2. SAME.

It seems doubtful whether any attachment under state laws can operate as a transfer of shares of national bank stock, since such stock exists solely under the laws of the United States, which provide for transfers, and declare the effect thereof.

This was a suit in equity by Merritt Sowles against the National Union Bank of Swanton, Vt. The cause was heard upon an intervening petition filed by Margaret B. Sowles and Edward A. Sowles.

Edward A. Sowles, for petitioners.

WHEELER, District Judge. Fifty-two and two-thirds shares of the capital stock of the bank stood on the books in the name of Edward A. Sowles, and were long ago attached, so far as they could be under the state statutes, as his, in suits in a state court, the proceedings in which have been long stayed, and lain for want of prosecution. Dividends amounting to $1,040, and five shares of National Car Company stock, belonging with this stock, have been withheld by the receiver, in winding up the affairs of the bank, because of this attachment, and the funds and car stock are now in court. Margaret B. Sowles, who has some color of title to these shares, has joined with Edward A. Sowles in an intervening petition for the payment of the dividends and delivery of the car stock to her, and they have tendered a bond of indemnity to the plaintiff in the attachments. When this attachment was attempted the laws of the state provided, in terms, for the attachment of shares of stock in corporations organized under the laws of the state only. R. L. Vt. §§ 3261, 3262. Shares in a national bank existing wholly under the laws of the United States were not included, if they could be. The laws of the United States provide for the transfer of shares in national banks, and what the effect of the transfer shall be, and this might exclude any effect of transfer proceedings by attachment under state laws. Rev. St. U. S. § 5139. This attachment does not of itself, therefore, seem to be of any force against the defendant in the attachment. His acts, however, in joining in this petition for payment and delivery to Margaret B. Sowles, may be, and for safety they should be, made upon an acquittance from both, and for still greater safety, upon acceptance of the bond. Bond accepted and petition granted.

BONNER et al. v. MEIKLE et al.

(Circuit Court, D. Nevada. September 20, 1897.)

No. 633.

1. MINING CLAIMS—APPLICATION FOR PATENT—RIGHT TO CONTEST.

Occupants of lots in a town located on public lands of the United States, who have built on and improved the same, have a possessory right, which entitles them to contest the issuance of a patent to the claimant of a mining location covering such lots, though neither they nor the authorities of the town have taken any steps to secure title to themselves.

2. SAME—CONTEST BETWEEN TOWN-SITE AND MINERAL CLAIMANTS.

To entitle an applicant to a patent for a mining claim, as against occupants who have improved lots situated within its limits, claiming under

the town-site act, it must be shown that at the time the town-site claimants acquired or purchased the lots the land was known to contain mineral of such extent and value as to justify expenditures for the purpose of extracting it. This rule applies though the town-site claimants have taken no steps to obtain title.

B. Sanders and O. W. Powers, for complainants.
Henry Rives and Robt. M. Clarke, for defendants.

HAWLEY, District Judge (orally). This suit was brought in the state court by complainant Bonner on behalf of himself and for the benefit of numerous other persons upon a protest made by complainants to an application made by defendants for a patent to the Naid Queen mining location at De Lamar, Lincoln county, Nev., and upon the petition of one of the defendants was removed to this court upon the ground of prejudice and local influence. Bonner v. Meikle, 77 Fed. 485. Some question was made in the oral argument of counsel as to the character of this suit. It was instituted under and by virtue of and in compliance with the provisions of section 2326, Rev. St., which provide as follows:

"Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim."

In such suits, as is said in Perego v. Dodge, 163 U. S. 160, 165, 16 Sup. Ct. 971, 973:

"The determination of the right of possession as between the parties is referred to a court of competent jurisdiction in aid of the land office, but the form of action is not provided for by the statute; and apparently an action at law or a suit in equity would lie, as either might be appropriate under the particular circumstances,—an action to recover possession when plaintiff is out of possession, and a suit to quiet title when he is in possession."

This suit comes within the latter class. The cause was tried before the court, a stipulation having been filed waiving a jury. The ground in controversy is situate upon the unsurveyed public lands of the United States. The complainants are the owners of, and in possession of, certain town lots, and the buildings erected thereon, in the town of De Lamar, situate within the surface limits of the location of the Naid Queen claim. They have expended over $30,000 in the construction of buildings and making improvements on their land. The notice of the mining location was posted on the ground prior to the entry of complainants upon the land. At the time the notice was posted, no discovery had been made of any mineral-bearing lode or vein within the limits of the location. Section 2320, Rev. St., provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." The contention of complainants is that no such discovery has ever been made, but, in any event, that no such discovery was made until

long after the rights of complainants had been acquired. In Enterprise Min. Co. v. Rico-Aspen Min. Co., 167 U. S. 108, 112, 17 Sup. Ct. 762, 763, the court said:

"In order to make a location, there must be a discovery; at least that is the general rule laid down in the statute. * * * The discovery in the tunnel is like a discovery on the surface. Until one is made, there is no right to locate a claim in respect to the vein, and the time to determine where and how it shall be located arises only upon the discovery, whether such discovery be made on the surface or in the tunnel."

This suit involves a question of fact. If a mineral lode or vein was discovered within the limits of the Naid Queen surface location, running in a parallel direction with the side lines of the location, prior to the entry of complainants upon the town lots, the defendants are entitled to a patent. Was such a discovery made prior to that time? A preliminary objection was urged by defendants' counsel to any consideration of the merits of this case upon the ground that complainants have no standing in court; that they have not established any right to the premises in controversy; and are not, therefore, entitled to protest against the application of defendants for a patent to the Naid Queen mining location, because there had been no action taken by the citizens of the town of De Lamar to obtain title from the United States to the town site. To quote from the argument of counsel: The testimony "does not show that the public authorities have ever made application for it. It does not show that any steps have been taken to comply with the laws of the United States on the part of the complainants, or to acquire by purchase or otherwise from the United States the title which is alleged to be outstanding in the government; nor is there anything in the case that shows that this complainant, or those whom he represents, have now or expect to obtain this title, or that they have taken any steps to connect themselves with the government of the United States." It is true that such steps might have been taken by the town authorities, if it has any town organization, or by complainants, to secure title from the government to the land occupied by them; but the fact that no such steps have been taken does not deprive the property owners of the town, or any or either of them, from protesting against the application of the defendants for a patent to the Naid Queen location, which includes the property which they claim to own. The citizens of a town have as much right to build houses upon the public domain in which to live as others have to locate mining claims upon which to work. One purpose is as necessary as the other. Both are entitled to the equal protection of the law. Although complainants have not connected themselves with any government title, nor sought in any manner to secure such title, yet they have such a possessory right to the land upon which their buildings have been erected as will prevent others, not having any title from the government, from entering thereon, and taking their property from them, without first establishing a superior right thereto.

There are many cases where the owners of mining ground valued at millions of dollars have preferred to hold the same under "a mere possessory right" rather than to take any steps to secure a patent

from the government. Forbes v. Gracey, 94 U. S. 762, 767. Would it not be absurd to claim that in such cases the owners of the possessory title, under valid mining locations, were not entitled to any protection, and could not even protest against the application of some subsequent locator for a patent covering a portion or all of their ground because they had never taken any steps to secure title to their property from the United States? The argument of counsel would have merit if the complainants were seeking to set aside a patent that had been issued by the United States to the owners of the Naid Queen location. Being simply occupants of and in possession of town lots on the public lands without title, they have no vested rights to this land as against the United States nor any purchaser from them. Sparks v. Pierce, 115 U. S. 408, 6 Sup. Ct. 102. But that is not this case. The defendants have no title from the United States. They are not in any better position in this respect than the complainants. It is true that they are seeking to procure the government title; but, in order to obtain a patent, they must first prove that they have a better right to the land than the complainants. The case must be considered upon its merits.

A mass of testimony has been introduced tending to show that the entire country in and around the town of De Lamar is one mineralized zone or belt about 5 miles long and 1½ miles wide, in which over 200 mining locations have been made; that the Naid Queen is within this mineralized zone; that it is entirely surrounded by other mining locations, in each of which more or less mineral has been found; that the general course of the fractures found in this belt, upon the sides of which the paying rock is usually found, is northeast and southwest. The formation of this zone or mineral belt of country is quartzite, and the pay ore or mineral rock is largely composed of, or is found in, this quartzite. It is difficult to tell by merely looking at the quartzite whether it contains mineral or not. There are specimens occasionally found where more or less quartz is plainly to be seen, clearly indicating that it contains gold in paying quantities; other specimens have copper stains and other marks peculiar to mineral-bearing rock; but the greater portion of the rock that is milled is of such a character that it is exceedingly difficult, if not impossible, even for experienced miners, thoroughly acquainted with this district, to tell the mineral-paying quartzite from the quartzite which does not contain sufficient mineral to pay for extracting and milling. It is necessary to have assays made in every section of the timbered ground in order to ascertain whether or not the quartzite therein contains mineral in sufficient quantities to justify its being sent to the mill for reduction. Owing to these peculiar characteristics, as well as of the exciting conditions found in all new mining camps upon the discovery of rich ore, it can readily be understood why all the ground in the mineral belt or region of country where the quartzite was found was located upon a claimed lode, whether any valuable mineral was found therein or not. The notice of location of the Naid Queen was posted on the ground April 14, 1892. At that time there were no houses or buildings of any kind upon the surface ground included within the limits of the Naid Queen location. The first cabin built within the town

site of De Lamar was constructed in the fall or winter of 1893. The first buildings erected upon the ground in controversy were put up in the spring of 1894. Quite a number of buildings were constructed that year; others in 1895. The town is built in a gulch. The following diagram shows the location of the ground as shown by the survey made by the United States mineral surveyor in the application made by the owners of the Naid Queen for a patent.