

receiver refused to entertain the application, because it conflicted with the patented Roydor placer aforesaid.

September 30, 1880, Robinson made affidavit that Roydor knew at the time when he applied for his patent of the existence of the quartz vein located by affiant, and with his affidavit filed two affidavits of third parties in support of the allegation.

December 6, same year, your office ordered a hearing to determine "whether a vein was known to exist at the date of the issuance of said placer patent." Hearing was accordingly had. The register and receiver found from the testimony that "at the time of the issuance of the patent to Roydor, January 14, 1876, there was no known ledge or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits." And upon appeal to your office you reviewed the testimony and affirmed the finding of the local officers.

Although your office directed the inquiry to be made as to whether the lode was known to exist at the date of the issuance of the placer patent, Robinson's affidavit averred that Roydor knew of its existence at the time that he made application for his said patent.

The averments in the affidavit, therefore, brought the case within the rule established by this Department in the late case of *Becker v. Sears*, and *War Dance v. Church Placer* (9 C. L. O., 212) in which it was held that the lode must be known to exist at the "date of the application."

I am of the opinion that the register and receiver should not have rejected Robinson's application because of its conflict with the patented Roydor placer. I therefore direct that all proceedings subsequent to said Robinson's application for a patent for the Mammoth lode be dismissed without prejudice, and that Robinson be permitted to proceed in compliance with the statute.

The adverse claim can then be made and the controversy settled by the court in the manner directed by the statute.

23 LD 529
25 " 233
CERTIORARI; EXISTING HOMESTEAD; NON-METALLIFEROUS DEPOSITS.

33 " 20
34 " 115
THE DOBBS PLACER MINE.

A petition to the Secretary of the Interior for *certiorari* under rule 84 of the rules of practice, must fully set forth the facts relating to the antecedent proceedings in the case, but a specific assignment of errors is not required.

Certiorari does not lie from a decision of the Commissioner as a matter of right, but as a matter of Executive discretion, and where the petition shows on its face that substantial justice has been done, the application will be denied.

A mineral entry is not invalid because at the time it was made the land was covered by a homestead entry.

Deposits of fine clay or kaolin being non-metalliferous in character, are properly subject to entry as placers, and not as lode claims.

Secretary Teller to Commissioner McFarland, May 10, 1883.

In the case of L. E. Montague, protestant, *v. Stephen E. Dobbs*, mineral entry No. 2, on lands in Sec. 14, T. 6, R. 9, Huntsville, Ala., I have examined the motion made by defendant to dismiss the application of

protestants for *certiorari* under Rules 83 and 84 of the rules of practice.

The motion is based on two grounds, viz :

First. That the petition shows upon its face that the protestant, Montague, has no lawful right to the land covered by the defendant's mineral entry.

Secondly. That there is no specific ground of complaint or assignment of errors.

I do not think the motion upon the last ground can prevail.

No assignment of errors is necessary on common law *certiorari*. (Hilliard on New Trials, 638, and cases there cited.) "A petition for *certiorari* should state facts, and not the opinions or conclusions of the petitioner." (*Ib.*, 696.)

Rule 84 seems to have been framed upon the well-established practice in such cases. It is as follows, viz : "Applications to the Secretary under the preceding rule shall be made in writing, under oath, and shall fully and specifically set forth the grounds upon which the application is made."

I think the "grounds" mentioned in the rule refer to the proceedings which are to be fully set forth in the application, and not to assignments of error.

Certiorari is not, however, a writ of right; but whether it shall issue lies in the judicial discretion of the tribunal to which the petition is addressed," and the writ will not be granted if substantial justice has been done, though the record may show the proceedings to have been defective and informal." (*Ib.*, 689.)

The facts in this petition, which constitute "the grounds upon which the application is made," are, I think, set out sufficiently full and specific, and the question presented is whether they disclose a proper case for granting an order directing the proceedings to be certified to this Department.

The petition discloses in substance the following facts, viz :

In January, 1870, James W. Bell made homestead entry for the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section 14. In August, 1875, Minerva J. Howard made homestead entry for the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ aforesaid.

Bell having died, his heirs, May 25, 1881, executed a relinquishment of his said entry to the United States, and by an instrument of even date attempted to sell to William C. Kean all their interest, and to authorize him to obtain title under the act of June 15, 1880. May 26, 1881, the petitioner went upon said tract for the purpose of locating a mining claim, and May 27 duly posted notice of such location on said claim, and duly made and published a proper notice that he "had located 1,495 linear feet on the Allen Spring lode, vein, or deposit of fire-clay or kaolin." Attached to said notice was an affidavit sustaining the averments of the notice, and setting forth that the land was more valuable for mineral deposits than for agricultural purposes. May 27, the same day that the petitioner posted notice of location, said Kean

applied, and was permitted by the local officers, to make cash entry of said land under the said act of June, 1880. Upon filing said notice of location the petitioner was informed by the register that the location would not be allowed, because of said Kean's cash entry, and it was accordingly rejected. From that decision no appeal appears to have been taken, and it therefore became final. June 6 the petitioner filed a protest in your office against said Kean's cash entry. October 31 petitioner filed in your office affidavits showing that the land entered by Kean was mineral in character, and as such was being worked by the petitioner, and asking that a hearing might be had to ascertain the true character of the land before any action was taken on said entry, and also to ascertain the circumstances under which Kean obtained his entry. July 21, 1881, said Minerva J. Howard gave notice of a mining claim upon certain land on the tract for which she had made the homestead entry aforesaid, said mining claim being described as "on the lode, vein, or deposit of fire-clay or kaolin in the Allen Spring lode," and the notice being accompanied with the affidavits of William C. Kean and Stephen E. Dobbs, averring that the land embraced within the boundaries of the claim was much more valuable for mineral than for agricultural purposes. December 10 Edwin A. Crandall, Sterling S. Lanier, Stephen E. Dobbs, W. M. Dobbs, Minerva J. Howard, and William C. Kean gave notice of location by them of the W. $\frac{1}{2}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said Sec. 14 as a placer claim. June 15, 1882, the receiver at Huntsville aforesaid issued to Stephen E. Dobbs (his collocators having conveyed their interest to him) duplicate receipt mineral entry No. 2 for \$300 in payment for the lands last above described, known as the Dobbs Placer Claim. This receipt was filed in your office June 17. June 28 attorneys for petitioner and D. P. Montague entered an appearance in your office in opposition to the issuance of a patent on the placer entry. July 28, 1882, Kean appeared in your office and consented to the cancellation of his said cash entry as "void *ab initio*." On said July 28 petitioner filed in writing in your office a further protest against issuance of a patent for said mineral entry No. 2, and called attention to the former application for a hearing to determine the mineral character of the land. This protest was accompanied by affidavits showing work done on petitioner's claim, and that the deposit of mineral lay in a well defined lode or vein, and that it should be entered only as a lode claim. November 23, 1882, your office canceled Kean's said cash entry, for the reason that the land was mineral, and because the entry was void *ab initio*, and Kean had requested its cancellation; and on the same day you canceled the Howard homestead entry, dismissed the protest of the petitioner against the issuance of a patent for the Dobbs placer, and rendered a decision awarding the land to Dobbs and denying the petitioner's claim to his said location. December 11, 1882, petitioner took an appeal to this Department from said decision of November 23, with assignments of error. December 19, 1882, you denied

the right of appeal, and dismissed it, presumably upon the ground that a protestant, not being properly a party in interest, has no right to appeal.

It is claimed by the defendant that all the material facts have not been set forth in the petition; but I think those set forth are sufficient to enable me to dispose of the question whether the order prayed for should be made.

It appears from the facts disclosed that the defendant made application for patent in proper form, gave the requisite notice by posting and publication and made due proof thereof; and that during the period of publication, no adverse claim was filed by Montague.

The protestant, however, claims that a patent should not be issued to the defendant, because, under the facts stated, the Commissioner should have first ordered a hearing and determined the question whether the character of the land was mineral, and whether it was more valuable for mineral than for agricultural purposes.

It seems to be conceded that the lands were returned as agricultural by the surveyor-general, and were therefore *prima facie* of that character.

Both parties to this contest, however, have alleged and proved that the lands are in fact mineral, and are more valuable for mineral than agricultural purposes; and both have made claim to the land, or parts of it, as mineral, and sought to obtain title thereto under the laws providing for the mode of obtaining titles to mineral lands.

The protestant cannot, therefore, now be heard to deny the mineral character of the land, and in that way prevent a patent from being issued to the defendant.

The particular complaint, however, which the protestant makes is, that you refused to order a hearing, as requested by him, for the purpose of determining the character of the land and clearing the record of the homestead entries appearing thereon. He had, however, asserted the mineral character of the land, and made a mineral location thereon, before such request was made.

It the lands were in truth mineral, I think the fact "that they had been previously borne on the official records as agricultural lands" was immaterial (*Scogin v. Culver*, 7 C. L. O., 23).

After such mineral locations were made, the agricultural entries were canceled, and therefore present no obstacle to the issue of mineral patents. I do not think, under the facts of this case as they appear on the record, that your refusal or neglect to direct a hearing to ascertain the character of the land was such an error or maladministration of the laws as would entitle the petitioner to the order asked for in the petition.

It will be observed that when his mineral location was rejected on account of Kean's cash entry, he took no appeal, nor did he file any

adverse claim during the publication of the notice of defendant's location.

The petitioner further claims that the Commissioner erred in holding that the lands were valuable only as containing placer deposits, and not veins or lodes.

I do not think that the deposit which both parties allege exists in the lands in controversy is of the character described as existing "in veins or lodes of quartz or other rock in place" in section 2320, Rev. Stats. Upon an examination of the authorities in the Federal and State courts referred to by counsel and in your decision, I think it was correctly held by you that fire-clay or kaolin, in the manner in which it exists as a deposit, is properly the subject of a placer location, and not a vein or lode. (*North Noonday v. Orient*, 6 Sawyer, 308; *Stevens v. Williams*, 1 McCrary, 486; *Moxon v. Wilkinson*, 2 Montana, 424; *The Eureka Case*, 4 Sawyer, 310; *Jupiter v. Bodie*, 7 Sawyer, 97.)

I am of the opinion that substantial justice has been done, and that the order prayed for in the petition should be denied, and the motion to dismiss the application be granted.

PRACTICE—CERTIORARI—SUPERVISORY AUTHORITY.

CLONTARF CLAIM.

Under rule 83 the matter subject to supervision must be so presented that a reasonable presumption is raised in the eye of the law that there has been error or oversight, or at least there must be such showing in the application as will convince the Department that a proper administration of the public business requires its intervention in order to prevent undue haste, or, possibly, injury to important and valuable interests.

Secretary Kirkwood to Commissioner McFarland, February 14, 1882.

I forward herewith an application, dated the 12th ultimo, by A. W. Rucker, attorney in behalf of S. G. Wright *et al.*, protestants against the issue of patent to the Saint Bernard Mining Company of certain premises in Colorado known as the Clontarf claim, asking that the papers be ordered before me for examination under rule 83 of practice.

The paper (verified by oath) briefly recites that on the 29th of October last said parties filed in the Leadville office a protest against issue of patent; that you on the 7th of January dismissed said protest, and on the 13th of January denied their right of appeal to this Department.

Inasmuch as the oath bears date on the 12th of January, and the insertion of the date of January "thirteenth" in the body of the affidavit is apparently in a different handwriting, it is manifest that the same was prematurely made, and when so sworn to no such denial of appeal had been made by you; nor is there filed any copy of any such denial, or of