

MINING CLAIM--PATENT DESCRIPTIONS--LOCUS OF CLAIM.

SINNOTT *v.* JEWETT.

In case of variance between the *locus* of a patented mining claim as indicated by the tie line described in the patent, from a corner of the claim to a corner of the public survey or a United States mineral monument, and as defined upon the ground, the land department will regard as constituting the patented claim, and will not receive further application for patent to, the tract of land embraced in the survey and bounded by the lines actually marked, defined, and established on the ground by monuments substantially within the requirements under the law and official regulations and corresponding to the description thereof in the patent.

Although the notice of an application for patent to a mining claim does not contain data sufficient to indicate the situation of the claim with substantial accuracy, nevertheless, so far as that objection is concerned, the patent subsequently issued is voidable merely, not void, and until vacated by appropriate judicial proceedings is of full force and effect.

The decisions of the courts and of the Department are to the effect that when patent once issues the land therein embraced passes beyond the jurisdiction and control of the land department, but they do not question the latter's right to determine, at least in the first instance, what public lands have been patented and what remain subject to its jurisdiction and control.

An adverse claim is the appropriate recourse of one claiming under a possessory title only, against a valid application for patent to land subject to appropriation under the mining laws, and the provisions of sections 2325 and 2326, Revised Statutes, with respect to that remedy, have no relation to or bearing upon the question of the effect and scope of a patent.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *July 12, 1904* (F. H. B.)

December 14, 1886, Delia Sinnott, Alice L. Prentice, and Eva M. Playter made entry, No. 2817, for the Emma Nevada lode mining claim, survey No. 4348, Leadville, Colorado, land district. Patent (No. 14,990) issued for the claim June 4, 1889.

April 28, 1902 W. Kennon Jewett filed, in the same local land office, application for patent to the Silver Monument lode mining claim, survey No. 15,714. During the ensuing period of publication of notice thereof no adverse claim was filed.

However, June 30, 1902 (during the aforesaid period), Delia Sinnott, Jr., claiming as the grantee of the patented Emma Nevada claim, filed protest against Jewett's application, in which, under oath and with corroboration, it is alleged, in substance and effect, that the patented Emma Nevada claim embraces the greater portion of the land included in the application for patent to the "so-called Silver Monument lode." Attached to and made part of

the protest is a plat or diagram, made on behalf of protestant by one George Holland (a United States deputy mineral surveyor) and stated by him, under oath, to have been prepared from surveys on the ground made June 20 and 21, 1902 and to correctly represent the conflict between the Emma Nevada and Silver Monument claims; and, in that connection, affiant Holland alleges that the Silver Monument survey, "as mad, covers a large portion of the Emma Nevada lode as marked and staked upon the ground."

Upon the expiration of the period of publication Jewett tendered the purchase price for the land embraced in his application and applied to make entry. The local officers refused to permit entry to be made and rejected the tender, because of the pending protest and the allegations therein contained of protestant's ownership of the land concerned under patent from the United States. Upon appeal by the applicant, Jewett, from the action of the local officers, the latter forwarded the record to your office, August 18, 1902, and recommended that, if it should be found to be the fact that the Silver Monument covers the patented Emma Nevada claim as staked upon the ground, the application for patent to the former be rejected.

By decision of April 22, 1903, your office found, among other things, in substance, as follows: That by the official survey of the Emma Nevada, approved September 2, 1886, the *locus* of the claim is fixed in the W. $\frac{1}{2}$ of Sec. 7, T. 9 S., R. 78 W., 6th P. M., and the southwest corner of said section is stated to bear from corner No. 1 (the southwest corner) of the claim, S., $23^{\circ} 27' W.$, 2329.2 feet; that in the published and posted notices of the application for patent the length of said bearing or tie line was given as 2339.2 feet; that in the patent issued for the claim the designation of the *locus* of the latter is identical with that contained in the approved field notes of survey; that by the field notes of survey (approved April 21, 1902) of the Silver Monument claim the southwest corner of said section 7 is stated to bear S., $51^{\circ} 49' 35'' W.$, 2424 feet, from corner No. 1 (the southwest corner) of the claim, and the south quarter-corner of the section to bear S., $26^{\circ} 15' E.$, 1673 feet, therefrom; and that, platted from their respective connecting or tie lines, as disclosed by the official records and as the Emma Nevada is described in the patent, the two claims do not conflict with one another: Wherefore, citing the case of The Mono Fraction Lode Mining Claim (31 L. D., 121) and several unreported decisions to the same effect, your office reversed the action of the local officers, dismissed the protest, and held that, in the absence of other objection, entry for the Silver Monument would be allowed.

Protestant thereupon prosecuted the pending appeal.

From certain data with the record it would appear that both course and distance of the tie line of the Emma Nevada claim, as given in the approved field notes of survey thereof and in the patent therefor, are erroneous; and the question arises: If there is in fact a variance between the *locus* of that

claim as indicated by the connecting or tie line described in the patent, from a corner of the claim to a corner of the public survey, and as fixed by the location of the claim upon the ground and its demarcation thereon by monuments referred to and described in the patent, should the land department regard the former or the latter designation, if either, as controlling? To support their respective contentions with respect to it, counsel for the contending parties have filed extensive briefs.

The general rule respecting discrepancies between courses and distances and the monuments mentioned in instruments of conveyance, when applied to the subject matter for the purpose of its ascertainment, is discussed in a number of authorities cited in the brief of counsel for appellant, and is sufficiently set forth in the following extracts.

In Tyler on Ejectment (p. 569) it is stated thus:

What is most material and most certain in a description shall prevail over that which is less material and less certain. Thus, course and distance shall yield to natural and ascertained objects, as a river, a stream, a spring, or a marked tree. Indeed, it seems to be a universal rule that course and distance yield to natural, visible and ascertained objects. *Newsom v. Pryor's Lessee*, 7 Wheat., 10; *Preston v. Bowmar*, 6 Wheat., 582; *Jackson v. Camp*, 1 Cow., 605; *Doe v. Thompson*, 5 Cow., 371; *Jackson v. Moore*, 6 Cow., 706.

In *Preston's Heirs v. Bowmar* (6 Wheat., 580, 582) it is said by the United States Supreme Court that—

It may be laid down as an universal rule, that course and distance yield to natural and ascertained objects.

In *McIver's Lessee v. Walker* (9 Cranch, 173 177-8) Chief Justice Marshall, speaking for the court, said:

It is undoubtedly the practice of surveyors, and the practice was proved in this cause, to express in their plats and certificates of survey, the courses which are designated by the needle; and if nothing exists to control the call for course and distance, the land must be bounded by the courses and distances of the patent, according to the magnetic meridian. But it is a general principle that the course and distance must yield to natural objects called for in the patent. All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to that actual survey; consequently if marked trees and marked corners be found conformably to the calls of the patent, or if water-courses be called for in the patent, or mountains or any other natural objects, distances must be lengthened or shortened, and courses varied so as to conform to those objects.

The reason of the rule is, that it is the intention of the grant to convey the land actually surveyed, and mistakes in courses or distances are more probable and more frequent than in marked trees, mountains, rivers or other natural objects capable of being clearly designated and accurately described.

In the case of *Higuera v. United States* (5 Wall., 827, 835-6) the court adopted almost literally a part of the language of Washburn on Real Property (2nd Ed., 673), saying:

But ordinary surveys are so loosely made, and so liable to be inaccurate, especially when made in rough or uneven land or forests, that the courses and distances given in the instrument are regarded as more or less uncertain, and always give place, in questions of doubt or discrepancy, to known monuments and boundaries referred to as identifying the land. Such monuments may be either natural or artificial objects, such as rivers, streams, springs, stakes, marked trees, fences, or buildings.

The principle was observed by Mr. Justice Washington, on circuit, in the case of *McPherson v. Foster* (4 Wash. C. C., 45; Fed. Cas., No. 8,921), and is stated in the syllabus as follows:

There is no principle of land law more firmly settled in this, and probably most of the states, in respect to country lands than this: that where the calls of a deed or other instrument are for natural, or well known artificial objects, both course and distance, when inconsistent with such calls, must give way and be disregarded.

The Supreme Court of California, in the case of *Adair v. White et al.* (85 Cal., 313; 24 Pac. Rep., 663, 664), determining the location of the southern boundary line of the Rancho Santa Paula y Staticoy, under a patent of the United States issued upon a confirmed Mexican grant, held that a discrepancy as to course and distance given in the patent should be disregarded, in favor of the monuments therein called for, and said:

The above is in accord with the well-settled rule that, in applying a conveyance to the tract of land described in it, course and distance must yield to natural objects or monuments called for. Such monuments are more certain and less liable to mistake or error than course and distance, and therefore monuments, as more certain, prevail over course and distance, partaking more or less of uncertainty.

Authorities to the same general effect might be multiplied. The principle is thus stated to be settled and universal, that where boundaries of a tract are described in the conveyance thereof by courses and distances and by reference to natural objects or fixed and known artificial monuments, the latter element controls in the event of disagreement between the two. No authorities to the contrary are cited by counsel for the Silver Monument applicant (appellee here), and none exist so far as the Department is able to ascertain.

Counsel for appellee contends, however, that the "general proposition" and decisions cited by counsel for appellant (protestant) "relate to the matter of determining *boundaries*, under certain conditions," and adds that not a single decision is cited in which it is held "that the *locus* of the *initial*

point of a survey may be ignored, where such *initial* point has been determined and fixed by actual survey of a tie line connecting it with an established corner of the public surveys.” But the brief of counsel for appellant contains a citation of and quotation at some length from the decision of the Supreme Court of Colorado in the case of Cullacott *et al. v.* Cash Gold and Silver Mining Co. (8 Colo., 179; 6 Pac. Rep., 211), in which the same principle was applied to a patented mining claim, the course and distance of the connecting or tie line of which, as given in the patent, were so far erroneous as to appear to establish the *locus* of the claim wholly without the boundaries as they had been laid and marked upon the ground. Within those boundaries a relocation was attempted by other parties, upon the assumption that the ground therein embraced was not the ground conveyed by the patent. At the trial the claim as actually located upon the ground was identified, by the monuments called for and, also, by its outcropping lode, its discovery shaft, shaft house, and surface improvements, as the premises described and contemplated by the patent; and it was therefore held that the entry thereon by those who sought to relocate was unwarranted and unlawful.

In Lindley on Mines (2nd Ed., Vol. II, Sec.778), upon the authority of cases cited in the notes, it is said:

It may be announced as a general rule that a patent is conclusive evidence as to the limits of a location, and that it cannot be assailed by showing that its actual boundaries were different from those described in the patent.

* * * * *

This rule is, of course, subject to the qualifications that where there is a variance between the calls of the patent for courses and distances and the monuments specified therein the monuments control, where the monuments are clearly ascertained.

In Snyder on Mines (Vol. I, Sec. 744) the rule is stated thus:

In cases of variance between calls of patent and monuments on the ground, the latter control. The field-notes of the surveyor are presumed to be made with reference to the monuments on the ground, and, when so made, of course they should correspond; and when the patent is issued it should describe the land with reference to the field-notes of the surveyor on file. It sometimes happens, however, that the calls in the patent do not agree with the monuments on the ground, and whenever there is a discrepancy of this nature the monuments on the ground must prevail. Of course this rule has reference to monuments which have always remained on the ground since first placed there; and where it appears that they have not remained in place, or where there is as much doubt as to where the monuments were first located as there is whether the course is correct, it has no application.

Counsel for appellee argues, however, that in view of “the uniform, carefully prepared, specific, and paramount requirements contained in all” the

official mining regulations, to the effect that a mining claim must by actual survey be tied to a corner of the public survey or United States mineral monument, and the strict and specific instructions to surveyors on this point, with the presumption always that the surveyor properly performs his duty, the surveyed tie line, definitely fixing the *locus* of the claim, can not be disregarded. But other requirements, as well, are prescribed in the law and official regulations.

By section 2324 of the Revised Statutes it is required, with respect to every mining claim, that—

The location must be distinctly marked on the ground so that its boundaries can be readily traced.

Section 2325 of the Revised Statutes provides, in part, that an authorized locator or locators of a mining claim, who has or have complied with the terms of the mining laws—

may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground.

And, among other prescribed proofs, it is therein required that the claimant shall file a certificate of the surveyor-general—

that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent.

The requirement under section 2324, above set forth, relates to the location of the claim, and contemplates its definition and identification on the ground during the period in which it is held under a possessory title, simply. The precise manner in which it shall be marked is not specified, although the result must be that “its boundaries can be readily traced.” But under section 2325, when proceedings for the acquisition of patent are initiated, the requirement is particular. Plat and field notes of survey of the claim must accompany the application, in which the boundaries are to be accurately shown; and at this juncture the claim must “be distinctly marked by *monuments* on the ground.” Proceeding, the section requires authentication of the plat, upon which in practice the claim is protracted and described by courses and distances, and “such further description by such reference to natural objects or *permanent monuments* as shall identify the claim, and furnish an *accurate description*, to be incorporated in the patent.”

Paragraph 34 of the mining regulations (31 L. D., 474, 479), with respect to “procedure to obtain patent to mineral lands,” reads in part as follows:

The claimant is required, in the first place to have a correct survey of his claim made under authority of the surveyor-general of the State or Territory in which the claim lies, such survey to show with accuracy the exterior surface boundaries of the claim, which boundaries are required to be distinctly marked by monuments on the ground.

By paragraph 36 thereof it is—

required in all cases that the plat and field notes of the survey of a claim must, in addition to the reference to permanent objects in the neighborhood, describe the locus of the claim with reference to the lines of public surveys by a line connecting a corner of the claim with the nearest public corner of the United States surveys, unless such claim be on unsurveyed lands at a distance of more than two miles from such public corner, in which latter case it should be connected with a United States mineral monument. . . . The connecting line or traverse line must be surveyed by the deputy mineral surveyor at the time of his making the particular survey, and be made a part thereof.

By paragraph 38 the following, among other, particulars are required to be observed in the survey of every mining claim:

(2) The intersection of the lines of the survey with the lines of conflicting prior surveys should be noted in the field notes and represented upon the plat.

(3) Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

Paragraph 48 of the regulations provides, in part, pursuant to the requirements of section 2325, Revised Statutes, that the claimant shall furnish a certificate of the surveyor-general—

that the plat filed by the claimant is correct; that the field notes of the survey, as filed, furnish such an accurate description of the claim as will if incorporated in a patent serve to fully identify the premises and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the locus thereof.

Paragraphs 143, 144, 145, 146, and 154, with respect to the “survey-how made,” are as follows:

143. Corners may consist of—

First.—A stone at least 24 inches long set 12 inches in the ground, with a conical mound of stone 1½ feet high, 2 feet base, alongside.

Second.—A post at least 3 feet long by 4 inches square, set 18 inches in the ground and surrounded by a substantial mound of stone or earth.

Third.—A rock in place.

A stone should always be used for a corner when possible, and when so used the kind should be stated.

144. All corners must be established in a permanent and workmanlike manner, and the corner and survey number must be neatly chiseled or scribed on the sides facing the claim. The *exact* corner point must be permanently indicated on

the corner. When a rock in place is used its dimensions above ground must be stated and a cross chiseled at the exact corner point.

145. In case the point for the corner be inaccessible or unsuitable a witness corner, which must be marked with the letters W. C. in addition to the corner and survey number, should be established. The witness corner should be located upon a line of the survey and as near as possible to the true corner, with which it must be connected by course and distance. The reason why it is impossible or impracticable to establish the true corner must always be stated in the field notes, and in running the next course it should be stated whether the start is made from the true place for corner or from witness corner.

146. The identity of all corners should be perpetuated by taking courses and distances to bearing trees, rocks, and other objects, as prescribed in the establishment of location monuments, and when no bearings are given it should be stated that no bearings are available. Permanent objects should be selected for bearings whenever possible.

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154. It should be stated particularly whether the claim is upon surveyed or unsurveyed public lands, giving in the former case the quarter section, township, and range in which it is located, and the section lines should be indicated by full lines the quarter-section lines by dotted lines.

The forgoing requirements under the law and official mining regulations are principally with respect to the designation of the *locus* of a mining claim for patent purposes; and it is to be observed that for such purposes at least two elements of description are always to be provided: (1) by course and distance from a corner of the claim to a corner of the public survey or to a United States mineral monument and the definition of the boundaries by courses and distances; and (2) by reference to and description of the "monuments on the ground," by which the "boundaries are required to be distinctly marked." It obviously is contemplated under those requirements that the different elements of description, whereby the *locus* of a claim is to be fixed, shall coincide; but it undoubtedly is true that the cases are many in which they are at variance. With such variance always possible, the mining claimant who disregards the foregoing requirements and fails to mark distinctly upon the ground, before the survey of his claim, the boundaries thereof with monuments of fixed and enduring character, such as are contemplated under the law and official regulations, or zealously thereafter to preserve them intact and in place as they are described in his patent, risks the consequences of his omission. This is the more apparent, since the probability of discrepancies between the several elements of the patent descriptions has had legislative recognition, and the considerations for the guidance of the land department in the determination of alleged or apparent conflicts between mineral applications and outstanding patents are declared, in the act of Congress, approved April 28, 1904 (33 Stat., 545), whereby section 2327 of the Revised Statutes is amended to read as follows:

The description of vein or lode claims upon surveyed lands shall designate the location of the claims with reference to the lines of the public survey, but need not conform therewith; but where patents have been or shall be issued for claims upon unsurveyed lands, the surveyors-general, in extending the public survey, shall adjust the same to the boundaries of said patented claims so as in no case to interfere with or change the true location of such claims as they are officially established upon the ground. Where patents have issued for mineral lands, those lands only shall be segregated and shall be deemed to be patented which are bounded by the lines actually marked, defined, and established upon the ground by the monuments of the official survey upon which the patent grant is based, and surveyors-general in executing subsequent patent surveys, whether upon surveyed or unsurveyed lands, shall be governed accordingly. The said monuments shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of such patented claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern, and erroneous or inconsistent descriptions or calls in the patent descriptions shall give way thereto.

Counsel for appellee points out the discrepancy in the length of the tie line of the Emma Nevada claim as given in the published notice of the application for patent thereto and as given in the patent itself; and contends that, on the one hand, if the published notice did not correctly describe the *locus* of the claim the patent was issued without authority of law and is void, and that, on the other hand, if the notice did accurately describe the *locus*, the patent was properly issued and is conclusive upon the land department, so that the latter is without jurisdiction “now *again* to determine the *locus* of that claim.” In answer to the first branch of the contention it is sufficient to say, that even if it be true (a question not here involved) that the notice, taken as a whole, did not contain data sufficient to have indicated the situation of the claim with substantial accuracy (see Hallett and Hamburg Lodes, 27 L. D. 104), yet, that ground alone considered, the patent subsequently issued is voidable merely, not void, and until vacated by appropriate judicial proceedings is of full force and effect (see Smelting Co. v. Kemp, 104 U. S., 636, 644-8). So far as the second branch of the contention is concerned, the decisions of the courts and of the Department unquestionably are to the effect that when patent once issues the land therein embraced passes beyond the jurisdiction and control of the land department; but, obviously, they do not question the latter’s right to determine, at least in the first instance, what public lands have been patented and what remain subject to its jurisdiction and control.

Counsel for appellee further contends that the failure of appellant to file an adverse claim, under sections 2325 and 2326, Revised Statutes, during the period of publication of notice of the Silver Monument application constituted a waiver of any claim she might have had to the land involved and a forfeiture of all right now to be heard on the question of ownership. But the mining laws are in themselves too plain and are too well understood to

require argument or citation of authorities to show that an adverse claim is the appropriate recourse of one claiming under a possessory title only, against a valid application for patent to land subject to appropriation under those laws, and that the provisions referred to have no relation to or bearing upon the question of the effect and scope of a patent.

The Mono Fraction case, *supra*, does not hold the descriptions, in mineral patents, by courses and distances to prevail over those by reference to natural objects or permanent monuments, or *vice versa*, but that while such patents remain outstanding the land department may not “deal with lands included within the descriptions contained in the patents as unpatented lands” and “is without the jurisdiction or authority to correct any mistakes that may have been made in the surveys.” Inasmuch as the question presented in that case is again presented in the similar case of Drogheda and West Monroe Extension Lode Claims, decided by the Department August 30, 1902 (unreported), now pending on motion for review, and the facts of each case differ from those of the case at bar, no discussion with respect to the Mono Fraction case will be here indulged.

The patent here in question (a duly certified copy of which, prepared in your office, is with the record now before the Department) defines the position and boundaries of the Emma Nevada claim by course and distance from a corner of the claim to a corner of the public survey and in like manner from corner to corner of the claim, by reference to and description of monuments as marking its corners on the ground, and by designation of points of intersection of boundary lines of other surveyed claims; the represented relative positions on the ground of the Emma Nevada and surveyed intersecting and adjoining claims appearing on a plat attached to and made part thereof. The claim is stated therein to embrace a portion of Sec. 7, T. 9 S., R. 78 W., 6th P. M. The monuments are described as follows: “at corner No. 1, a granite stone, 24 x 12 x 6 inches, marked 1-4348, in mound of stones;” at “corner No. 2, a granite stone, 28 x 10 x 6 inches, marked 2 x 4348, in mound of stones;” at “corner No. 3, a granite stone, 40 x 10 x 4 inches, marked 3 x 4348, in mound of stones;” and at “corner No. 4, a granite stone, 27 x 10 x 10 inches, marked 4 x 4348, in mound of stones.” The stone described as marking corner No. 3 is further stated to be “situate on line 4-1” of adjoining “survey No. 2929 [Iola lode claim], the same being line 2-3 of survey No. 2928, the Tip-Top lode claim.”

Whilst it is not specifically admitted by or on behalf of appellee that the Silver Monument and Emma Nevada claims actually conflict with one another as laid upon the ground, yet by the allegations of Holland and those contained in the protest, and by some of the plats filed in the case, that situation would appear and is not disputed; and, indeed, the argument of appellee’s counsel proceeds upon this assumption. This, however, is one of the questions of fact presented in the case, among which are those respecting the situation of the Emma Nevada claim as actually surveyed

for patent, and as at present claimed and bounded, the existence on the ground of the monuments described in the patent, the definite and substantial character of such monuments as contemplated by the law and official regulations, the existence of any other visible evidences of the actual position of the claim, and, if ascertained, the true course and distance of its tie line. These questions remain to be determined, as far as may be, inasmuch as, under the provisions of the act above given, the land department should regard as constituting the patented claim, and should not receive further application for patent to, the tract of land embraced in the survey and "bounded by the lines actually marked, defined, and established on the ground" by monuments substantially within the requirements under the law and official regulations and corresponding to the description thereof in the patent, if such there be. If the land is in fact so defined and any portion thereof is embraced in the Silver Monument application, the latter, to the extent of such conflict, must be rejected.

The record is therefor returned to your office, with directions that a hearing be ordered before the local officers, in the usual manner, upon application therefor by appellant within a time to be fixed by your office, at which full opportunity will be afforded both parties to submit such evidence as they may have touching the before-mentioned questions, as to the relative actual situations of the claims and as to the identity of the patented claim. If the hearing shall be had, the case will be regularly adjudicated according to the showing there made, agreeably to the views hereinabove expressed; otherwise, in the absence of an application for such hearing, the Silver Monument application will be allowed to proceed, provided no other or further objection appears.

The decision of your office is modified accordingly.
