§ 536. Origin of the doctrine.—The dignity thus attaching to the miner's title had its genesis in the early history of mining in the west, and was founded upon the law of possession. It was the natural result of the recognition by local legislatures of mining rights in the public domain, and the exercise of such rights by appropriation under the local rules and customs. As no intruder upon the possession of a prior appropriator could successfully defend an action involving possessory rights, by asserting that the paramount title was in the general government, this antecedent possession was in itself sufficient evidence of title. This was nothing more than the application of a familiar rule of the common law, that as against a mere trespasser, title may be inferred from possession. The actual possessor of real property was so far regarded by law as the owner thereof, that no one could lawfully dispossess him of the same without showing some well-founded title of a higher or better character than such possession itself furnishes.[1]

The early announcement of the doctrine by the courts in the mining states, that controversies between occupants of the public mineral lands were to be determined by the law of possession, and that persons claiming and in the possession of mining claims on these lands were, as between themselves and all other persons, except the United States, owners of the same, having a vested right of property founded on their possession and appropriation,[2] was the declaration of no new canon of jurisprudence.

The enunciation of the rule, that the naked possessor of land was deemed in law the owner until the general government or a person showing title under it makes an entry upon the same, and that when this was done the right or claim of the possessor must yield to the paramount authority of the United States or its grantee,[3] was but a restatement of a well-established rule of law.

[1] 3 Washburn on Real Property, 3d ed., p. 114; 5th ed., p. 134.
[2] Hughes *v.* Devlin, 23 Cal. 502.
[3] Doran *v.* C. P. R. R., 24 Cal. 245.

It is also a familiar doctrine of the common law, that where one, under a title deed describing a parcel of land by metes and bounds, enters upon the premises, claiming to hold the same under his deed, he is constructively in possession of all that is included in his deed, though he actually occupies but a part;[1] and by the same rule, any instrument having a grantor and a grantee, and containing an adequate description of the lands to be conveyed and apt words for their conveyance, gives color of title to the lands described.[2]

The application of these elementary rules to the novel and peculiar conditions surrounding the early history of the mining industry in the west, evolved a new *color of title* by which the extent of a miner's right of possession was determined.

§ 537. Actual and constructive possession, under miners' rules.—It was early announced as a rule of property, that mining claims were held by compliance with local rules, and *pedis possessio* was not required to give a right of action. When the claim was defined, and a party entered into possession of a *part*, that possession was possession of the entire claim as against any one but the true owner or prior occupant,[3] and priority of occupation established a priority of right.[4]

This doctrine of constructive possession was even extended to instances where the right asserted was not referable to local rules. Thus it was held, that mining ground acquired by an entry under a claim for mining purposes upon a tract, the bounds of which were distinctly marked by physical marks, accompanied with actual occupancy of a part of the tract, was sufficient to enable the possessor to maintain ejectment for the entire claim,

[1] 3 Washburn on Real Property, 3d ed., p. 118; 5th ed., p. 138.

[2] *Id.*, 3d ed., p. 139; 5th ed., p. 167; Brooks *v.* Bruyn, 35 Ill. 392.

[3] Attwood *v.* Fricot, 17 Cal. 37; English *v.* Johnson, *Id.* 107; Roberts *v.* Wilson, 1 Utah, 292.

[4] Gibson *v.* Puchta, 33 Cal. 310.

although such acts of appropriation were not done in accordance with any local mining rule.[1]

In such case, however, the extent of such location was not without limit. The quantity taken must have been reasonable, and whether it was so or not was to be determined in such cases by the general usages and customs prevailing upon the general subject. If an unreasonable quantity was included within the boundaries, the location was ineffectual for any purpose, and possession under it only extended to the ground actually occupied.[2]

But as a rule, mere entry and possession gave no right to the exclusive enjoyment of any given quantity of the public mineral lands.[3]

Where an occupant relied upon constructive possession, it devolved upon him to establish three essential facts:—

(1) That there were local mining customs, rules, and regulations in force in the district embracing the claims;

(2) That particular acts were required to be performed in the location and working of the claims;

(3) That he had substantially complied with the requirements.[4]

This rule was somewhat relaxed in favor of a purchaser who entered under a deed which contained definite and certain boundaries which could be marked out and made known from the deed alone,[5] which was nothing more than a reiteration of the doctrine of the common law relative to entries under color of title, heretofore mentioned. The miner's title extended to such mining lands as were reduced to his actual possession, or to such as were constructively in his possession, according to the rules above enumerated.

[1] Table Mountain T. Co. *v.* Stranahan, 20 Cal. 199; Hess *v.* Winder, 30 Cal. 349.

[2] Table Mountain T. Co. *v.* Stranahan, 20 Cal. 199. See Mallett *v.* Uncle Sam M. Co., 1 Nev. 156.

[3] Smith *v.* Doe, 15 Cal. 101; Gillan *v.* Hutchinson, 16 Cal. 154.

[4] Pralus *v.* Jefferson G. & S. M. Co., 34 Cal. 558.

[5] Hess *v.* Winder, 30 Cal. 349.

§ 538. **Federal recognition of the doctrine.**—While the government passively encouraged and fostered the system of development of the mineral resources as practiced in the mining states and territories, it gave no legislative expression of its encouragement, or any recognition that the occupants of the public mineral lands were other than mere trespassers, until February 27, 1865, when congress passed an act providing for a district and circuit court for the state of Nevada, the ninth section of which provided as follows:—

"That no possessory action between individuals in any "of the courts of the United States for the recovery of any "mining title, or for damages to such title, shall be affected "by the fact that the paramount title to the land on which "such mines are, is in the United States; but each case "shall be adjudged by the law of possession."[1]

This was re-enacted in the Revised Statutes,[2] and forms a part of the general legislation of congress on the subject of mineral lands.

The supreme court of the United States, in the case of Forbes *v.* Gracey,[3] approved and confirmed the doctrine of the early decisions as to the nature of locator's estate.

"Those claims," said that court, "are the subject of bar-"gain and sale, and constitute very largely the wealth of "the Pacific Coast states. They are property in the fullest "sense of the word, and their ownership, transfer, and use "are governed by a well-defined code, or codes of law, and "are recognized by the states and the federal government. "These claims may be sold, transferred, mortgaged, and "inherited, without infringing the title of the United "States."

Possessory Claims on Mineral Lands.

1. The act of April 25th, 1855, "for the protection of growing crops and improvements in the mining districts of this State," so far as it purports to give a right of entry upon the mineral lands of this State, in cases where no such right existed anterior to its passage, is invalid. *Gillan* v. *Hutchinson*, 16 Cal. 153.

2. This act of 1855 seems to proceed upon the idea of an absolute and unconditional right in the miner to enter upon the possessions of another for mining purposes, and the intention of the act was to limit this supposed right, and not to give a right of entry in cases where no such right previously existed. Miners have no such absolute and unconditional right. The true rule is laid down in *Smith* v. *Doe*, 15 Cal. 100. *Id.*

3. In ejectment for mineral land, plaintiff averred possession of a large tract of land, including the mining land in controversy, and that he occupied the land for agricultural and mining purposes, without stating that any use was made of the particular portion held by defendants. This averment of possession, and also the averment of ouster, were insufficiently denied in the answer; but the answer averred affirmatively that, at the time defendants entered upon the ground in dispute, it was a part of the public domain of the United States; contained large and valuable deposits of gold; that they entered upon and took possession of it for mining purposes, and that they have since held and used it for such purposes only. The Court below gave judgment for plaintiff on the pleadings: *held*, that these affirmative averments of defendants being proved, plaintiff could not recover without showing such an actual and meritorious possession and occcupancy as rendered the interference of the defendants unjust and inequitable; that he could not recover on the pleadings, because the character of his possession did not appear, the complaint not averring that this particular portion of land was ever used by plaintiff for any purpose whatever. *Smith* v. *Doe*, 15 Cal. 100.

4. The allegation of possession is too broad to defeat the rights of a person who has, in good faith, located upon public mineral land for the purpose of mining. *Id.*

5. When a party enters upon mineral land for the purpose of mining, he cannot be presumed to be a trespasser, for if the land be not private property he has the right to enter upon it for that purpose; and, until it is shown that the title has passed from the Government, the statutory presumption that it is public land applies. *Id.*

6. Mere entry and possession give no right to the exclusive enjoyment of any given quantity of the public mineral lands of this State. *Id.*

7. As a general rule, the public mineral lands of this State are open to the occupancy of every person who, in good faith, chooses to enter upon them for the purpose of mining. But this rule has its limitations, to be fixed by the facts of each particular case. Certain possessory rights and rights of property in the mining region, though not founded on a valid legal title, will be protected against the miner—as valuable permanent improvements, such as houses, orchards, vineyards, growing crops, etc. *Id.*

8. The act of April, 1852, "prescribing the mode of maintaining and defending possessory actions on public lands in this State," gives permission to all persons to work the mines upon public lands, although they may be in the possession of another, for agricultural purposes. *Stoakes* v. *Barrett*, 5 Cal. 36; *Clark* v. *Duval*, 15 Id. 88.

9. The right of the agriculturist to use and enjoy public lands must yield to the right of the miner when gold is discovered in his land. *Tartar* v. *Spring Creek W. & M. Co.*, 5 Cal. 395; *Burdge* v. *Underwood*, 6 Id. 45.

10. But this does not confer any right upon the miner to dig a ditch to convey water to his mining claim through land thus occupied. *Id.*; *McClintock* v. *Bryden*, 5 Cal. 97; *Fitzgerald* v. *Urton*, Id. 308.

11. The Government of the United States will issue no patent to a preemption claimant upon mineral lands, who claims the same for agricultural purposes. *McClintock* v. *Bryden*, 5 Cal. 99.

12. The Government of this State being a Government of the people, has, as far as its action has been determined, modified the claim to the precious metals by the sovereign, and permitted its citizens and others to use the public lands for the purpose of extracting the most valuable metals from their soil. *Id.*

13. A person who has settled for agricultural purposes upon any of the mining lands of this State has settled upon such lands subject to the rights of miners, who may proceed in good faith to extract any valuable metals there may be found in the lands so occupied by the settler, to the least injury of the occupying claimant. *Id.* 102.

14. Miners have a right to dig for gold on the public lands. *Irwin* v. *Phillips*, 5 Cal. 145; *Hicks* v. *Bell*, 3 Id. 219.

15. The miner who selects a piece of ground to work must take it as he finds it, subject to prior rights, which have an equal equity on account of an equal recognition from the sovereign power. *Id.* 147.

16. Settlers may occupy public lands and inclose the same for their immediate benefit, except in the mining regions, else the entire gold region might have been inclosed in large tracts under the pretense of agriculture and grazing. *Tartar* v. *Spring Creek W. & M. Co.*, 5 Cal. 398.

17. The Government of the United States, in the face of the notorious occupation of the public lands in this State by her citizens—that upon those lands they have mined for gold, constructed canals, built saw mills, cultivated farms, and practiced every mode of industry—has asserted no right of ownership to any of the mineral lands in the State. *Conger* v. *Weaver*, 6 Cal. 556.

18. The right, like digging gold, is a franchise, and the attending circumstances raise the presumption of a grant from the sovereign of the privilege, and every one who wishes to attain it has license from the State to do so; *provided*, that the prior rights of others are not infringed upon. *Id.*

19. A license to work the mines implies a permission to extract and remove the mineral. Such license from an individual owner can be created only by writing, and from the General Government only by act of Congress. But Congress has adopted no specific action on the subject, and has left that matter to be controlled by its previous general legislation respecting the public domain. The supposed license from the General Government consists in its simple forbearance. *Boggs* v. *Merced M. Co.*, 14 Cal. 374.

20. If the forbearance of the Government were entitled to any consideration, as a legal objection to the assertion of the title of the Government, it could only be so in those cases where it has been accompanied with such knowledge on its part, of a working of the mines and the removal of the mineral, as to have induced investigation and action, had this been intended or desired. Such knowledge must be affirmatively shown by those who assert a license from forbearance. *Id.*

21. How far the right of miners to go upon public mineral lands in possession of another, for the purpose of mining, must be modified to secure any rights of such possessor, reserved. *Id.*

22. Neither the act of 1858, as to the location of seminary land, nor the act of Congress, donating it, allows mineral land to be located. *Id.*

23. Miners have a right to enter upon public mineral land, in the occupancy of others, for agricultural purposes, and to use the land and water for the extraction of gold—the use being reasonable, necessary to the business of mining, and with just regard to the rights of the agriculturist; and this, whether the land is inclosed or taken up under the possessory act. *Clark* v. *Duval*, 15 Cal. 88.

24. The right so to enter and mine carries with it the right to whatever is indispensable for the exercise of this mining privilege—as the use of the land and such elements of the freehold as water. *Id.*

25. The possession of agricultural land is *prima facie* proof of title against a trespasser; but where it is shown that the party goes on mineral land to mine, there is no presumption that he is a trespasser; and the statutory presumption that it is public land, in the absence of proof of title in the person claiming it as agricultural land, applies. *Burdge* v. *Smith*, 14 Cal. 383.

26. In this State, although the larger portion of the mineral lands belong to the United States, yet defendant cannot defeat an action for mining claims, water privileges, and the like, by showing the paramount title of the Government. Our Courts, in determining controversies between parties thus situated, presume a grant from the Government to the first appropria-

tor. The presumption, though of no avail against the Government, is held absolute in such controversies. *Coryell* v. *Cain*, 16 Cal. 573.

27. A miner has no right to dig or work within the inclosure surrounding a dwelling-house, corral, and other improvements of another. *Burdge* v. *Underwood*, 6 Cal. 45.

28. There is no prohibition against locating school land warrants on any of the mineral lands in the State. *Nims* v. *Johnson*, 7 Cal. 110.

29. A party cannot, under pretense of holding land in exclusive occupancy as a town lot, take up and inclose twelve acres of mineral land in the mining district, as against persons who enter afterwards upon the land, in good faith, for the purpose of digging gold, and who do no injury to the use of the premises as a residence, or for carrying on of any commercial or mechanical business. *Martin* v. *Browner*, 11 Cal. 12.

30. Where a miner enters upon land in the possession of another, claiming the right to enter for mining purposes, he must justify his entry, by showing: 1st, that the land is public land; 2d, that it contains mines or minerals; 3d, that he enters for the *bona fide* purpose of mining, and such justification must be affirmatively pleaded in answer, with all the requisite averments to show a right under the statute, or by law, to enter. *Lentz* v. *Victor*, 17 Cal. 271.

31. A party in possession of public mineral land is entitled to hold it as against all the world, the Government excepted, if the land belong to it—subject only to the qualification that, upon land taken up for other than mining purposes, a right of entry for such purposes may attach. *Id.*

32. Whether in this case, even if the defense of justification as a miner, etc., had been properly set up, defendant would have been entitled to enter, not decided. *Id.*

33. The eleventh section of the act of March, 1856, "for the protection of actual settlers and to quiet land titles in this State," does not apply to miners engaged in extracting gold from quartz veins. *Fremont* v. *Seals*, 18 Cal. 433.

34. The mines of gold and silver in the public lands are as much the property of the State, by virtue of her sovereignty, as are similar mines in the hands of private proprietors. *Hicks* v. *Bell*, 3 Cal. 227; *Stoakes* v. *Barrett*, 5 Id. 39.

35. The State, therefore, has the sole right to authorize the mines to be worked, to pass laws for their regulation, to license miners, and affix such terms and conditions as she may deem proper to the freedom of their use. *Id.*

Growing Wood and Timber.

1. The right to the use of growing wood and timber upon the public mineral lands, as between the claims of miners on the one hand and agriculturists on the other, is governed by the rule of priority of appropriation. *Rogers* v. *Soggs*, 22 Cal. 444.

2. The possession of public land in the mineral districts of this State, acquired and held in accordance with the possessory act for agricultural purposes, carries with it the right to the wood and timber growing thereon, and this right is superior to that of subsequent locators of mining claims

who need, and seek to use, the wood and timber for carrying on their mining operations. *Id.*

3. In an action between occupants of the public lands neither party can claim a right to the growing timber thereon under the laws of the United States. The cutting or destruction of the timber by any occupant is expressly prohibited by Act of Congress of March 2d, 1831. *Id.*

Private Lands.

1. The United States, like any other proprietor, can only exercise their right to the mineral on private property, in subordination to such rules and regulations as the local sovereign may prescribe. *Boggs* v. *Merced M. Co.*, 14 Cal. 376.

2. The general course of legislation in this State authorizes the inference of a license from her to the miner to enter upon lands and remove the gold, so far as the State has any right; but this license is restricted to the public lands. *Id.*

3. Where premises containing deposits of gold are held under a patent from the United States, an injunction lies to prevent miners from excavating ditches, digging up the soil, and flooding a portion of the premises, for the purpose of extracting the gold. *Henshaw* v. *Clark*, 14 Cal. 460.

4. Such injuries are calculated to destroy the entire value of the land for all useful purposes. They are irreparable. *Id.*

5. Miners have no right to enter upon private land, and subject it to such uses as may be necessary to extract the precious metals which it contains. *Id.*

6. The right to mine for the precious metals can only be exercised upon public lands, and, although it carries with it the incidents of the right, such as the use of wood and water, those incidents also must be of the public domain. *Tartar* v. *Spring Creek W. & M. Co.*, 5 Cal. 398.

7. The presumption of a grant from the Government, of mines, water privileges, and the like, is to the first appropriator; but such a presumption can have no place for consideration against the superior proprietor. *Boggs* v. *Merced M. Co.*, 14 Cal. 375; *Henshaw* v. *Clark*, 14 Id. 464.

CONVEYANCE OF MINING CLAIMS.

AN ACT to provide for the Conveyance of Mining Claims.

[Passed April 13th, 1860.—Wood's Dig. p. 896; Stat. 1860, p. 175.]

SECTION 1. Conveyances of mining claims may be evidenced by bills of sale or instruments in writing not under seal, signed by the person from whom the estate or interest is intended to pass, in the presence of one or more attesting witnesses; and also all conveyances of mining claims hereto-

fore made by bills of sale or instruments of writing, not under seal, shall have the same force and effect as *prima facie* evidence of sale, as if such conveyances had been made by deed under seal; *provided*, that nothing in this act shall be construed to interfere with or repeal any lawful local rules, regulations, or customs of the mines in the several mining districts of this State; and *provided*, further, every such bill of sale or instrument in writing shall be deemed and held to be fraudulent and void as against all persons except the parties thereto, unless such bill of sale or instrument in writing be accompanied by an immediate delivery to the purchaser of the possession of the mining claim or claims therein described, and be followed by an actual and continued change of the possession thereof, or unless such bill of sale or instrument in writing shall be acknowledged and recorded as required by law in the case of conveyances of real estate.

SEC. 2. This act shall apply to gold mining claims only. (*This section was repealed by Act of March 26th*, 1863—Stat. 1863, p. 98.)

Conveyances of Mining Claims, etc.

1. A bill of sale, not under seal, is insufficient to convey a mining claim. *McCarron* v. *O'Connell*, 7 Cal. 152.

[The act of April 13, 1860, permits bills of sale of mining claims, without seal, to pass title.]

2. A bill of sale for a mining claim, not under seal, and without warranty, which only purports to convey the right and title of the vendor, will not pass the title, although the vendor is in possession at the time, if such possession is without title. It only passes an equity which is subject to the legal title or a superior equity. *Clark* v. *McElvy*, 11 Cal. 154.

3. A written conveyance is not necessary to the transfer of a mining claim. *Table Mountain Tunnel Co.* v. *Stranahan*, 20 Cal. 198.

4. The right to mining ground, acquired by appropriation, rests upon possession only; and rights of this character, 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. *Id.*

5. A writing is not necessary to vest or divest title on taking up a mining claim. The right of the miner comes from the mere appropriation of the claim made in accordance with the mining rules and customs of the vicinage. The title is in the Government, and the right to mine is by its permission to the appropriator. *Gore* v. *McBrayer*, 18 Cal. 582.

6. The statute of frauds, requiring an instrument in writing to create an interest in land, does not apply to taking up of mining claims. A mere verbal authority to one man to take up a claim for another is sufficient. No title is divested out of the Government, but a right of entry given under it. *Id.*

7. Mining claims are real estate within the code defining the venue of civil actions. *Watts* v. *White*, 13 Cal. 324.

8. Upon questions as to the occupancy of public mineral land, it seems that a transfer of the occupant's right of possession may as well be by simple agreement as by deed, the vendee taking possession. *Jackson* v. *F. River and Gibsonville W. Co.*, 14 Cal. 22.

9. From an early period of our State's jurisprudence we have regarded claims to public mineral lands as titles. *Merritt* v. *Judd*, 14 Cal. 64.

10. The owner of a mining claim has, in effect, a good vested title to the property, until divested by the higher right of his superior proprietor. He is entitled to all the remedies for the protection of his mine that he could claim if he were the owner against all the world, except the true owner. *Merced Mining Co.* v. *Fremont*, 7 Cal. 317.

11. The purchaser of a mining claim can only acquire such right or title as his vendor had at the time of sale. *Waring* v. *Crow*, 11 Cal. 366.

12. Where parties conveyed to H. one-third interest in the lead, by deed purporting to convey in the fee simple absolute, and subsequently acquired another title: *held*, that such subsequent acquisition inured to H.'s benefit. *Hitchens* v. *Nougues*, 11 Cal. 28.

13. A bill of sale of a mining claim is sufficiently proven when the handwriting of the subscribing witness, who is absent from the State, and the execution by the vendor are proven. It is no objection to such bill of sale that it is not under seal, whatever may be the effect of it as evidence. *Jackson* v. *Feather River Water Co.*, 14 Cal. 22.

§ 216. Naked occupancy of the public mineral lands confers no title — Rights of such occupant. — Title to mineral lands of the public domain can be initiated and

[1] 19 Stats. at Large, 377; 26 Stats. at Large, 1095.
[2] 26 Stats. at Large, 1095.

acquired only under the mining laws. As was said by the supreme court of the United States,—

"No title from the United States to land known at the "time of sale to be valuable for its minerals of gold, silver, "cinnabar, or copper can be obtained under the pre-emption, "homestead, or townsite laws, or in any other way than as "prescribed by the laws specially authorizing the sale of "such lands."[1]

There can be no strictly lawful possession of such lands, unless that possession is referable to the mining laws.

"There can be no color of title in an occupant who does "not hold under any instrument, proceeding, or law, pur- "porting to transfer to him the title, or to give to him the "right of possession. And there can be no such thing as "good faith in an adverse holding, where the party knows "that he has no title, and that under the law, which he "is presumed to know, he can acquire none by his occu- "pation."[2]

As heretofore shown, when dealing with occupants of the public mineral lands for the purposes of trade or business,[3] mere occupancy of the public lands and improvements thereon give no vested right therein as against the United States, or one connecting himself with the government, by compliance with the law.[4]

This is the universal rule as to all classes of public lands.[5] While this is true, the occupant has certain rights based upon the fact of actual possession, which, from motives of public policy, are accorded to him.

As was said by the supreme court of California,—

"As against a mere trespasser, one in possession of a "portion of the public land will be presumed to be the "owner, notwithstanding the circumstance that the court "has judicial notice that he is not the owner, but that the

[1] Deffeback *v.* Hawke, 115 U. S. 392, 404.

[2] *Id.*

[3] See, *ante*, § 170.

[4] Sparks *v.* Pierce, 115 U. S. 408.

[5] Frisbie *v.* Whitney, 9 Wall. 187; Hutchins *v.* Low, 15 Wall. 77; Campbell *v.* Wade, 132 U. S. 34; Jourdan *v.* Barrett, 4 How. 169; Burgess *v.* Gray, 16 How. 48; Gibson *v.* Chouteau, 13 Wall. 92; Oaksmith *v.* Johnston, 92 U. S. 343; Morrow *v.* Whitney, 95 U. S. 551.

"government is. This rule has been maintained from "motives of public policy, and to secure the quiet enjoy- "ment of possessions which are intrusions upon the United "States alone."[1]

This is nothing more than a reiteration of the familiar rule, that, as against a mere intruder, or one claiming no higher or better right than the occupant, possession is *prima facie* evidence of title.[2]

But this is all that can be claimed. As against one connecting himself with the government, this occupancy must yield to the higher right.

§ 217. Rights upon the public domain can not be initiated by forcible entry upon the actual possession of another.— To what extent actual possession of any portion of the public mineral lands prevents their valid appropriation under the mining laws depends upon the facts and circumstances of each particular case. There are certain recognized principles, however, which are necessarily involved in all such cases, the application of which will, generally speaking, result in their proper solution.

It is a doctrine well established that no rights upon the public domain can be initiated by a forcible entry upon the possession of another. A forcible and tortious invasion of such possession confers no privilege upon the invader, and can not be made the basis of a possessory title. A rightful seisin can not flow from a wrongful disseisin.

It has been distinctly held in cases arising under the former pre-emption laws that no right of possession could be established by settlement and improvement upon a tract of land conceded to be public where the pre-emption claimant forcibly intruded upon the actual possession of another who, having no other valid title than possession, had already settled upon, inclosed, and improved the tract;

[1] Brandt *v.* Wheaton, 52 Cal. 430.

[2] Campbell *v.* Rankin, 99 U. S. 261; Atwood *v.* Fricot, 17 Cal. 38; English *v.* Johnson, *Id.* 108; Hess *v.* Winder, 30 Cal. 349.

that such an intrusion was but a naked and unlawful trespass, and could not initiate a right of pre-emption.[1]

In conformity with this rule, it was wisely said by the late Judge Sawyer, in the ninth circuit, district of California, that the laws no more authorize a trespass upon the actual possession and occupation of another claiming a pre-emption right, for the purpose of locating and acquiring the title to a piece of mineral land, than to initiate an ordinary pre-emption right to a tract of agricultural land; that the law does not encourage or permit for any purpose unlawful intrusions and trespasses upon the actual occupation and possession of another. To permit a right to accrue or confer authority to thus initiate a title to the public land, would be to encourage strife, breaches of the peace, and violence of such character as to greatly disturb the public tranquility.[2]

§ 218. Appropriation of public mineral lands by peaceable entry in good faith upon the possession of a mere occupant without color of title.— Conceding that the law is correctly stated in the three preceding sections, it is not to be understood that a mere occupant of the public mineral lands can by virtue of such occupancy prevent, under all circumstances, their appropriation for mining purposes. The law interdicts entries effected with force and violence for any purpose. But a mere intruder upon the public lands, a mere occupant, whose possession is not referable to some law or right conferred by virtue of an instrument giving color of title, can not by reason of such occupancy prevent a peaceable entry in good faith by one seeking to avail himself of the privilege vouchsafed by the mining laws.

The doctrine that by mere entry and possession a right may be acquired to the exclusive enjoyment of any given quantity of the public mineral lands, was condemned by

[1] Atherton *v.* Fowler, 96 U. S. 513; Quinby *v.* Conlan, 104 U. S. 421; Hosmer *v.* Wallace, 97 U. S. 575.

[2] Cowell *v.* Lammers, 10 Saw. 246.

the supreme court of California in its earliest decisions. If such doctrine could be maintained, said that court,—

"It would be fraught with the most pernicious and disas-
"trous consequences. The appropriation of these lands in
"large tracts for agricultural and grazing purposes, and
"the concentration of the mining interest in the hands of
"a few persons, to the exclusion of the mass of the people
"of the state, are some of the evils which would necessarily
"result from such a doctrine."[1]

There is no grant from the government under the acts of congress regulating the disposal of mineral lands, unless there is a location according to law and the local rules and regulations. Such a location is a condition precedent to the grant. Mere possession, not based upon a valid location, would not prevent a valid location under the law.[2] This doctrine is clearly established by the supreme court of the United States in Belk *v.* Meagher,[3] affirming the decision of the supreme court of Montana. In that case Belk undertook to locate a mining claim. His entry was peaceable, and he did all that was necessary to perfect his rights, if the premises had been at the time open for that purpose. But at the time of such attempted appropriation the ground was covered by a prior, and, as the court found, a valid, subsisting location. Subsequently this prior subsisting location lapsed, and thereafter Meagher relocated the claim, his entry for that purpose being made peaceably and without force. Belk brought ejectment, and being unsuccessful in the territorial courts, took the case on writ of error to the supreme court of the United States.

It having been established that when Belk made his relocation, in December, 1876, the claim of the original locators was still subsisting and valid, and remained so until January 1, 1877, the supreme court considered three propositions of law as necessarily arising in the case:—

[1] Smith *v.* Doe, 15 Cal. 101, 105; Gillan *v.* Hutchinson, 16 Cal. 154.
[2] Belk *v.* Meagher, 3 Mont. 65, 80.
[3] 104 U. S. 279, 284.

(1) Whether Belk's relocation was valid as against everybody but the original locators, his entry being peaceable and without force;

(2) Whether, if Belk's relocation was invalid when made, it became effectual in law on the 1st of January, 1877, when the original claims lapsed;

(3) Whether, even if the relocation of Belk was invalid, Meagher could, after the 1st of January, 1877, make a relocation which would give him, as against Belk, an exclusive right to the possession and enjoyment of the property, the entry for that purpose being made peaceably and without force.

All three propositions were resolved against Belk, the court holding that he had made no such location as prevented the lands from being in law vacant, and that others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force. His possession might have been such as would have enabled him to bring an action of trespass against one who entered without any color of right, but it was not enough to prevent an entry peaceably and in good faith for the purpose of securing a right under the acts of congress to the exclusive possession and enjoyment of the property. This doctrine was held not to be in conflict with the rule announced by the same court in Atherton *v.* Fowler,[1] cited in a preceding section, wherein it was determined that a right of pre-emption could not be established by a *forcible* intrusion upon the possession of one who had already settled upon, improved, and inclosed the property.

The controlling force of the doctrine of Belk *v.* Meagher has been abundantly recognized by the courts since its promulgation.[2]

[1] 96 U. S. 513.

[2] Noyes *v.* Black, 4 Mont. 527; Hopkins *v.* Noyes, *Id.* 550; Sweet *v.* Weber, 7 Colo. 443; Horswell *v.* Ruiz, 67 Cal. 111; Russell *v.* Hoyt, 4 Mont. 412; Du Prat *v.* James, 65 Cal. 555; Russell *v.* Brosseau, *Id.* 605; Garthe *v.* Hart, 73 Cal. 541.

A similar doctrine had been previously announced by Judge Deady, United States district judge, in Oregon,[1] where a location of mining ground in the possession of Chinese was upheld, on the theory that this class of aliens could acquire no rights by location, purchase, or occupancy upon the mineral lands of the public domain.

As was said by the supreme court of Montana,—

"Possession within a mining district, to be protected "or to give vitality to a title, must be in pursuance of the "law and the local rules and regulations. Possession, in "order to be available, must be properly supported. . . . "The mere naked possession of a mining claim upon the "public lands is not sufficient to hold such claim against "a subsequent location made in pursuance of the law, and "kept alive by a compliance therewith."[2]

The right of possession comes only from a valid location.[3]

Possession is good as against mere intruders; but it is not good as against one who has complied with the mining laws.[4]

Several cases appear in the reports which might be construed to be not entirely in harmony with the rule announced in the foregoing cases.[5] Some of them recognize the doctrine as to all ground not covered by the *pedis possessio*. Others do not mention the element of force as entitled to controlling weight in determining the question. In most of these cases the statement of facts upon which the decisions are based is very meager, and we are therefore unable to say to what extent, if at all, any of them repudiate the doctrine of Belk *v.* Meagher. Be that as it may, it cannot be denied that if there is any conflict between the decisions here referred to and the doctrine announced by the supreme court of the United States, they must, to the extent of such conflict, be disregarded.

[1] Chapman *v.* Toy Lung, 4 Saw. 23.

[2] Hopkins *v.* Noyes, 4 Mont. 550, 556.

[3] Hammond *v.* Foster, 4 Mont. 421.

[4] Garthe *v.* Hart, 73 Cal. 541, 543.

[5] Eilers *v.* Boatman, 3 Utah, 159; Armstrong *v.* Lower, 6 Colo. 581; Weise *v.* Barker, 7 Colo. 178; Lebanon M. Co. *v.* Con. Rep. M. Co., 6 Colo. 380; Faxon *v.* Barnard, 4 Fed. 702; North Noonday *v.* Orient, 6 Saw. 507.

§ 219. **Conclusions.** — We are justified in deducing the following general rules upon the subject under discussion:—

(1) Actual possession of a tract of public mineral land is valid as against a mere intruder, or one having no higher or better right than the prior occupant;

(2) No mining right or title can be initiated by a violent or forcible invasion of another's actual occupancy;

(3) If a party goes upon the mineral lands of the United States and either establishes a settlement or works thereon without complying with the requirements of the mining laws, and relies exclusively upon his possession or work, a second party who locates peaceably a mining claim covering any portion of the same ground, and in all respects complies with the requirements of the mining laws, then such second party is entitled to the possession of such mineral ground to the extent of his location as against the prior occupant, who is, from the time said second party has perfected his location and complied with the law, a trespasser.[1]

The peaceable adverse entry by the locator, coupled with the perfection of his location, operates in law as an ouster of the prior occupant.[2]

In some of the states laws are enacted protecting the right of a discoverer upon the public mineral lands for a limited period of time, to enable him to perfect his location. Where no such local statutes are in force, according to the current of authority, by the policy of the law a reasonable time is allowed to such discoverer to complete his appropriation. During such periods the possession or occupation of the discoverer will be protected as against subsequent locators. This subject will be fully considered in another portion of this treatise and the application of the doctrines above enunciated to such cases will there be fully explained.

[1] This is substantially the charge to the jury upheld in Horswell *v.* Ruiz, 67 Cal. 111.

[2] Belk *v.* Meagher, 3 Mont. 65, 80.

POSSESSION.

(See LIMITATIONS, § **3138** and *notes.*)

901. Possession is *prima facie* evidence of a grant from the **sovereign authority; Sears** *v.* **Taylor**, 4 Colo., 43 (1877); **Bingham on Real Property, p. 4.**

902. Instance of **ejectment** suit for mine where the title relied on was occupancy and possession: Jackson *v.* McMurray, 4 Colo., 76 (1878).

903. Since no time is required within which plaintiff in possession of a mining claim shall make application for a patent, his possession may in time ripen into a perfect right; Lebanon Mg. Co. *v.* Con. Rep. Mg. Co., 6 Colo., 381 (1882).

904. Under the federal and state statutes two kinds of possession of mining ground are recognized: First, where the miner, by virtue of work and improvements upon a tract of mineral land, and occupancy thereof, holds the same independent of location statutes against one having no better right; second, where, after discovering a vein, the miner undertakes to avail himself of the benefits of the location statutes; Armstrong *v.* Lower, 6 Colo., 582 (1883).

905. When the locator has performed all things required by statute, he is entitled to the possession of the entire claim until he does, or omits to do, some thing which in law amounts to an **abandonment** thereof; *Id.*

906. By failure to conform to the statute in making a location, the locator **forfeits** all rights to any benefit from his partial compliance with the statutes, except as he may be aided thereby in his proof of actual possession; *Id.*, 583.

907. One attempting to make a location, but failing to comply with all statutory requirements, can not, by virtue of actual possession of one hundred feet, hold the entire claim as against one who enters upon such land after such failure and acquires rights before the prior locator has perfected his location; *Id.*

908. There can be no such possession under a location that does not comply with R. S. U. S., § 2324, that will hold against a subsequent *valid* **re-location**; Sweet *v.* Webber, 7 Colo., 450 (1884).

909. Under location statutes to constitute such possession as will give the locator a right to mineral lands before patent issues, neither residence on the premises, nor continuous actual occupation, nor that kind of possession denominated *possessio pedis* is required; Strepey *v.* Stark, 7 Colo., 622 (1884).

910. Possession alone is not enough to entitle to a **patent**; Becker *v.* Pugh, 9 Colo., 591 (1886); see Belk *v.* Meagher, 104 U. S., 287.

911. On the public domain a miner may hold the place in which he may be working against all others having no better right. But when he asserts title to a full claim of fifteen hundred feet in length and three hundred feet in width, he must prove a lode extending throughout the claim; Zollars *v.* Evans, 5 Fed. Rep., 173 (1880). But see Armstrong *v.* Lower, 6 Colo., 399, 585 (1882); Bushnell *v.* Crooke M. & S. Co., 12 *Id.*, 252 (1888).

912. The prospector upon the public domain can hold to the extent of his claim in actual possession prior to the discovery of mineral in place; but if he stand by and permit another to sink a shaft within his boundaries, and the latter first discovers mineral, his will be the better claim; Crossman *v.* Pendery, 8 Fed. Rep., 694; 2 McCrary, 139 (1881).

913. Possession upon the public domain of the kind known as *pedis possessio* by a prospector while searching for mineral is as good as a possessory title against all the world, except the United States; *Id.*

914. In an action to recover possession of a mining claim plaintiff must establish a prior location, and it rests with plaintiff to show that ore was found in the **discovery** shaft, and that the same body, vein or lode extends to the ground in controversy; Van Zandt *v.* Argentine M. Co., 8 Fed. Rep., 727.

915. Only a valid location can give to the claimants possession of a mining claim beyond their actual occupancy, and if valid, the full extent of a claim fifteen hundred feet in length by one hundred and fifty feet in width will be held; Harris *v.* Equator M. & S. Co., 8 Fed. Rep., 865.

916. In an action to recover possession of a mining claim plaintiff must show a good location, and in his **discovery shaft** a vein or lode of valuable ore, in rock in place, as well as compliance with the statute in other regards; Terrible M. Co. *v.* Argentine M. Co., 5 McCrary, 639 (1883).

917. Mining claims are held by possession, but that possession is regulated and defined by usage and local conventional rules, and the actual possession which is required of agricultural lands can not be required of a mining claim; Attwood *v.* Fricot, 17 Cal., 43; Sears *v.* Taylor, 4 Colo., 39 (1877); Wade Am. Mining Law, p. 33; Faxon *v.* Barnard, 4 Fed. Rep., 705; Erhardt *v.* Boaro, 8 *Id.*, 692; North Noonday M. Co. *v.* Orient M. Co., 6 Saw., 317; Hess *v.* Winder, 30 Cal., 355; McKinstry *v.* Clark, 1 Pac. Rep., 762 (Mont.).

918. A mining claim must be in some way defined as to limits before the possession of or working upon part gives possession to any more than the part so possessed

or worked. But when the claim is defined, and the party enters in pursuance of mining rules and customs, the possession of part is possession of the entire claim; Attwood *v.* Fricot, 17 Cal., 44; Hess *v.* Winder, 30 *Id.*, 355–6.

919. Possession of a mining claim presumes ownership of such mining claim, and, also, a compliance with the law, and the local rules and customs; Gropper *v.* King, 1 Pac. Rep., 755 (Mont.).

920. If a party enters *bona fide* under **color of title** as under a deed or lease, the **possession** of a part as against any one but the true owner or prior occupant is the possession of the entire claim described by the paper, and this though the paper did not convey the title; Attwood *v.* Fricot, 17 Cal., 44; Hess *v.* Winder, 30 *Id.*, 355–6; North Noonday M. C. *v.* Orient M. Co., 6 Saw., 317; 11 Fed. Rep., 128; Harris *v.* Equator M. & S. Co., 8 Fed. Rep., 866; Tyler on Ejectment, 897.

921. Possession to be available to a mining claim must be actual and *bona fide;* Belk *v.* Meagher, 104 U. S., 287; Funk *v.* Sterrett, 59 Cal., 614; Golden Fleece Co. *v.* Cable Con. Co., 12 Nev., 321; Armstrong *v.* Lower, 6 Colo., 583 (1883).