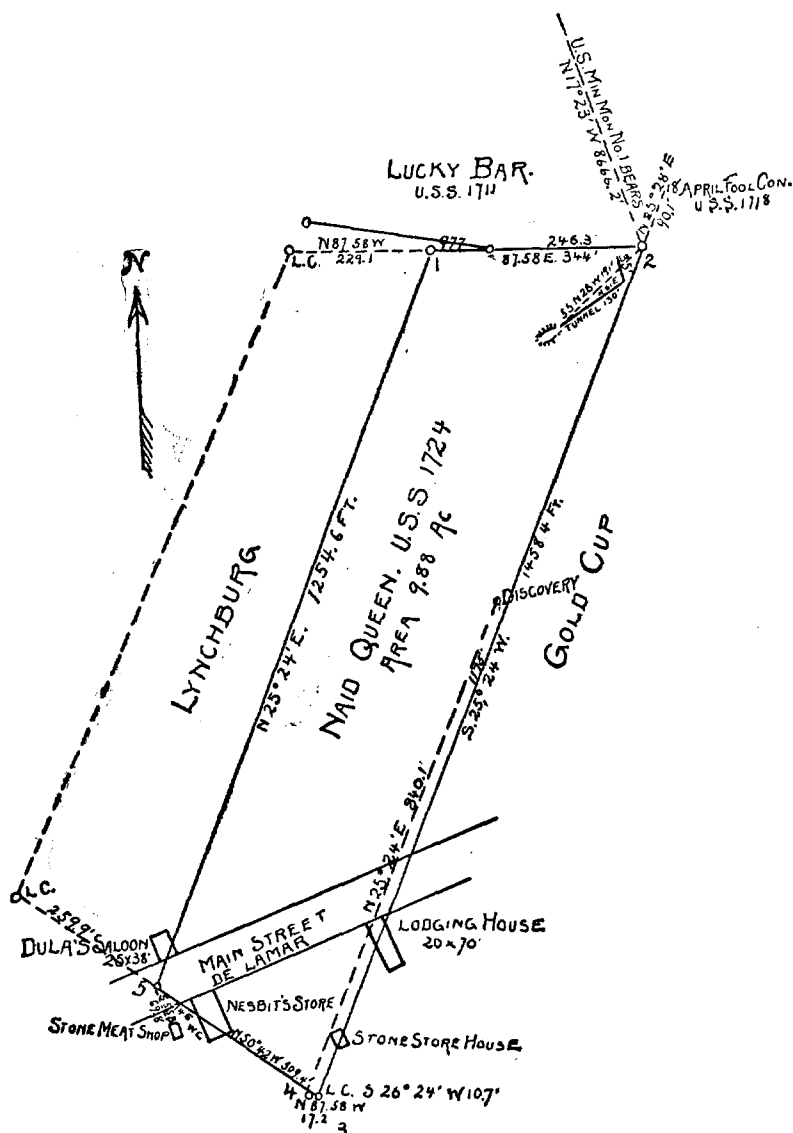


site of De Lamar was constructed in the fall or winter of 1893. The first buildings erected upon the ground in controversy were put up in the spring of 1894. Quite a number of buildings were constructed that year; others in 1895. The town is built in a gulch. The following diagram shows the location 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.



There was some work on the extreme northerly end of the Naid Queen location done in the fall of 1893,—a little cut 5 or 6 feet long and 2 feet deep on the croppings, and another small cut or prospect hole about the north end of the tunnel, found on the diagram. The cut at the croppings was enlarged in 1894. It was made a little deeper, and extended in length to about 16 or 18 feet, and in the deepest place was about 6 feet. The tunnel was started in April, 1895. The following assays of samples of rock found in the tunnel were made by the assayer of the De Lamar Company:

“Naid Queen Samples.

“No. 1. From door of tunnel E. 12 feet, sides and top; value, trace. No. 2. 2nd 12 feet E. of No. 1, sides and top; value, trace. No. 3. 1st 6 feet of 3rd 12 feet E. of No. 1, sides and top; value, trace. No. 4. 4th 12 feet east, sides and top; value, trace. No. 5. 5th 12 feet east, sides and top; value, trace. No. 6. 6th 12 feet east, sides and top; value, trace. No. 7. 7th 12 feet E., sides and top; value, trace. No. 8. 8th 12 feet E., sides and top; value, trace. No. 9. 9th 12 feet E., sides only; value, trace. No. 10. Distance from crosscut to face of tunnel (10'), sides, top, and face; value, trace. No. 11. About 40 feet east of door of tunnel on south side of tunnel; value, \$.46. No. 12. About 70 feet east of No. 11 in a winze in south crosscut; value, \$.82. No. 13. South side of winze in south crosscut; value, \$.68. No. 14. Face of north crosscut, about 50 feet north of No. 13; value, trace. No. 15. 13 feet south of No. 14, on west side north crosscut; value, \$1.14. No. 16. 6 feet south of No. 15, west side of north crosscut; value, \$.70. No. 17. Intersection of west side of north crosscut and north side of main tunnel; value, trace. No. 18. Roof of tunnel at its intersection with crosscut; value, \$.42. Above samples were taken on or about March 7, 1897, and were made in duplicate, and checked.

Oscar Lachmund,

“Assayer for De Lamar Nevada G. Mg. Co., De Lamar, Nevada.”

From the testimony it appears that assays No. 12 and No. 18 were in fact taken over the easterly side line of the Naid Queen. It is admitted by the defendants that no ore or rock containing mineral was ever found at or near the point of “discovery” marked on the diagram. The testimony shows that nothing more than a trace was found in the tunnel for a distance of 108 feet from the mouth. The length of the tunnel is 130 feet. All the samples were taken at the northeast corner of the Naid Queen location. There is no testimony tending to show the discovery of any mineralized rock of any value in any other portion of the Naid Queen location. The points where the assays were taken showing a trace are over 1,000 feet distant from the buildings claimed by the complainants. The opinions and beliefs of witnesses that, as depth is attained, quartzite containing valuable mineral would or might be found extending through the location of the Naid Queen from the north to the south end, is entirely theoretical and problematical. At present, none has been found except at the places above stated. The fact that pay ore has been found in the middle or northern portion of the Lucky Bar, immediately adjoining the Naid Queen on the north, and in the southerly end of the Richmond location, adjoining the Naid Queen on the south, is too remote to establish the fact that there is a continuity of ore extending from the one point to the other through the Naid Queen location. So, with reference to the quartzite in the Gold Cup on the easterly side of the Naid Queen, while some valuable specimens of rock are found,

and some ore has been milled, still it is not shown that ore or rock of any value extends over and into the Naid Queen. At the northerly end of Jim Crow, which is situated adjoining and northwesterly from the Lynchburg, valuable rock containing mineral is found. To the west of Lucky Bar, in Jim Crow No. 1 and No. 2, paying ore is found; and to the north and northeast of the Lucky Bar, in Monitor No. 2 and April Fool, the quartzite is rich in mineral; and to the north of these last-named claims are the Millionaire, Monitor, Cliff, Swifter, and other valuable locations. From the testimony it appears that the richest locations are found in the hills surrounding the town; that, as you approach the base toward the gulch, the values cease; and in the gulch, where the town of De Lamar is shown on the diagram, no mineral has been found.

Taking into consideration all the facts and circumstances testified to by the respective witnesses, and carefully weighing the same, it seems clear to my mind that, whatever the probabilities or improbabilities of the continuance of mineral-bearing quartzite and rock in place through the Naid Queen lengthwise at the present time may be, there was not, at the time the complainants took up, purchased, or secured the town lots upon which their respective buildings are erected, any such discovery of mineral-bearing earth, rock, or ore within the limits of the Naid Queen location as would give to the owners of such location a prior right to the ground and premises occupied by the complainants herein. It must be borne in mind that this is not a contest between two mining companies, both claiming the ground as mineral land, and each claiming to be the first locator, or the first to discover rock in place bearing mineral. In all such cases the question as to what constitutes a discovery of a vein or lode under the provisions of section 2320, Rev. St., is governed by the rule announced in *Book v. Mining Co.*, 58 Fed. 106, 121, that, when a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low, with this qualification: that the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found. This rule has always prevailed in the courts, as is clearly shown in the numerous authorities there cited. See, also, *McShane v. Kenkle* (Mont.) 44 Pac. 979, 981. Why? Because it was never intended that the courts should weigh scales to determine the value of the mineral found as between a prior and subsequent locator of a mining claim on the same lode. But where the rights of claimants to a town site, or to agricultural land, or as between the locators of a placer claim and others claiming a vein or lode to the same ground, are involved, other questions must be considered. In all such cases there are different statutes to be construed, and a somewhat different rule prevails. This is clearly stated by the court of appeals of this circuit in *Migeon v. Railway Co.*, 23 C. C. A. 156, 77 Fed. 249, 256. In a case of contest between mineral claimants on one side and parties holding town-site patents on the other the supreme court has repeatedly declared that under the acts of congress

which govern such cases, in order to except mines or mineral lands from the operation of a town-site patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect, but they must at that time be known to contain mineral of such extent and value as to justify expenditures for the purpose of extracting them; and, if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town-site patent. *Deffeback v. Hawke*, 115 U. S. 393, 404, 6 Sup. Ct. 95; *Davis v. Webbald*, 139 U. S. 507, 525, 11 Sup. Ct. 628; *Dower v. Richards*, 151 U. S. 658, 663, 14 Sup. Ct. 452. In *Davis v. Webbald*, the court, after announcing the rule as above stated, said:

"In connection with these views it is to be borne in mind, also, that the object of the town-site act was to afford relief to the inhabitants of cities and towns upon the public lands by giving title to the lands occupied by them, and thus induce them to erect suitable buildings for residence and business. Under such protection many towns have grown up on lands which, previously to the patent, were part of the public domain of the United States, with buildings of great value for residence, trade, and manufactures. It would, in many instances, be a great impediment to the progress of such towns if the titles to the lots occupied by their inhabitants were subject to be overthrown by a subsequent discovery of mineral deposits under their surface. If their title would not protect them against a discovery of mines in them, neither would it protect them against the invasion of their property for the purpose of exploring for mines. The temptation to such exploration would be according to the suspected extent of the minerals, and, being thus subject to indiscriminate invasion, the land would be, to one having the title, poor and valueless, just in proportion to the supposed richness and abundance of its products. We do not think that any such results were contemplated by the act of congress, or that any construction should be given to the provision in question which would lead to such results."

I am of opinion that those cases, and the principles therein announced, are applicable to this case. It is true that no steps have even been taken by the town-site claimants of De Lamar to obtain a town-site patent in order to procure a title from the government. They might have done so; and, if they had, then the mineral claimants to the Naid Queen mining location could have protested, and the identical question here raised would then have been presented. The fact as to which party first applies for a patent certainly cannot make any difference in the principle which is involved.

It was argued by counsel for complainants that, if any discovery of a lode or vein was made in the Naid Queen location, it was a vein that ran in an easterly and westerly direction at the northerly end of the location. It was also claimed that the application for a patent by the defendants was not made in good faith for the purpose of procuring a patent to mining ground for mining purposes, but was an attempt to obtain a patent for the sole purpose of getting title to the town lots and buildings in possession of the complainants. It is undoubtedly true that in a case like the present, where complainants acted in the utmost good faith in locating upon or purchasing the town lots upon which their improvements are made, under the belief that the land was not mineral, their rights ought not to be disturbed without clear and satisfactory proof that within the limits of the mining location there

had been found a lode or vein which, in its natural course and direction, would give the owners thereof a right to all the surface ground within the limits of the location. In other words, if the proofs were undisputed that a discovery of a lode or vein had been found at the northerly end of the Naid Queen location; that from such discovery it clearly appeared that the course of the lode lengthwise was easterly and westerly, and at right angles within the side lines of the Naid Queen,—then, in the eye of the law, the side lines of the location as made upon the ground would become the end lines of the location (*King v. Mining Co.*, 152 U. S. 222, 228, 14 Sup. Ct. 510; *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 687, 15 Sup. Ct. 733), and the owners of the claim would only be entitled to a patent for 300 feet of surface ground on each side of the middle of the lode; and hence it would not interfere with complainants' rights. There is more or less testimony that tends to support that theory, but the views already expressed are decisive of the case, and render it unnecessary to decide other questions raised by counsel. The defendants are not entitled to a patent for any part or portion of the land claimed and occupied by the complainants. The complainants are entitled to judgment for their costs. Let a decree be entered accordingly.

MUTUAL LIFE INS. CO. OF NEW YORK v. BOYLE, Atty. Gen., et al.

(Circuit Court, D. Kansas, First Division. September 27, 1897.)

1. JURISDICTION OF FEDERAL COURTS—SUITS AGAINST STATE OFFICERS.

The eleventh amendment to the federal constitution does not prevent a federal court from entertaining a suit by an individual or corporation against an executive officer of a state to compel him to perform a plain ministerial duty, as to which the law allows him no discretion, or to enjoin him from performing some official act whereby complainant's rights will be injured.

2. STATE SUPERINTENDENTS OF INSURANCE—EXCLUSION OF INSURANCE COMPANIES OF OTHER STATES.

The Kansas law of 1889 providing, among other things, that the superintendent of insurance shall have no power to refuse an insurance company a certificate of authority to do business in the state if such company is solvent and has fully complied with the state laws, applies to life as well as fire insurance companies, and to both home and foreign corporations. The act is mandatory, and allows no exercise of discretion.

3. SAME—EQUITY JURISDICTION—INJUNCTION.

Where an insurance company has built up a large and successful business in the state, and has valuable property and numerous policies therein, the act of the state superintendent of insurance, who is personally insolvent, in illegally refusing it a license to continue in business, and threatening to institute criminal proceedings against it, warrants a court of equity in interfering to enjoin the threatened injury, but the state officers will not be enjoined from bringing a suit in quo warranto to test the right of the company to do business in the state.

This was a suit in equity brought by the Mutual Life Insurance Company of New York against Louis C. Boyle, as attorney general of the state of Kansas, and Webb McNall, as superintendent of insurance of the same state, to enjoin them from interfering with the transaction of its business in that state, and to procure an adjudication that it was entitled to a certificate authorizing it to carry on business therein.