#63 1/4/67

Memorandum 67-1

Subject: Study 63 - Evidence Code (Evidence Code Revisions)

You have previously received the blue pamphlet containing the Commission's recommendation relating to the Evidence Code. This memorandum relates to one matter concerning which the Commission wished further information. This matter is our proposed repeal of Evidence Code Section 1602 and enactment of Public Resources Code Section 2325.

We have attached as exhibits to this memorandum copies of the correspondence we have had relating to the classification of the presumption now contained in Section 1602.

To refresh your recollections concerning the status of the matter: The staff originally proposed that Section 1602 be revised to state a hearsay exception. The Commission ultimately decided to recommend the creation of a presumption affecting the burden of producing evidence. The problem arises because the term "prima facie evidence" has been used with different meanings in various parts of the California codes. Although the usual significance of the term appears to be to create a presumption, at times it is used to signify merely that evidence is admissible or that a particular form of evidence is sufficient to take the case to the trier of fact. Professor Degnan discusses this on pages 1143-1149 of Volume 6 of our Reports. The lack of any case law construing Evidence Code Section 1602 (or its predecessor, CCP § 1927) leaves us with no authoritative statement as to the original meaning of the section. The staff first wrote to Justice Regan of the Third District Court of Appeal because he has some familiarity with mining law. He referred our letter to mining lawyers that he knows and their replies are attached on pink paper. We then went

to Martindale Hubbel and compiled a list of attorneys who identified themselves as having practices that relate to mining law. We sent a mimeographed letter to about 20 attorneys whose names were obtained in this fashion. We noted from the listings of committee members of the American Bar Association that Mr. John B. Lonergan has been a member of a committee on hard minerals. Accordingly, we sent him a personal letter relating to the subject, a copy of which appears on yellow paper. The mimeographed letter to the other attorneys was a virtual copy of the letter sent to Mr. Lonergan.

Some of the replies to these inquiries indicated that the section may serve no function whatever because patents do not contain recitals of location dates. To check this information out, we wrote to the Bureau of Land Management in Washington to determine the actual practice. The Bureau's reply is attached on goldenrod paper. It indicates that it is not the practice of the Bureau to enter location dates on mineral patents. The letter indicates that the Washington office requested the State Director in Sacramento to check past practices in the California office. We have not as yet heard from the State Director in Sacramento, but we have sent a follow up letter.

The legal problem is this: A person can hold title to a mining claim without obtaining the United States patent for it. However, he must continue to do annual assessment work on the claim if he does not have a patent. The patent conveys the government's title to the property so that annual assessment work is no longer necessary and the patentee can use the property for other than mining purposes. The patent has the effect of cutting off all other claims to the property which existed at that time. A person with an adverse claim to the property must file an adverse claim

in the patent proceeding or be forever barred from asserting his adverse claim. Thus, the owner of an unpatented mining claim can have his rights cut off by a person locating a later mining claim if the later locater obtains a patent to his later claim. The senior locater must file his adverse claim in the patent proceedings to stop the issuance of the patent and then litigate with the junior locater as to their conflicting rights.

The requirement that an adverse claim be filed or be forever cut off applies only to adverse claimants with surface conflicts or with known sub-surface conflicts. The owner of a claim is entitled to all of the ore in any vein with its apex within the surface of his claim even though beneath the surface the vein extends beyond the sidelines of his claim. Where veins having apexes in two different surface claims unite beneath the surface, the owner of the ore in the vein beneath the point of union is the owner with the prior date of location. This is the significance of the date of location in Section 1602. However, if there is no surface conflict and it is not known that there is a sub-surface conflict, neither surface claimant is permitted to file an adverse claim in the patent proceedings initiated by the other. As indicated in the letter from the Bureau of Land Management, the original date of location is established in the patent proceedings usually by the uncontested statements of the applicant. Because there is ordinarilly no requirement that a claim must have been located within any given period of time, there is no need for the United States to verify the date of location at any particular time. Mineral patent investigations, thus, are usually directed to confirming the alleged discovery, verifying that the requisite improvements have been made, and determining that other statutory and regulatory requirements are met.

The question, then, is whether the owner of a patented claim should be entitled to a presumption that a date recited in the patent as the date of location is the actual date of location and, if so, whether an adverse sub-surface claimant should have the burden of proving the recited date incorrect. Mr. Kelley of Musick, Peeler and Garrett suggests that the location date may be of significance in a controversy between the patentee and another locater to determine seniority of rights on the mining claim. He asserts that the location date should be significant evidence against any claimant intervening between the date of location and the date of the patent. I believe he is incorrect in this, because the patent cuts off all adverse claims whether based on a location prior to or subsequent to that of the patentee. As stated in 3 LINDLEY, MINES § 783 (3d ed. 1914):

> Where there is conflict between junior and senior claimants, the issuance of a patent to either, without adverse, raises a conclusive presumption as to priority in favor of a patentee as to everything embraced within the patented area, and within its vertical bounding planes, subject only to the right of invasion by an outside priprietor having within his claim the apex of the vein so situated as to convey an extralateral right. But, as underground rights are not the subject of adverse claims where controversies arise over, and are limited to underground segments of the vein beyond the vertical boundaries of the patented claim, the failure to adverse does not estop the parties from litigating the fact of priority.

Lindley also points out (in § 730):

> An application for patent invites only such contests as affect the surface area. A possible union of veins underneath the surface cannot be foreshadowed at the time the application is made. When such a condition arises, it is adjusted by reference to surface apex ownership and priority of location.
>
> The rule is well settled that conflicting adverse rights set up to defeat an application for patent cannot be recognized in the absence of an alleged surface conflict. Prospective underground conflicts or questions involving extralateral rights are not the subject of adverse claims.

The views of the attorneys corresponding with us are all over the lot. Mr. Tolles states that Section 1602 is of no significance, he has

never seen a date recital in a patent, and the section should be repealed. He says that if the section is retained, it should be retained as a hearsay exception only. Mr. Carlton and Mr. Cibula both suggest that no presumption be created. Mr. Carlton gives as a reason that any date recital must be based on the ex parte statements of the patentee. Mr. Lonergan points out that the date is not recited in patents but, nevertheless, argues in favor of a presumption affecting the burden of proof. Mr. Kelley and Mr. Bridges also recommend the creation of a presumption affecting the burden of proof. Mr. Kennedy would like to have a presumption, but it is not clear from his letter what kind. The rationale given in support of his position tends to indicate that a presumption affecting the burden of producing evidence would satisfy him.

It appears that we may have expended much effort for naught. There may be nothing to which the section applies. The mining bar is certainly not of one mind concerning what should be done with the section. Our current recommendation, if applicable to anything, is probably as good a reconciliation of the opposing views as may be attained. Accordingly, we do not recommend any change in our recommendation as the result of these comments.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

IN REPLY REFER TO:
3400(722b)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

NOV 30 1966

Mr. Joseph B. Harvey
Assistant Executive Secretary
California Law Revision Commission
School of Law - Stanford University
Stanford, California 94305

Dear Mr. Harvey:

This responds to your inquiry of November 6 with reference to your review of California Evidence Code Section 1602.

Insofar as we can determine in this office, it has not been our practice to enter the date (s) of location on mineral patents. However, since we are unable to verify this from the records at hand, we are referring this question to our State Director in California with a request that he review specimens of past patent certificates and advise you regarding his findings.

Assuming that some patents may recite the date of location, it would probably be based upon the applicant's submission of his evidence of title. The present requirement is described in detail in Title 43, Code of Federal Regulations, Subpart 3550.3(see enclosed Circular 2149), which provides for the submission of a copy of the original location notice, or secondary evidence in lieu thereof as provided in Section 3450.4 of the regulations.

In proceedings for the issuance of a patent, any adverse claimant may intervene as provided by 30 U.S.C. § 30, et seq. However, the only effect that this would have on the administrative process would be to stay the patent proceedings until the controversy shall have been settled or decided by a court of competent jurisdiction. The United States would not attempt to establish the truth of the allegations of either party.

Usually, the showings of proof submitted by the mineral patent applicant are of such quality that there is no necessity for the United States to undertake a separate investigation to determine the date of location. Mineral patent investigations are more commonly directed to confirming the alleged discovery, verifying that the requisite improvements have been made, and other statutory and regulatory requirements are met. There is, ordinarily, no requirement that the claim must have

been located within a given period of time. However, there are circumstances which do require that a claim must have been located prior to a cut-off date, as in the case of lands or minerals which have been removed from the purview of the general mining laws. In such cases, the date of location becomes critical and we do endeavor to verify it in all cases where doubt exists.

It occurs to us that the significance of the statute may be related to the determination of the claimant's liability for the payment of taxes, although this is merely speculation.

We trust that this information will be of benefit. You may anticipate a response from our State Director in the near future.

Sincerely yours,

Assistant Director, Lands and Mineral

1 Enclosure
Encl. 1 - Circular 2149

STATE OF CALIFORNIA

District Court of Appeal

THIRD APPELLATE DISTRICT
STATE LIBRARY AND COURTS BUILDING
SACRAMENTO

EDWIN J. REGAN
JUSTICE

September 6, 1966

Joseph B. Harvey, Esq.
Assistant Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California

94305

Dear Mr. Harvey:

Pursuant to your letter of August 5, 1966, Justice Regan wrote to four attorneys in Shasta County, who are quite familiar with mining law. I am enclosing copies of the letters of three of these attorneys, and when the other arrives I will send it on to you.

I hope that you will find their expressions on this subject to be of help to you.

Sincerely,

Virginia White

Virginia White
Secretary to:

EDWIN J. REGAN

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August 12, 1966

Honorable Edwin J. Regan
District Court of Appeal
State Library and Courts Building
Sacramento, California

Dear Judge:

I received your letter and the memorandum relative to Section 1602 of the new Evidence Code. I am disposed to agree with the suggestion that Section 1602 should not create a presumption. This for the obvious reason that the statement of the date of location is predicated on ex parte claims and statements and while perhaps permissible hearsay, should not rise to the dignity of a presumption which can create considerable problems.

I am a little surprised, however, that the words "prima facie evidence" is to be considered as creating a presumption. Perhaps elsewhere in the Code there is a definition to this effect and I must confess I am reading the new Code in installments in an effort to learn of the changes but have not come across such language.

I do not believe the case law makes prima facie evidence the equivalent of presumption. While the area is somewhat vague I thought the effect of such language meant that proof was sufficient to support a finding but was considerably short of the weight of a true presumption. Perhaps I am in error in this regard and in any event this is irrelevant to the specific question submitted.

I appreciate very much your thinking of me and permitting me to comment on the new section.

With best wishes, I am

Sincerely,

DANIEL S. CARLTON

dsc br

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August 3rd, 1966

Hon. Edwin J. Regan, Justice
District Court of Appeal
State of California
Third Appellate District
State Library and Courts Building
Sacramento, California

Re: Section 1602 of the Evidence Code as proposed

Dear Senator Regan:

I have reviewed the documents which you forwarded to this office and shall submit my considerations. For the most part, I take no issue with the presentation as outlined in the memorandum. However, I have some doubts as to whether "prima facia evidence" does in fact create a presumption. Without belaboring that particular point, I shall continue the analysis.

It seems that the memorandum is in fact correct when it states that this matter of evidence may most properly not be placed in our Evidence Code. I refer to the indication that any revision of this particular aspect of mining law should be properly situated in the Public Resources Code and not in the Evidence Code. Furthermore, it does not seem that it lies within the scope of an evidence code to create a presumption of the nature proposed, if such is intended. The implications of this proposed section on mining law are, indeed, obvious. It would seem to be a grave error for the commissioners to submit a section which would seriously affect the rights of parties in this somewhat technical area of the law.

Therefore, it is my recommendation that the proposed section be limited to its apparent purpose, i.e., to create an exception to the hearsay rule only. It does seem a serious hazard to create a presumption from what is, in effect, a self-serving document.

ALVIN M. CIBULA

FRANKLIN S. CIBULA
ASSOCIATE

As d ou note above, my remarks reflect a concurrence with the memorandum as submitted. I feel strongly that any adjustment of this matter as a matter of evidence be only done within the scope of an exception to a hearsay rule. Furthermore, it seems more logical and sensible to include the proposed exception to the hearsay rule to the Public Resources Code and not in the Evidence Code.

I trust that the above meet the test of the type of comment which you were anticipating. My best to your family. Dad left for Europe today and I trust will have a memorable voyage.

Best personal wishes,

FRANKLIN S. CIBULA

FSC:jt

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AREA CODE 916
243-1265

August 11, 1966

Honorable Edwin J. Regan Justice
District Court of Appeal
Third Appellate District
State Library and Courts Building
Sacramento, California

Dear Justice Regan:

I have reviewed the material forwarded with your letter of August 9th concerning reconsideration of Evidence Code Section 1602 by the Law Revision Commission.

It seems to me that there are some valid reasons for leaving Section 1602 in such form as to create a presumption, rather than merely enacting an exception to the hearsay rule.

I am thinking particularly of older patents. Certainly the investigation by the United States, and the demand for detailed documentation, under present Federal policies concerning patent applications, provides a substantial reservoir of evidence.

This is not the case with respect old locations and old patents, as you are well aware. The logic of a presumption with respect date of location, it seems to me, is comparable to the logic used in the presumption with respect filing of proofs of labor under Section 2315 of the Public Resources Code. Often in cases of old locations and old patents, there would be no evidence other than the recital in the patent, because of the "loose" fashion in which location notices where prepared, posted and filed. Even a search of mining records to determine original locations and to trace title from original locations and

later relocations is often impossible due to wholly inadequate descriptions. As you know, title companies will not insure possessory title to mining claims principally for the reason that an adequate search is impossible.

Since the presumption is, in any event, rebuttable, where is the harm in leaving it in the section to cover what may well be the great majority of situations where the presumption will be the only "evidence" available.

I concur with the Commission's interpretation of the mining laws with respect priorities in conflicts over lode claims, and it certainly would appear that the presumption could be a useful tool in resolving these conflicts and reducing litigation.

As for placement of the section, I do agree that it belongs more logically in the Public Resources Code, for the same reason that we find the proof of labor presumption in the Public Resources Code.

I hope these comments will be helpful in resolving the question.

Best personal regards,

DONALD R. KENNEDY

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October 10, 1966

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

In reply to your letter of September 2, 1966, regarding Section 1602 of the California Evidence Code, the following comments and answers to your questions are submitted.

1. Is a recital in a patent for mineral lands of the date of location (not the date of patent or of patent application) considered by the mining bar and the trial courts as raising a presumption of the location date that is binding even on those who could not have asserted an adverse claim in the patent proceedings?

Although no instance can be recalled where the question was considered in a trial court, it would seem that such a presumption does and should be raised. Substantively, a patent for a mineral claim is deemed a final determination and conclusive in all suits at law when valid on its face and when not in opposition to law. 2 American Law of Mining §9.33 (1964). It is conclusive of all facts as to which the Bureau of Land Management passes upon in considering the application for patent, Butte & Superior Copper Co. v. Clark-Montana Realty Co., 248 Fed. 609 (9th Cir. 1918), cert. den. 247 U. S. 516 (1918). Moreover, section 1963 of the California Code of Civil Procedure provides that a disputable presumption, which may be controverted by other evidence, is raised that an official duty has been regularly performed. In accordance with the latter provision, it would seem that the better view would be that the recitals in patents issued by the United States pursuant

to an official duty of the Department of the Interior are truthful and correct, and accurately specify the facts adjudicated in the proceedings for patent. See, Bode v. Trimmer, 82 Cal. 513, 123 Pac. 187 (1890). Accordingly, it would follow that, even as to parties who could not have asserted an adverse claim in the patent proceeding, such recitals raise a presumption, subject to being overcome by the introduction of evidence controverting the truth of such recitals.

2. If the section has been largely unnoticed by the mining bar as it has been by the appellate courts, what significance, if any, does the mining bar attach to the date of location recitals in mining patents?

As your question intimates, Section 1927 of the Code of Civil Procedure has been largely unnoticed by the bar, but this is probably for the reasons that (1) a locator is not required under mining laws to proceed to patent; and (2) patent applications are relatively rare. Amplifying on the former, a claimant who has satisfied all the requirements of a valid location not only has the exclusive right to possession of the surface of the land embraced in the claim, but also the right to remove the minerals which he has discovered. Thus, there is, in many instances, no real incentive to patent a mining claim, despite the fact that a patent does give the patentee title to all surface materials, enables him to use the land for non-mining purposes, and eliminates the requirements of annual assessment work.

The failure of most locators to proceed to patent is probably the most prominent reason why Section 1927 of the Code of Civil Procedure has had little application. Most controversies as to mining rights in public lands arise between non-patentees, since it is location, not patent, that is the crucial factor in such mining rights controversies. For example, with regard to subsurface rights, extralateral and intralimital, it is clear that such rights are not granted by patent, but, rather, are derived from the location upon which the patent is predicated, Gwillim v. Donnellan, 115 U. S. 45 (1885); Whildim v. Maryland Gold Quartz Mining Co., 33 Cal. App. 270, 164 Pac. 408 (1917).

Thus, the date of location recitals in a mining patent has significance in only those limited circumstances where locators have proceeded to patent. Where a locator has proceeded to patent, however, date of location recitals should be accorded evidentiary value in two types of controversies which could arise with regard to mining claims: (1) a controversy between the patentee and another locator to determine seniority of rights in the mining claim; and (2) a controversy regarding the power of the United States government to issue a patent. Regarding the latter, see, e.g., Ames v. Empire Star Mines, Inc., 17 Cal. 2d 213, 110 P. 2d 13 (1941). The former type of controversy is more prevelant, and, as indicated previously, date of location recitals should be significant to the extent that they provide relevant evidence against any claimants intervening between the date of location and the date of patent, since, by the doctrine of relation back, the possessory title which vested in the patentee by virtue of the prior location or relocation is merged in the full legal title as of the prior date, Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 185 U. S. 499 (1901).

3. Should Evidence Code Section 1602 be retained in its present form, under which Section 1602 establishes a presumption that the location date recited in a mining patent is correct? If so, should the presumption be one that affects the burden of proof or one that affects the burden of producing evidence?

It is our opinion that Section 1602 should be retained in its present form, although the fact that the section has been used only occasionally would constitute a strong argument for its repeal. Repeal would perhaps further the policy objectives of simplifying the California statutory law by eliminating unnecessary legislation. However, if retained, the section should be preserved in its present form, entitling a mining patentee to a rebuttable presumption that the recitals of location dates are correct. Consistent with the presumption that an official duty has been regularly performed, it should be presumed that a patent issued by the United States government has been issued correctly and that the patent accurately states the facts adjudicated in the patent proceedings, including the date of location. Moreover, as contrasted with the alternative

of requiring a patentee to establish his date of location by independent means, which may be no more credible that the mining patent itself and which may be difficult to obtain because of passage of time, it would seem that, in the interest of giving stability to titles, the patentee should be able to offer into evidence his mining patent, and the burden should be placed on anyone contesting that title or the date of location described in the patent to prove the facts are otherwise than as stated in the patent.

The answer to your third question impliedly answers your fourth and fifth questions as to whether or not Section 1602 should be amended or repealed. If we can be of any further assistance in this matter, please do not hesitate to contact us.

Very truly yours,

Gerald G. Kelly
for MUSICK, PEELER & GARRETT

MMM/km

August 18, 1966

Mr. John B. Lonergan
Lonergan & Jordan
506 Anderson Building
San Bernardino, California 92401

Dear Mr. Lonergan:

We are writing to you because your practice relates to mines and minerals and because we have noted that you are, or have been, a member of the ABA committee on mineral and natural resources law and the committee on hard minerals. A problem relating to this subject has arisen, and the Law Revision Commission would like to have your advice and assistance in resolving the problem.

When the Evidence Code was enacted, certain special provisions in the Code of Civil Procedure concerning official documents relating to property were recodified in the Evidence Code without change. Because they were recodified without change, they do not fit perfectly with the remaining provisions of the Evidence Code. The Law Revision Commission is now reconsidering each of those provisions for the purpose of conforming them to the remaining provisions of the Evidence Code.

In this connection, we are considering Section 1602 of the Evidence Code. Evidence Code Section 1602 is a restatement of the provisions of Code of Civil Procedure Section 1967, which was enacted in 1905. It provides:

> 1602. If a patent for mineral lands within this state issued or granted by the United States of America contains a statement of the date of the location of a claim or claims upon which the granting or issuance of such patent is based, such statement is prima facie evidence of the date of such location.

By virtue of Evidence Code Section 602 (a statute providing that a fact or group of facts is prima facie evidence of another fact

establishes a rebuttable presumption"), the present language of Evidence Code Section 1602 would establish a presumption of the date of location of a mining claim from a recital of that date in a United States patent. However, we have substantial doubt whether it was originally intended to have the compulsory effect of a presumption or whether it has ever been construed to have such an effect. It may have been enacted merely to overcome the force of the suggestion in Champion Mining Co. v. Consol. Wyo. Gold Mining Co. (1888) 75 Cal. 78 that such a recital is inadmissible hearsay, and thus to assure merely the admissibility of the evidence. On the other hand, it may have been enacted to require a finding in accordance with the recital unless evidence is introduced to prove the falsity of the statement. We are anxious to learn the purpose of the section so that we can recommend an amendment that will reflect its true purpose.

Inasmuch as the issuance of a United States patent for mineral lands conveys the government's title and cuts off all adverse claims that could have been asserted in the patent proceedings (30 U.S.C. § 29); Hamilton v. So. Cal. Gold & Silver Min. Co. (1887) 33 Fed. 562), the significance of the date of location so far as a patented claim is concerned appears to be limited to conflicting subsurface rights in veins or lodes that merge or cross beneath the surface. See 3 LINDLEY, MINES (3d ed. 1914) § 778. Where veins or lodes cross or meet beneath the surface, the owner of the vein in the west of the intersection or beneath the point of meeting is the owner of the claim that was located first. 30 U.S.C. §§ 26, 29; Champion Mining Co. v. Consol. Wyo. Gold Mining Co. (1888) 75 Cal. 78. A question of priority of location can also arise between a claimant under a patent and a claimant under a tunnel right. Creede & Cripple Creek Min. & Milling Co. v. Uinta Tunnel Min. & Transportation Co. (1905) 196 U.S. 337; Butte & Boston Min. Co. v. Rio-Algom Const. Corp. (1964) 347 U.S. 427.

Evidence Code Section 1602 [illegible] 1967 has not been cited in any appellate case since it was enacted in 1965, we cannot determine what its original purpose was. We, therefore, wish to have your views on the following questions:

1. Is a recital in a patent for mineral lands of the date of location (not the date of patent or of the application) considered by the mining bar and the trial courts as creating a presumption of the location date that is binding even on a claimant who has asserted an adverse claim in the present proceedings?

2. If the section has been as largely unnoticed by the mining bar as it has been by the appellate courts, what significance, if any, does the mining bar attach to date of location recitals in mining patents?

3. Should Evidence Code Section 1602 be retained in its present form, which under Section 602 establishes a presumption that the location date recited in a mining patent is correct?

4. Should Evidence Code Section 1602 be amended to provide that such a date recital is admissible as evidence of the date but raises no presumption that the location date is correct?

5. Should Evidence Code Section 1603 be repealed as having served no purpose since its enactment (as C.C.P. § 1927) in 1905?

Your views on these matters will greatly assist the Commission in determining its recommendation to the Legislature on this subject. Please reply at your earliest convenience.

Very truly yours,

Joseph A. Bailey
Assistant Executive Secretary

JAB:lb
cc: Mr. Edwards

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September 6, 1966

Mr. Joseph B. Harvey
Assistant Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. Harvey:

This will refer to your letter of August 18, 1966, addressed to me and inquiring about my views on certain mining law questions and relating in particular to evidence and presumptions.

The rights of possession, title and other issues concerning unpatented mining claims are usually subjects of controversy and litigation. A patent from the United States is valuable, for it sets at rest most of the former controversial questions.

The date of location continues to be important, however, even though the claim may have been patented for many years. The doctrine of "relation back" has developed in the mining law and applies most frequently to lode claims. I will not attempt to discuss the various factual and legal situations in which "relation back" would be subject of inquiry or concern to a patentee or his successor in interest. Reference to standard texts and other works on mines and mining (see the enclosures) will easily disclose some of the applications of the doctrine.

One considering the question of "relation back" in a given case should always have in mind that the original location may have been a "paper" location, without a discovery of valuable mineral. Actual discovery, essential to a valid location, may have come a day or years later. The location became effective upon the discovery, in such instance, although the claimant may not have seen fit to post and file an amended notice of location to cure the defect (absence of discovery) in his original location.

The date of location does not appear in a mineral patent. When a placer claim is located upon ground not included within the lines of the public surveys, or is not described by public survey subdivisions, the area must be subjected to an official mineral survey by a Deputy United States Mineral Surveyor before it may be the subject of an application for patent. A lode claim must always be the subject of such a mineral survey before an application for patent is filed.

The official field notes of survey, and the plat, when approved, are descriptive of the boundaries of the surveyed placer or lode claim. The field

notes should have attached to them a copy of the original notice of location or of the amended notice of location upon which the claim and the mineral survey were based. The notice or amended notice would contain the date of location (the date of the original location in an original notice and certainly the date of the amended location in the amended notice).

Under the provisions of the present federal regulations (43 CFR 3458. 1) the land description in a patent for a lode mining claim, for a millsite claim, or for a placer claim not consisting of legal subdivisions, must consist of the names and mineral survey numbers of the claims being patented, the description must refer to the field notes of survey and the plat for a more particular description, and the mineral patent must expressly make them a part thereof. A copy of the plat and field notes of each mineral survey patented must be furnished to the patentee, and in practice they are attached to the patent. (You might look at Foss vs. Johnstone, 158 Cal. 119 at 128, which holds that a reference to a mineral survey and the description of a claim makes the field notes of survey and the plat a part of the description of the claim as fully as if expressly incorporated therein.)

I would assume that when the Legislature was considering the enactment of the 1905 statute (Section 1927 of the Code of Civil Procedure), mining of lode claims was engaged in far more often than the mining of placer claims. The "relation back" doctrine would have come into play more often in the "early days" with respec to lode claims and their conflicts. Hence, it may have been considered as important to place in the law, when it was more formally enacted in 1905, a provision such as contained in that section. In 1909, provisions of the Civil Code now reflected in Sections 2311 and 2315 of the Public Resources Code, similarly provided for certain official acts as creating prima facie evidence of the facts stated in the official or recorded document.

We do not have available to us the material you must have available to you for research to determine the purpose of original Section 1927. Nor am I able to locally determine whether it is a counterpart of similar enactments in other mining states. I do not find the suggestion that you find in Champion Mining Co. v. Consolidated Wyoming Gold Mining Co. (75 Cal. 78), but that is not important. Our California courts would take judicial notice these days of the proceedings in the Land Office of the Bureau of Land Management of the U. S. Department of the Interior.

I believe the true purpose of Section 1927, as enacted in 1905, was to settle the controversy as to whether the title of a patentee and his successors related merely to the date of the filing of the application for patent or to the earlier date of the location of the claim. I believe the statute serves a useful purpose in the law of evidence and should not be disturbed. The problem arising out of the lack of a discovery at the time of a purported original location is a refinement that need not be put in the statute.

The patent "sweeps under the carpet" all uncertainties, doubts, and even defects in or between the location date and the patent date (short of fraud) by application of the doctrine of "relation back."

Now turning to the specific questions found at the lower part of page 2 and the upper part of page 3 of your letter:

1. The presumption would be a rebuttable one, available not only against those who could have asserted adverse claims in the patent proceedings, but all others.

2. I am unable to speak for the "mining bar" for, who are they? where are they? what are they? In instances of controversy relating to the title to or right of possession of a vein or lode on its downward descent beyond the vertical downward extension of the lines of the lode claim, cross veins, and veins uniting in their downward descent (among others) a recital of the date of location could become important and a rebuttable presumption would be very helpful. I might add that the question would more likely arise in the mother lode and northern counties than in Southern California courts. We expect a revival of the mining interest in metallics such as silver and gold, and controversies are bound to arise. I think that the presumption resulting from the prima facie evidence is just about a law of property and should not be disturbed.

3. In my opinion, the section (Evidence Code Section 1602) should not be disturbed. The work of the Public Land Law Review Commission of the United States may change the systems (lode and placer, for instance) of claiming valuable mineral deposits. That is perhaps five or ten years in the future. Even then, claims located under the earlier system should have the rebuttable presumption available to them.

4. I see no reason for making the change. Frankly, I have never encountered the problem, but I can see that it could arise so as to make the rebuttable presumption matter of considerable value to someone who has expended time, trouble and money in applying for and securing a mineral patent. Surely the official patent proceedings in the Land Office should have and be accorded some dignity and credit, including a basic fact--the date of location. However, no one should be foreclosed from asserting that while the date of location is a stated fact in the patent proceedings, the actual location of a valuable and valid mining claim (by later discovery) might not have been until a later date. It is not necessary to change Section 1602 to obtain this result.

5. You have no way of knowing whether Section 1602 has or has not served a useful purpose since its enactment as Section 1927 in 1905. For all we know, it may have had a very salutary and excellent effect--the avoidance of litigation or, at least, appeals!

I truly hope I have helped. I would be interested in knowing the comments of any others in the profession whose answers to your like questions impressed you.

Very truly yours,

John B. Lonergan

JBL:vs
Encls.

THE DOCTRINE OF RELATION.

112. The title conveyed by the patent relates back to the completion of the location.

In the case of patents, as in the case of locations, the doctrine of relation of title applies. The title conveyed by the patent relates back to the completion of the location upon which the application for patent was based.[42] But the doctrine of relation cannot be applied to cut off the rights of a prior patent on a junior location.[43] Because the order in which discovery and the acts of location take place is immaterial to the government, a patent does not fix the time to which the title relates, except that it asserts that at the time of entry there was a discovery and a perfect location.[44]

After patent the property conveyed by the United States to the patentee becomes fully subject to constitutional state legislation. As the Supreme Court of the United States said in an early case: "We hold the true principle to be this: That whenever the question in any court, state or federal, as whether a title to land which had once been

[42] EARLY v. GOLDEN, 31 Colo. 447, 83 Pac. 246. See Ballack v. Traher, [illegible] 127 Fed. 62, 61 C. C. A. 538. The fact that he did not advance the patent application is immaterial. STEVENS v. GLADSTONE CENTRAL MIN. CO., 133 Fed. 28, 67 C. C. A. 294; Shoenbach v. First Nat. Bank, 5 Dak. 477, 41 N. W. 697. But if, pending the patent, he parts with his interest to one of the incorporators to whom patent issues, he has, as against him, lost all ground to complain. WILKINSON v. LARIMY, 27 Mont. 202, 70 Pac. 715.

[43] MAXWELL v. [illegible], 15 Colo. App. 261, 61 Pac. 228.

[44] Parkinson v. Iverslie, 105 U. S. 204, 25 Sup. Ct. 35, 49 L. Ed. 211. See Holt v. Murphy, 207 U. S. 407, 28 Sup. Ct. 212, 52 L. Ed. 271.

[45] ALTA GOLD MIN. CO. v. ALTA GOLD MIN. CO., 182 U. S. 493, 21 Sup. Ct. [illegible], 45 L. Ed. 1203; Silver Bow Min. & Mill. Co. v. Clark, 5 Mont. 378, 5 Pac. 560; Talbot v. King, 6 Mont. 76, 9 Pac. 431; Kahn v. Old Telegraph Min. Co., 2 Utah, 174.

[46] Lode Co. Consol. Min. Co. v. Richmond Min. Co., 4 Sawy. (U. S.) 302, Fed. Cas. No. 8,508; RICHMOND MIN. CO. OF NEVADA v. EUREKA CONSOLIDATED MIN. CO., 103 U. S. 839, 26 L. Ed. 567; Hall v. Equator Mining & Smelting Co., Fed. Cas. No. 5,931.

[47] CREEDE & C. C. MIN. & MILL. CO. v. UINTA TUNNEL MIN. & TRANSP. CO., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501.

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the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to state legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States." [48]

[48] Wilcox v. McConnell, 13 U. S. (9 Pet.) 498, 517, 10 L. Ed. 264.

§ 9.31 Relation Back. When a patent is issued to a mining claim, the possessory title which rested in the patentee by virtue of the prior location or relocation by the patentee or his predecessors is merged in the full legal title, and relates back to the inception of the location or relocation to protect the patentee against intervening claims.[1] However, the doctrine of relation back cannot be applied so as to cut off rights of an earlier patentee under a later location when there was no opposition to the patent of the later location.[2] An exception to this rule exists where two or more veins unite. The oldest or prior location takes the vein below the point of union including the space of intersection.[3] Where there has been a relocation, the rights will only relate back to the time of the relocation.[4]

§ 9.32 Priorities in General. In applying the doctrine of relation back, certain distinctions in priorities must be kept in mind. In all cases, a patent will not relate back to discovery so as to defeat a prior patent.[1] The doctrine will never apply to defeat a statute or to work an injustice.[2] When a patent is issued, after due notice to all the world through posting of notices and publication, and ample opportunity is given to any adverse party to adverse the patent, the general rule is that the claim patented is prior in surface and extralateral rights to other claims whose surface is in conflict therewith.[3]

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§ 9.31 [1] Creede [illegible] Co. v. [illegible] Mining Co. (1905) [illegible] US 337; [illegible] Gold Mining Co. v. Ajax [illegible] Mining Co. [illegible] 409; [illegible] v. Wellman [illegible] US 537; [illegible] v. [illegible] US [illegible]; [illegible] City [illegible] Lode Claim (1887) 6 Mont 557, 13 Pac 855; Las Vegas & Tonopah RR v. Summerfield (1910) 35 Nev 226, 129 Pac [illegible]; [illegible] v. Old [illegible] Mining Co. [illegible]

[2] This will apply whether the location is under the laws of 1872 [illegible] Calhoun Gold Mining Co. v. Ajax Gold Mining Co. (1899) 27 Colo 1, 59 Pac [illegible], 50 LRA 209; Deno v. [illegible], 20 Nev 249, 20 Pac 305.

[3] [illegible], 30 USC § 41 (1958).

[4] [illegible] Mining Co. v. Federal Mining & Smelting Co. (9th Cir 1920) 267 Fed [illegible], [illegible], 254 US 651.

§ 9.32 [1] [illegible] Consolidated Mining Co. v. [illegible] Mining Co. (1881) 103 US [illegible].

[2] See Morrison, Mining Rights 168 (16th ed 1936).

[3] [illegible] v. Western Oil Coal & Investment Co. (8th Cir 1925) 3 [illegible], Bunker Hill & Sullivan Mining Co. v. Empire State-Idaho

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It is conclusively presumed that the question of validity of the prior location was determined adversely to the first locator who allowed a subsequent party to obtain a patent without adverse proceedings. Where a group patent to several claims settles the priority of the claim in suit by excluding conflicting claims, those objecting to the adjudication must then and there institute adverse proceedings or protest in the land office, and if they fail to do so, they cannot thereafter contest the adjudication of the land office as to the priorities between the different locations.[4]

The issuance of a patent, however, does not necessarily determine the priority of location for all purposes,[5] and, where it does not appear that such a question was put in issue and actually decided during the course of the patent proceedings, the owner of another claim is not estopped from asserting the priority of his claim in a subsequent controversy over extralateral rights which were not involved in the patent proceedings.[6]

§ 9.33 Conclusiveness. A patent for a mineral claim is a final determination and conclusive in all suits at law when it is valid on its face and when it was not issued in opposition to law. It is the final determination and disposition of the legal title to the land granted and must be recognized by courts and allowed such effect.[1] It is conclusive of all facts within the jurisdiction of the Bureau of Land Management in

Mining Co. (9th Cir 1901) 109 Fed 538; Jefferson Mining Co. v. Anchoria-Leland Mining Co. (1904) 32 Colo 176, 75 Pac 1070.

[4] Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co. (1914) 36 Nev 543, 138 Pac 71, *reh den*, 36 Nev 645, 141 Pac 849.

[5] Clark-Montana Realty Co. v. Butte & Superior Copper Co. (D Mont 1916) 233 Fed 547; United States Mining Co. v. Lawson (8th Cir 1904) 134 Fed 769.

[6] Butte & Superior Copper Co. v. Clark-Montana Realty Co. (1919) 249 US 12; Creede Mining Co. v. Uinta Mining Co. (1905) 198 US 337; Tom Reed Gold Mines Co. v. United Eastern Mining Co. (1922) 24 Ariz 269, 209 Pac 233; Hickey v. Anaconda Copper Mining Co. (1905) 32 Mont 46, 81 Pac 804.

§ 9.33 [1] Steel v. St. Louis Smelting & Refining Co. (1891) 106 US 447; Boggs v. Merced Mining Co. (1859) 14 Cal 279, 10 Mor Min Rep 334; Poire v. Wells (1882) 6 Colo 406.

passing on the application and even cures defects in the act of location itself.[2] In the absence of an adverse claim or protest, it is equivalent to an adjudication of every fact and proposition which might have been set up thereby.[3] It has been held, however, that the patent proceeding and issuance does not raise a presumption that anything was considered except rights to the surface.[4]

§ 9.34 Collateral Attack. A patent may not be collaterally attacked in a legal proceeding on any grounds that was settled or might have been settled in the patent proceeding. Thus, it may not be attacked on the ground that false testimony was used to obtain it,[1] or that the patented claim failed to conform to any of the requirements for patent, such as want of a valid discovery or location notice,[2] or proper limits of the claim.[3] Neither can it be collaterally attacked on the ground that State, as well as Federal, prerequisites to location and patent were not met.[4]

Under certain circumstances, however, a patent may be collaterally attacked, *e.g.*, where it is void on its face or where it was issued in spite of a law which forbade its issuance.[5] In such cases, the patent is void where the government had no title.[6] It may be set aside or cancelled by a direct proceeding

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[2] Butte & Superior Copper Co. v. Clark-Montana Realty Co. (9th Cir 1918) 248 Fed 605, *cert den*, 247 US 516.

[3] Gwillim v. Donnellan (1886) 115 US 45; Jefferson Mining Co. v. Anchoria-Leland Mining Co. (1904) 32 Colo 176, 75 Pac 1076, 64 LRA 925.

[4] Butte & Superior Copper Co. v. Clark-Montana Realty Co. (1918) 249 US 32; Lawson v. United States Mining Co. (1904) 207 US 1.

§ 9.34 [1] Steel v. St. Louis Smelting & Refining Co. (1882) 106 US 447.

[2] Carson City Gold & Silver Mining Co. v. North Star Mining Co. (9th Cir 1897) 83 Fed 658, 19 Mor Rep 118.

[3] Waterloo Mining Co. v. Doe (Cal 1887) 56 Fed 685, 17 Mor Rep 780.

[4] York Mining & Milling Co. v. Bessie Jack Pot Mining Co. (8th Cir 1902) 114 Fed 620, 114 CCA 392 *cert den*, 220 US 610.

[5] Mann v. Old Telegraph Mining Co. (1877) 2 Utah 174, 11 Mor Rep 673; St. Louis Smelting & Refining Co. v. Kemp (1881) 104 US 636; Shepard v. Silver Peak Mines (CC D Nev 1895) 68 Fed 578, *aff'd*, 94 Fed 945.

[6] Davis v. Weibbold (1891) 139 US 507.

for that purpose on the grounds of mistake or error of law in its issuance.[7] For example, a patent issued for a claim within a forest reservation, after the filing of a protest, may be canceled on the ground that the failure to consider such protest was either through inadvertence or a mistake of law.[8] A patent may also be set aside or canceled on the grounds of fraud in procuring it.[9] To cancel the patent, however, the fraud must be more than a mere irregularity in its issuance.[10]

In all cases, the burden of proof to set aside a patent is on the one attempting to set it aside and the evidence to overcome the presumption of validity must be clear and convincing.[11]

[7] United States v. Marshall Silver Mining Co. (1889) 129 US 579; Carson City Gold Mining Co. v. North Star Mining Co. (9th Cir 1897) 83 Fed 658.

[8] United States v. Lavenson (WD Wash 1913) 206 Fed 755.

[9] Diamond Coal Co. v. United States (1914) 233 US 236; San Pedro Coal Co. v. United States (1892) 146 US 120.

[10] Colorado Coal Co. v. United States (1887) 123 US 307; United States v. King (9th Cir 1897) 83 Fed 188; Re Robert Hawke (1886) 5 LD 13.

[11] United States v. King, *supra* N. 10; Trailman v. Thomas (8th Cir 1901) 111 Fed 277, 49 Lor Rep 573.

§ 9.35 [Reserved]

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September 12, 1966

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Gentlemen:

In response to the questions asked in your letter of September 2 regarding Evidence Code §1602.

1. The mining bar and certainly the trial courts have no discernible view.

2. The mining bar attaches no significance to location recitals in mining patents. I personally do not recall ever having seen such a recital in a mining patent. If such recitals were used in 1905, or at any time, the practice has long since been abandoned.

3. Section 1602 is either of no value or of such limited value that it should be repealed. If the presumption is retained it should affect the burden of proof.

4. If 1602 is not repealed, it should be amended as suggested.

5. Section 1602 should be repealed -- although just because it can't be found in reported cases doesn't mean it has served no purpose.

Yours very truly,

E. Leroy Tolles

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September 13, 1966

California Law Revision Commission
Room 30
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Attn: John H. De Moully,
Executive Secretary

Re: Section 1602 of the Evidence Code

Gentlemen:

In response to your inquiry of September 2, 1966, concerning the above referred matter, we submit the following comments in question of priority of rights a patentee or his successor in interest is limited to the date of location appearing in the patent record and they would not be permitted to give evidence of a prior location. Jacob vs. Lorenz 98C 332. We deem it fair and equitable that a patentee of his successor in interest be allowed to suggest a date as prima facie evidence of the date of location.

It is suggested that the presumption affect the Burden of Proof and that the evidence required is either the original or a duly certified copy of said patent obtained from the Federal Government or the County Recorder.

It is further suggested that due consideration be given to making this section a part of the public resources code such as a new section designated as 2311.5, 2313.5 or 2315.5 rather than part of the evidence code.

Very truly yours,

Claude W. Bridges

CWB:gem