Chapter 10

MINERALS AND WATERS

Gold was discovered on January 24, 1848, and was followed by California's famous rush for gold. This momentous discovery and the beginnings of the great influx of people both took place before statehood and the establishment of a legal system. The result was that the miners had to create their own law, which they did as best they could, but such a procedure was still haphazard and left many important but unresolved legal problems, particularly as the number of miners increased.

In 1849 Henry Gunter paid for some lumber with gold dust, each ounce valued as $15.50 in payment, even though worth $16.00 at the time. He later sued for the difference and in *Gunter v. Sanchez* the Court did not allow this claim, as both parties had agreed to the $15.50 value.[1] "Gold dust is constantly fluctuating in its market value — it is an article of traffic like merchandise, and a payment in it is a payment for just so much as the parties agree, and for no more."[2] This was the first case arising from the discovery of gold, and possibly the easiest one decided.

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[1] Gunter v. Sanchez (1850), 1 Cal. 45.

[2] Ibid., 49.

The state legislature gave official sanction to miners' rules and regulations adopted by the various mining districts,[3] and the state's courts admitted their validity,[4] but still to come before the Supreme Court were questions dealing with the appropriation of mineral lands and water, the paramount title to the mineral lands, and the conflict between farmers and miners when minerals were found on a piece of land also used for agricultural purposes.

OWNERSHIP OF MINERAL LANDS

For the two-year period between the discovery of gold and California's admission as a state, and the eleven additional years between statehood and 1861, the question as to the ownership of the minerals in ground remained unresolved. Neither federal nor state legislation was enacted to settle this question. It was finally brought before the California Supreme Court, where the justices had to work out a solution. The importance of a solution was stated by Stephen J. Field:

> The position of the people of California with respect to the public mineral lands was unprecedented. The discovery of gold brought . . . an immense immigration to the country. The slopes of the Sierra Nevada were traversed by many of the immigrants in search of the precious metals, and by others the tillable land was occupied for agricultural purposes. The title was in the United States, and there had been no legislation by which it could be acquired. Conflicting possessory claims naturally arose, and the question was presented as to the law applicable to them.[5]

The first statement on the matter of the title to the mineral lands by the California Supreme Court appeared in 1853 in *Hicks v. Bell*. The Court said that all minerals found in the state, whether on public or private lands, belonged to the state by virtue of her sovereignty, a conclusion based on English cases recognizing the right of the crown to minerals. Under this ruling the state had

> solely the right to authorize them [the public lands] to be worked; to pass laws for their regulation; to license miners; and to affix such terms

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3 Cal. Stats. (1851), chap. 5, § 621.

4 Hicks v. Bell (1853), 3 Cal. 219.

5 Stephen J. Field, *California Alcalde* (Oakland: Biobooks, 1950), 103.

> and conditions as she may deem proper, to the freedom of their use. In her legislation upon this subject, she has established the policy of permitting all who desire it, to work her mines of gold and silver, with or without conditions; and she has wisely provided that their conflicting claims shall be adjudicated by the rules and customs which may be established by bodies of them working in the same vicinity.[6]

Justice Solomon Heydenfeldt based his opinion on the English common law rule that the gold and silver in the British realm belonged to the crown. Commenting in later years about *Hicks v. Bell*, Stephen J. Field, one of the losing counsel, wrote that the Court ignored the reasoning behind the rule, but adopted its conclusion, and held that "the United States have no municipal sovereignty within the limits of the State, that they must belong in this county to the State."[7] By relying exclusively on the common law, the Court did not have to take into account any Spanish or Mexican law that may have conflicted, nor did the counsel for either party mention any but English and United States precedents.

One implication of this decision was that private lands being used for other purposes could be worked by miners without the owners' permission, and the mineral-seekers were quick to grasp the opportunity.

The *Hicks* decision was upheld throughout the decade of the 1850s, albeit with some modifications as to the right of entry on private lands, until 1859, when *Hicks v. Bell* was seriously challenged in *Biddle Boggs v. Merced Mining Co.*[8] The case had originally come before the Court in 1857 as a contest between Merced Mining Company and John C. Frémont, with the company mining land on which Frémont was also conducting mining operations, and which he also claimed under a Mexican grant.[9] The plaintiff company was granted an injunction to prevent Frémont from trespassing on its mining premises, and from working these claims. In so deciding Justices Peter H. Burnett, who wrote the opinion, and David S. Terry refused to comment on whether the minerals belonged to the state or federal government, but said that the company's mining claim was property and

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6 Hicks v. Bell, 227.

7 Field, California Alcalde, 105.

8 Biddle Boggs v. Merced Mining Co. (1859), 14 Cal. 279.

9 Merced Mining Co. v. Fremont (1857), 7 Cal. 307

was entitled to protection under the law. The rule laid down in *Hicks v. Bell* was necessary to deal with the circumstances in California at that time.

Frémont had his grant verified, a patent was issued, and he leased his mineral rights to Biddle Boggs, who brought suit to eject the Merced Mining Company. Biddle Boggs won in the lower court, and that decision was brought on appeal to the Supreme Court. Among the attorneys representing Biddle Boggs were Joseph G. Baldwin, soon to take his place on the Court, and Solomon Heydenfeldt, who now argued against his earlier position in *Hicks v. Bell* in regard to the right of entry on private lands for mining purposes. At its January 1858 term the Court reversed the lower court, with justice Burnett again writing the opinion and agreeing with his views in the 1857 case. Terry, now the chief justice, concurred, saying that the title to the minerals did not pass to Frémont, but he refused to comment on *Hicks v. Bell*. Stephen J. Field, now a member of the Court, dissented without an opinion.

A rehearing was granted, and the case was reargued at the July 1858 term and again at the October 1859 term. Chief Justice Stephen J. Field and Justice Warner W. Cope now affirmed the lower court in support of Frémont's lessee, Biddle Boggs. Field wrote the opinion, but sidestepped the question of whether the mineral rights passed to the state or the United States, saying he wanted to wait for a full bench; the third member of the Court, Joseph G. Baldwin, had been one of Boggs' counsel, and did not sit for the case. Without deciding the paramount title to the minerals, Field still modified *Hicks v. Bell* extensively. He said that for the sake of argument the minerals belonged either to the state or to the federal government. If the ownership belonged to neither, then the defendant company had no case at all. Assuming the first premise, there had to have been a license for the defendant to enter. But forbearance was the extent of the federal license to mine on the public lands, and such a license could not apply to private lands where the government was ignorant of entries to work such lands. There was no license from the state either. If the United States owned the minerals, it could only do so as a private proprietor, and as such it could not authorize entries on private land for removal of minerals when such entries caused damage to private property.

In 1861 Field had the opportunity to decide the title to the minerals in the cases of *Moore v. Smaw* and *Fremont v. Flower*.[10] The two cases involved

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[10] Moore v. Smaw and Fremont v. Flower (1861), 17 Cal. 199.

the same question of law and were decided as one. The technical question was "whether a patent of the United States for land in California, issued upon a confirmation of a claim held under a grant of the former Mexican government, invests the patentee with the ownership of the precious metals which the land may contain."[11]

Both plaintiffs had patents from the United States based on Mexican grants, while both defendants were mining the respective lands. Field, in rendering his opinion, first referred back to Mexican law to note that when the grants were made,

> it was the established doctrine of the Mexican law that all mines of gold and silver in the country, though found in the lands of private individuals, were the property of the nation. No interest in the minerals passed by a grant from the Government of the land in which they were contained, without express words designating them. By the ordinary grant of land, only an interest in the surface or soil, distinct from the property in the minerals, was transferred.[12]

This practice of Mexico was, further, but a continuation of Spanish law. An interest in minerals could be transferred under certain circumstances, but at the time of the cession from Mexico to the United State, no gold or silver had been found on either grant. The minerals, then, constituted "at that time the property of the Mexican nation, and by the cession passed, with all other property of Mexico within the limits of California, to the United States."[13]

The defendants, accepting that the minerals did pass to the United States, offered two defenses, inconsistent with each other, but either one of which, if accepted, would have defeated the plaintiffs. The first of these defenses presented the view that when the gold and silver passed with the cession, the United States held them in trust for the state; when California was admitted the minerals passed to the state. This argument was supported by *Hicks v. Bell*, but, as previously noted, had already been repudiated by the justice rendering that opinion, Solomon Heydenfeldt. The second argument presented was that even if the minerals did become the property of the United States and did not vest in the state, the minerals remained the property of

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[11] Ibid., 210.

[12] Ibid., 212–13.

[13] Ibid., 213.

the central government and did not pass with the patents. The reasoning behind this argument was that the act of March 3, 1851, provided for the recognition and confirmation of Mexican grants, and since no minerals passed with the grants,[14] "and if the patents amount only to an acknowledgment of the rights derived from the former Government that interest still remains in the United States."[15] This argument was also rejected. Field noted that there was no restriction on the operation of a patent from the United States. What passed with the patent was "all the interest of the United States, whatever it may have been in everything connected with the soil, in everything forming any portion of its bed or fixed to its surface, in everything which is embraced within the signification of the term land."[16]

This included the face of the earth and everything under it. The accepted rule was that in regard to its real property within a state, the United States was in the position of a private proprietor, except that it was not subject to state taxation, and a patent from the federal government was subject to the same rules of contraction as applied to a conveyance by an individual; a conveyance by an individual would not reserve the minerals without an express provision. Further, Field said, the United States had never yet reserved minerals from the operation of its patents. In a decision the next year again involving John C. Frémont, Field said that local mining customs, although recognized by statute and judiciary, could not prevail against the paramount proprietor, the United States, "and as a consequence cannot against parties who claim by conveyance from the United States."[17]

The legal effect of the decision in *Moore v. Smaw* was to bar mining on lands belonging to another, and was bitterly assailed. In later years Field wrote that "for holding what now seems so obvious, the judges were then grossly maligned as acting in the interest of monopolists and land owners, to the injury of the laboring class."[18] Field's biographer wrote that if the charges of corruption were disregarded, this decision "was determined by the ideas of the judges as to what rule would work best amid the unprecedented conditions of pioneer

[14] 9 U.S. Stat. at L. (1851), 631–34.

[15] Moore v. Smaw and Fremont v. Flower, 223.

[16] Ibid., 224.

[17] Fremont v. Seals (1861), 18 Cal. 435.

[18] Field, *California Alcalde*, 108.

mining and agricultural life."[19] If the decision barred entry on private lands for mining purposes, it did not prevent entries on the public lands, and in 1866 the United States acted to recognize such entries by providing a method for mining claims to be patented and the miners to receive title to their mines.[20]

MINING CLAIMS AND MINING CUSTOMS

The wealth of California's mining areas often times resulted in conflicting claims that came to the Supreme Court for final adjudication, but so complicated were some of the cases that they would reappear before the Supreme Court on several occasions. Each time the Court would decide a point of law and generally return the case to the district court for further action based on the high court's ruling. A new point of law would then be raised and the case brought back up to the Supreme Court.

One such case has been aptly described:

> Year after year, and term after term, the great case of Table Mountain Tunnel vs. New York Tunnel, used to be called in the court held at Sonora, Tuolumne County. The opposing claims were on opposite sides of the great mountain wall. . . . When these two claims were taken up, it was supposed the pay streak followed the Mountain's course; but it had here taken a freak to shoot across a flat. . . . Into this ground, at first deemed worthless, both parties were tunnelling. The farther they tunnelled, the richer grew the pay streak. . . . Both parties claimed it. The law was called upon to settle the difficulty. The law was glad, for it had then many children in the county who needed fees. Our lawyers ran their tunnels into both of these rich claims, nor did they stop boring until they had exhausted the cream of that pay streak. Year after year, Table Mountain vs. New York Tunnel Company was tried, judgment rendered first for one side and then for the other, then appealed to the Supreme Court, sent back, and tried over, until, at last, it had become so encumbered with legal barnacles, parasites, and cobwebs, that none other than the lawyers knew or pretended

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[19] Carl Brent Swisher, *Stephen J. Field; Craftsman of the Law* (Washington, D.C.: The Brookings Institution, 1930), 88.

[20] 16 U.S. Stat. at L. (1866), 251–52.

> to know aught of the rights of the matter. Meantime, the two rival companies kept hard at work, day and night.[21]

The author, a juror for one of the district court hearings, came away disillusioned with lawyers, courts, and juries.

The greatest difficulty lay in the fact that the bulk of the mines was on public lands; the title to these lands was in the United States, and no legislation had been passed under which the land could be acquired by mining interests under a perfect title. But in order to work a mining claim it was not necessary to have a perfect legal title to the claim. In the mid-1850s, the Court said that prior possession of public lands, and most of the mines were on the public lands, would entitle the. possessor to maintain an action against a trespasser, and that this possessory right could become part of one's estate and descend, or in event of the possessor's death, the possessory right could be sold to another by the executor of the estate.[22] In 1856 the Legislature enacted a statute holding that unless one using land entered by miners could show a legal title, the presumption would be that the land in question was public land.[23] This statute was upheld by the Court at its October 1859 term in *Burdge v. Smith*.[24] The decision was affirmed in *Smith v. Doe* at the Court's next term.[25]

Of course, the possessory right had to be proved by one seeking to eject a trespasser. To hold differently would have contravened the principle "that a plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary."[26] Since in most of these cases the strength of title consisted in the possessory right, prior possession was all that was needed to be shown. What actually constituted "possession" was often open to debate, but in 1851 the Legislature provided that local mining customs should prevail in suits for mining claims in justices' courts, and was soon extended by the Supreme Court to apply to actions for mining claims in all courts.[27] In *Attwood v. Fricot*, the Court said: "Mining claims are held by possession, but that possession

[21] Prentice Mulford, *Prentice Mulford's Story; Life by Land and Sea* (New York: F. J. Needham, Publisher, 1889), 174–75.

[22] Glover v. Hawley (1855), 5 Cal. 85.

[23] Cal. Stats. (1856), chap. 47, 21.

[24] Burdge v. Smith (1859), 14 Cal. 380.

[25] Smith v. Doe (1860), 15 Cal. 100.

[26] Penn. Mining Co. v. Owens (1860), 15 Cal. 135.

[27] Irwin v. Phillips (1855), 5 Cal. 140.

is regulated and defined by usage and local, conventional rules."[28] The Court added that mining claims did not need the same degree of possession as did agricultural lands in order to maintain an action for trespass.

Attwood v. Fricot was decided at the Supreme Court's October 1860 term, and that same term the Court affirmed that decision when it decided the leading case of *English v. Johnson*, which was a controversy over a piece of mining ground in the county of Amador.[29] At the trial in the lower court the jury was instructed,

> in effect, that possession taken, without reference to mining rules, of a mining claim was sufficient, as against one entering by no better title, to maintain the action; and further, that this possession need not be evidenced by actual enclosures, but if the ground was included within a distinct, visible and notorious boundaries, and if the plaintiffs were working a portion of the ground within those boundaries, this was enough as against one entering without title.[30]

This instruction was correct; since neither entrant used the mining rules of the vicinage, "The actual prior possession of the first occupant would be better than the subsequent possession of the last."[31] The Court approved *Attwood v. Fricot* in that less was required to acquire possession of a mining claim than agricultural lands; for one thing, enclosure was not necessary as the physical marks on and around the claim were enough to establish the boundaries of the claim. Then the Court turned to deal with the instance of the prior possessor not following local rules, and the so-called intruder complying with the local customs, and came up with a compromise of sorts by saying the prior claimant could keep what the local customs decreed even if he had not followed them, or could keep the whole amount, as already indicated, if the second entrant did not follow the customs, either. But in any event, "this whole matter can be, and should be regulated by the miners, . . . who have full authority to prescribe the rules governing the acquisition and divestiture of titles to this class of claims, and their extent subject only to the general laws of the State."[32]

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28 Attwood v. Fricot (1860), 17 Cal. 43.

29 English v. Johnson (1860), 17 Cal. 107.

30 Ibid., 115.

31 Ibid.

32 Ibid., 118.

Subsequent cases affirmed and broadened *English v. Johnson*. In *Hess v. Winder*, the Court said, "Possession is presumptive evidence of title; but it must be actual. By actual possession is meant a subjection to the will and dominion of the claimant."[33] The Court did say, too, that the evidence of the right of possession had to be sufficient to give notice to anyone having the right to know this, that the claim was under the control and dominion of a claimant. The possessory right was also sufficient, under the Practice Act,[34] for the party in possession to bring suit to determine the adverse claim or title of one out of possession.[35] The Court noted in 1871 that in California the subject matter of an action for the recovery of mining ground was regarded as a question of title to real property in fee, even though the ultimate title was in the United States.[36]

The case of *Attwood v. Fricot* also said that when a mining claim's boundaries were defined, "and the party enters in pursuance of mining rules and customs, the possession of part is the possession of the entire claim."[37] Some years later the Court laid down the facts needed to establish constructive possession of a mining claim.[38] It was necessary to prove that there were local mining customs, rules and regulations in force in the district embracing the claims; that certain acts were required by such mining laws or customs to be performed at the location and working of claims as authorized by such laws; and that the claimant (plaintiff) had substantially complied with these requirements.

The importance of local mining customs in defining possession was also evident in determining when a claim had been abandoned. For an abandonment to be effected, there had to be, by the possessor, some act or other evidence indicating an intent to abandon his claim. In abandoning a claim, the possessor

> must leave it free to the occupation of the next comer, whoever he may be, without any intention to repossess or reclaim it for himself in any event, and regardless and indifferent as to what

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33 Hess v. Winder (1863), 30 Cal. 355.

34 Cal. Stats. (1851), chap. 5, § 254.

35 Pralus v. Pacific G. & S. M. Co. (1868), 35 Cal. 30.

36 Spencer v. Winselman (1871), 42 Cal. 479.

37 Attwood v. Fricot, 43.

38 Pralus v. Jefferson G. & S. M. Co. (1868), 34 Cal. 558.

> may become of it in the future. When this is done, a vacancy in the possession is created, and the land reverts to its former condition, . . . and not until then, an abandonment has taken place. There can be no abandonment except where the right abates, and ceases to exist. If it be continued in another, by any of the modes known to the law for the transfer of property, there has been no abandonment, for the right, first acquired by the occupancy still exists, although vested in another, and the continuity of possession remains unbroken.[39]

The claimant to a mine on the public lands could also lose his claim by forfeiture, which in California meant the loss of a right, previously acquired, to mine a particular piece of ground by neglect or failure to comply with the rules and regulations of the bar or diggings in which the mining ground was situated.[40] However, the Court added in 1868 that for the noncompliance to act as a forfeiture, the rule violated would itself have to so provide.[41] The line between forfeiture and abandonment was unfortunately not always clear, for in another case the Court held that the failure to perform the amount of work required by local mining laws amounted to an abandonment; the Court here did not mention the term "forfeiture."[42]

Miners' rules extended into areas other than possession and abandonment. In 1860 the Court recognized a local custom holding that loose quartz belonged to the claim on which the quartz ledge from which the loose material had been detached was located,[43] and the next year said that local mining rules could limit the quantity of ground claimed by location, although such rules could not limit the quantity of ground or the number of claims that could be purchased.[44] As prevalent as mining rules were, they were of no avail against the United States,[45] and they could not prevail against locations made before their adoption.[46]

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39 Richardsog v. McNully (1864), 24 Cal. 344.

40 St. John Kidd (1864), 26 Cal. 263.

41 Bell v. Bed Rock T. & M. Co. (1868), 36 Cal. 214.

42 Depuy v. Williams (1865), 26 Cal. 309.

43 Brown v. Quartz Mining Co. (1860), 15 Cal. 152.

44 Prosser v. Park (1861), 18 Cal. 47.

45 Fremont v. Seals, *supra*.

46 Inimitable Mining Co. v. Union Mining Co. (1870), 1 Cal. Unrep. 599.

At Court, miners' rules and regulations were allowed to be introduced into evidence whenever possible, even if, as in *Roach v. Gray*, only one of the parties claimed under local customs.[47] In 1866, in one of the several cases between the Table Mountain Tunnel Company and S. N. Stranahan, the Court held that the statute recognizing local mining customs did not extend to general customs or usages.[48] This particular case dealt with the size of mining claims, and the Court said that if there were no local custom at the time of location, general customs were admissible in evidence on the question of the reasonableness of the extent of a claim. Any general custom would have to be proved, "but evidence of local usages and regulations varying from each other, are not admissible for this purpose, for they tend to show that the usage is *not* general."[49]

On another occasion the Court noted that local mining rules acquired validity from their customary obedience and acquiescence by the miners following enactment, and not from the enactment itself.[50] It followed from this that a custom became void whenever it fell into disuse or was generally disregarded, and this was a question for the jury to decide. Further, a custom generally observed would prevail as against a written mining law fallen into disuse. The Court was careful at all times to limit the admissibility of local customs to actions respecting mining claims, and so remain within the provisions of the statute. In an action dealing with damage to a ditch the Court said:

> Proof of custom is not admissible to oppose or alter a rule of law, or to change the legal rights and liabilities of parties as fixed by law. A vested right is acquired by the location and construction of a ditch. It is an injury to mine it away, and so recognized by law. The trespass cannot be justified by custom.[51]

But within the sphere in which customs could be used, their admissibility as evidence was strongly supported by the Supreme Court.

Local miners' rules and regulations were upheld and interpreted in *Packer v. Heaton*,[52] where the Court said that a bona fide intent to work a

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47 Roach v. Gray (1860), 16 Cal. 383.

48 T. M. Tunnel Co. v. Stranahan (1866), 31 Cal. 387.

49 Ibid., 392.

50 Harvey v. Ryan (1872), 42 Cal. 626.

51 Hill v. Weisler (1872), 1 Cal. Unrep. 724.

52 Parker v. Heaton (1858), 9 Cal. 569.

claim could be considered as work done, in determining whether a claim had been abandoned, and the fact that one partner, or tenant in common, absented himself for a time did not indicate an abandonment.[53] In *McGarrity v. Byington*,[54] the Court said, "The right of a mining claim vests by the taking in accordance with local rules . . . . The failure to comply with *any one* of the mining rules and regulations of the camp is not a forfeiture of title."[55] In *Dutch Flat Water Co. v. Mooney*, the Court added that when a right of property attached by local custom, it did not necessarily follow that the right could also be divested by local custom when such local custom was different from the general law on the subject.[56]

In 1864 in *Morton v. Solambo C. M. Co.*, Chief Justice Silas W. Sanderson stressed the importance of miners' rules and regulations, and traced their growth and development.[57] These customs, he said,

> were few, plain and simple, and well understood by those with whom they originated. They were well adapted to secure the end designed to be accomplished, and were adequate to the judicial determination of all controversies touching mining rights. And it was a wise policy on the part of the Legislature . . . to give them the additional weight of a legislative sanction. These usages and customs were the fruit of the times, and demanded by the necessities of communities who, though living under the common law, could find therein no clear and well defined rules for their guidance applicable to the new conditions by which they were surrounded, . . . Having received the sanction of the Legislature, they have become as much a part of the law of the land as the common law itself which was not adopted in a more solemn form.[58]

With or without the use of miners' customs, rules, or regulations, the tenuous legal title of one claiming a mine still presented certain questions that would not have arisen had the claimant of a mine been able to acquire legal title. It has already been noted that the possessory right could

53 Waring v. Crow (1858), 11 Cal. 366.
54 McGarrity v. Byington (1859), 12 Cal. 426.
55 Ibid., 431.
56 Dutch Flat Water Co. v. Mooney (1859), 12 Cal. 534.
57 Morton v. Solambo C. M. Co. (1864), 26 Cal. 527.
58 Ibid., 532–33.

descend, or be sold by the estate of a deceased owner of a possessory right, but other legal aspects of this right still came before the Court. The Court in 1858 held that the possessory right could be seized and sold[59] under an execution to satisfy a debt, and the next year the Court said that permanent improvements became part of the claim, as was normal with real estate.[60] In 1863 the Court further commented that a claim could be sold as could any piece of real estate and the proceeds divided among tenants in common.[61] The Court explained that

> Although the ultimate title in fee in our public mineral lands is vested in the United States, yet as between individuals, all transactions and all rights, interests and estates in the mines are treated as being an estate in fee, and as a distinct and vested right of property in the claimant or claimants thereof, founded upon their possession or appropriation of the land containing the mine.[62]

For purposes of this case a mining claim may have been considered to be an estate in fee, but not for all transactions. Drawing together the unsettled status of a mining claim as an estate and the use of mining custom was the problem of sale of claims. Under the statute of frauds as adopted in California and most other jurisdictions in the United States, all sales of real estate had to be in the form of a written contract in order to be enforced in a court of law,[63] but the California Supreme Court did not always consider a mining claim as real estate within the meaning of the statute of frauds. The case of *Gore v. McBrayer* brought this point to the fore, as the Court said the statute of frauds did not apply to a mining claim on the public lands:

> The title to the land is in the United States; the right to mine and to use and hold possession of the claim inures by a sort of passive concession of the Government to the discoverer or appropriator. No writing is necessary to give the miner a title; but whatever right he has originally comes from the mere parol fact of appropriation

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59 McKeon v. Bisbee (1858), 9 Cal. 137.

60 Merritt v. Judd (1859), 14 Cal. 59.

61 Hughes v. Devlin (1863), 23 Cal. 501.

62 Ibid., 506.

63 Cal. Stats. (1850), chap. 101.

> unless indeed, the rules or the customs prevailing . . . make a written notice necessary.[64]

Responding to a petition for a rehearing the Court clarified the rule somewhat: "The title is in the Government; if a written contract is needed to divest it the Government would have to execute it. But, subsidiary to the Government's paramount title is the permissive claim of the locator. This comes from a mere parol fact."[65]

In another of the *Table Mountain Tunnel Co. v. Stranahan* cases the Court reiterated that the transfer of a mine need not be by a deed; the mere transfer of possession was enough, because

> a conveyance by deed would have passed no greater interest than the plaintiff acquired by a transfer of possession. Rights resting upon possession only, and not amounting to an interest in the land, are not within the statute of frauds, and no conveyance, other than a transfer of possession, is necessary to pass them.[66]

The Court went further in *Patterson v. Keystone Mining Co.*, where it held that a bona fide parol sale of a mining claim, accompanied by a delivery of possession was valid as against a later sale by the same seller, even though the second sale was accompanied by a duly acknowledged deed.[67] It was necessary, though, that the seller be in the actual possession of the claim and be able to deliver the claim to the vendee.[68]

The Legislature took the question of parol sales away from the courts in 1860 when it declared gold claims to be real estate and prohibited parol sales of such mining claims;[69] in 1863, the 1860 law was extended to include all types of mines,[70] recognizing the importance of silver and copper mines to the state's economy. The Court affirmed these acts in 1866, limiting itself to parol sales made prior to their passage, although it continued to enforce the earlier parol sales.[71] The succeeding years saw a virtual

64 Gore v. McBrayer (1861), 18 Cal. 588.
65 Ibid., 589.
66 Table Mountain Tunnel Co. v. Stranahan (1862), 20 Cal. 208.
67 Patterson v. Keystone Mining Co. (1863), 23 Cal. 575.
68 Copper Hill Mining Company v. Spencer (1864), 25 Cal. 18.
69 Cal. Stats. (1860), chap. 212.
70 Cal. Stats. (1863), chap. 89.
71 Patterson v. Keystone Mining Co. (1866), 30 Cal. 360; Goller v. Fett (1866), 30 Cal. 481.

dearth of cases dealing with parol sales until 1876 and the case of *Milton v. Lambard*, which involved an alleged verbal sale that took place in June 1874.[72] The argument of the plaintiffs was that the act of 1860 was repealed by the codes as its provisions (as well as those of the 1863 act) were not incorporated in the Civil Code. The defendant argued that if a mining claim were considered real estate then a transfer had to be in writing under the provision of the Civil Code dealing with the sale of real estate,[73] and if the section did not include mining claims, then the 1860 act was still in force. The Court accepted the defendant's first argument, saying, "A mine is real estate, and an interest therein . . . can be transferred only by operation of law or by an instrument in writing subscribed by the party disposing of the same, or his agent thereunto authorized by writing."[74]

WATER RIGHTS

The need for a readily available supply of water is most normally associated with the needs of agriculturalists and stockmen, but in California water was essential for mining operations as well. In the early days of California mining, water was used to wash away the gravel, and what remained, hopefully, was gold. At some diggings miners even constructed ditches to bring water to arid but gold-bearing claims. In 1849 the miners also began to work the river bottoms by diverting the water to only part of its channel, and mine the exposed part of the channel. Later on, as the search for precious metals moved away from immediate sources of water, series of sluices and toms were used for gold washing, again necessitating large quantities of water. As the gold reserves close to the surface were taken up, deeper gold finds needed to be worked by hydraulic mining methods, and as the term implies, a good deal of additional water was required.[75] As was the case with the appropriation of mining claims, a system of water appropriation was developed prior to statehood, again based on local customs, and again putting forth the doctrine of prior appropriation.

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72 Melton v. Lambard (1876), 51 Cal. 258.

73 Cal. Civil Code (1872), § 1091.

74 Melton v. Lambard, 260.

75 For the various mining methods involving the use of water, see John Walton Caughey, *Gold is the Cornerstone* (Berkeley: University of California Press, 1948), 159–76.

The decade of the 1850s saw the doctrine of prior appropriation of water affirmed by the Supreme Court starting with the 1853 case of *Eddy v. Simpson*, a landmark case in this area.[76] The plaintiffs in this case had prior occupancy of the waters being contested by use of a dam and a ditch, were using the water for mining purposes, and brought the suit to collect damages for interference with their alleged rights. The Supreme Court upheld the plaintiffs, the Court holding that the first possessor had the right to the water, and that this right was usufructuary, consisting more in the advantage of using the water, and not necessarily in the water itself. "The owner of land through which a stream flows, merely transmits the water over its surface, having the right to its reasonable use during its passage."[77] Once the water left the user's possession, all right to the water left as well. Two years later, in *Irwin v. Phillips*, the Court tied priority in the possession of water to the right to work the mines;[78] in both situations prior possession had become the rule.

When a claim to water was not dependent on ownership of the land through which the water ran, that is, the water was on public land, prior appropriation would enable a miner to use the water, and this prior possession had to be real; constructive possession was not sufficient.[79] In 1857 the Court added still more, saying that the right to water flowing through the public lands did not include the right to divert the water and prevent it from running on someone else's adjoining land, when such land was occupied prior to the diversion.[80]

An important case dealing with water rights in the mining region was *Bear River Co. v. York Mining Co.*, a case between two companies using the waters of the Bear River.[81] The plaintiffs' dam and ditch were located seven miles below, and some time before, defendants' dam and ditch. After use by defendants, the water returned to its natural channel and flowed down for plaintiffs' use. The plaintiffs sued for damages, claiming that the defendants had materially lowered both the quality and the quantity of the water. The Court held for the plaintiffs, saying that they were entitled to an

[76] Eddy v. Simpson (1853), 3 Cal. 249.
[77] Ibid., 252.
[78] Irwin v. Phillips (1855), 5 Cal. 140.
[79] Kelly v. Natoma Water Co. (1856), 6 Cal. 105.
[80] Crandall v. Woods (1857), 8 Cal. 136.
[81] Bear River Co. v. York Mining Co. (1857), 8 Cal. 327.

undiminished quantity of water so as to fill their ditch to the same height as before defendants' appropriation above; otherwise, by diminishing the flow, plaintiffs' prior appropriation could become worthless.

In *Butte Canal and Ditch Co. v. Vaughan*, the Court said that turning water from a ditch into a natural water course so that it could move downstream to be used again did not constitute an abandonment of the water.[82] The water could be taken out and used again, so long as the natural waters of the stream were not lessened so as to injure those who had previously appropriated the natural waters. In claiming waters on public lands, notice by appropriate acts, and completion of the ditch were sufficient to all subsequent locators, the title to such water going back to the beginning of the work,[83] and in *Parke v. Kilham* the Court said that an action for the diversion of water should be treated as an action for the abatement of a nuisance.[84]

The use of the doctrine of prior appropriation of mines and water was a judicial acknowledgment of the actual procedure practiced by the miners. At the same time the courts were legally bound to follow the common law, and this they did in a manner of speaking. The common law included the doctrine of prior appropriation of minerals, but not of water. The Supreme Court of California was thus left in the position of having to deal with a system of water appropriation that was already in use and accepted by the mining industry.

The common law, as it pertained to water, was that a stream belonged equally to those who had title to its banks, "and that no individual could carry away the stream from that community, nor could any member of the community take unto himself more than a reasonable share of the supply, for use upon his own land only."[85]

This view was obviously contrary to the accepted practice in the gold fields, especially since the waters in question were on public lands, the title resting with the federal government. At first the courts did not know whether to follow the practice in effect or the express (common) law.

> The judges, being drawn from the people, inclined to support the public action in appropriating natural resources, while attorneys

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82 Butte Canal and Ditch Co. v. Vaughan (1858), 11 Cal. 143.

83 Kimball v. Gearhart (1859), 12 Cal. 27.

84 Parke v. Kilham (1857), 8 Cal. 77.

85 Samuel C. Wiel, "Public Policy in Water Decisions," *California Law Review* I (November, 1912): 12.

> naturally, when suiting their cases, urged express law. The courts adopted the attitude, in deference to the legal points, that they would not change the law because of policy — they said they would uphold the law; but they supported the public policy nevertheless by finding a way to say it was the express law.[86]

The solution to this problem was to use common law rules other than those dealing with water, and in effect the appropriation of water became analogous to the appropriation of mining claims also on the public lands. The title to the public lands was, as stated, in the federal government, and anyone appropriating the water would be a trespasser. But among trespassers, the first such had a title sufficient as against all other subsequent trespassers. This doctrine, known in the common law as disseisin, provided that the title of the first appropriator was paramount against everyone but the true owner. This reasoning could be justified as being the common law and also fortuitously coincided with actual practices adopted by the miners. Justice Solomon Heydenfeldt, who had earlier rendered the decision in *Hicks v. Bell*, now rationalized this extension of the common law by saying:

> In the decisions we have heretofore made upon the subject of private rights to the public domain, we have applied simply the rules of the common law. We have found that its principles have abundantly sufficed for the determination of all disputes which have come before us; and we claim that we have neither modified its rules, nor have we attempted to legislate upon any pretended ground of their insufficiency.
>
> That new conditions and new facts may produce the novel application of a rule which has not been before applied in like manner, does not make it any less the common law; for the latter is a system of grand principles, founded upon the mature and perfected reason of centuries. It would have but little claim to the admiration to which it is entitled, if it failed to adapt itself to any condition, however new, which may arise; and it would be singularly lame if it is impotent to determine the right of any dispute whatsoever.[87]

This departure from the common law prevented the disruption of mining operations throughout the state, and remained the rule of decision,

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86 Ibid.

87 Conger v. Weaver (1856), 6 Cal. 555–56.

with the Supreme Court essentially affirming earlier decisions, albeit with an occasional modification or clarification. Thus, in *Burnett v. Whitesides*, the Court upheld the right of the first appropriator of water to an undiminished amount regardless of the acts of later takers,[88] but if the first appropriator were to take only a part, someone else could later appropriate the remainder, and such a later appropriation gave the appropriator a right as perfect and as entitled to the same protection as that of the first appropriator to the portion taken by him.[89]

In an 1869 case, the Court affirmed *Eddy v. Simpson* directly, saying, "The right to the water . . . is only acquired by an actual appropriation and use of the water. The property is not in the corpus of the water, but is only in the use."[90] As with a mining claim, a water right could be lost by nonuse or abandonment. Said the Court in *Davis v. Gale* of an appropriator's right:

> Appropriation, use and nonuse are the tests of his right; and place of use and character of use are not. When he has made his appropriation he becomes entitled to the use of the quantity which he has appropriated at any place where he may choose to convey it, and for any useful and beneficial purpose to which he may choose to apply it.[91]

The significance of this decision was that an appropriator of water for one purpose, such as mining, at one place, could send or convey the water to another place, and for another purpose. Whatever the purpose was, it had to be a beneficial use, that is, the water was going to be used directly by the appropriator. Holding water for purposes of speculation was not such a beneficial use, and would void the appropriation.[92] The Court in *Davis v. Gale* was interested in abandonment, but in *Union Water Company v. Crary* the Court said the "right of the first appropriator may be lost, in whole or in same limited portions, by the adverse possession of another."[93] Such possession had to be "adverse" in the legal sense; it must have been continuous for the entire length of the statutory period and asserted, with

[88] Burnett v. Whitesides (1860), 15 Cal. 35.

[89] Smith v. O'Hara (1872), 43 Cal. 371.

[90] Nevada County and Sacramento Canal Co. v. Kidd (1869), 37 Cal. 310.

[91] Davis v. Gale (1867), 32 Cal. 34.

[92] Weaver v. Eureka Lake Co. (1860), 15 Cal. 271.

[93] Crary v. Union Water Company (1864), 25 Cal. 509.

the knowledge and consent of the owner of land, under a claim of title. In addition, the burden of proving this was on the adverse claimant.[94]

These cases were all based on the doctrine of prior appropriation, which involved the use, not the ownership, of water. In the leading case of *Kidd v. Laird*, the Court reiterated

> that running water, so long as it continues to flow in its natural course, is not, and cannot be made the subject of private ownership. A right may be acquired to its use, which will be regarded and protected as property; but it has been distinctly declared . . . that this right carries with it no specific property in the water itself.[95]

The rights of the first appropriator, "like those of a riparian owner, are strictly *usufructuary*."[96] The mention of a "riparian owner" pointed out that the Court was familiar with, even if it did not use, the common law of waters. The riparian doctrine

> accords to the owner of land contiguous to a watercourse a right to the use of the water on such land. The use of the water is limited to riparian [adjoining the water] land. The water may be used for . . . beneficial purposes. . . . The riparian right is not based upon use, and in the absence of prescription it is not lost by disuse. No riparian owner acquires priority over other riparian owners by reason of the time of beginning use of the water.[97]

The doctrine of prior appropriation was included in a positive statutory provision in the 1872 code revision,[98] and remained the law in California until past the period of this study. The doctrine of prior appropriation was tested and found wanting in 1886 in the case of *Lux v. Haggin*,[99] which "has been accepted as establishing the doctrine that the common [law] rule of riparian rights prevails in California."[100] There were some earlier

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94 American Co. v. Bradford (1865), 27 Cal. 360.

95 Kidd v. Laird (1860), 15 Cal. 179–80.

96 Ibid., 180.

97 Wells A. Hutchins, *The California Law of Water Rights* (Sacramento: State of California Printing Division, 1956), 40.

98 Cal. Civil Code (1873), § 1422.

99 Lux v. Haggin (1886), 69 Cal. 255.

100 Willoughby Rodman, *History of the Bench and Bar of Southern California* (Los Angeles: William J. Porter, 1909), 96.

instances of the use of the riparian doctrine to decide water cases starting in 1865 with the case of *Ferrea v. Knipe*, but this decision involved two riparian owners who were not engaged in mining.[101] The Court said each of the parties was entitled to use the water in question because each was a riparian owner; the question of prior appropriation did not arise.

In the twenty years between *Ferrea v. Knipe* and *Lux v. Haggin*, three other Supreme Court decisions also involved the riparian doctrine; all three were in the two-year period 1878–1879, presaging the decision in *Lux v. Haggin* the next decade.

The first, *Creighton v. Evans*, saw the Court uphold the rights of a riparian owner against one who was not a riparian owner,[102] and in *Los Angeles v. Baldwin* the Court proportioned water between two riparian owners.[103] The Court, in the third of these cases, *Pope v. Kinman*, reaffirmed that the riparian proprietor had a usufruct in the waters of the stream in question as it passed over his land.[104] In none of these three cases were public mineral lands involved, perhaps indicating that the Court was preparing or anticipating a dual system of water law involving both the riparian and appropriation doctrines that in fact came to pass. Although with *Lux v. Haggin* the Court brought California into what might be called the mainstream of water law, the continued use of the appropriation doctrine was to acknowledge rights already acquired in the early days of statehood. Or, as one scholar has put it, "The Courts of California have recognized the common law rule, but have found that certain extensions and modifications were necessary to render it applicable to novel conditions."[105]

The Court itself found it occasionally necessary to defend its use of the appropriation doctrine against the

> notion, which has become quite prevalent, that the rules of the common law touching water rights have been materially modified in this State upon the theory that they were inapplicable to the conditions found to exist here, and therefore inadequate to a just and fair determination of controversies touching such rights. This notion is

101 Ferrea v. Knipe (1865), 28 Cal. 340.

102 Creighton v. Evans (1878), 53 Cal. 55.

103 Los Angeles v. Baldwin (1879), 53 Cal. 469.

104 Pope v. Kinman (1879), 54 Cal. 3.

105 Rodman, *Bench and Bar*, 96.

> without any substantial foundation. The reasons which constitute the groundwork of the common law on this subject remain undisturbed. The conditions to which we are called upon to apply them are changed, and not the rules themselves . . . . When the law declares that a riparian proprietor is entitled to have the water of a stream flow in its natural channel . . . without diminution or alteration, it does so because its flow imparts fertility to his land. . . . But this rule is not applicable to miners and ditch owners, simply because the conditions upon which it is founded do not exist in their case. They seek the water for a particular purpose, which is not only compatible with its diversion from its natural channel.[106]

Chief Justice Silas W. Sanderson said that controversies between appropriators could be determined in a like manner as controversies between riparian proprietors, that is, by determining whether "the plaintiff's use and enjoyment of the water *for the purpose for which he claims its use* has been impaired by the acts of the defendant?"[107] Defenses such as Sanderson's did not convince all California lawyers, however. Gregory Yale, his inability to practice in courts during the Civil War notwithstanding, was a leading member of the legal profession. His conclusion was that there was indeed a departure from the common law, and:

> The only principle which can be asserted to justify the past action of the Courts is in the fact that they sustained the state of things found to be extensively existing upon the doctrine of necessity. . . . An attempt to vindicate the Courts, upon the ground that their action was but an application of the common law in modified forms to suit the new conditions of things, would prove a disastrous failure.[108]

MINER AND FARMER

Mention has already been made that one implication of *Hicks v. Bell* was to open legally private lands as well as public lands to the gold seekers, who responded

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[106] Hill v. Smith (1865), 27 Cal. 482.

[107] Ibid., 483.

[108] Gregory Yale, *Legal Titles to Mining Claims and Water Rights in California . . .* (San Francisco: A. Roman & Company, 1867), 137–38.

with great alacrity. This decision went beyond the possessory act passed by the Legislature in 1852 authorizing a possessor of public land used for grazing or farming purposes to maintain an action for injury to his possession, but the possession was not to preclude any person from mining the land for precious metals.[109] Why did Heydenfeldt go as far as he did? Stephen J. Field stated,

> It was the policy of the State to encourage the development of the mines, and no greater latitude in exploration could be desired than was thus sanctioned by the highest tribunal of the State. It was not long, however, before a cry came up from private proprietors against the invasion of their possessions which the decision had permitted; and the court was compelled to put some limitation upon the enjoyment by the citizen of this right of the State.[110]

The Court limited the full effects of *Hicks v. Bell* in 1855 in the case of *Stoakes v. Barrett*, which nominally passed on the 1852 possessory act.[111] The Court affirmed the act, saying it only gave the right to mine public, not private, lands used for agricultural purposes. Justice Heydenfeldt, who again wrote the opinion, affirmed *Hicks v. Bell* as to the state owning the minerals, but also affirmed the limitation implicit in the statute by saying, "to authorize an invasion of private property in order to enjoy a public franchise, would require more specific legislation than any yet resorted to."[112]

At the same January 1855 term the Court affirmed an entry on a farm on public lands, but Justice Charles Bryan, in writing the Court's opinion, used a broader basis than the state's right to the minerals.[113] He said it had generally been the policy of governments to reserve mineral to themselves and keep them from private ownership. The state of California, by virtue of its police powers, could and did pass a law dealing with the public lands, and the law passed, the Possessory Act, did not protect mineral-bearing public lands from entry. No one, then, using public land for agricultural purposes should be allowed to fence off a large body of minerals for his use;

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109 Cal. Stats. (1852), chap. 82.

110 Field, *California Alcalde*, 106.

111 Stoakes v. Barrett (1855), 5 Cal. 36.

112 Ibid., 39

113 McClintock v. Bryden (1855), 5 Cal. 97.

but any miner to enter, was to extract the minerals in the most practicable manner possible, causing as little injury as possible to the agriculturalist.

In spite of these two decisions, the Court did whittle the miners' right of entry. In *Fitzgerald v. Urton*, the Court refused to allow a miner to enter property being used for a hotel.[114] The Court said that since the 1852 act had legalized what would have been a trespass under the common law, it was to be construed strictly, "and the Act cannot be extended by implication to a class of cases not specifically provided for."[115] Hence, since the act of 1852 only mentioned agricultural and grazing lands, the Court would not extend it to cover other uses.

Responding to complaints by farmers, the "more specific legislation" mentioned by Justice Heydenfeldt in *Stoakes v. Barrett* was passed by the Legislature in 1855.[116] This law provided for indemnification to those injured by the working of mining claims under the 1852 act. The next year the Court allowed damages to a farmer for an injury to his property in *Burdge v. Underwood*, but the 1855 law was not mentioned; the Court did affirm the previous series of cases, however.[117]

In *Martin v. Browner*, one party enclosed twelve acres of land in a mining town, claiming it to be a town lot.[118] Defendants' mining operations were not near, nor did they interfere with plaintiffs' buildings. The Court held for the defendants, saying that if a person were to claim such large pieces of land in a mining district, "the consequence would be that all of the mineral lands in a neighborhood might be appropriated by a few persons, by their making a village or hamlet on or near the land so appropriated."[119] At the same term as the previous case, the Court affirmed *Burdge v. Underwood* and allowed damages for a ditch dug across the plaintiff's garden and orchard without his permission.[120]

The decision in *Biddle Boggs v. Merced Mining Co.*, which settled once and for all that miners could not enter land to which the agriculturalist had

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114 Fitzgerald v. Urton (1855), 5 Cal. 308.

115 Ibid., 309.

116 Cal. Stats. (1855), chap. 119.

117 Burdge v. Underwood (1856), 6 Cal. 45.

118 Martin v. Browner (1858), 11 Cal. 12.

119 Ibid., 14.

120 Weimar v. Lowery (1858), 11 Cal. 104.

gained a title in fee, still left public lands open to entry. When, in *Burdge v. Smith*, the Court affirmed the 1856 act declaring that unless the user of land being entered by miners could actually show legal title, the presumption would be that the land was public land, the Court provided grist for Charles Shinn's later statement that "the mining-interests were in those days held to be altogether predominant in importance to the agricultural interests, over the entire gold-bearing area."[121]

The 1860s seemingly opened with the Court continuing in much the same vein, as it affirmed *Burdge v. Smith* in *Smith v. Doe*.[122] The unanimous Court, with Justice Warner W. Cope, writing the opinion, said that if the right of entry on public lands for mining purposes were taken away, large tracts of mineral lands could be claimed, resulting in the concentration of mining interests in a few persons. Admitting that the miner had the right to enter, Cope added that protection was to be afforded permanent improvements and growing crops of all descriptions, since they constituted private property, thus in effect limiting entries. He said:

> It must not be understood, however, that within the limits of the mines all possessory rights and rights of property, not founded upon a valid legal title, are held at the mercy and discretion of the miner. Upon this subject, it is impossible to lay down any general rule, but every case must be determined upon its own particular facts. Valuable and permanent improvements, such as houses, orchards, vineyards, etc., should, undoubtedly, be protected; as also, growing crops of every description, for these are as useful and necessary as the gold produced by the working of the mines. Improvements of this character, and such products of the soil as are the fruits of toil and labor, must be regarded as private property, and upon every principle of legal justice are entitled to the protection of the Courts. But in all cases it must be borne in mind that, as a general rule, the public mineral lands of the State are open to the occupancy of every person who, in good faith, chooses to enter upon them for the purpose of mining, and the examples we have given

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121 Charles H. Shinn, *Mining Camps; A Study in American Frontier Government*, edited by Rodman W. Paul (New York: Harper & Row, 1965), 260.

122 Smith v. Doe (1860), 15 Cal. 100.

> may serve, in some measure, to indicate the proper modifications of this rule, and the restrictions necessary to be placed upon the exercise of this right. It is the duty of the Courts to protect private rights of property, but it is no less their duty to secure, as far as possible, the entire freedom of the mines, and to carry out and enforce the obvious policy of the Government in this respect.[123]

That same judicial term the Court held enclosing the land would not prevent an entry either, and the Court, in *Clark v. Duval*, went on to say,

> In giving effect to the policy of the Legislature, we must hold that the miner is not confined to a mere right of entry and egress, and a right to dig the soil for gold. Whatever is indispensable to the exercise of the privilege must be allowed him; else it would be a barren right, subserving no useful end. But the substantial thing is a right to use the land upon which he goes, not merely to dig, but to mine and so to use the land and such elements of the freehold or inheritance, of which water is one, as to secure the benefits which were designed. This use must be reasonable, and with just respect to the agriculturalist.[124]

The Court awarded damages to the farmer for actual injury done, and an injunction against the further diversion of his water, but refused damages or injunction for ditches and reservoirs dug by miners that the jury felt to be necessary to their mining operation. Now that the Court said the use by the miners had to be reasonable, and that there were exceptions to the right to enter and use farmlands, the Court was able to state exceptions and limitations, judging each such exception or limitation by the facts of each particular case.

In *Gillan v. Hutchinson*, the Court said the 1855 act was invalid if it tried to give a right of entry if none existed before the act's passage because the Legislature could not take property from one person and give it to another.[125] Thus, the Court said, the miner's right of entry did not entitle him to dig up an orchard or, in *Rogers v. Soggs*, to cut growing timber.[126]

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123 Ibid., 105–6.

124 Clark v. Duval (1860), 15 Cal. 88.

125 Gillan v. Hutchinson (1860), 16 Cal. 153.

126 Rogers v. Soggs (1863), 22 Cal. 444.

One who did enter legitimately under the 1855 act would lose the right if the possessor of the land received a patent from the United States.[127] In 1863 the Court partially reversed *Gillan v. Hutchinson*, and this became the final word on the subject until the federal government took action in 1866, holding that the 1855 act was clearly constitutional and was merely a regulation of the right to enter under the 1852 possessory act.[128]

Whatever the rights of miners under the 1852 and 1855 acts, the Supreme Court needed to establish the technical requirements a miner needed to plead in court to justify an entry. One entering had to show

> at least, first, that the land is public land; second, that it contains mines or minerals; third, that the person entering upon or against a prior possession enters for the bona fide purpose of mining. But this being in the nature of a justification of the entry as against an apparent and prima facie right of the actual prior possessor, must be affirmatively pleaded . . . with all the requisite averments to show a right under the statute, or by law to enter.[129]

The farmer or grazer on his part needed to show his prior possession,[130] and as late as 1873 the Court was called upon to say what constituted mineral lands for purposes of entries for mining. The Court said,

> The mere fact that portions of the land contained particles of gold, or veins of gold-bearing quartz rock, would not necessarily impress it with the character of mineral land within the meaning of the Acts . . . . It must at least be shown that the land contains metals in quantities sufficient to render it available and valuable for mining purposes.[131]

Controversies between mining and farming interests also involved the appropriation and use of water, and damage to farm and grazing lands as a result of such use. Conflicts over running water were dealt with by the doctrine of prior appropriation, but two cases came before the Court dealing with diversions of water from a farmer's reservoir. In the first of these, *Clark v. Duval*, the 1860 case quoted above, the Court upheld the

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127 Fremont v. Seals (1861), 18 Cal. 433.

128 Rupley v. Welch (1863), 23 Cal. 452.

129 Lentz v. Victor (1861), 17 Cal. 271.

130 Ensminger v. McIntire (1863), 23 Cal. 593.

131 Alford v. Barnum (1873), 45 Cal. 484.

diversion as being a necessary incident to the entry for mining, but in *Rupley v. Welch*, the new five-man Court was not so generous, saying, "The threatened diversion of water from plaintiff's reservoir is a clear violation of a vested right of property, acquired by the plaintiff, by virtue of his prior appropriation of the water, and of which he cannot be divested for any private purposes or for the benefit of a few private individuals."[132]

The actual use of water by miners was also a potential hazard to farming and grazing interests. In two cases dealing with the same parties, the plaintiff complained of his land being flooded by the defendant's mining. The Court said that the defendant was bound to use his ditch so as not to injure the plaintiff's land regardless of who had the older right or title.[133] The miner was liable for damages, a view affirmed by the Court when the case came up again two years later. Now the farmer was also complaining of sediment being deposited on his land, and the miner was again liable.[134] In *Wixon v. Bear River* and *Auburn Mining Co.*, the Court, assessing damages against the defendant company for mud and silt that had accumulated on the plaintiff's crops, said that the plaintiff, in enclosing a tract of public land in the mineral region, received a vested right to be protected against one entering for mining purposes, an opinion more attentive to agricultural interests, at least in tone, than *Clark v. Duval*.[135] The Court extended the liability of miners for damages in 1875 to farm lands to cover mining industries other than gold and silver mining, in this case coal.[136]

On the other side of the coin, a miner sued a farmer for damage done to his claim by the farmer's running water, but since this was not an instance of a miner and farmer on the same parcel of land, the common law applicable to cases between adjoining landholders was used. Since the defendant was irrigating his own crops on his own land, a right which was his,

> [a]n action cannot be maintained against him for the reasonable exercise of his right, although an annoyance or injury may thereby be occasioned to the plaintiffs. He is responsible to the plaintiffs only

132 Rupley v. Welch, 455.
133 Richardson v. Kier (1869), 34 Cal. 63.
134 Richardson v. Kier (1869), 37 Cal. 263.
135 Wixon v. Bear River and Auburn Mining Co. (1864), 24 Cal. 367.
136 Robinson v. Black Diamond Coal Co. (1875), 50 Cal. 460.

> for the injuries caused by his negligence or unskillfulness, or those willfully inflicted in the exercise of this right of irrigating his land.[137]

Reading the cases dealing with mines and waters gives the impression of a definite but extremely slow change from the viewpoint of allowing miners to do virtually as they pleased to one that realized that there were limitations on the actions of miners in their search for minerals. It would be easy for a critic to say that the Court finally came around to a sounder legal view, but there was more than that involved. The change more likely reflected a general societal change in regard to property rights in California as the rush for gold ebbed and the mining industry became controlled by large companies desiring stability. At the same time other industries developed, and agriculture was one of these, that also demanded stability in property rights. To be sure, all conflicts between miners and farmers did not end, such as the conflict over mining debris in the Sacramento Valley in the 1880s,[138] but stability was at hand.

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[137] Gibson v. Puchta (1867), 33 Cal. 310.

[138] Robert L. Kelley, *Gold v. Grain; The Hydraulic Mining Controversy in California's Sacramento Valley; A Chapter in the Decline of the Concept of Laissez-Faire* (Glendale: The Arthur H. Clarke Company, 1959), 327.