

PLACER MINING LAW IN ALASKA¹

Placer Mining Law as administered in the district of Alaska may properly invite special though brief consideration in the course of general study of the law of mining upon the public lands of the United States. Some peculiar conditions there obtaining have presented to the courts new problems for solution, or have called for new applications of familiar principles; and that judicial field, embracing probably the largest and richest area of placer deposits on the globe, finds itself furnished with a more scanty equipment of written law touching the acquisition of possessory rights in mineral lands than any one of the mining states and territories in our contiguous continental area. To this lack of statutory regulation of the subject matter is largely due, as we shall see, the excessive litigation over titles to mining claims, which has made the uncertainty of Alaskan investments a reproach and has operated as a serious drag upon the energy of its mining enterprise. Hence, this discussion of the subject must inevitably take on, to some extent, the aspect of a criticism of the non-action of Congress.

The proceedings to obtain patents of mineral lands from the government call for no separate treatment, either as regards Alaska or as regards placer ground in contradistinction to lode deposits. This is so, not only because the formal steps toward obtaining a mineral patent all follow one beaten track, with whatever region or whatever class of mineral deposits they are concerned, but because the mining interests of Alaska have little to do, thus far, with patented titles. Not one per cent of the located claims have as yet been made the basis of applications for patents; probably at least ninety per cent of the profitable ground will eventually be worked out without ever being divested of government title.² We have here to do, then, only with the possessory estate in unpatented mining claims, and the legal incidents attendant on its acquisition and enjoyment.

Consider for a moment the basis of the estate, and the acts by force of which it vests. The government of the United States more than sixty years ago abandoned all idea of insisting upon

¹ Lecture delivered to the graduate class of the Yale Law School, March 4, 1909. By Thomas R. Shepard, of the Bar of Nome, Alaska.

² See 37 *L. D.* (1908), pp. 257-8.

regalian rights in the mineral wealth of its domain, even in the precious metals, and contented itself with a policy of reservation from sale of its mineral lands;³ and, after submitting perforce to the occupation and enjoyment, by each firstcomer, of the gold fields of the Pacific slope for some eighteen years following the discovery of their wealth, during which period the miners crudely organized themselves under local rules which acquired the force of customary law, the government finally, in 1866, by statute recognized and confirmed the rights which its acquiescence had given rise to, and extended to the discoverer and occupier of mineral land the right to purchase it and receive a patent of ownership in fee.⁴ But the government did more. It threw its mineral lands open not only to purchase by the discoverer and occupier, but to the discoverer's *occupation without purchase*; the Act of 1866, confined to lode deposits, being first extended by an amendatory Act of 1870⁵ to embrace placer ground, and then replaced in 1872 by the substantially equivalent statute still in force, which declares that:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, *and the lands in which they are found to occupation and purchase*, by citizens of the United States," etc.⁶

Observe the phraseology of this broad grant: "The lands in which they are *found*"—there is the requirement of *discovery* of valuable mineral, to differentiate such lands from the general public domain and bring them within the scope of the grant. "To *occupation and purchase*"—there are the privileges conferred, the extent of the grant. Its two components—occupation, and purchase—are specified conjunctively, and the later sections provide the machinery of purchase and fix the price; yet there is no requirement that he who, having discovered mineral, may *occupy* the land (which, as construed, means enjoy to the uttermost—

³ Act of Congress Sept. 4, 1841, Ch. 16, § 10; 5 *U. S. Stats.*, at *Large*, p. 453. Act of July 4, 1866, Ch. 166, § 5; 14 *Stats.*, p. 86; U. S. R. S. § 2318. 1 Lindley on *Mines* (2nd Ed., 1903), §§ 33-36. Shamel on *Mining, Mineral and Geological Law* (1907), p. 24. See *Shoemaker v. United States* (1893), 147 U. S. 282; 37 L. Ed. 170, 171.

⁴ Act of July 26, 1866, Ch. 262, § 1; 14 *Stat. L.*, p. 251. *Jennison v. Kirk* (1879), 98 U. S. 453; 25 L. Ed. 240, 242. *Broder v. Natoma W. & M. Co.* (1879), 101 U. S. 274; 25 L. Ed. 790, 791.

⁵ Act of July 9, 1870, Ch. 235, § 1; 16 *Stat. L.*, p. 217; R. S. § 2329.

⁶ Act of May 10, 1872, Ch. 152, § 1; 17 *Stat. L.*, p. 91; R. S. § 2319.

work out, and render valueless)⁷ must also *purchase* it.⁸ And by a long line of decisions it is established that purchase cannot be compelled, that the permission to occupy, when acted upon, creates a vested possessory estate—not a mere revocable license, but a transferable and inheritable interest in real estate which is subject only to the “paramount title of the United States,” and is property.⁹ And the paramount title of the United States—reserved until patent, which in most instances is never called for—is a “barren ideality;” for the possessory estate being *property*, it is protected by the Constitution from extinguishment without compensation.¹⁰

Here, then,—putting aside the provision for purchase as without significance, purchase being wholly optional with the grantee of the right of possession,—is a grant certainly extraordinary in its liberality. And it is a grant, like other statutory grants of the public lands (the homestead act, the railroad aid acts, and so on), uncertain in the first instance as to its subject matter, and which afterwards becomes definite and operative, and vests an estate in a specific tract, by force solely of certain acts, *in pais*, on the part of the grantee.¹¹

Such a grant, to be guarded in any degree against fraudulent and unmerited acquisition of its great benefits, must needs be hedged about with careful provision for the actual and due performance of those acts on the part of a would-be grantee which are to vest in him the estate. And it was the aim of the law of 1872 to provide such safeguards. But that was done, first, by

⁷ *Forbes v. Gracey* (1877), 94 U. S. 762; 24 L. Ed., 313, 314. *Belk v. Meagher* (1881), 104 U. S. 279; 26 L. Ed., 735, 737. *Silver Bow M. & M. Co. v. Clark* (1885), 5 Mont. 378, 414; 5 Pac. 570, 574. And see R. S. § 2322.

⁸ *Gold Hill Q. M. Co. v. Ish* (1873), 5 Or. 104, 109. *Coleman v. McKenzie*, 29 L. D. 359. See commissioner's instructions to local land offices, *Zabriskie's Land Laws*, p. 207.

⁹ *Forbes v. Gracey*, *supra*. *Belk v. Meagher*, *supra*. R. S. § 910.

¹⁰ *Gwillim v. Donnellan* (1885), 115 U. S. 45, 50. *Gold Hill Co. v. Ish*, *supra*. *McFeters v. Pierson* (1890), 15 Col. 201, 204; 24 Pac. 1076, 1077; 22 Am. St. R. 383, 390. *Seymour v. Fisher* (1891), 16 Col. 188, 192; 27 Pac. 240, 241.

¹¹ *Ryan v. Carter* (1876), 93 U. S. 78; 23 L. Ed. 807, 808. *Heydenfeldt v. Daney G. & S. M. Co.* (1877), 93 U. S. 634; L. Ed. 995, 997. *Tameling v. U. S. Freehold & Co.* (1877), 93 U. S. 644; 23 L. Ed. 998, 1003. *Gwillim v. Donnellan*, *supra*. *Manuel v. Wulff* (1894), 152 U. S. 505; 38 L. Ed. 532, 534. *Talbott v. King* (1886), 6 Mont. 76, 99; 9 Pac. 434, 436.

expressly laying down only two requirements ("discovery," as a preliminary requisite, being presupposed), namely, that "the location must be distinctly marked on the ground so that its boundaries can be readily traced," and that "all records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim;"¹² and secondly, by providing that, subject to these two skeleton requirements:

"The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, and amount of work necessary to hold possession of a mining claim."¹²

The federal legislation, then, evidently contemplates that its scanty outline of the acts needful to vest the possessory estate granted and to apply the grant to a specific area shall be supplemented and particularized, either by local state or territorial legislation, or by more narrowly local district regulation, or by both. And it is plain that only by such supplementary enactments can the grant be safeguarded against uncertainty of operation, and grave abuses. The federal law, which as has been said is a grant to every citizen who chooses to accept it, a grant inchoate and indefinite but presently to become complete and specific by force of the citizen's own acts, does not call for the posting of any notice at the point of discovery or within the limits claimed,¹³ or specify anything as to the posts or other monuments to be set in marking the location on the ground, or fix the length of time after discovery within which the acts of location shall be completed, or require that notice of location shall be anywhere recorded.¹⁴ As to this last, it should be noted that the federal statute does not in terms require that mining claims shall be recorded, but merely specifies what shall be contained in such records of them (if any) as local authority may require.

¹² Act of May 10, 1872, Ch. 152, § 5; 17 *Stat. L.*, p. 92; R. S. § 2324.

¹² Act of May 10, 1872, Ch. 152, § 5; 17 *Stat. L.*, p. 92; R. S. § 2324.

¹³ *Haws v. Victoria Copper Co.* (1895), 160 U. S. 303; 40 L. Ed. 436, 441. *Book v. Justice M. Co.* (1893), 58 Fed. 106, 115.

¹⁴ *Haws v. Copper Co.*, *supra*. *Golden Fleecę G. & S. M. Co. v. Cable C. G. & S. M. Co.* (1877), 12 Nev. 312, 323. *North Noonday M. Co. v. Orient M. Co.* (1880), 1 Fed. 522, 523. *Fuller v. Harris* (1887) 29 Fed. (Alaska) 814, 818. *Meydenbauer v. Stevens* (1897), 78 Fed. (Alaska) 787, 792. *Thomson v. Allen* (1902), 1 Alaska, 636, 639.

All these omitted details, as well as others, are of importance. Rules prescribing them (or at least some of them), and conformity to such rules, are essential to the definiteness and certainty of mining rights and to the defeat and discouragement of groundless litigation, often instituted with blackmail as its motive and perjury as its weapon. And the local jurisdictions of the states and territories (other than Alaska) embracing mineral lands of the public domain have long ago responded to the necessities of the case and exercised the regulative power delegated to them by the federal statute. As Lindley states, miners' district organizations and regulations prescribed by them are, for the most part, things of the past, and were better abolished altogether.¹⁵ But out of fourteen states and territories (other than Alaska) in which the federal mining law finds any considerable application, twelve have by their statutes required the posting of notices on located claims and prescribed the contents of such notices, have specified the character and markings of the monuments to be set, and have fixed a limit to the time following discovery for completing acts of location; ten of them prescribe an amount of annual assessment work going beyond the minimum federal requirement, and regulate its character; and all fourteen require the recording of location notices in local registration offices.¹⁶

In contrast with this ample supplementary regulation, in our other western mining commonwealths, of the conditions upon which the miner's possessory estate may vest, what have we in Alaska?

Lindley says¹⁷ that the lack of any local legislature for the district of Alaska, taken with the unique manner of occurrence of some of its gold deposits, has resulted in the formation of local codes of mining regulations, some of them quite elaborate. It is to be regretted that this statement is not borne out by the facts in some of the most important mining camps, and that in some, where local regulations were adopted, they have long since so fallen into disuse as to be now quite lost sight of—disregarded by and even unknown to the great bulk of the mining community. This of course deprives those early district regulations of the force of

¹⁵ 1 *Lindley*, § 76.

¹⁶ 1 *Lindley*, Sect. 250. The state and territorial statutes presenting these and other details are set forth in the Appendix, 11 *Lindley*, pp. 1792-1938.

¹⁷ 1 *Lindley*, § 76.

customary law,¹⁸ if indeed they ever acquired such force. For example, the miners' regulations of the Cape Nome district, adopted on October 15, 1898, which that author mentions,¹⁹ and which in 1901 were held by the district court to be void as regards their attempt to limit the shape and proportions of placer claims,²⁰ are now no longer treated as in force at all; and it is safe to say that nine-tenths of the present mining population of that district is unaware of their existence. And at Council the recorder was unable to find for me, in 1904, any record of a local code for that rich district.

There is, then, in Alaska virtually no regulation by miners' district organizations of those details of the acquisition of a miners' possessory estate which the federal law has left, everywhere, to local authority. There remains, as a source of such regulation, only general legislation applicable throughout Alaska.

But the Congress of the United States retains in its own hands, coupled with its functions as lawgiver on matters of national concern, the functions of a local legislature for Alaska;²¹ denying to the 87,000²² inhabitants of the district all legislative autonomy whatever. There is much to be said in justification of this withholding of full territorial organization, so long as the political conditions of the district remain in their present chaotic state. But meanwhile, what has Congress done in its capacity of Alaska's local legislature, as regards this matter of detailed regulation of the locating and maintaining of unpatented mining claims? Congress did indeed enact in 1899 a criminal code²³ and in 1900 a civil code²⁴ for Alaska, which were carefully framed and are in general adequate to the local needs. But there is not a line of enactment requiring that a notice of location of a mining claim be posted upon it, or regulating the character

¹⁸ *Harvey v. Ryan* (1872), 42 Cal. 626, 628. *Jupiter M. Co. v. Bodie Con. M. Co.* (1881), 7 Saw. 96, 106; 11 Fed. 666, 674.

¹⁹ 1 *Lindley*, § 448a (p. 796).

²⁰ *Price v. McIntosh*, 1 Alaska, 286, 297.

²¹ *American Ins. Co. v. Canter* (1828), 1 Pet. 511, 542; 7 L. Ed. 242, 255. *First Natl. Bank v. County of Yankton* (1880), 101 U. S. 129, 133; 25 L. Ed. 1046, 1047. *Mormon Church v. United States* (1890), 136 U. S. 1, 43; 34 L. Ed. 478, 491.

²² Population in 1906, according to minority report from house judiciary committee on the bill to provide an additional judge for Alaska. (60th Cong., 1st Sess., H. R. Report No. 1633.)

²³ Act of March 3, 1899, Ch. 429; 30 *Stat. L.*, p. 1253.

²⁴ Act of June 6, 1900, Ch. 786; 31 *Stat. L.*, p. 321.

or markings of the monuments to be set, or limiting the time after a discovery for completing a location based on it; and only the following provision touching the recording of location notices:

"The respective recorders shall . . . record. . . . :—
Tenth. Notices of mining location and declaratory statements; *Provided*, notices of location of mining claims shall be filed for record within ninety days from the date of the discovery of the claim described in the notice, and all instruments shall be recorded in the recording district in which the property or subject matter affected by the instrument is situated," etc.²⁵

The district court for the third division of Alaska appears to regard this provision as mandatory, and its non-observance as entailing a forfeiture;²⁶ following in this the views of the Montana and Nevada courts.²⁷ The district court for the second division, on the contrary, holds the statute directory, its disregard carrying no penalty since none is expressed;²⁸ which is the settled doctrine in California and Arizona,²⁹ as well as the more sound in principle.

The result of this incompleteness of the written law of Alaska on the subject is that unscrupulous persons can and do set up claims to a valid and prior location of mineral land which, in the hands and through the efforts of others, has developed evidence of substantial value. The way in which such claims are set up, and often successfully maintained, may be best illustrated by a concrete example:

B, who in 1907 had purchased the right of the locator in a tundra claim staked in 1906, and who has developed a rich "pay-streak" and is working on a large scale, is sued in ejectment by A, who claims to have made in 1905 a location embracing all that part of B's claim in which the paystreak lies, based on a dis-

²⁵ Act of June 6, 1900, Ch. 786, Tit. I., § 15; 31 *Stat. L.*, p. 327.

²⁶ *Charlton v. Kelly* (1905), 2 *Alaska*, 532, 539. See *Butler v. Good-enough M. Co.* (1901), 1 *Id.* 246, 253, and *Redden v. Harlan* (1905), 2 *Id.* 402, 404.

²⁷ *King v. Edwards* (1870), 1 *Mont.* 235, 241. *Purdum v. Laddin* (1899), 23 *Id.* 387, 389; 59 *Pac.* 153, 154. *Sisson v. Sommers* (1899), 24 *Nev.* 379, 387; 55 *Pac.* 829, 830; 77 *Am. St. R.* 815, 818.

²⁸ In several recent cases, as yet unreported.

²⁹ *McGarrity v. Byington* (1859), 12 *Cal.* 426, 431. *English v. Johnson* (1860), 17 *Id.* 108, 117; 76 *Am. D.* 574, 577. *Bell v. Bed Rock T. & M. Co.* (1868), 36 *Id.* 214, 219. *Jupiter M. Co. v. Bodie Con. M. Co.* (1881), 7 *Saw.* 96, 117; 11 *Fed.* 666, 680. *Rush v. French* (1874), 1 *Ariz.* 99, 146; 25 *Pac.* 816, 830. *Johnson v. McLaughlin* (1884), 1 *Ariz.* 493, 501; 4 *Pac.* 130, 132.

covery of gold made in A's presence in 1903 (by a locator who in 1904 allowed his claim to lapse by non-performance of the assessment work), which discovery A says that he adopted³⁰ when making his own location. A testifies that he set stakes at the four corners of his claim, marking them with its name and the respective corner designations; that he had no paper or blank notices with him, but went to town to obtain some, where he was told by his lawyer that so long as his stakes were properly marked a posted notice was not essential;³¹ and that he therefore did not journey back to the claim, but made out a notice and filed it for record. The suit is brought and tried during 1908, and the jury, viewing the premises, find only one stake anywhere near a corner of what A points out as the ground located by him—and that one, a crooked piece of willow brush, blazed on one side but so weathered that its markings are undecipherable. The recorded notice offered in evidence by A contains a description tied to no landmarks nor neighboring claims, and hence so indefinite and ambulatory that the notice is just as referable to any one of a hundred other claims as to the one in question; but its indefiniteness is not fatal, since there is no statute requiring either the posting or the recording of any notice at all.

Such are the local conditions, in a large part of the Seward Peninsula at least, that a case based on the evidence here supposed is perfectly consistent with either the truthfulness or the absolute falsity of A's claim. A featureless plain or bench, almost flat, and bare of timber except, in places, a gnarled and stunted willow brush; claim-stakes standing or fallen on every hand—not a foot of the country within miles of Nome or Council, for instance, but has been staked and restaked from three to ten times; roving prospectors crossing in every direction on their way to ground beyond, and prone as they pass by to pull up the willow stakes either for use (after whittling off the markings) in staking new claims of their own or, it may be, to eke out a campfire (this notwithstanding a penal statute against disturbance of claim corners); a spring break-up often involving such violence to the

³⁰*Jupiter M. Co. v. Bodie Con. M. Co.* (1881), 11 Fed. (Cal.) 666. *Hayes v. Lavignino* (1898), 17 Utah, 185; 53 Pac. 1029. *Nevada Sierra Oil Co. v. Home Oil Co.* (1899), 98 Fed. (Cal.) 673. *Copper Globe M. Co. v. Allman* (1901), 64 Pac. (Utah) 1019.

³¹*Haws v. Victoria Copper Co.* (1895), 160 U. S. 303; 40 L. Ed. 436, 441. *Book v. Justice M. Co.* (1893), 58 Fed. 106, 115.

surface by ice-movements and flood that many stakes are swept away and that it is impossible to determine afterwards, from any surviving indications, whether or not a trench or pit alleged to have been dug the preceding season by way of assessment work involved the required amount of labor, or was even dug at all; and a large floating population, here to-day and gone to-morrow, so that an honest claimant's own testimony may well have to go uncorroborated or, on the other hand, a plaintiff seeking to win by his perjury may plausibly allege that he does not know what has become of a man who, he says, was with him when he staked his claim, or when he made his discovery, or when he performed his assessment work for such and such a year. Add to these elements a strong motive on the part of the one in possession, as soon as he has found his claim to contain rich pay, to destroy the stakes and other evidences of any location apparently conflicting with and prior to his own, and you have a field where to litigate a mining claim is, in many instances, merely to gamble on the well-known capriciousness of the average jury.

It has become proverbial in Alaska that the finding of rich "pay" is the signal for an adverse claim to the ground, sometimes two or three of them, which had never been heard of while its value was still conjectural. And I have myself been professionally connected with a suit over a claim worth more than a quarter of a million dollars, in which the only *physical* evidence of the plaintiff's ever having staked the ground was a recorded notice; yet the case was tried three times, each trial lasting a full week or longer and entailing upon the two parties a total expense of more than fifteen thousand dollars, and each trial resulting in a disagreement of the jury, and finally it was compromised by the plaintiff's acceptance of fifty thousand dollars in settlement; and I have never been clear in my own mind as to whether my client or the adverse party was the one justly entitled.

And it would be so easy to eliminate the chief causes of all this uncertainty of titles (even without a recasting of the federal law on the lines of the admirable Mexican mining code), and to lift the curse of needless litigation from Alaska's boundless mineral wealth, by the enactment of legislation local to that region, corresponding to that which has long been on the statute books of all the mining states and territories, supplementing the basic requirements of Section 2324 of the United States Revised Statutes.

It is not that Alaskans regard the federal mining law, which has served our western commonwealths for forty years, as unsuited to their own needs; but that Congress fails to appreciate the fact that the general law, as it stands, is but one component of an adequate system of regulation, and that its complement, which Congress alone has the power to enact as law local to Alaska, is wholly lacking.

An exception to this statement should be noted, however, in respect of the required proof of performance of assessment work; Congress having passed an act in 1907, which requires a particularity of such proof that goes far toward putting an end to sham and perjury in that regard.³²

Taking the mining law of Alaska as we find it, however, let us examine some of the questions which its application to placer ground gives rise to.

How far does the rule that a trespass can initiate no right in the public lands, as against one in actual possession, go to prevent an adverse location which will give the locator a standing to challenge the validity of a previous alleged location? That rule is a settled one where there is *possessio pedis* and the trespass is forcible;³³ but where the possession is constructive,—a mere legal presumption arising from recent actual physical occupancy,—or where, though the possession is actual, the technical trespasser's entry is made peaceably and is unresisted, a discovery and staking following upon such entry may constitute a mining location valid as against an actual occupant without right of possession.³⁴ This, of course, is the law everywhere.

But "blanket locations" are common in Alaska. A man locates, in the names of himself and seven others, an association claim of one hundred and sixty acres. Such a claim, extending half a mile in each dimension, may include within its boundaries half a dozen single claims of twenty acres each, previously staked, as

³² Act of March 2, 1907, Ch. 2559; 34 *Stat. L.*, p. 1243.

³³ *Atherton v. Fowler* (1878), 96 U. S. 513; 24 L. Ed. 782. *Eilers v. Boatman*, 3 Utah, 159; 2 Pac. 66. S. C., 111 U. S. 356; 28 L. Ed. 454. *McIntosh v. Price* (1903), 121 Fed. (C. C. A.) 716, 719. *Bulette v. Dodge* (1905), 2 Alaska, 427, 431.

³⁴ 1 *Lindley*, Sects. 217, 218. *Smith v. Doe* (1860), 15 Cal. 101, 105. *Brandt v. Wheaton* (1877), 52 Cal. 430. *Belk v. Meagher* (1881), 104 U. S. 279; 26 L. Ed. 735, 738. *Wilson v. Triumph C. M. Co.* (1899), 19 Utah, 66; 56 Pac. 300; 75 Am. St. R. 718. *Thallmann v. Thomas* (1901), 111 Fed. 277, 279 (C. C. A., 8th Cir.).

well as several small fractions left "open" (that is, not located upon), interspersed among them; yet the corner and side line stakes of the association claim may lie wholly outside the single claims, so that no visible trespass was committed in setting them. But if one of the prior locators, over whose claim a blanket is thus thrown, is in actual possession of it, and objects to the newcomer's staking ground which includes his own, does not the staking of the blanket claim constitute a trespass upon the objector's ground, for the purposes of the rule that a trespass can initiate no rights, equally as if the later locator walked across the other's ground in setting his stakes, instead of around it? Much may be said in support of the view that this is virtually a trespass, making the attempted group location void as against included claims in actual possession under color of right. The Alaska courts have not to my knowledge gone so far as this, however. But it has been wisely held, in the second division, that the blanket location must be supported, as to each detached parcel that it embraces, by a separate discovery thereon, whether those parcels are previously unstaked fractions lying between the claims adversely held, or are such claims themselves.³⁵

The differing limitations of lode and placer claims in point of size—of lode claims, to a maximum length of 1,500 feet and width of 600 feet, and of placer claims to a maximum area of twenty acres for a single locator—are familiar to all. They are here mentioned only as introductory to the subject of restrictions upon the dimensions and shape of placer claims located upon unsurveyed lands. As to these, there has been some difference of view, and of land office practice. In an old land office case, a placer claim in California laid out so as to extend for 12,000 feet along a stream bed in a narrow canyon, yet comprising an area of only twenty acres, was approved and patented. Recently, in a case from Alaska, the general land office rejected an application for a patent of a placer claim in the vicinity of Nome, upon the ground that it was irregular in shape and did not conform to meridian lines, nor to the plan of any system of general public surveys which may hereafter be undertaken in that region. (There have been no public land surveys in Alaska according to the government's general system, but only special surveys of individual claims in connection with applications for mining patents, and a few for homesteads.) On appeal to the Secretary of the In-

³⁵ Recent case, not yet reported.

terior, however, that decision has been reversed, quite recently; the Secretary laying it down as a rule for the future guidance of the land office, in passing on applications for patents, that a placer claim of any shape and with its boundary lines running in any directions will be approved, provided it is of compact form and can be included within a square forty-acre tract, or within an eight acre parallelogram if located by three or four persons, within three forties if by five or six, or within four forties if by seven or eight persons; that, however, no inordinately long and narrow claim can be patented; but that no locator will be compelled to include non-placer ground unless he so desires.³⁶

This ruling, of course, only establishes a modified restriction upon the dimensions and shape of placer claims which will be passed to patent. As to unpatented holdings, the rule laid down in 1901 by the district court for the second division of Alaska, still obtains in that district; namely, that placer claims may be located without regard to the general system of public surveys, and need not conform thereto in any particular.³⁷ This is an extremely liberal construction of the statute,³⁸ a complete disregard of it, indeed; but if "judge-made law" is ever justifiable, it would seem to be so in this matter, for the mountain spurs, gulches, winding streams and buried beach deposits of Alaska are so various in position and irregular in trend and outline, that the rectangular and meridional system of land surveys, which was so admirably adapted to our prairie west, is utterly unsuited to that land—unless, perhaps, to such scattered areas as are agricultural in character; and a general survey, when undertaken, may be on a radically different basis. Meanwhile, even if the plan of the future general survey could be forecast, it would paralyze both prospecting and development if every claim must needs be laid out according to fixed proportions and compass bearings.³⁹

In this connection it should be noted that in 1901 the then district judge for the third division of Alaska, sitting temporarily in the second division, held that where a claim had been located on a winding creek as "commencing at the upper or north end stake of Claim No. 14, thence running along the bed of the creek 1,500 feet, then 300 feet east and west from the center stake,"

³⁶ *Re Snow Flake Fraction Placer* (1908), 37 L. D. 250, 258.

³⁷ *Price v. McIntosh*, 1 Alaska, 286, 295.

³⁸ R. S. § 2331.

³⁹ See 1 Lindley, § 448.

it must be taken not as following the sinuosities of the creek, notwithstanding the language used, but as a parallelogram whose center line runs straight from the center stake at one end to that at the other.⁴⁰ In view of this decision, it would seem that a locator desiring to take in the whole bed of a crooked stream, must set side-line stakes at intervals along its course, and should frame the description in his location notice accordingly.

Next, as to the effect of a discovery subsequent to the act of location: The law is settled that the order of succession of these two acts is immaterial, no adverse rights having intervened.⁴¹ But when discovery follows location, does it relate back to the time of location? Clearly it cannot, as against an intervening locator's rights; but does it so relate back for the purpose of perfecting the possessory right of one who was competent to acquire such a right when he staked the claim, but had become incapacitated in the interval? The district court for the second division of the district of Alaska, has recently held that it does not;⁴² and the cause is now pending on appeals before the circuit court of appeals for the ninth circuit, heard but not yet decided. The pertinent facts were these:

In 1902, one Whittren located the claim, and made a discovery within its lines, near its northwest corner. In November, 1903, on surveying the claim he ascertained that he had staked an area in excess of twenty acres, whereupon he drew in the northwest corner, thus excluding from the corrected area the site of his original discovery;⁴³ and in the following month he made a new discovery within the area retained. But in the interval preceding his restaking and new discovery, he had become a United States deputy mineral surveyor, and at that time still held the office. One who in 1904 located a claim conflicting with his brought ejectment, and the district court held, following the Utah⁴⁴ and rejecting the Nevada⁴⁵ precedent, that as a deputy mineral surveyor he was disqualified, by the provisions of R. S. Sec. 452,

⁴⁰ *Steen v. Wild Goose M. Co.* (1901), 1 Alaska, 255, 263.

⁴¹ *Heman v. Griffith* (1901), 1 Alaska, 264. *Redden v. Harlan* (1905), 2 Id. 402. *Bulette v. Dodge* (1905), 2 Id. 427. *Charlton v. Kelly* (1905), 2 Id. 532.

⁴² *Hammer v. Waskey*, decided in 1907; not yet reported. See *Redden v. Harlan* (1905), 2 Alaska, 402, 406.

⁴³ See *Gwillim v. Donnellan* (1885), 115 U. S. 45, 50.

⁴⁴ *Lavignino v. Uhlig*, 71 Pac. (Utah) 1046.

⁴⁵ *Hand v. Cook*, 92 Pac. (Nev.) 3.

from acquiring any interest in the public domain—a ruling which would seem to be fully sustained by the decision of the United States Supreme Court, rendered since then, in *Prosser v. Finn*.⁴⁶ The district court thereupon directed a verdict in favor of the plaintiff. To reach this result, the court must necessarily have held—in view of the established rules that a location inadvertently made in excess of the permitted maximum area is void only as to the excess,⁴⁷ and that the locator may select for himself the portion to be retained,⁴⁸—that a new discovery within the retained area was requisite, and that such a discovery, made at a time when the locator stood disqualified from acquiring a mining claim, could not relate back to the time of the original location, when he was not disqualified.

An important difference between the legal rules applied to lode and to placer mining is found in the classification, as between realty and personalty, of mineral-bearing material, or "pay dirt," when removed from its place in nature but not yet "sluiced" to separate and save the gold which it contains. This is matter for special consideration with reference to the deep mining of the buried ancient beach deposits of the Nome region. The so-called "third beach line," for example, is what was in some far-removed geologic period the actual beach against which flowed the tides and beat the storms of Bering Sea. The counteraction of tide and surf against the gold brought by stream-flow and gravitation to the sea's edge, effected a rich concentration of the metal in the beach gravel, underlaid at the depth of a few feet by bedrock. A later upheaval of the land mass lifted this bedrock, with the gold-charged beach gravel overlying it undisturbed, to an elevation of some seventy feet above the present level of the sea. Ages of erosion of the farther uplands followed, burying bedrock and gravel under an alluvial deposit averaging near one hundred feet in depth. And now comes the Nome miner, sinks a shaft through this alluvium to bedrock, finds the gravel rich in gold, thaws it, shovels it into buckets, hoists it to the surface, and all through the winter, while the face of the country is icebound, he is accumulating beside the mouth of his shaft a "dump" of this material. In the spring, when the snows melt and the streams

⁴⁶ 208 U. S. 67 (1908).

⁴⁷ See *Pratt v. United Alaska M. Co.* (1900), 1 Alaska, 95, and cases cited in Syl. 3. *Richmond v. Rose* (1885), 114 U. S. 576.

⁴⁸ *McIntosh v. Price* (1903), 121 Fed. (C. C. A.) 716.

begin to run, he sets up his sluice boxes, brings a "sluice head" of water from the nearest stream, and washes out his gold dust—from forty to sixty dollars' worth from every cubic yard of the gravel that he hoisted to the surface.

Is this dump of gold-bearing material, before it goes through the sluice boxes and yields up its gold, real estate or personal property? The question has a variety of bearings which render it important; as, upon title, remedy, measure of damages.

It is settled that an unpatented mining claim is real estate, conveyable and descendible as such, notwithstanding the government still holds the paramount title. Again, it is settled that when quartz or other mineral-bearing "rock in place" has been severed by the miner from its *situs in natura* and placed elsewhere, it has thus become converted from real into personal property.⁴⁹ This is because the ore is itself a marketable product, often sold by the ton (upon assay) before extraction of the gold, often shipped, whether by the miner or by a purchaser from him, to distant smelters where the gold is to be separated. Of course, too, the gold dust in the placer dump, when once separated and saved by "sluicing the dump," is personal property. But take the unwashed dump as it stands, with the particles of gold widely scattered throughout its mass. It is of no value to load and ship away—the expense would be too great. It is of no value where it stands, except to extract the gold from it right there. The material has been shifted in position, it is true, from the deep-buried bedrock to the surface of the claim. But it was not "rock in place" where it lay—not locatable as a lode, according to the better opinion;⁵⁰ although there is one case holding that a mass of gravel, boulders and broken rock, buried deep within the original unbroken mass of the mountain, is "in place" and locatable as a lode, no matter where originally formed or how deposited.⁵¹ This placer gold has not been "mined;" merely one step toward mining it has been taken—the removing of the material throughout which the gold is scattered to the surface of the ground, where the gold can more conveniently be extracted from it. Every rain storm washes some of the gold out of the edges of the dump into the undisturbed soil of the natural surface. If the dump is never

⁴⁹ *Forbes v. Gracey* (1877), 94 U. S. 762; 24 L. Ed. 313, 314.

⁵⁰ *Gregory v. Pershbacher*, 73 Cal. 109.

⁵¹ *Jones v. Prospect Mt. Tunnel Co.*, 31 Pac. (Nev.) 642.

sluiced, a few seasons will weather it down and make it one with the ground on which it rests.

In view of these considerations, the district court for the second division of Alaska held, in 1907, that a dump of placer material is still part of the real estate if resting on the surface of the claim from which it was dug out, and that it remains one in title with the claim itself; so that if taken out by a trespasser, or by one against whom a suit in ejectment and for damages has prevailed, the judgment for the plaintiff does not vest the defendant with title to the dump, as might be the case were it personal property.⁵²

It is worth while to point out, in conclusion, that although the miner's possessory title to an unpatented claim (whether placer or lode) is an interest in real estate, and descendible as such, in Alaska its transfer does not require a joinder of the miner's wife in the deed; but this rule does not have to find its basis in any peculiarity of the estate, but rests on the fact that, by the civil code of Alaska, a widow is dowable not of whatever lands her husband was seized of during coverture, but only of those whereof he died seized.⁵³ The United States Supreme Court has held, however, that the right of dower does not attach to an unpatented mining claim, even under the wording of statutes of dower usual in other jurisdictions.⁵⁴ The use of the word "seized" in those statutes is what reconciles this decision with the now firmly established doctrine that the possessory right is, notwithstanding the "paramount title of the United States," a vested and descendible estate in real property.

Thomas R. Shepard.

⁵² *Johnston v. Gibson* (No. 1716); on motion for injunction. The cause was settled before final decree, and is not reported.

⁵³ Civil Code of Alaska, Tit. III, Ch. 7, § 36. See *Bechtol v. Bechtol* (1905), 2 Alaska, 397, 399.

⁵⁴ *Black v. Elkhorn M. Co.*, 163 U. S. 445; 41 L. Ed. 221.