

necessary for buildings and grounds. The residue of the property should be invested in government or other similar securities. 2. That no license to hold in mortmain should be necessary. 3. That the charity shall be subject to revision at the end of thirty years, and that, if necessary, a new declaration of trusts may be made by a Committee of Public Charities in the Privy Council, following, as near as may be, the original design. 4. That charities shall not be void for uncertainty, or on the ground of the pernicious nature of the objects expressed by the testator. These points are to be established by legislation.<sup>1</sup> To these should be added, in our judgment: 5. That provision should be made, that persons having lawful claims upon a testator's bounty, shall not be disappointed of their reasonable expectations.

It is now time that a definite policy in respect to this subject should be fixed upon in this country. Charitable donations increase rapidly in number and importance. It may be predicted that they will hereafter be looked upon with augmented favor, and that we shall agree with the Law Amendment Committee, that charity cannot be too great, so long as heavy taxation is otherwise necessary to provide for the very objects on account of which the charitable donation is made. T. W. D.]

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#### MINES—MARIPOSA GRANT.

The time has long since gone by when "*cujus est solum ejus est usque ad cœlum*" defined the extent of the ownership of a landholder, as a maxim of universal acceptance. And regarding *solum* as the surface of the earth, the extent to which the owner might claim property in the opposite direction has in so many cases been limited to a crust of a few feet, beneath which other owners were operating within their own closes, limited and defined like those upon which the sun is accustomed to shine, that in some portions of our

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<sup>1</sup> London Law Magazine (1861), Vol. II. p. 305.

own country, as well as of England, an upper and a lower freehold in the same soil have come to be familiar estates to the law. Cases are numerous, of late years, where the surface-owners have had sharp struggles in restraining the mine-owners beneath them from weakening the supports upon which their houses rest, while it is no rare experience for a landowner to see the bottom of his well dropping out, or failing to hold the requisite supply of water, and in whole sections of the country the people upon the upper stratum of the earth must live in constant apprehension of finding themselves involuntary intruders upon those who are toiling and bringing up the hidden treasures of the lower regions.

It is not our purpose, however, to discuss the subject of mines and mining rights in general, but to confine ourselves to those of gold and silver.

From a very early period these have been regarded by the common law of England as belonging to the crown, as a part of the *jura regalia*, whether found in public lands or private estates. The question was examined at great length in the 10th Elizabeth, in a case reported in Plowden, 310-340. The reasoning of Mr. Onslow, as counsel for the queen, in favor of this assumption (p. 315), states the following as one of the grounds, that "the common law, which is founded upon reason, appropriates everything to the persons whom it best suits: as, common and trivial things to the common people; things of more worth to persons in a higher and superior class, and things most excellent to those persons who excel all other; and because gold and silver are the most excellent things which the soil contains, the law has appointed them (as in reason it ought), to the person who is most excellent, and that is the king." And, passing from the land to the water, he finds that the king shall, for the same reason, "have whales and sturgeons, taken in the sea or elsewhere within the realm," "so that the excellency of the king's person draws to it things of an excellent nature." As many, now-a-days, in the light of the history of the Tudors and the Stuarts, might not agree so readily in this reason for the law as in the fact that it was the law, it will be enough to state it as one of its settled dogmas: 1 Black. 294; 2

Co. Inst. 577. The existence of this right is recognised, together with his right of aliening the same, thereby showing that it was no part of the essential, inherent sovereignty of the king, in the charters granted by the crown to the early colonists of this country. In that of Massachusetts, in 1628, there was granted, among other things, "mines and minerals, *as well royal mines of gold and silver*, as other mines and minerals," the grantees yielding and paying to the crown one-fifth part of the ore of gold and silver which they might obtain. And a similar provision was contained in the Plymouth Charter, granted to Governor Bradford in 1629: 3 Dane. Ab. 137; Anc. Chart. of Mass. 1; Plym. Col. L., Brigham's ed. 21.

It is not known that any practical result ever came of these provisions. But at the time of the Revolution the states of New York and Pennsylvania asserted the prerogative as to mines which had originally been in the crown, as to the lands in the provinces; but in a case in Georgia, it was held that these mines belonged to the owner of the land within which they are found: Willard R. Est. 50; Dunlop's Stat. 90; 3 Kent 378, note. It is stated by counsel, in the argument of *Boggs vs. Merced Co.*, after reciting the cessions of public territory to the general government by Massachusetts, New York, Connecticut, South Carolina, Virginia, and North Carolina, of a region known to be rich in a great variety of mines, that the government never had claimed mines on the land of individuals: 14 Col. 336. It is said that by the civil law mines within the boundary of a private grant originally belonged to the owner of the soil: 14 Col. 337; Coop. Just. 461. But Spain, in derogation of this right, seized upon mines of gold and silver, wherever situate, by royal ordinances, as a part of her *jura regalia*, by way of eminent domain, thereby reaping the questionable benefit of the treasures of the American colonies.

These laws of Spain extended over California while it formed one of her provinces, and although the value of this right was not then understood, because the extent of these mineral deposits had not then been discovered, yet the principle of property in mines on the part of the state, as well as sovereignty over the territory,

which was an acknowledged dogma under the Spanish administration, led to questions of no small difficulty after that territory had come under the jurisdiction of the United States.

It was conceded, that whatever belonged to Spain in her sovereign capacity, passed to the government of Mexico upon her becoming an independent state; and that whatever of sovereignty belonged to Mexico passed to the United States, by the treaty ceding California to the latter government.

But how far this affected the property in mines of gold and silver, and whether there continued an ownership in these incident to the government, and independent of the ownership of the soil, was raised in various forms, though it seems to have been at last settled in a series of cases, which have arisen in the California courts, which from their magnitude and importance, as well as the ability with which they have been discussed at the bar and by the bench, are deserving special notice. Indeed, they form a new and peculiar chapter in American jurisprudence. And it is among the remarkable circumstances connected with the settlement of that empire state of the West that we have before us, while writing this, parts of the eighteenth volume of the Reports of the Supreme Court of that state, although the territory was first ceded by Mexico in 1848, and that, for the importance and general interest of the questions settled, as well as the learning and ability exhibited in their presentation and decision, as well as the style of execution of the volumes themselves, these volumes compare favorably with those of the Atlantic states of the Union.

One of these cases has acquired a kind of historic interest, aside from the importance and magnitude of the interests involved, from the parties associated with its incidents. We allude to the case of *Boggs vs. Merced Co.*, 14 Cal. 279-380, involving the title to the Mariposa mines, of reputed fabulous amount in value.

We propose to give a brief outline of the history of this case. But before doing so, it should be stated that in the case of *Hicks vs. Bell*, 3 Cal. 219, the Court had determined that the mines of gold and silver found in public lands, as well as the lands of private citizens, were the property of the state by virtue of her sovereignty, giving to her in fact, by right of succession, the same

interest in those minerals as the King of Spain or the government of Mexico had had. In deciding the case of *Boggs vs. Merced Company*, this doctrine was indirectly impugned, though frequently adverted to, and was finally overruled in *Moore vs. Smaw*, and *Fremont vs. Fowler*, 17 Cal. 199–226, the latter involving the title to the minerals in the Mariposa grant. It was settled in those cases that the mines passed with the lands in which they were found, and that the United States held them in the same manner as any other public property, not as sovereigns, but as proprietors of the lands themselves. And that, consequently, nothing passed to the state in the mines as incident to its sovereign character.

The important distinction between the law, as it stood under the Mexican authority, and as it was finally construed under that of the United States or state government, was, that upon a grant of lands by the former, these mines did not pass without express words to that effect; whereas, by the latter they did pass, unless expressly excluded by the terms of the grant: The reader may also be reminded that the usual form of evidence of a grant of public lands by the United States, is what is called a patent, answering to a deed of a private proprietor, issued to the person to whom the grant is made.

Another circumstance connected with the idea of the property in the mines being in the state by right of sovereignty ought to be stated, and that is, that it became the settled policy of the state, sustained by legislation, to encourage citizens in exploring for and extracting the minerals from the soil, whereby every explorer stood, in some measure, in the place of the state, with a right paramount to those of the agricultural settler upon lands, who could not, by such settlement and occupation, exclude the operations of miners who were in good faith proceeding to extract the gold from the earth: *McClintock vs. Bryden*, 5 Cal. 97. And the owner of a mining claim had, in practical effect, a good and vested title to the property until his title was divested by the exercise of the higher right of the superior proprietor, the State: *Merced Min. Co. vs. Fremont*, 7 Cal. 327.

These preliminary statements are necessary, to understand the

issues involved in determining the title of General, late Colonel, Fremont to his Mariposa Mines.

The history of this title is briefly this:—In 1844, the then Governor of California granted a tract of land, known as “Las Mariposas,” to the extent of ten square leagues, lying within certain boundaries of a much larger extent of territory, to Alvarado. In 1847, Alvarado conveyed his interest in the tract to Colonel Fremont. In 1848, Mexico ceded California to the United States. In 1849, Colonel Fremont had a survey and map prepared of his grant, and, in 1852, filed his claim before the Board of Commissioners, which had been created to settle the private land claims in California. In December of that year this board confirmed his claim to the extent of ten square leagues, as described in his grant and map. In 1853, an appeal was taken from this decision to the United States District Court in California, where the same was reversed in 1854, and an appeal was taken to the Supreme Court of the United States, where the case was argued by Messrs. Jones, Bibb and Crittenden, for the appellant, and Attorney-General Cushing for the United States. At the December term of that Court, 1854, the Chief Justice gave the opinion of the Court, sustaining the validity of the grant, but expressly waives the question as to any mines within the grant. Justices Catron and Campbell dissented. The Court ordered a re-survey to be made, under the authority of the United States, and remitted the case for final decree to the District Court: *Fremont vs. United States*, 17 How. 542–576. From the action of the District Court, pursuant to this order, an appeal was attempted to be taken again to the United States Supreme Court. But, in December, 1855, that Court granted an order for a writ of procedendo to the District Court to execute the former mandate. The Court further held that the interest of Colonel Fremont being a “floating claim,” it could not be located by a decree of the Court, but must be done by the executive or legislative power of the government: 18 How. 30. This, as it will be perceived, has a very important bearing upon the moral aspect which the case finally assumed in the State Court of California.

In pursuance of this decree, a survey was made under the direction of the Surveyor-General of the United States, of the ten square leagues, and a patent of the same was issued to Colonel Fremont, by the United States, in February, 1856, referring to the various proceedings, and decree of confirmation above stated.

But the question of the greatest importance remained yet to be decided. It had been discovered, since the original grant was made, that the tract embraced in the patent contained gold, in mineral form, of immense value, and, as will be seen, a mine was then being wrought by the Merced Mining Company. And it was earnestly denied that Colonel Fremont had, by these proceedings, acquired any title to the minerals contained within his grant. Among the grounds on which this position was maintained, was, 1st, that all he had acquired by the judgment of the Court was a *confirmation* of Alvarado's title, that this confessedly did not embrace the mines of gold, that these mines had become the property of California, upon her admission as a state in 1850, so that the patent in 1856 could not and did not pass a title to these mines. This question was raised in a proceeding commenced by the *Merced Mining Company vs. Colonel Fremont*, to restrain him from trespassing upon their possessions, and working the mineral veins within the same. This was heard and decided by the Supreme Court of California in April, 1857. The ground of their claim was, that finding the land vacant and unoccupied, they had, in 1851, under the statutes and laws of California, entered upon and worked the mines which they had found there, and had in so doing expended \$800,000 in valuable improvements; that the mine worked by them was two miles outside of the lines of the survey which Fremont had caused to be made as the lines and boundaries of his grant in 1849; that he had suffered them to go on and make those expenditures with a full knowledge of their being made, and had made no objection, and that he was estopped to claim the mine, although now included in the limits of his new survey and patent. All these points were not, it is true, raised in the hearing of the first case, and they have been stated in anticipation to avoid repeating. The application for injunction was successful, and he was

prohibited by the decree of the Court from interfering with or working the plaintiff's mine. The opinion was given by Burnett, J., in which Terry, J., concurred, but Murray, C. J., dissented, on the ground of its not being a case in which the Court ought to interpose by injunction.

In April, 1857, Boggs, the lessee of Fremont, commenced an action of ejectment against the Merced Company to recover the mine in question, which was argued before the Supreme Court of California, and an opinion given in the case in July, 1858, by Burnett, J., in the general grounds of which Terry, C. J., concurred, but Field, J., dissented. The decision was adverse to the plaintiff, on the ground, among other things, that Fremont's title was a mere *confirmation* of that granted to Alvarado, which clearly excluded the minerals, and that the defendants had a right to enter upon and take these from the land.

A rehearing was granted, and the case was again argued in July, 1858, and again in October, 1859, before Field, who had become Chief Justice, and Cope, J., Baldwin, the third Judge, having previously been of counsel in the case. The judgment of the Court was in favor of the plaintiff, and the opinion of the Chief Justice is a full, elaborate, and able examination of the various grounds taken by the eminent and learned counsel engaged in the argument, fully sustaining the legal rights of Colonel Fremont, under the terms of his patent, to the premises in controversy. He examines the allegation as to the original survey, differing from that made by the United States, the latter of which being the only valid and binding one. He holds that the patent issued by the United States was conclusive of the validity of the original grant, and the survey upon which it issued, and was a relinquishment to Fremont of the interest of the United States in the land. He examines the point of the plaintiff being estopped, and maintains that the doctrine did not apply in this case, as his grant, when he made the survey, had not been surveyed and designated by the United States, the only authority which could make it. That the defendants had no title to the land in controversy, except that of a general license to enter upon mining lands, and work the mines therein,

and that this did not extend to lands owned as private property, and therefore, as against the plaintiff in this case, the defendants had no right of possession.

But the question of the property in the minerals was not fully determined until January, 1861, in the case of *Fremont vs. Flower*, 17 Cal. 199, above stated, where it was held that the minerals in the soil belonging to the United States pass with the soil by a grant thereof, and that neither the sovereignty of the United States nor of an individual state extends to the ownership of such metals, and consequently that when the United States granted a patent to Colonel Fremont for ten square leagues surveyed, and thereby indicated and described, they granted to him the minerals as well as the soil. And the title to this celebrated grant, which had proved so fruitful in fees, as well as in the elements from which fees are rendered valuable, seems at last to be settled and at rest.

It would be pleasant, if this article had not become so extended, to dwell for a moment upon the reflections that are at once awakened as one contemplates the various phases of this celebrated case, upon the silent yet resistless majesty of the law, so long as its robes of office are worn by men of learning, uprightness, and unsuspected moral courage, acting within their proper sphere. Here has been a controversy involving, it is said, millions in value, as well as many considerations of great hardship, exciting not a little local as well as personal feeling and animosity. It has been passed upon by three men, personally without power, the organs and officers of the law, and there the contest ends, for the law has spoken, and we are, after all, a law-abiding people.