of this state, in taking from us the right so long considered sacred, viz: that of enacting our own laws for the government of our mines, was guilty of a gross usurpation, or at least, abuse of power, unparalleled in the legislative, executive, or judicial history of the Pacific Slope.

Resolved, that we are in favor of the unconditional repeal of said law, and will vote for no person for either branch of the Legislature not pledged to vote and work for its repeal. (Adopted by mines of Nevada, March 30, 1866.)

63 The threat of drastic legislation by opponents and the thrilling contest over the adoption of the Stewart bill, which finally passed, as well as the reason for its peculiar title, "An Act granting a right of way to ditch and canal owners, etc.," is dramatically set forth by Yale in his work on Mining Claims, pp. 9-12.
"The mass of the people living in the mines feel that the mines should be left free and open to and within the reach of the hardy explorer and adventurer without tax or impost whatever. . . . They also fear all systems of sale lest any which should be adopted might result in monopoly. . . . They, nevertheless, will readily acquiesce in any plan which shall confirm existing rights at reasonable rates. . . . Another feature of the bill recommended is, that it adopts the rules and regulations of miners in the mining districts where the same are not in conflict with the laws of the United States. This renders secure all existing rights of property, and will prove at once a just and popular feature of the new policy. Those 'rules and regulations' are well understood, and form the basis of the present admirable system in the mining regions; arising out of necessity, they became the means adopted by the people themselves for establishing just protection to all.

"In the absence of legislation and statute law, the local courts, beginning with California, recognize those 'rules and regulations,' the central idea of which was priority of possession, and have given to the country rules of decision, so equitable as to be commanding in its natural justice, and to have secured universal approbation. The California reports will compare favorably, in this respect, with the history of jurisprudence in any part of the world. Thus the miners' 'rules and regulations' are not only well understood, but have been construed and adjudicated for now nearly a quarter of a century.

"It will be readily seen how essential it is that this great system, established by the people in their primary capacities, and evidencing by the highest possible testimony the peculiar genius of the American people for founding empire and order, shall be preserved and affirmed. Popular sovereignty is here displayed in one of its grandest aspects, and simply invites us not to destroy, but to put upon it the stamp of national power.

Hon. E. F. Dunne of Nevada in a letter to Dr. R. W. Raymond (Dec. 20, 1869) described the situation as follows: "Fortunately, the mining interest was ably represented in Congress, led by Senators Stewart of Nevada and Conness of California, both thorough masters of the subject. They grappled the question with all their power, knowing it was a matter of life or death to the regions they represented, and, after a desperate struggle, defeated the highest bidder plan, and achieved a complete victory for the principles most anxiously desired by the miners, namely, the recognition of their mining laws, and the right of the discoverer of a mine to purchase the title from the government at a reasonable price. No matter how defective the bill may be in detail; no matter how many points it leaves entirely untouched; the miners will ever be grateful for its passage, for in that, to them, memorable session, it was not a question of detail nor perfection, but a struggle between two great conflicting principles, and the policy desired by the miners prevailed." Raymond, Mineral Resources (1870), p. 423.
and unquestioned authority."\textsuperscript{64}

The language of Senator Wm. M. Stewart in advocating the passage of the lode law of 1866 cannot be improved upon, for it is the best evidence of his own mental operations and gives us the reasons which controlled him in framing the Act and embodying in it the extralateral grant, already a part of the miners' law. The following liberal quotation is therefore pardonable:

"To extend the pre-emption system—applicable to agricultural lands—to mines is absurd and impossible. Nature does not deposit the precious metals in rectangular forms, descending between perpendicular lines into the earth, but in veins or lodes, varying from one foot to three hundred feet in width, dipping from a perpendicular from one to eighty degrees, and coursing through mountains and ravines at nearly every point of the compass. In exploring for vein mines, it is a vein or lode that is discovered, not a quarter section of land marked by surveyed boundaries. In working a vein more or less land is required, depending upon its size, course, dip, and a great variety of other circumstances, not possible to provide for in passing general laws. Sometimes these veins are found in groups, within a few feet of each other, and dipping into the earth at an angle of from thirty to fifty degrees, as at Freiberg, Saxony, or Austin, in Nevada. In such case a person buying a single acre in a rectangular form would have several mines at the surface, and none at five hundred or a thousand feet in depth. With such a division of a mine, one owning it at the surface, another at a greater depth, neither would be justified in expending money in costly machinery, deep shafts and long tunnels, for the working of the same. Nor will it do to sell the land in advance of discovery, for this would stop explorations, and practically limit our mining wealth to the mines already found for no one would 'prospect' with much energy upon the land of another, and land speculators never find mines. The mineral lands must remain open and free to exploration and development; and while this policy is pursued our mineral resources are inexhaustible. There is room enough for every prospector who wishes to try his luck in hunting for new mines for a thousand years of exploration, and yet there will be plenty of mines undiscovered. It would be a national calamity to adopt any system that would close that region to the prospector.

"The question then presents itself, how shall the Government give title, so important for permanent prosperity, and avoid these intolerable evils? I answer, there is but one mode, and that is to assure the title to those who now or hereafter

\textsuperscript{64}Browne, Mineral Resources, 1867, pp. 219-220.
may occupy according to local rules, suited to the character of the mines and the circumstances of each mining district. In the increasing agitation of the subject by the introduction into Congress of bills which miners regard as a system of confiscation, and which tend to destroy all confidence in mining titles, we now need statutes which shall continue the system of free mining, and hold the mineral lands open to the exploration and occupation, subject to legislation by Congress and local rules; something which recognizes the obligation of the Government to respect private rights which have grown up under its tacit consent and approval, and which shall be in harmony with the legislation of 1865, protecting possessory rights, irrespective of any paramount interest of the United States. The system will be in harmony with the rules of property as understood by a million men, with the legislation of nine States and Territories, with a course of judicial decisions extending over nearly a quarter of a century, and finally ratified and confirmed by the Supreme Court of the United States; in harmony, in short, with justice and good policy."

Appendix No. 1, 70 U. S., 779, 780.

During the course of the debate in the Senate Senator Stewart said:

"He evidently has not read it (the bill), and has fallen into the popular prejudice of supposing that land is to be sold in rectangular form between perpendicular lines. It has been explained that this cannot be done. A vein pitches into a hill, and a perpendicular line would cut it up into pieces. He speaks of that. This bill provides for selling the vein and following it into the earth, with its natural dips and angles."

Senator Conness also added:

"I desire to say to him, (Senator Williams of Oregon) in this connection, that vein mines do not enter the earth by perpendicular lines, but on the contrary, have what are called dips or slants running by oblique lines into the earth; that they follow each other regularly in that respect; and that the custom now, and the habit everywhere, and the law, first determined by necessity, by the fact, next by the population obeying that necessity, next by the local courts affirming that necessity by their decisions, is that the miner is authorized to follow every vein according to its dips and angles and variations. This whole bill is based upon the principle of confirm-

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65 Referring to the writer of a letter read by an opponent of the bill in which the writer stated that it would be absurd to sell quartz mines by subdivisions with vertical boundaries because lode mines did not conform to such surface allotments. See Congressional Globe, June 18, 1866, pp. 3451-2.

66 Congressional Globe, June 18, 1866, p. 3452.
ing what has grown out of necessity, the wisest system, perhaps, that could possibly be devised, which is the work of the people themselves. Would the senator want to enter the earth by perpendicular lines so that a man who owned a claim today, after he had descended 50 ft. of it, should leave it to the ownership of another man tomorrow?"

The Act was quite universally approved in the West. The Sacramento Union of June 23, 1866, said:

"... this bill has been framed with a more intelligent regard for the interests of the people of the Pacific Coast than any other previous measure that we can now recall, and it is probable that its provisions can be executed without inflicting injury upon the rights which accrued under the policy hitherto pursued by the government."

Governor McCormick of Arizona, in his annual message delivered to the legislature October 8th, 1866, said:

"The act of Congress to legalize the occupation of mineral lands, and to extend the rights of pre-emption thereto, adopted at the late session, preserves all that is best in the system created by miners themselves, and saves all vested rights under that system, while offering a permanent title to all who desire it, at a mere nominal cost. It is a more equitable and practicable measure than the people of the mineral districts had supposed Congress would adopt, and credit for its liberal and acceptable provisions is largely due to the influence of the representatives of the Pacific coast, including our own intelligent delegate. While it is not without defects, as a basis of legislation it is highly promising, and must lead to stability and method, and so inspire increased confidence and zeal in quartz mining."

The Virginia Enterprise, the leading journal of the State of Nevada, on July 13, 1866, said editorially:

"The Bill proposed nothing but what already exists, except giving a perfect title to the owners of any mine who may desire it."

When we come to analyze the Act of 1866 we find that it is just what its author and others claimed for it, merely a confirmation of miners' rules and regulations with the added feature of

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67 Id. p. 3234. This language of Senator Conness is strikingly similar to arguments of some of the French Statesmen in the Chamber of Deputies when the French mining law of 1810 was under consideration. Halleck's translation of De Fozz on the Law of Mines had already been published (1860) on the Pacific Coast and the Senator had undoubtedly read it. See 4 California Law Review, 371-372.

affording an opportunity to the miner of securing a title in fee
simple to his mining claim through issuance of a patent.

Section one of the Act confirmed what had theretofore been
tacitly accepted as the fact, that mineral lands of the public domain
were free to prospectors and miners, subject to statutory regu-
lation and “also to the local customs or rules of miners in the several
mining districts” etc.

Section two provided that when “a vein or lode of quartz, or
other rock in place, bearing gold, silver, cinnabar or copper,” has
been taken up “according to the local customs or rules of miners
in the district where the same is situated” and not less than one
thousand dollars expended thereon, 69 the claimant might “file in the
local land office a diagram of the same, so extended laterally or
otherwise as to conform to the local laws, customs, and rules of
miners” and “receive a patent therefor, granting such mine,
together with the right to follow such vein or lode, with its dips,
angles and variations, 70 to any depth, although it may enter the
land adjoining, which land adjoining shall be sold subject to this
condition.”

Section three is concerned with the detailed procedure for
acquiring a patent.

Section IV provided . . . . “that no location hereafter
made shall exceed two hundred feet in length along the vein
for each locator, with an additional claim for discovery to the
discoverer of the lode, with the right to follow such vein to
any depth, with all its dips, variations and angles, together

69 The Reese River and other district laws of 1863 provided that
“Whenever one thousand dollars shall have been expended” on a claim, it
“shall be deemed as belonging in fee to the locators thereof and their
assigns” etc. Senator Stewart is supposed to have modeled the Act of
1866 upon the Reese River district regulations and the fact that this
precedent in the Reese River rules exists is at least corroborative evidence
to support this view. Vol. XIV Tenth U. S. Census, pp. 525, 533, showing
that this same principle and amount had been adopted in Placer County,
California, in 1863, and in the Genoa Mining District, Nevada, during or
prior to 1860. See Bancroft's Handbook of Mining (1861), p. 203. The
same principle is to be noticed in Grass Valley, Nevada County, in 1852.

70 The Sutro Tunnel Act, 14 U. S. Stats. 242, of July 25, 1866,
passed by Congress one day prior to this main lode Act of 1866 used the language
“dips, spurs and angles” as applied to the Comstock lode and veins which
might be intersected by the tunnel.

71 Julien, who bitterly opposed the passage of this act in the House,
said of this extralateral feature “. . . . this bill overturns the common
law of the world, by allowing one man to run half a mile under the land
with a reasonable quantity of surface for the convenient working of the same, as fixed by local rules; and provided further, that no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons.\textsuperscript{72}

The balance of the sections of the act related to mining matters of subordinate importance and to rights of way for ditches and canals on the public domain, etc.

It is quite clear that the act did not interfere materially with the operation of the miner’s rules and customs and instead of abridging the powers of these local law-making bodies, the act repeatedly places the stamp of approval on their functions and existence\textsuperscript{73}. It is true that the act did prescribe what should be the lawful maximum length of a lode claim thereafter made but it has already been pointed out that this limitation of “two hundred feet in length along the vein for each locator”\textsuperscript{74} had been adopted almost universally throughout the West in the mining districts and by the state and territorial legislatures, as the linear measurement for lode claims except in the older districts, where one hundred feet had been the rule. The limitation of “one location on the same lode” for each locator was also a rule in force in nearly all the districts and also adopted by the legislatures. The “additional claim for discovery to the discoverer” was also a universally accepted regulation. The granting of “the right to follow such vein or lode, with its dips, angles and variations, to any depth” was not as we have seen, the creation of a new right,\textsuperscript{75} but

\textsuperscript{72} All of these provisions were already in force in a vast majority of the mining districts, excepting possibly the last limitation of 3000 feet as the maximum length for a company. Even this was foreshadowed in local rules for a maximum length of 2400 feet had already been prescribed. Vol. XIV Tenth U. S. Census, p. 616. And see also similar legislation in Montana, (Act of Dec. 26, 1864, limiting length to 1000 feet in each direction from the discovery claim); Colorado, (Act of Mar. 11, 1864, limiting length to sixteen 100 foot claims, and Act of Feb. 9, 1866, limiting length of a claim to 1400 feet); Nevada, (Act of Feb. 27, 1866, limiting length of a claim to 2000 feet); and New Mexico, (Act of Jan. 18, 1865, limiting the length of a company claim to 1500 feet).

\textsuperscript{73} During the course of the Senate debate on this bill, Senator Stewart said: “All there is in this bill is a simple confirmation of the existing condition of things in the mining regions, leaving everything where it was, indorsing the mining rules.” Congressional Globe (June 18, 1866) p. 3234.

\textsuperscript{74} In the bill as originally drafted, this length was 300 feet. Congressional Globe (June 18, 1866), p. 2225.

\textsuperscript{75} The anathema that has been heaped upon the framers of the Law of Apex is amusing to one familiar with the real facts underlying its origin. “The Law of Apex, this monumental blunder of experimental legislation” . . . “begotten in bland self-complacent ignorance by a group of opulent
was language taken bodily from the miners' rules and regulations themselves, and which had already become the "law of the land" throughout the entire West except in a few mining districts adhering to the square surface claim with vertical boundaries. The districts where the extralateral right was in force were the rare exception, and the words "dips, spurs, angles and variations" had long since become common mining parlance and were employed every day in conveyances of interests in lode claims. As already noted, the legislatures of most of the Western States and Territories had, prior to the passage of the Act of 1866, also enacted statutes along the lines of the local miners' laws, and the extralateral right had become so thoroughly a part of the mining law of the West, that in 1866 to have disassociated the idea of extralateral right from lode mining would have been unthinkable. If Senator Stewart, on whose head so much uninformed abuse has been undeservedly heaped, had in 1866 urged Congress to abolish the extralateral right, instead of urging its acceptance, not only his Nevada constituents, but the first mining community he happened to pass through on his return from Washington would undoubtedly...

mechanics" . . . guilty of "foisting upon the mining public of a great domain your ill-advised and flimsy statutes,"—so writes a critic in Economic Geology, Vol. I, No. 6 (July, 1906), p. 572 et seq. Usually this crime is charged on Senator Stewart who framed the Act and took a leading part in the Comstock litigation. As late as the issue of June 10, 1916, the Mining & Scientific Press (p. 850) contains a letter from a correspondent in which he refers to "the principle of the extralateral right as having been evolved from the brain of a capable, brilliant lawyer and through his remarkable ability and powers of persuasion made to serve his ends," and adds "it has continued on its pernicious course nearly 50 years." The shades of the pioneers of 1851 would resent such credit being given to a lawyer fifteen years later, for in many of the mining camps, lawyers were expressly prohibited from practicing. "No lawyer shall be permitted to practice law in any court in the district under penalty of not more than fifty nor less than twenty lashes and be forever banished from the district." (By-laws of Dec. 10, 1860, Union Mining District, Clear Creek County, Colorado. Vol. XIV Tenth U. S. Census, p. 373. See also, p. 411).

This is one original sin which the lawyers cannot be charged with. They usually frame most legislation but the democratic mining camp usurped this privilege in the case of the extralateral right.

See Bullion Mining Co. v. Croesus Mining Co. (1866), 2 Nev. 168, 176. Mark Twain wrote: "I have been through the California mill, with all its dips, spurs and angles, variations and sinuosities. I have worked there at all the different trades known to the catalogue." American Stationer.

Congdon's Mining Laws and Forms (1864), p. 168, San Francisco, uses the words "dips, spurs and angles" in standard form of mining deed.

As Senator Conness said in the Senate debate on the part of the bill conferring extralateral rights: "That simply is no change; it is the law of the mines now." Congressional Globe (June 18, 1866) p. 3234.
have met him with a delegation, politely described in the pioneer
days as a "neck-tie party," or at least they would have carried a
rail and a goodly supply of tar and feathers. To have ignored the
extralateral right in those days would have meant to unsettle the
title to virtually all of the countless thousands of lode claims
which had already been acquired throughout the West. If any sin
was committed in perpetuating the extralateral right, the pioneer
miners of the West, and the legislatures of the Western States and
Territories, and not Senator Stewart, were primarily responsible.
All that he added to the laws created by these pioneers, was the
privilege of securing a fee simple title through patent. Whether
they accepted even this desirable feature or not remained entirely
optional with them, for they might continue to hold their claims
under the possessory title afforded by their locations exactly as
they had been doing up to that time under their own local laws. A
very few districts had to change their rules and recognize that
quartz locations made after the passage of the act\textsuperscript{79} must conform
to the prescribed two hundred foot length along the lode for each
claimant, but as we have seen, this had already become the univers-
ally accepted length and most of the state and territorial laws
had already anticipated the federal act, so this limitation was not
an innovation. The extralateral right as already noted, had also
become a characteristic feature of practically all of the mining
districts and the Act of 1866 in recognizing it, continued the grant
of the right in the identical language employed by the great
majority of the local regulations and western legislatures so that
few districts had to change their laws in this respect.\textsuperscript{80}

It is not the province of this article to discuss the workings of
the Act of 1866 and the interpretation placed by the courts on the
rights conferred by the Act. The very excellent treatises on the
subject of mining law are referred to for this information.\textsuperscript{81} It is
interesting to note in passing, that the Act of 1866 did not pre-
scribe the manner of determining the direction of the end-bound-

\textsuperscript{79} Claims located prior to the passage of the Act were governed by the
local laws as to length. 1 Copp's Land Owner, p. 83.

\textsuperscript{80} "Usually a quartz claim follows the lode as deep into the earth as it
may go", (p. 184) .... "quartz claims ordinarily follow the lode, with its
dips and angles, to the full extent of its depth," (p. 186). Hittell, Hand
Book of Mining for the Pacific States (1861).

\textsuperscript{81} Lindley on Mines (3rd ed. 1914), §§ 53-61, 566-577a; Costigan on
Mining Law (1908), pp. 14-18, 415-417; Morrison's Mining Rights (14th ed.
aries of the length of vein located. Naturally the ascertainment of the longitudinal limits of the segment of vein carved out in depth, became important. The land department issued instructions providing that when not agreed upon between adjoining claimants nor fixed by local rules, the end lines "shall be drawn at right angles to the ascertained or apparent general course of the vein or lode." It is strange that none of the district regulations seem to have provided the method of determining the exact measure of this right to mine in depth. Judge Field in the celebrated Eureka Case stated the proposition as if it were one already generally accepted, that,

"Lines drawn down through the ledge or lode at right angles with a line representing this general course at the end of the claimant's line of location will carve out, so to speak, a section of the ledge or lode within which he is permitted to work and out of which he cannot pass."

This view was later upheld in the Argonaut-Kennedy case. The interesting feature of this situation is the fact that in both Derbyshire and in Germany the laws granting the extralateral right were equally indefinite regarding these end bounding planes and in each country the generally accepted custom was to lay out the end line planes at right angles to the general course of the vein.

The Act of 1866 was also found wanting in other respects. The fact that no lateral surface width for a claim was prescribed by its terms gave rise to great confusion and resulted in applications for patents for claims of all conceivable shapes. The restriction that only one lode or vein could be owned in a claim also gave rise to endless disputes and litigation.

No one had claimed that the Act of 1866 was perfect. It was hastily prepared to forestall contemplated drastic legislation which would have seriously crippled the mining industry in the West and

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82 Yale, Mining Claims, p. 360.
83 (1877), 4 Sawy. 302, Fed. Cas. 4548.
84 Argonaut Mining Co. v. Kennedy Mining Co. (1900), 131 Cal. 15, 63 Pac. 148, affirmed on other grounds in Kennedy Mining Co. v. Argonaut Mining Co. (1903), 189 U. S. 1, 47 L. Ed. 685. This decision was the first to definitely determine the extent of the extralateral grant, and was rendered fifty years after the right was initiated.
86 See Lindley on Mines, § 59.
87 Senator Stewart remarked in the debate on the Act of 1872: "Now, for want of a more definite rule the whole region is in litigation. Every man who goes West to locate a claim finds so much local legislation which is uncertain that he is discouraged; he finds the neighborhood in litigation."
was generally recognized as being crude and incomplete, though "a step in the right direction." Senator Stewart later prepared a bill calculated to remedy the objections to the Act of 1866 already noted, and which passed the Senate, February 8th, 1871, but failed in the House for lack of time. This bill contained many of the features of the subsequent Act which was adopted in 1872. It contained an interesting clause not found in the Act of 1872, providing not only that the end lines should be parallel but also that they should be "at right angles with the general course of the vein."  

A discussion of the Federal Act of 1872 which superseded the Act of 1866 and which is the mining law now in force in the Western States is appropriately reserved for separate presentation.  

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