

as indicated above, could not be shifted to the purchaser in the absence of an express agreement to that effect. This being so, I think it plain that the act of March 7, 1928, *supra*, can have no retroactive effect to the extent either of imposing a lien against the land or in any way to alter the rights and obligations of the parties. So to do would have the effect of impairing rights and obligations that had become vested and fixed under the prior legislation and this would run counter to the doctrine recognized and upheld by the court in *United States v. Heinrich* (12 Fed. 2d series, 938). See also *Choate v. Trapp, supra*.

In conclusion I have to advise that, in my opinion, Mr. Syrie is liable for repayment of only such proportionate part of the construction costs of the Wind River irrigation project as are properly assessable against such additional areas as may have been brought under irrigation after the acquisition of title by him. As to this acreage he is in no position to insist or demand that the Government furnish water free of costs, but it would be advisable, as suggested in Solicitor's opinion of November 6, 1926, above referred to, to require the execution of an agreement to that effect and delivery of water to such additional areas may be withheld until he agrees to pay therefor.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

LAYMAN ET AL. v. ELLIS

Decided October 16, 1929

MINERAL LANDS.

The question whether a given substance is locatable or enterable under the mining law is not to be resolved solely by the test of whether the substance considered has a definite chemical composition expressible in a chemical formula.

MINERAL LANDS.

Mineral lands include not merely lands containing metalliferous minerals, but all such as are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture.

MINERAL LANDS—GRAVEL.

Gravel is such substance as possesses economic value for use in trade, manufacture, the sciences, and in the mechanical or ornamental arts, and is classified as a mineral product in trade or commerce.

MINERAL LANDS—GRAVEL—MINING CLAIM.

Lands containing deposits of gravel which can be extracted, removed and marketed at a profit are mineral lands subject to location and entry under the placer mining laws.

MINING CLAIM—MINERAL LANDS—DISCOVERY.

A placer discovery will not sustain a lode location and no right to possession of loose, scattered deposits, not rock in place, can be acquired by an attempted lode location.

MINING CLAIM—POSSESSION—HOMESTEAD ENTRY.

Land in the actual and peaceable possession of a mineral claimant in apparent good faith under claim of right to which he can acquire a valid possession or title under applicable laws, is not subject to homestead entry by another.

PRIOR DEPARTMENTAL DECISION OVERRULED.

Case of *Zimmerman v. Brunson* (39 L. D. 310), overruled.

EDWARDS, Assistant Secretary:

Joseph Thomas Ellis has appealed from a decision of the Commissioner of the General Land Office, dated April 13, 1929, holding for cancellation his homestead entry, Los Angeles 044941, allowed January 16, 1928, under section 2289, Revised Statutes, for lots 2, 11, and 13, Sec. 13, T. 16 S., R. 16 E., S. B. M., containing 68.80 acres.

On April 29, 1928, Gertrude B. Layman and Dallas E. Layman instituted a contest against the entry, alleging prior possessory rights to the land by virtue of two certain mining locations made November 30, 1925, for valuable deposits of gravel; that the locations were valid and existent at the date of said homestead entry; that by reason of the mineral character of the land and also their actual and continued possession thereof, the land was not subject to entry under the homestead law.

Upon evidence adduced at a hearing of the contest the register found that the land was valuable for its gravel deposits, the commissioner found that at least one-half of it was so valuable, but in view of the rule in *Zimmerman v. Brunson* (39 L. D. 310), both officers considered that they were bound to hold that lands valuable on account of sand and gravel deposits were not subject to entry under the mining laws and not excluded by reason thereof from entry under the homestead law. The register, however, held that as the land within the Gertrude B. Layman claim was actually occupied and used in good faith under color of title, at the date of the entry of Ellis, the entry to the extent of its conflict with such claim should be canceled. The commissioner's action was based upon the finding that the entry was made for the purpose of speculating on the value of the gravel deposits.

The material facts disclosed by the record appear to be as follows: Copies of the location notices show that the mining claims were located as veins or lodes and according to the dimensions permissible for lode claims, and not in conformity with legal subdivisions of the township wherein the land lies. Maps filed show the locations adjoin on the end lines, the Gertrude B. Layman claim being the

northernmost and the Dallas E. Layman claim the southernmost, and that, roughly speaking, they together cover the east half of the homestead entry and fractions of adjacent tracts to the east. The gravel deposits had been utilized before the locations in question were made, and since their location the Laymans have extracted, sold, and delivered about 40,000 cubic yards of gravel of the value of \$20,000 from the Gertrude B. Layman claim for use in road and building construction on the State highway system and have installed facilities to the value of \$5,000 on that claim to elevate, screen, and segregate the gravel. The gravel deposits are five feet or more thick lying under from one to three feet of mixed sand gravel and soil cover, and the process of extraction requires the removal of the cover and the screening of the gravel from the sand, the latter being discarded. The excavations are in the form of pits of 60 feet or more in width and extending practically the length of the Gertrude B. Layman claim. No gravel has been mined or removed by the Laymans from the other claim, but the testimony is uncontradicted that deposits of gravel were discovered in the post holes dug thereon. The record clearly established that the entryman at the time he made his entry had full knowledge of the nature and extent of the locations, of the Laymans' claims of title and of the actual possession and development of the Laymans but was of the opinion they were without right or color of title. Upon making entry, entryman notified the mining claimants to cease operations, but a few days later he and D. E. Layman consulted the acting register of the local land office as to the legality of an agreement between them under which Layman could remove the gravel provided he paid the entryman for it. It is said that officer was of the opinion that the rules respecting the removal of timber upon an unperfected entry by a homestead entryman was applicable to the situation, and the register appears to have advised the parties that such a sale would not be in violation of law if the proceeds of sale were applied to the improvement of the entry. Thereupon entryman and Layman entered into a written contract dated January 24, 1928, the substance of which is that Ellis allows Layman the exclusive right to work two pits of gravel on the land for seven months or until the former makes final proof, the latter to pay 15 cents per ton or 20 cents per cubic yard for all gravel hauled away, the proceeds to be used for improvement of the remainder of the entry. Layman was not to erect any buildings, allow occupancy of any building or interfere with growing crops or improvements on the land without the consent of Ellis. After this agreement was made Layman continued to mine and remove gravel from the northernmost claim and in September, 1928, Ellis peaceably took possession of a house on that claim near the workings, formerly

in possession of a stranger to this controversy, and continued in possession thereof and cleared some 15 or 20 acres of brush from parts of the entry for purposes of cultivation. As to the area affected by the contract, operations under which would entail denudation of, or material damage to the cultivable soil, the entryman will not be heard to say that such area was more valuable for cultivation, but as to the residue of surface contestant did not establish that ordinary crops of the region could not be grown thereon or that such part was more valuable for its gravel deposits. It is uncontradicted that the entryman paid substantial sums assessed upon the land by the local irrigation district and had the right to necessary water to sufficiently irrigate the same.

The contract does not warrant the inference that damage to the undisturbed cultivable soil on the entry or a substantial part thereof was contemplated by the contract. There are restrictions as to time and place therein, and provision for protection of crops and improvements. The acts recited of the entryman are consistent with a *bona fide* intent to comply with the homestead law, and where such consistency appears fraud is not presumed. The entryman had no right to sell the gravel, but although he may have committed trespass that fact would not necessarily invalidate his entry. *Litch v. Scott* (40 L. D. 467); *United States v. Brousseau* (24 L. D. 454). The principles applicable to the sale of timber by an entryman from his entry seem applicable here, and in the timber cases it has been held by the Supreme Court that the entryman can not sell timber for money except so far as it may be cut for purpose of cultivation. *Skaver v. United States* (159 U. S. 491). The incidental power of disposition extends only to *surplus* timber cut and removed from so much of the tract as is cleared or in clearing for cultivation. *United States v. Murphy* (32 Fed. 376, 385).

While the sale of the gravel was unlawful, under the facts and surrounding circumstances, bad faith in making the entry is not established.

Bad faith in making the entry not being established, the question arises whether the entry or any part thereof was invalid because of the existence of gravel deposits thereon admittedly valuable. The question is not new. In *Zimmerman v. Brunson*, *supra*, it was held (syllabus) that—

Deposits of gravel and sand, suitable for mixing with cement for concrete construction, but having no peculiar property or characteristic giving them special value, and deriving their chief value from proximity to a town, do not render the land within which they are found mineral in character within the meaning of the mining laws, or bar entry under the homestead laws, notwithstanding the land may be more valuable on account of such deposits than for agricultural purposes.

Although the commissioner held that he was governed by the rule in *Zimmerman v. Brunson*, *supra*, he was of the opinion that valuable deposits of gravel should be held subject to appropriation under the mining law for the reason that they are valuable mineral deposits, and that the rule in that case should be modified.

Data are presented contained in publications of the Geological Survey, entitled "Mineral Resources of the United States," as evidence of the marked increase in production, use, and price of this commodity since 1909, when the decision in the *Zimmerman case* was rendered. Supplementing the data presented by the commissioner, this series of publications show that in 1909 there was sold and used in the United States 23,382,904 tons of gravel of all kinds of the value of \$5,719,886, of which amount California produced 914,035 tons, valued at \$169,476 (1910, Part 2, p. 602); that in 1927 the combined tonnage of building, paving and railroad ballast gravel used and sold in the United States was 103,865,930 tons, valued at \$51,238,388. Of this amount California produced 2,460,072 tons of paving gravel alone of the value of \$1,177,086 (1927, Part 2, pp. 160-181). The commissioner's statement also appears to be correct that "according to these tables in 1927, California produced over seven times the amount it did in 1909, the value of the 1927 production being over 26 times the value in 1909." The tables for the year 1927 also show an average value throughout the United States of all gravel sold of 67 cents per ton. A noteworthy feature in recent years is the growth in the size and number of large plants producing washed or otherwise cleaned gravel and crushed stone of standardized grading and size, bringing about keen competition between gravel and crushed stone for wide market areas in contrast to the strictly local market of a few years ago, this competition developing controversies and discussion as to zone and commodity freight rates. (1925, Mineral Resources, Part 1, p. 47.) In these publications gravel and sand have uniformly been classed as a mineral resource. They are also included in the list of useful minerals (U. S. Geological Survey Bulletins, Nos. 585, 910) and mineral supplies (U. S. Geological Survey Bulletin No. 666).

From what has been stated there can be no question that gravel deposits are definitely classified as a mineral product in trade and commerce and have a pronounced and widespread economic value because of the demand therefor in trade, manufacture, or in the mechanical arts.

The *Zimmerman case* quotes the rule in *Pacific Coast Marble Co. v. Northern Pacific R. R. Co. et al.* (25 L. D. 233), frequently since applied as a test of the mineral character of land, reading as follows (p. 244):

Whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws.

But it was nevertheless attempted to take the deposit under consideration from under the rule, *first*, because the standard authorities have failed to classify sand and gravel as mineral, and *second*, because the deposit had no special property or characteristic giving it special value, and *third*, its chief value arose from industrial conditions peculiar to the locality where the deposit was found.

The deposit here is characterized as beach gravel. Gravel is variously defined as "fragments of rock worn by the action of air and water larger and coarser than sand" (Glossary of the Mining and Mineral Industry, U. S. Geological Survey Bulletin No. 95), as "more or less rounded stones and pebbles often intermixed with sand" (28 C. J. 824), as "sand fragments of mineral, mainly quartz" (Bayley on Mineral and Rock, p. 202). Many of the beach pebbles are composed largely of quartz, because it is the most common mineral which physically and chemically can resist the wear of wave action. Diller, Education Series of Rock Specimens (U. S. Geological Survey Bulletin No. 150, p. 57). The distinction between sand and gravel is largely one of gradation in size. (Idem 59.) As gravel is not composed always of the same mineral substances, it would not be expected that gravel would appear in a strict mineralogical classification based on definite chemical composition, but examination of the decisions of the department and the courts disclose that questions whether a given substance is locatable or enterable under the mining law are not resolved solely by the test of whether the substance considered has a definite chemical composition expressible in a chemical formula. Such a criterion would exclude a number of mineral substances of heterogeneous composition that have been declared to be subject to disposition under the placer mining law, for example, guano, granite, sandstone, valuable clays other than brick clay, which may be made up of a number of minerals and not always the same minerals.

In Lindley on Mines, section 98, after review of the adjudicated cases and rulings of the department, deductions, which seem warranted, are made as to when the mineral character of public land is established. It is stated—

The mineral character of the land is established when it is shown to have upon or within it such a substance as—

(a) Is recognized as mineral, according to its chemical composition, by the standard authorities on the subject; or—

(b) Is classified as a mineral product in trade or commerce; or—

(c) Such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts;—

And it is demonstrated that such substance exists therein or thereon in such quantities as render the land more valuable for the purpose of removing and marketing the substance than for any other purpose, and the removing and marketing of which will yield a profit; or it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in the effort to obtain it.

That valuable gravel deposits fall within categories (b) and (c) of Mr. Lindley can not be disputed.

Good reason also exists for questioning the statement that gravel has no special properties or characteristics giving it special value. While the distinguishing special characteristics of gravel are purely physical, notably, small bulk, rounded surfaces, hardness, these characteristics render gravel readily distinguishable by any one from other rock and fragments of rock and are the very characteristics or properties that long have been recognized as imparting to it utility and value in its natural state.

As to the third ground for exclusion in the *Zimmerman case*, it has not been shown that the gravel deposits in this case derive their value from the proximity between place of production and use, and as heretofore indicated gravel is generally recognized as having special characteristics that render it valuable generally in the mechanical arts. The conclusion, hardly justified when the decision in the *Zimmerman case* was rendered, that the value shown was one arising chiefly from exceptional and peculiar conditions in the locality where the deposit in question was found, is not warranted under present conditions.

In *Northern Pacific Railway Co. v. Soderberg* (188 U. S. 526, 534) it was held that the overwhelming weight of authority was to the effect that mineral lands include not merely metalliferous minerals, but all such as are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture, and the opinion quotes with approval certain observations in *Midland Railway v. Checkley* (L. R. 4 Eq. 19), reading—

Stone is, in my opinion, clearly a mineral; and in fact everything except the mere surface, which is used for agricultural purposes; anything beyond that which is useful for any purpose whatever, whether it is *gravel*, marble, fire clay, or the like, comes within the word "mineral" when there is a reservation of the mines and minerals from a grant of land. (Italics supplied.)

In *Loney v. Scott* (112 Pac. 172) the Supreme Court of Oregon held that building sand worth 50 cents per cubic yard, and marketable in large quantities, as shown by the Director of the Geological Survey in his Reports of Mineral Resources, was mineral

land and subject to location under the placer mining law, and that a patent issued to a railroad company under its place land grant carried no title to such deposits then known to be embraced in a placer mining claim.

The Secretary of the Treasury has held that gravel bought as ballast is entitled to free entry as crude mineral. (25 T. D. 627.) Applying the rule in the *Pacific Coast Marble Company case, supra*, the department has held that land of little value for agricultural purposes, but which contains extensive deposits of volcanic ash, suitable for use in the manufacture of roofing material and abrasive soaps and having a positive commercial value for such purposes is mineral land not subject to disposition under the agricultural laws (*Bennett et al. v. Moll*, 41 L. D. 594); that trap rock particularly suitable, and profitably marketable as railroad ballast, is, when the land in which it is contained is chiefly valuable for such, a valuable mineral deposit (*Stephen E. Day, Jr., et al.*, 50 L. D. 489); that amphibole schist, particularly resistant to the action of water, occurring in proximity to the place of use, and with easy facilities for its transportation, and marketable at a profit for use in the building of a local jetty, was enterable under the mining law (*Lee Davenport et al.*, decided March 20, 1926, unreported); that deposits of fractured granite not serviceable as building stone suitable for rip rap on breakwaters and embankments and useful as railroad ballast and road material, which could be quarried and delivered at a profit and taken from land of no agricultural value, was subject to disposition under the mining law (Charles F. Guthridge, A. 11785, decided August 3, 1928, unreported).

It seems apparent in the *Zimmerman case* and cases based on the same reasoning that the rule in the *Pacific Coast Marble Company case* was not followed, but disregarded on unsubstantial grounds. It has been vigorously criticized by leading text writers on the mining law. (See Lindley on Mines, section 424; Snyder on Mines, section 124.) There is no logical reason in view of the latest expressions of the department why, in the administration of the Federal mining laws, any discrimination should be made between gravel and stones of other kinds, which are used for practically the same or similar purposes, where the former as well as the latter can be extracted, removed and marketed at a profit. The rule in *Zimmerman v. Brunson* will therefore no longer be followed but is overruled.

The evidence in the case warrants the classification of the east half of the entry, to wit, east half of lots 2, 11 and 13, as mineral in character, valuable for deposits of gravel. The entry to that extent was therefore invalid and should be cancelled.

Although the land last described was mineral in character, no valid right to possession was acquired by the Laymans by attempted location of them as lodes or veins. The deposits are loose, scattered deposits, not rock in place. It is well settled that a placer discovery will not sustain a lode location. *Cole v. Ralph* (252 U. S. 286, 295). The lode claimants had no rights that would prevent others entering peaceably and in good faith to avail themselves of the privileges accorded by the mining laws, *Cole v. Ralph, supra*, p. 300, but the east half of the entry being mineral in character, the entryman could acquire no right under the homestead law to such half, no matter if his entry was peaceable and with the acquiescence of the mineral claimant.

It is not shown that the entryman entered into any contract or engagements or made any valuable improvements or expenditures on the land affected by this decision in furtherance of a purpose to comply with the homestead law. He was therefore not misled to his prejudice by a reliance, if any, upon the rule in the *Zimmerman case*. No grievous wrong to him results, therefore, by the overruling of an erroneous decision. Nor was the rule in that case of such breadth and generality as to justify the conclusion that sand and gravel under any circumstances were not locatable under the mining law. It should also be mentioned that the entryman entered land in the actual and peaceable possession of the mineral claimant in apparent good faith under claim of right, to which the latter can acquire a valid possession or title under applicable laws, that is, entry upon land not subject to homestead entry. *Lindgren v. Shuel* (49 L. D. 653); *United States v. Hurliman* (51 L. D. 258, 263).

The entry will be held intact as to west half thereof; as to the east half it should be canceled.

As modified the commissioner's decision is

Affirmed.

PUBLICATION OF NOTICE OF INTENTION TO SUBMIT FINAL PROOF

INSTRUCTIONS¹

DEPARTMENT OF THE INTERIOR,
Washington, D. C., October 19, 1929.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

Attention has been directed to the fact that in many cases it is necessary for registers of local offices to designate a daily paper in

¹ See paragraph 3 of Circular No. 1200 (52 L. D. 683, 685) for a change in the prior existing regulation relating to publication.—Ed.