looking dress shoes of the type manufactured by the McElwain Company.

Nor am I able to say that the McElwain Company, for the stock of which petitioner gave its own stock having a market value of $9,460,000, was then in such financial straits as to preclude the reasonable inference by the Commission that its business, conducted either through a receivership or a reorganized company, would probably continue to compete with that of petitioner. See *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356, 357. It plainly had large value as a going concern, there was no evidence that it would have been worth more or as much if dismantled, and there was evidence that the depression in the shoe trade in 1920–1921 was then a passing phase of the business. For these reasons and others stated at length in the opinion of the court below, I think the judgment should be affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concur in this opinion.

WILBUR, SECRETARY OF THE INTERIOR, *v.* UNITED STATES EX REL. KRUSHNIC.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 63. Argued December 6, 9, 1929.—Decided January 6, 1930.

1. Under the General Mining Law, a perfected location of a mining claim has the effect of a grant by the United States of the right of present and exclusive possession, and so long as the owner complies with that law, this right, for all practical purposes of ownership, is as good as though secured by a patent. P. 316.
2. Failure to perform the annual labor (Rev. Stats. § 2324; U. S. C., Title 30, § 28) renders the claim subject to loss through relocation by another claimant, but it does not *ipso facto* forfeit the claim, and no relocation can be made if work be resumed by the owner after default and before such relocation. P. 317.

3. So far as the Government is concerned, failure to perform labor in any year is without effect, and whenever $500 worth of labor in the aggregate has been performed, and the other requirements, including the payment of the purchase price, have been complied with, the owner is entitled to a patent, even though in some years annual assessment labor has been omitted. P. 317.
4. Under the Mineral Leasing Act of February 25, 1920, which, in respect of lands containing oil shale and other deposits therein specified, substituted a policy of leasing for that of location and acquisition of title, but which, by § 37, saves valid claims existent at the date of the Act and "thereafter *maintained* in compliance with the laws under which instituted," and declares that they may be perfected under such laws, the owner of an oil shale placer claim which was valid at the date of the Act but upon which no labor was performed for the assessment year in which the Act was passed, "maintains" the claim by resuming work thereon in a subsequent year, unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened. P. 317.
5. Where the Secretary of the Interior, in declining to issue a patent for a mining claim, interprets and applies a statute in a way contrary to its explicit terms, he departs from a plain official duty, and the error may be corrected by mandamus in the Supreme Court of the District of Columbia. P. 318.
6. The writ of mandamus in this case should direct a disposal of the application for patent on its merits, unaffected by the temporary default in performance of assessment labor for the year 1920; and that further proceedings be in conformity with the views expressed in this opinion as to the proper interpretation and application of the excepting clause in the Leasing Act, and of Rev. Stats. § 2324. P. 319.

30 F. (2d) 742, affirmed with modification.

CERTIORARI, 279 U. S. 831, to review a judgment of the Court of Appeals of the District of Columbia, which reversed a judgment of the Supreme Court of the District dismissing a petition for mandamus.

Mr. George C. Butte, Special Assistant to the Attorney General, with whom *Solicitor General Hughes,* and *Mr. E. C. Finney,* Solicitor, Department of the Interior, were on the brief, for petitioner.

Where, by the terms of an Act, the Secretary is required, upon application of the claimant, to issue a patent or other certificate of title, Congress, by implication, confers upon the Secretary power to make all determinations of law as well as of fact which are essential to the performance of the duty specifically imposed. In making such determinations, "he acts as a special tribunal with judicial functions." *West* v. *Standard Oil Co.,* 278 U. S. 200; *Work* v. *Braffet,* 276 U. S. 560.

The construction of the Act by the Secretary involved the exercise of judgment and discretion, the exercise of judicial functions. In resistance to the writ of mandamus it is believed sufficient to show that the decision of the Secretary was not in apparent defiance of law, nor arbitrary or capricious, but within the scope of the administrative duty confided to him. *Hall* v. *Payne,* 254 U. S. 343; *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316; *Ness* v. *Fisher,* 223 U. S. 683; *Alaska Smokeless Coal Co.* v. *Lane,* 250 U. S. 549; *U. S. ex rel. Dunlap* v. *Black,* 128 U. S. 40; *U. S. ex rel. Miller* v. *Raum,* 135 U. S. 200.

The decision was in accord with previous rulings of the Department. *E. C. Kinney,* 44 L. D. 580; *Interstate Oil Corp'n and Frank O. Chittenden,* 50 L. D. 262; *Cronberg* v. *Hazlett,* 51 L. D. 101; Headnote to the Mining Regulations subsequent to the passage of the Leasing Act, 49 L. D. 58. Cf. *Hodgson* v. *Midwest Oil Co.,* 17 F. (2d) 71.

The decision disturbed no vested right of respondent. Respondent's theory as to the nature of the estate after default in the performance of assessment work, if by estate is meant the exclusive right of possession, is not sustained by the opinion in *Belk* v. *Meagher,* 104 U. S. 279, and is incompatible with numerous opinions of this Court and of other eminent authorities on the mining law. Furthermore, this theory would seem to involve the consequence that while the Government could, after the

default, clothe a third party with the right to divest the locator's estate, it could not of itself by legislation directly divest it.

Under the general mining law when the default in the performance of annual labor occurred, the land was open public domain, subject to location and purchase under the mining laws by another; the possessory right of the original locators had come to an end and all that remained to them was the privilege of resuming work before another entered whereby the delinquency would be condoned, and the right of possession restored. The possessory right terminates upon the happening of the default. *Black* v. *Elkhorn Mining Co.,* 163 U. S. 445; *Farrell* v. *Lockhart,* 210 U. S. 142; *Union Oil Co.* v. *Smith,* 249 U. S. 337; *Cole* v. *Ralph,* 252 U. S. 286; *Little Gunnell Co.* v. *Kimber,* 15 Fed. Cas. No. 8402, p. 629; *Swanson* v. *Kettler,* 17 Idaho 321, affirmed *sub nom. Swanson* v. *Sears,* 224 U. S. 180; *Honaker* v. *Martin,* 11 Mont. 91. Cf. § 1, Act of July 2, 1898, c. 563, 30 Stat. 651.

Until the claimant does some act toward paying the purchase money, he obtains no vested right of purchase or claim to a patent. *Benson Mining Co.* v. *Alta Mining Co.,* 145 U. S. 428; *Black* v. *Elkhorn Mining Co.,* 163 U. S. 445.

Congress has power to withdraw the permission to resume work, and its offer to sell the land. *Cameron* v. *United States,* 252 U. S. 450. Cf. *Frisbie* v. *Whitney,* 9 Wall. 187; *Yosemite Valley Case,* 15 Wall. 77; *Shiver* v. *United States,* 159 U. S. 491; *Russian-American Packing Co.* v. *United States,* 199 U. S. 570.

The decision of the Secretary was correct.

We think it plain that the words "thereafter maintained in compliance with the laws under which initiated" refer primarily to the continued performance of assessment work required by such laws for each and every

statutory period. That was the only exaction the mining law had prescribed to maintain a claim. Moreover, the frequency with which " maintained " or equivalent expressions, " kept up," " kept alive," " preserved," are encountered in the decisions of this Court (See *Gwillim* v. *Donnellan,* 115 U. S. 45; *Cole* v. *Ralph,* 252 U. S. 286; *El Paso Brick Co.* v. *McKnight,* 233 U. S. 250; *Union Oil Co.* v. *Smith,* 249 U. S. 337) in referring to the necessity of the annual assessment work, gave it a well-understood meaning.

The theory that the right to resume work under § 2324 is perpetuated by the Leasing Act as to the mineral deposits mentioned in the latter, is opposed to the policy and purpose of the Act. First, it would take away the penalty of forfeiture by relocation imposed in the same section to counterbalance the privilege of resumption. The practical effect of the recognition that such privilege continues, is to render the estate of the locator terminable only at his will and pleasure, no matter how negligent the claimant has been in developing the land. He could hold the claim against any seeker of rights and grantees under the Leasing Act and against the Government itself, except upon establishment that the claim had been abandoned.

Second, if the Leasing Act intended that no new rights could be initiated by relocation, it necessarily follows that it did not intend that any lapsed rights should be reinstated. Section 2324 merely created a race for priority of reëntry for the purpose of development. The only advantage the prior locator had over the relocator was that he could dispense with the initial acts of location. The latter could adopt the previous discovery of the prior locator.

Third, to hold that the right to resume work was preserved by the Leasing Act, would render its proper admin-

istration with respect to lands known to be valuable for oil shale deposits, difficult if not impossible.

An actual entry or office found is not necessary to enable the Government to take advantage of a condition broken, and to resume the possession of lands that have been forfeited. *United States* v. *Repentigny,* 5 Wall. 211; *Schulenberg* v. *Harriman,* 21 Wall. 44; *Farnsworth* v. *Minnesota & P. R. Co.,* 92 U. S. 49; *McMicken* v. *United States,* 97 U. S. 204.

Respondent's contention that some overt act by the Government should take place evincing an intent to repossess the land, or that some judicial proceeding should be initiated before work was resumed, is predicated upon the fallacious premise that the right of resumption of work after default remained after the Leasing Act, and that the Government, therefore, must act the part of a relocator, and get in before the locator gets back.

The entry and improvements made after the default by the respondent in an effort to qualify him to obtain a patent were made in violation of law. He could gain no rights thereby. He, therefore, could set up no equities against the Government by reason thereof. *Deffeback* v. *Hawke,* 115 U. S. 392; *Sparks* v. *Pierce,* 115 U. S. 408.

Messrs. Langdon H. Larwill and *Chester I. Long,* with whom *Messrs. Charles S. Thomas, Malcolm Lindsey, George K. Thomas,* and *Peter Q. Nyce* were on the brief, for respondent.

Mandamus is the proper remedy. *Roberts* v. *United States,* 176 U. S. 221; *Ballinger* v. *Frost,* 216 U. S. 240; *Lane* v. *Hoglund,* 244 U. S. 174; *Work* v. *McAlester-Edwards Co.,* 262 U. S. 200; *Payne* v. *Central Pac. R. Co.,* 255 U. S. 228; *West* v. *Standard Oil Co.,* 278 U. S. 200.

The decision of the Secretary was erroneous. A valid mining claim is property. *Forbes* v. *Gracey,* 94 U. S. 762;

Belk v. *Meagher,* 104 U. S. 279; *Manuel* v. *Wulff,* 152 U. S. 505; *Elder* v. *Horseshoe Co.,* 194 U. S. 248; *Elder* v. *Wood,* 208 U. S. 226; *Bradford* v. *Morrison,* 212 U. S. 389; *Yosemite Nat'l Park,* 25 L. D. 48; *Work* v. *Braffet,* 276 U. S. 560.

It has been repeatedly held that the Government has no concern with the performance of the annual labor under § 2324. *McEvoy* v. *Megginson,* 29 L. D. 164; *Nichols* v. *Priest,* 29 L. D. 401; *In re Wolenberg,* 29 L. D. 302; *Nielson* v. *Champagne Co.,* 29 L. D. 491. Mining Regs., § 55.

Moreover, the performance or nonperformance of annual labor under § 2324 did not affect the right of a locator to a patent under § 2325.

Section 2324 is a penal statute to be construed strictly in favor of the claim-owner. The penalty for failure to perform assessment work within the assessment year has been confined strictly within the language of the statute. The rule has been firmly established that the owner of a mining claim does not lose his estate upon such failure, and that the only penalty resulting from it is the possibility that adverse rights may be initiated, provided always that such initiation take place prior to the resumption of work by the original owner. *Belk* v. *Meagher,* 104 U. S. 279; *North Noonday Mining Co.* v. *Orient Mining Co.,* 1 Fed. 522; *Bingham Copper Co.* v. *Ute Copper Co.,* 181 Fed. 748; *Lacey* v. *Woodward,* 5 N. M. 583; *Emerson* v. *McWhirter,* 133 Cal. 510; *Madison* v. *Octave Oil Co.,* 154 Cal. 768; *Field* v. *Tanner,* 32 Colo. 278; *Knutson* v. *Fredlund,* 56 Wash. 634; *Florence-Rae Copper Co.* v. *Kimbel,* 85 Wash. 162. Distinguishing *Hodgson* v. *Midwest Oil Co.,* 17 F. (2d) 71.

There is nothing in the words of § 37 to show any intent to repeal any portion of the old mining laws under which the claim in question was located. No additional burdens

in the maintenance are placed upon its owner, nor is any privilege or right which he enjoyed under the old laws taken away by the new. If any such deprivation had been attempted, there would be presented a question of the constitutional power of Congress.

The Secretary has attempted to preserve all of the burdens placed upon the owner by § 2324, and, at the same time, to take away the benefit of the right of resumption which is conferred by that section. Such a construction is impossible. Cf. *Thatcher* v. *Brown,* 190 Fed. 708.

The policy or purpose of the Leasing Act cannot affect claims excepted from its operation. They must be scrutinized in the light of the policy and purpose of the old mining laws under which they were initiated. The policy and purpose of the latter were to encourage the development of the mineral resources of the country by extending privileges to the persons who undertook such development. Admittedly, under such prior laws, the Government had no interest in annual labor.

Abandonment and forfeiture distinguished. Lindley on Mines, 3d ed., vol. 2, § 643, pp. 1597, 1598; *Justice Mining Co.* v. *Barclay,* 82 Fed. 554.

The Leasing Act has not removed the necessity of assessment work on the part of the owners of mining claims covering the mineral substances embraced in that Act. If assessment work is in default and the owner fails to resume it, a third person may make application for a lease or may locate the ground for mineral substances not covered by the Leasing Act. Again, the question may be raised by a third person who has initiated rights under laws other than the mining laws.

In the absence of some appropriate judicial action, there must be some appropriate legislative action before a forfeiture may be accomplished for condition broken.

Spokane & B. C. R. Co. v. *Washington & G. N. R. Co.*, 219 U. S. 166; *St. Louis, I. M. & S. R. Co.* v. *McGee*, 115 U. S. 469.

Mr. Justice Sutherland delivered the opinion of the Court.

The disposition of this case depends upon the construction and application of § 2324, R. S. (U. S. C. Title 30, §28), and the effect upon its provisions of § 37 of the Mineral Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, 451 (U. S. C. Title 30, § 193). Section 2324, R. S., which has its origin in § 5 of the Mining Act of 1872 (c. 152, 17 Stat. 91, 92), provides:

"On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. . . . and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

By § 2325, R. S. (U. S. C., Title 30, § 29), provision is made for issuing patents for claims located under the mining laws. One of the prerequisites, and the only one in respect of labor, is that the claimant must show "that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors."

The Leasing Act of 1920 effected a complete change of policy in respect of the disposition of lands containing deposits of coal, phosphate, sodium, oil, oil shale, and gas. Such lands were no longer to be open to location and acquisition of title, but only to lease. But § 37 (U. S. C. Title 30, § 193) contains a saving clause protecting "valid claims existent at date of the passage of this Act and

thereafter maintained in compliance with the laws under which initiated," and declaring that they "may be perfected under such laws, including discovery."

On October 1, 1919, respondent and seven associates, all qualified under the law, located a tract of land in Garfield County, Colorado, under the name of Spad No. 3 placer claim. The land contained valuable deposits of oil shale and was open to appropriation under the mining laws of the United States. Spad No. 3 placer claim formed one of a group of six oil placer claims, numbered Spad No. 1, 2, 3, 4, 5 and 6 respectively, all located and owned by the same persons, and lying adjacent to each other. The assessment year 1920, by act of Congress, was extended until July 1, 1921. Prior to that date, annual labor amounting in value, it was asserted, to more than $600 was performed on claims numbered 4, 5 and 6, with the intention that said labor should apply to the entire group.

Subsequently, respondent acquired the interest of his co-locators in the Spad No. 3, and, during and for the assessment year 1921, performed thereon assessment labor of an admitted value of more than $100, and continued to perform labor and make improvements on the claim until the aggregate value exceeded $500. On September 25, 1922, he applied for a patent, and, having complied with the statutory requirements and paid the purchase price, obtained final receiver's receipt on December 16, 1922. No relocation of the claim was ever attempted, nor was the valid existence or maintenance of the claim ever challenged in anywise by the United States, or by anyone, prior to the issue of the receiver's receipt. Thereafter, a proceeding against the entry was instituted by the Commissioner of the General Land Office; and that officer, after consideration, held the claim null and void upon the sole ground of insufficient assessment labor for the year 1920. This holding was affirmed by the Secretary of the Interior.

In all the proceedings before the land officers and the Secretary, it was conceded, as it is here conceded, that the claim was valid and existent when the Leasing Act was passed; and that no reason existed, or now exists, for withholding a patent, save the alleged failure of assessment labor for the assessment year 1920. The Secretary held that by such failure, all rights to the claim became extinguished and could not be saved or revived by a resumption of work.

Thereupon, respondent applied by petition to the Supreme Court of the District of Columbia for a writ of mandamus to compel the Secretary to issue a patent to the claim. After a hearing on rule to show cause, that court discharged the rule and dismissed the petition. Upon appeal this judgment was reversed by the Court of Appeals for the District. 30 F. (2d) 742.

Two questions are presented for determination: (1) Did the Leasing Act of 1920 have the effect of extinguishing the right of the locator, under § 2324, to save his claim under the original location by resuming work after failure to perform annual assessment labor? (2) Is the case a proper one for the writ of mandamus?

1. The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is "real property" subject to the lien of a judgment recovered against the owner in a state or territorial court. *Belk* v. *Meagher,* 104 U. S. 279, 283; *Manuel* v. *Wulff,* 152 U. S. 505, 510-511; *Elder* v. *Wood,* 208 U. S. 226,

232; *Bradford* v. *Morrison,* 212 U. S. 389. The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent. While he is required to perform labor of the value of $100 annually, a failure to do so does not *ipso facto* forfeit the claim, but only renders it subject to loss by relocation. And the law is clear that no relocation can be made if work be resumed after default and before such relocation.

Prior to the passage of the Leasing Act, annual performance of labor was not necessary to preserve the possessory right, with all the incidents of ownership above stated, as against the United States, but only as against subsequent relocators. So far as the government was concerned, failure to do assessment work for any year was without effect. Whenever $500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment labor had been omitted. *P. Wolenberg et al.,* 29 L. D. 302, 304; *Nielson* v. *Champagne Mining & M. Co.,* 29 L. D. 491, 493.

It being conceded that the Spad No. 3 "was a valid claim existent on February 25, 1920," the only question is whether, within the terms of the excepting clause of § 37, the claim was "thereafter maintained in compliance with the laws under which initiated." These words are plain and explicit, and we have only to expound them according to their obvious and natural sense.

It is not doubted that a claim initiated under § 2324, R. S., could be maintained by the performance of annual assessment work of the value of $100; and we think it is no less clear that after failure to do assessment work, the owner equally maintains his claim, within the meaning

of the Leasing Act, by a resumption of work, unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened; for as this court said in *Belk* v. *Meagher, supra,* at page 283, "His rights after resumption were precisely what they would have been if no default [that is, no default in the doing of assessment labor] had occurred." Resumption of work by the owner, unlike a relocation by him, is an act not in derogation but in affirmance of the original location; and thereby the claim is "maintained" no less than it is by performance of the annual assessment labor. Such resumption does not *restore* a *lost* estate—see *Knutson* v. *Fredlund,* 56 Wash. 634, 639; it *preserves* an *existing* estate. We are of opinion that the Secretary's decision to the contrary violates the plain words of the excepting clause of the Leasing Act.

2. While the decisions of this Court exhibit a reluctance to direct a writ of mandamus against an executive officer, they recognize the duty to do so by settled principles of law in some cases. *Lane* v. *Hoglund,* 244 U. S. 174, 181, and cases cited. In *Roberts* v. *United States,* 176 U. S. 221, 231, referred to and quoted in the *Hoglund* case, this Court said:

"Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree,

a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

See also *Ballinger* v. *Frost,* 216 U. S. 240, 250.

In this case, the Secretary interpreted and applied a statute in a way contrary to its explicit terms, and in so doing, departed from a plain official duty. A writ of mandamus should issue directing a disposal of the application for patent on its merits, unaffected by the temporary default in the performance of assessment labor for the assessment year 1920; and that further proceedings be in conformity with the views expressed in this opinion as to the proper interpretation and application of the excepting clause of the Leasing Act of February 25, 1920, and of § 2324, Revised Statutes of the United States. A writ in that form follows the precedent established by this Court in respect of the writ of injunction in *Payne* v. *Central Pac. Ry. Co.,* 255 U. S. 228, 238, and *Payne* v. *New Mexico,* 255 U. S. 367, 373, as being better suited to the occasion than that indicated by the District Court of Appeals. As so modified the judgment of that court is

Affirmed.