

ALASKA REPORTS

VOLUME 1

Containing All the Unpublished Decisions of the
District Courts of the Territory of Alaska
from May 17, 1884, to January 1, 1903

The Index-Digest at the end of this volume contains a complete digest
of all the Alaska decisions, both original and appellate, found in the
Federal Cases Reprint, and in the Federal Reporter to and including
volume 118, and in the reports of the Supreme Court of the United
States to and including volumes 187 U. S., p. 132, and 23 Supreme
Court Reporter, p. 48, being all decisions down to January 1, 1903

EDITED, ARRANGED, AND DIGESTED BY
JAMES WICKERSHAM
ONE OF THE DISTRICT JUDGES OF ALASKA TERRITORY

ST. PAUL, MINN.
WEST PUBLISHING CO.

1903

COPYRIGHT, 1903,
BY
WEST PUBLISHING CO.

Rec. Oct. 30, 1903.

PREFACE.

Prior to the Act of Congress entitled "An act providing a civil government for Alaska," approved May 17, 1884 (23 Stat. 24, c. 53), the District Courts of the United States in California and Oregon, and the District Courts of Washington had jurisdiction in such cases as arose under the laws extended to the unorganized district of Alaska. 15 Stat. 241; Rev. St. § 1957. Such decisions as were rendered in these courts during that period were published in Sawyer's and Deady's Reports, were republished in the Federal Cases, and are fully referred to in the index digest at the end of this volume. By the act of 1884 a district court was provided for Alaska. Many of the decisions of that court after 1884 and prior to the passage of the act of June 6, 1900, entitled "An act making further provisions for a civil government for Alaska, and for other purposes," were published in the Federal Reporter, while others remained in manuscript in the clerk's office at Sitka. Those not found in the Federal Reporter are published in this volume, while the former are included in the index digest. All decisions of the district judges of Alaska, rendered since June 6, 1900, and prior to January 1, 1903, are included in this volume.

In addition to digesting the decisions published in this volume, all Alaska decisions heretofore published in the Federal Cases and Federal Reporter, as well as all appealed cases from Alaska decided by the Circuit Court of Appeals, Ninth Circuit, down to and including 118 Federal, and all appealed cases from Alaska decided by the Supreme Court of the Unit-

ed States, to and including 187 U. S. 132, 47 L. Ed. —, are included in the index digest at the end of this volume, though the decisions are not republished herein. All the cases included in the alphabetical list of cases preceding the text in this volume are included in the index digest.

The preparation of this volume was undertaken with the consent of the Attorney General of the United States, though the Department of Justice assumes no responsibility for the editorial work or the manner or cost of publication.

JAMES WICKERSHAM.

Valdez, Feb. 21, 1903.

ALASKA OFFICIALS FROM 1884.

JUDGES, DISTRICT OF ALASKA.

Name.	Date of Commission.
WARD McALLISTER, Jr.....	July 5, 1884.
EDWARD J. DAWNE.....	July 21, 1885.
LAFAYETTE DAWSON.....	Dec. 3, 1885.
JOHN H. KEATLEY.....	July 19, 1888.
JOHN S. BUGBEE.....	Oct. 15, 1889.
WARREN TRUITT.....	Jan. 11, 1892.
ARTHUR K. DELANEY.....	Nov. 8, 1895.
CHARLES S. JOHNSON.....	July 28, 1897.
MELVILLE C. BROWN.....	April 1, 1900.
MELVILLE C. BROWN.....Division No. 1.....	June 6, 1900.
ARTHUR H. NOYES.....Division No. 2.....	June 6, 1900.
ALFRED S. MOORE.....Division No. 2.....	May 27, 1902.
JAMES *ICKERSHAM.....Division No. 3.....	June 6, 1900.

1 A.R.

(v)

CLERKS OF DISTRICT COURT.

Ex-officio Secretary of the Territory and Receiver of Public Moneys, until by Act of June 6, 1900, the Surveyor-General is made ex-officio Secretary of the Territory.

Name.	Date of Commission.	How Vacated.
LEWIS, ANDREW T..... Ill.....	July 5, 1884.....	Removed.
HAYDON, HENRY E..... Minn.....	Jan. 29, 1887.....	Removed.
PECKINPAUGH, N. R..... Ind.....	June 23, 1890.....	Removed.
ROGERS, CHARLES D..... Alas.....	Jan. 31, 1894.....	Removed.
ELIOT, ALBERT D..... D. C.....	July 26, 1897.....	

FIRST DIVISION.

BORCHSENIUS, GEO. W... Wis.....	June 6, 1900.....	Removed.
STEEL, HARRY G..... Wash.....	July 15, 1901.....	Resigned.
BORCHSENIUS, GEO. W... Wis.....	July 14, 1902.....	

SECOND DIVISION.

ROGERS, J. J.....	July 1, 1900.....	Resigned.
HILLS, W. J.....	Sept. 1, 1900.....	

THIRD DIVISION.

HEILIG, ALBERT R..... Wash.....	June 6, 1900.....	
---------------------------------	-------------------	--

UNITED STATES ATTORNEYS.

Name.	Date of Commission.
E. W. HASKETT.....	July 5, 1884.
MOTTROM D. BALL.....	July 21, 1885.
WHITAKER M. GRANT.....	Sept. 26, 1887.
JOHN C. WATSON (declined).....	Aug. 31, 1889.
CHARLES S. JOHNSON.....	Sept. 14, 1889.
LYTTON TAYLOR.....	Feb. 19, 1894.
BURTON E. BENNETT.....	Aug. 2, 1895.
ROBERT A. FRIEDRICH.....	July 18, 1898.
ROBERT A. FRIEDRICH.....Division No. 1.....	June 6, 1900.
THOMAS R. LYONS*.....Division No. 1.....	Dec. 31, 1902.
JOSEPH K. WOOD.....Division No. 2.....	June 6, 1900.
MELVIN GRIGSBY.....Division No. 2.....	June 24, 1902.
ALFRED M. POST.....Division No. 3.....	June 6, 1900.
NATHAN V. HARLAN.....Division No. 3.....	June 21, 1901.

*Ad interim appointment by the Court under Act of June 6, 1900, vice Robert A. Friedrich, deceased.

UNITED STATES MARSHALS.

Name.	Date of Commission.
M. C. HILLYER.....	July 5, 1884.
BARTON ATKINS.....	July 21, 1885.
ORVILLE T. PORTER.....	Oct. 1, 1889.
LOUIS L. WILLIAMS.....	Feb. 20, 1894.
JAMES M. SHOUP.....	June 26, 1897.
JAMES M. SHOUP.....Division No. 1.....	June 6, 1900.
CORNELIUS L. VAUTER.....Division No. 2.....	June 6, 1900.
FRANK H. RICHARDS.....Division No. 2.....	March 2, 1901.
GEORGE G. PERRY.....Division No. 3.....	June 6, 1900.

COMMISSIONERS.

Alaska Act of June 6, 1900, disconnects these positions from the Department of the Interior.

UNALASKA.

Name.	Date of Commission.	How Vacated.
JOHNSTON, JOSEPH B.... Va.....	Aug. 2, 1886.....	Resigned.
ANDERSON, ROBERT S.... Ore.....	May 27, 1889.....	Declined.
HUNT, MELANCTHON W.... Ore.....	June 5, 1889.....	Resigned.
TARPLEY, LOUIS H..... Ore.....	Dec. 30, 1889.....	Resigned.
CONN, LAFAYETTE F.... Ore.....	July 13, 1892.....	Declined.
WOODWARD, L. R..... Cal.....	April 24, 1894....	Resigned.

JUNEAU CITY.

WILLIAMS, WILLIAM L.. Mo.....	Aug. 2, 1886.....	Term Expired.
HOYT, WILLIAM R..... Wis.....	Aug. 2, 1890.....	Resigned.
MELLEN, HENRY W..... Ind.....	Dec. 28, 1893.....	Resigned.
OSTRANDER, JOHN Y..... Alas....	Feb. 19, 1897.....	Resigned.
MALCOLM, NORMAN E... Cal....	Feb. 12, 1898.....	Resigned.

WRANGEL.

SHEAKLEY, JAMES	Pa.....	Jan. 16, 1888.....	Term Expired.
KELLY, WILLIAM A.....	Ore.....	Mar. 16, 1892....	Term Expired.
JACKSON, KENNETH M..	Alas....	June 6, 1896.....	Resigned.
PAGE-TUSTIN, FRED	Ore.....	Dec. 14, 1898....	

SITKA.

JEWETT, T. CARLOS..... Minn...	Feb. 28, 1889.....	Removed.
ROGERS, ROBERT C..... Cal.....	July 11, 1890.....	Resigned.
TUTTLE, CALDWELL W.. Ind.....	June 22, 1897....	

CIRCLE CITY.

(Act of June 4, 1897.)

CRANE, JOHN E..... Ill.....	July 8, 1897.....
-----------------------------	-------------------

COMMISSIONERS—Cont'd.

KADIAK.

Name.	Date of Commission.	How vacated.
EDWARDS, ALPHONSO C.. Wash...	Jan. 26, 1895.....	Resigned.
GALLAHER, PHILIP	Wash...June 24, 1897....	

SAINT MICHAEL.

(Act of June 4, 1897.)

JONES, WILLIAM J.....	Wash...July 8, 1897.....	Resigned.
SHEPARD, LENOX B....	Alas....July 26, 1897....	Resigned.

DYEA.*

(Act of June 4, 1897.)

SMITH, JOHN U.....	Ore.....July 8, 1897.....	Resigned.
SEHLBREDE, CHAS. A....	Ore....Mar. 17, 1898....	

UNGA.

(Act of June 4, 1897.)

ISHAM, CHARLES H.....	Md.....July 22, 1897....	Resigned.
-----------------------	--------------------------	-----------

GOVERNORS.

Name.	Date of Commission.	How Vacated.
KINKEAD, JOHN H.....	Nev....July 4, 1884.....	Suspended.
SWINEFORD, ALFRED P..	Mich... June 7, 1886.....	Resigned.
KNAPP, LYMAN E.....	Vt.....Jan. 9, 1890.....	Removed.
SHEAKLEY, JAMES	Alas...Sept. 2, 1893.....	Resigned.
BRADY, JOHN G.....	Alas...June 23, 1897....	
" " "	"June 6, 1900.....	Reappointed.

*President's Order of November 25, 1898, added Skagway as another official residence of this Commissioner.

SURVEYORS-GENERAL.

Regular position of Surveyor-General of Alaska was created by Act of July 24, 1897. Prior thereto U. S. Marshal was ex-officio Surveyor-General. Act of June 6, 1900, also makes Surveyor-General ex-officio Secretary of Alaska.

Name.	Date of Commission.	How Vacated.
PRAY, GILBERT B.....Iowa....	July 27, 1897....	Declined.
DISTIN, WILLIAM L.....III....	Jan. 12, 1898....	
" " " "	June 7, 1900....	Reappointed.

CASES REPORTED OR DIGESTED.

	Page
Adsit, Malony v., 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163...	
	743, 774, 799, 803
Alaska Commercial Co. v. Raymond.....	154
Alaska Com. Co., Spaulding v.....	497
Alaska Gold Min. Co., The, v. Barbridge.....	311
Alaska Packers' Ass'n & Babler, United States v.....	217
Alaska Steamship Co., Juneau Ferry Co. v.....	538
Alaska Treadwell Gold Min. Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390.....	791, 792
Alaska Treadwell Gold Min. Co. v. Whelan, '64 Fed. 462, 12 C. C. A. 225.....	794, 832
Alaska Treadwell Gold Min. Co., Corbus v. (D. C.) 99 Fed. 334..	
	737, 760, 774
Alaska United Gold Min. Co. v. Keating, 116 Fed. 561, 53 C. C. A. 655.....	695, 740, 793, 832
Alaska United Gold Min. Co. v. Muset, 114 Fed. 66, 52 C. C. A. 14	700, 792, 794
Alaska United Min. Co., McKinley Creek Min. Co., v., 183 U. S. 563, 22 Sup. Ct. 84, 46 L. Ed. 331.....	699, 701, 780, 784
Alexander, The, 75 Fed. 519, 21 C. C. A. 441.....	748
Alexander, The (D. C.) 60 Fed. 914.....	710, 748
Allen v. Myers.....	114
Allen v. United States, 115 Fed. 3, 52 C. C. A. 597..	700, 724, 725, 759
Allen, Thomson v.....	636
American Gold Min. Co. v. Giant Powder Co.....	664
American Gold Min. Co., Griffin v., 114 Fed. 887, 52 C. C. A. 507..	
	738, 836
Ames v. Kruzner.....	596
Ames v. Kruzner.....	598
Anderson v. Comptois, 109 Fed. 971, 48 C. C. A. 1.....	712, 713
Anvil Gold Min. Co. v. Hoxie & Lyng.....	604

	Page
Arthur B., The.....	353
Arthur B., The Schooner.....	403
Ash, United States v. (D. C.) 75 Fed. 651.....	726, 727, 764, 765
 B., The Arthur.....	353
B., The Schooner Arthur.....	403
Baker & Co. v. Healey.....	45
Bank of Skagway, The First, Moody v.....	104
Banks v. Wilson.....	241
Barbridge, The Alaska Gold Min. Co. v.....	311
Bates v. Mayor & Council of Nome.....	208
Beaton, Woods v.....	344
Behrends v. Goldsteen.....	518
Bennett, In re Estate of William M.....	159
Bennett v. Forrest (D. C.) 69 Fed. 421.....	722
Bennett v. Harkrader, 158 U. S. 441, 15 Sup. Ct. 863, 39 L. Ed. 1046.....	700, 742, 785, 832
Bennett, Mason v. (D. C.) 52 Fed. 343.....	743
Binns, United States v.....	553
Binswanger v. Henninger.....	509
Bird, In re, 2 Sawy. 33, Fed. Cases No. 1,428.....	702, 703
Bird v. United States, 180 U. S. 356, 21 Sup. Ct. 403, 45 L. Ed. 570 	727, 740
Bird, Homer, v. United States, 187 U. S. 118, 23 Sup. Ct. 42, 47 L. Ed. —.....	719, 727, 728, 752, 838
Bird, Homer, United States v.....	379
Black v. Teeter.....	561
Blackett, Miller v. (D. C.) 47 Fed. 547.....	736, 827
Bonnifield v. Thorp (D. C.) 71 Fed. 924.....	706, 768
Bonnifield, Thorp v., 177 U. S. 15, 20 Sup. Ct. 533, 44 L. Ed. 652..	698
Bottling License, In re Hill's.....	436
Brace v. Solner, Treasurer of Nome.....	361
Bridleman, United States v. (D. C.) 7 Fed. 896.....	753
Brockway, Price v.....	233
Brown, United States v., 3 Sawy. 602, Fed. Cases No. 14,672....	816
Bruno Munro, In re.....	279
Burton, In re.....	111
Butler v. Good Enough Min. Co.....	246

CASES REPORTED OR DIGESTED.

xiii

	Page
Callsen v. Hope (D. C.) 75 Fed. 758.....	737, 805, 812, 829
Campbell v. Silver Bow Basin Min. Co., 49 Fed. 47, 1 C. C. A. 155	735
Campbell, Waters v., 4 Sawy. 121, Fed. Cases No. 17,264.....	753, 754, 765, 773
Campbell, Waters v., 5 Sawy. 17, Fed. Cases No. 17,265.....	765, 766
Campion Min. Co., Crossly v.....	391
Canada, The (D. C.) 92 Fed. 196.....	687, 814
Canadian Pacific Nav. Co., Gibson v.....	407
Can-ah-couqua, In re (D. C.) 29 Fed. 687.....	796, 797, 818
Carr, In re, 3 Sawy. 316, Fed. Cases No. 2,432.....	754, 765
Carr, United States v., 3 Sawy. 302, Fed. Cases No. 14,730.....	691, 717, 745
Carroll v. Price (D. C.) 81 Fed. 137.....	804, 805, 807-809
Carroll, Harkrader v. (D. C.) 76 Fed. 474.....	783, 805
Carstens Bros. v. Frye-Bruhn & Co.....	140
Cashell, Piper v. (Mem. Dec.) 118 Fed. 1019, 54 C. C. A. 682.	
Catherine Sudden, The.....	607
C. E. Wynn-Johnson, In re.....	630
C. G. White, The, 64 Fed. 579, 12 C. C. A. 314.....	733
Challenge, The	70
Chambers v. Hannum.....	468
Chambers v. Solner, Treasurer of Nome.....	271
City of Seattle, The.....	471
Clark, United States v. (D. C.) 46 Fed. 633.....	749, 752
Clark, United States v. (D. C.) 76 Fed. 560.....	707
Cohen, Graeco-Russian Church v.....	32
Comptois, Anderson v., 109 Fed. 971, 48 C. C. A. 1.....	712, 713
Coon, Noland v.....	36
Cooper, Ex parte, 138 U. S. 404, 11 Sup. Ct. 289, 34 L. Ed. 998...	721
Cooper, Ex parte, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232...	687, 698, 701, 709, 718, 802, 812
Coquitlam, The, 163 U. S. 346, 16 Sup. Ct. 1117, 41 L. Ed. 184....	695, 719, 720, 827
Coquitlam, The, 77 Fed. 744, 23 C. C. A. 438.....	689, 731
Coquitlam, The (D. C.) 57 Fed. 706.....	731, 732, 733, 742, 818, 819
Corbus v. Alaska Treadwell Gold Min. Co. (D. C.) 99 Fed. 334...	737, 760, 774
Corbus v. Leonhardt, 114 Fed. 10, 51 C. C. A. 636.....	711, 712, 744, 745, 831

	Page
Coy, McBride v.....	238
Crossly v. Campion Min. Co.....	391
Cyane, Johnson v., 1 Sawy. 150, Fed. Cases No. 7,381.....	826
 Dalton, Haines Wharf Co. v.....	555
Daly v. Gardner.....	357
Dam, Foss v.....	346
Decker v. Williams (D. C.) 73 Fed. 308.....	698, 721
DeGroff, Dunbar v.....	25
Dolan v. United States, 116 Fed. 578, 54 C. C. A. 34.....	771
Donnelly, Osgood v.....	385
Dubuque, Ex parte.....	16
Dufresne, Engelstad v., 116 Fed. 582, 54 C. C. A. 38.....	699, 715, 831
Dufresne, Russell v.....	486
Dufresne, Russell v.....	575
Dunbar v. DeGroff.....	25
 Earle v. United States, 77 Fed. 744, 23 C. C. A. 438.....	689
Ebner v. Zimmerly, 118 Fed. 818, 55 C. C. A. 430.....	697, 737
Ebner, Marx v., 180 U. S. 314, 21 Sup. Ct. 376, 45 L. Ed. 547.....	801
Emma, Ex parte (D. C.) 48 Fed. 211.....	702, 719
Endleman v. United States, 86 Fed. 457, 30 C. C. A. 186.....	711, 723, 725, 756, 767, 828
Engelstadt v. Dufresne, 116 Fed. 582, 54 C. C. A. 38.....	699, 715, 831
Esb erg-Bachman Leaf-Tobacco Co. v. Heid (D. C.) 62 Fed. 692.....	799
Eubanks v. Petree.....	427
Everton v. Smith.....	422
 Fideliter, The, 1 Sawy. 153, Fed. Cases No. 4,755.....	697, 816
Fideliter, The, Deady, 620, Fed. Cases No. 4,756.....	817
Fideliter, United States v., Fed. Cases No. 15,088.....	817
Finn v. Hoyt (D. C.) 52 Fed. 83.....	722
First Bank of Skagway, The, Moody v.....	104
Fitzpatrick v. United States, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078.....	740, 752, 757, 838
Florence alias Maud Rice, United States v.....	676
Ford, Walsh v.....	146
Forrest, Bennett v. (D. C.) 69 Fed. 421.....	722
Foss v. Dam.....	346

CASES REPORTED OR DIGESTED.

xv

	Page
Fox, Administrator, v. Mackay.....	329
Frye-Bruhn & Co., Carstens Bros. v.....	140
Fuller v. Harris (D. C.) 29 Fed. 814.....	779, 782, 786, 794
Galen, Mitchell v.....	339
Gardiner, Loeser v.....	641
Gardner, Daly v.....	357
Garside v. Norval.....	19
Geise, Hackleman v.....	568
Giant Powder Co., American Gold Min. Co. v.....	664
Gibson v. Canadian Pacific Nav. Co.....	407
Gladough, In re Estate of M. O.....	649
Goldsteen, Behrends v.....	518
Goldsteen, Young v. (D. C.) 97 Fed. 303.....	785, 787, 804
Good Enough Min. Co., Butler v.....	246
Good Enough Min. Co., Webster v.....	246
Graeco-Russian Church v. Cohen.....	32
Griffin v. American Gold Min. Co., 114 Fed. 887, 52 C. C. A. 507.....	738, 836
Griffith, Heman v.....	264
Hackleman v. Geise.....	568
Haines Wharf Co. v. Dalton.....	555
Handy, Weitzman v.....	658
Hannum, Chambers v.....	468
Hannum, Nodine v.....	302
Hardy v. United States, 186 U. S. 224, 22 Sup. Ct. 889, 46 L. Ed. 1137.....	724, 740, 771
Harkrader v. Carroll (D. C.) 76 Fed. 474.....	783, 805
Harkrader, Bennett v., 158 U. S. 441, 15 Sup. Ct. 863, 39 L. Ed. 1046.....	700, 742, 785, 832
Harris, Fuller v. (D. C.) 29 Fed. 814.....	779, 782, 786, 795
Hartman, Van Schuyver v.....	431
Hawkins v. United States, 116 Fed. 569, 53 C. C. A. 663.....	725, 769, 770
Hayden, Rigley v.....	308
Healey, Baker & Co. v.....	45
Heckman v. Martin (Mem. Dec.) 118 Fed. 1016, 54 C. C. A. 681.	
Heckman, Martin v.....	165
Heckman, Sutter v.....	81

	Page
Heckman, Sutter v.....	188
Heman v. Griffith.....	264
Henninger, Binswanger v.....	509
Hill's Bottling License, In re.....	436
Hillyer, United States v.....	47
Hillyer, United States v., 58 Fed. 678, 7 C. C. A. 428.....	835
Holden v. Williams (D. C.) 75 Fed. 798.....	834
Holt, Nestor v.....	567
Homer Bird v. United States, 187 U. S. 118, 23 Sup. Ct. 42, 47 L. Ed. ---.....	719, 727, 728, 752, 838
Homer Bird, United States v.....	379
Hope, Callsen v. (D. C.) 75 Fed. 758.....	737, 805, 812, 829
Hoxie & Lyng, Anvil Gold Min. Co. v.....	604
Hoxsie, Malone v.....	267
Hoyt, Finn v. (D. C.) 52 Fed. 83.....	722
 Independence, The	591
 Jackson v. United States, 102 Fed. 478, 42 C. C. A. 452.....	
698, 699, 704, 729, 730, 740, 741, 750, 758, 759	
James G. Swan, The (D. C.) 50 Fed. 108.....	709, 747, 755
Jesse Scott Oliver, In re.....	1
Johnson v. The Cyane, 1 Sawy. 150, Fed. Cases No. 7,381.....	826
Johnson, Lewis v.....	529
Johnson, Lewis v. (C. C.) 90 Fed. 678.....	721
Jordon, Lane, v., 116 Fed. 628, 54 C. C. A. 79.....	696, 760
Jorgensen v. Young & Burns.....	335
Juneau Ferry Co. v. Alaska Steamship Co.....	533
 Keating, Alaska United Gold Min. Co. v., 116 Fed. 561, 53 C. C. A. 655.....	695, 740, 793, 832
Kie v. United States (C. C.) 27 Fed. 351.....	691, 726, 751, 753, 754, 769
Kimball v. Miller.....	347
Kinkead v. United States, 150 U. S. 483, 14 Sup. Ct. 172, 37 L. Ed. 1152.....	691, 739, 803, 818, 829
Kjellman v. Rogers (Mem. Dec.) 109 Fed. 1061, 47 C. C. A. 684.	
Knapp v. Knapp (D. C.) 59 Fed. 641.....	719
Kodiak, The (D. C.) 53 Fed. 126.....	711, 747, 762
Kohn v. McKinnon (D. C.) 90 Fed. 628.....	723, 736, 744, 800

CASES REPORTED OR DIGESTED.

xvii

	Page
Kruzner, Ames v.....	596
Kruzner, Ames v.....	598
 Lane v. Jordon, 116 Fed. 623, 54 C. C. A. 79.....	696, 760
Lang, Town of Nome v.....	593
Langstedt, The Tyee Cons. Min. Co. v.....	439
La Ninfa, The, 75 Fed. 513, 21 C. C. A. 434.....	710, 747, 748, 830
La Ninfa, The (D. C.) 49 Fed. 575.....	747, 748, 830
Larimore v. Wright (Mem. Dec.) 118 Fed. 1018, 54 C. C. A. 681.	
Lear v. United States (D. C.) 50 Fed. 65.....	807
Leonhardt, Corbus v., 114 Fed. 10, 51 C. C. A. 636.....	
	711, 712, 744, 745, 831
Lewis v. Johnson.....	529
Lewis v. Johnson (C. C.) 90 Fed. 673.....	721
Lewis v. Wells (D. C.) 85 Fed. 896.....	788, 789, 833
License, In re Hill's Bottling.....	436
License, In re Stadie Bros.'.....	436
Loeser v. Gardiner.....	641
Louisa Simpson, The, 2 Sawy. 57, Fed. Cases No. 8,533.....	762
 McAllister v. United States, 141 U. S. 174, 11 Sup. Ct. 949, 35 L. Ed. 693.....	717, 828
McBride v. Coy.....	238
McIntire Estate, In re Thompkins.....	73
Macintosh v. Town of Nome.....	492
McIntosh, Price v.....	286
McIntosh, United States ex rel., v. Price.....	204
Mackay, Fox, Administrator, v.....	329
McKenzie, In re, 180 U. S. 536, 21 Sup. Ct. 468, 45 L. Ed. 657....	
	694, 750, 811
McKinley Creek Min. Co. v. Alaska United Min. Co., 183 U. S. 563, 22 Sup. Ct. 84, 46 L. Ed. 331.....	699, 701, 780, 784
McKinnon, Kohn v. (D. C.) 90 Fed. 623.....	723, 736, 744, 800
McMorry v. Ryan.....	516
Malone v. Hoxxic.....	267
Malony v. Adsit, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163....	
	743, 774, 799, 803
Marks v. Shoup, 181 U. S. 562, 21 Sup. Ct. 724, 45 L. Ed. 1002...	705
Martin v. Heckman.....	165

	Page
Martin, Heckman v. (Mem. Dec.) 118 Fed. 1016, 54 C. C. A. 681.	
Marx v. Ebner, 180 U. S. 314, 21 Sup. Ct. 376, 45 L. Ed. 547.....	801
Marx & Weiss v. Valentine.....	28
Mason v. Bennett (D. C.) 52 Fed. 343.....	743
Mayor & Council of Nome, Bates v.....	208
Melsing, Tornanses v., 106 Fed. 775, 45 C. C. A. 615.....	
	696, 697, 700, 713
Melsing, Tornanses v., 109 Fed. 710, 47 C. C. A. 596.....	699, 784
Meydenbauer v. Stevens (D. C.) 78 Fed. 787.776-778, 780, 781, 784, 785	
Miller v. Blackett (D. C.) 47 Fed. 547.....	736, 827
Miller, Kimball v.....	347
Mitchell v. Galen.....	339
M. O. Gladough, In re Estate of.....	649
Moody v. The First Bank of Skagway.....	104
Moore, In re (D. C.) 66 Fed. 947.....	763, 764
Moore v. Moore.....	225
Moore v. Rennick.....	173
Moore v. Steelsmith.....	121
Mosely, United States v. (D. C.) 8 Fed. 688.....	689
Munro, In re Bruno.....	279
Muset, Alaska United Gold Min. Co. v., 114 Fed. 66, 52 C. C. A.	
14.....	700, 792, 794
Myers v. Swineford.....	10
Myers, Allen v.....	114
Nackkelä v. Webster (Mem. Dec.) 109 Fed. 1061, 47 C. C. A. 684.	
Nelson v. United States (C. C.) 30 Fed. 112..692, 756, 759, 764, 827, 828	
Nelson, United States v. (D. C.) 29 Fed. 202....724, 756, 757, 762, 764	
Nestor v. Holt.....	567
New York & Alaska Min. Co., Whitehead v.....	245
Nodine v. Hannum.....	302
Noland v. Coon.....	36
Nome, Mayor & Council of, Bates v.....	208
Nome-Sinook Co. v. Simpson.....	578
Nome, Solner, Treasurer of, Brace v.....	361
Nome, Solner, Treasurer of, Chambers v.....	271
Nome, Town of, v. Lang.....	593
Nome, Town of, Macintosh v.....	492
Nome, Town of, Reed Com'r v.....	395

CASES REPORTED OR DIGESTED.

xix

	Page
North-West Trading Co., United States v.....	5
Norval, Garside v.....	19
Nugget, The	202
Ocean Spray, The, 4 Sawy. 105, Fed. Cases No. 10,412. 747, 817, 818	
Oliver, In re Jesse Scott.....	1
Oregon, The, 116 Fed. 482, 53 C. C. A. 650.....	689
Osgood v. Donnelly.....	385
Pacific Cold Storage Co., In re.....	429
Petree, Eubanks v.	427
Piper v. Cashell (Mem. Dec.) 118 Fed. 1019, 54 C. C. A. 682.	
Powers & Robertson, United States v.....	180
Pratt v. United Alaska Min. Co.....	95
Price v. Brockway.....	233
Price v. McIntosh.....	286
Price, Carroll v. (D. C.) 81 Fed. 137.....	804, 805, 807-809
Price, United States ex rel. McIntosh v.....	204
Raymond, Alaska Commercial Co. v.....	154
Reed Com'r, Town of Nome v.....	395
Reedy v. Wesson.....	570
Rennick, Moore v.....	173
Rice, Florence alias Maud, United States v.....	676
Richards & Jourden, United States v.....	613
Rigley v. Hayden.....	308
Ring, Yager v.	305
Roberts, Valentine v.....	586
Rogers, Kjellman v. (Mem. Dec.) 109 Fed. 1061, 47 C. C. A. 684.	
Russell v. Dufresne.....	486
Russell v. Dufresne.....	575
Ryan, McMorry v.....	516
Sah Quah, In re (D. C.) 81 Fed. 327.....	691, 754, 755
St. Paul, The	71
Sawyer v. Van Hook.....	108
Schooner Arthur B., The	403
Schooner Sylvia Handy v. United States, 143 U. S. 513, 12 Sup. Ct. 464, 36 L. Ed. 246.....	696, 742

	Page
Seveloff, United States v., 2 Sawy. 311, Fed. Cases No. 16,252..	719, 730, 753, 766
Sharick, Bankrupt, In re.....	398
Sheep Creek John, United States v.....	682
Shelp v. United States, 81 Fed. 694, 26 C. C. A. 570.....	706, 726, 727, 728, 756, 759
Shoup, Marks v., 181 U. S. 562, 21 Sup. Ct. 724, 45 L. Ed. 1002..	705
Silver Bow Basin Min. Co., Campbell v., 49 Fed. 47, 1 C. C. A. 155	735
Simpson, The Louisa, 2 Sawy. 57, Fed. Cases No. 8,533.....	762
Simpson, Nome-Sinook Co. v.....	578
Skookum, The	394
Smith, Everton v.	422
Solner, Treasurer of Nome, Brace v.....	361
Solner, Treasurer of Nome, Chambers v.....	271
Spaulding v. Alaska Com. Co.....	497
Stadie Bros.' License, In re.....	436
Steelsmith v. Moore.....	121
Steen v. Wild Goose Min. Co.....	255
Stephens, United States v. (C. C.) 12 Fed. 52.....	754, 763
Stevens, Meydenbauer v. (D. C.) 78 Fed. 787.....	776-778, 780, 781, 784, 785
Stockslager v. United States, 116 Fed. 590, 54 C. C. A. 46.....	719, 720, 728, 730, 750, 758
Sudden, The Catherine.....	607
Sutter v. Heckman.....	81
Sutter v. Heckman	188
Swan, The James G. (D. C.) 50 Fed. 108.....	709, 747, 755
Swineford, Myers v.....	10
Sylvia Handy, Schooner, v. United States, 143 U. S. 513, 12 Sup. Ct. 464, 36 L. Ed. 246.....	696, 742
Teeter, Black v.....	561
Thompkins McIntire Estate, In re.....	73
Thomson v. Allen.....	636
Thorp v. Bonnifield, 177 U. S. 15, 20 Sup. Ct. 533, 44 L. Ed. 652 698	698
Thorp, Bonnifield v. (D. C.) 71 Fed. 924.....	706, 768
Tla-koo-yel-lee v. United States, 167 U. S. 274, 17 Sup. Ct. 855, 42 L. Ed. 166.....	741

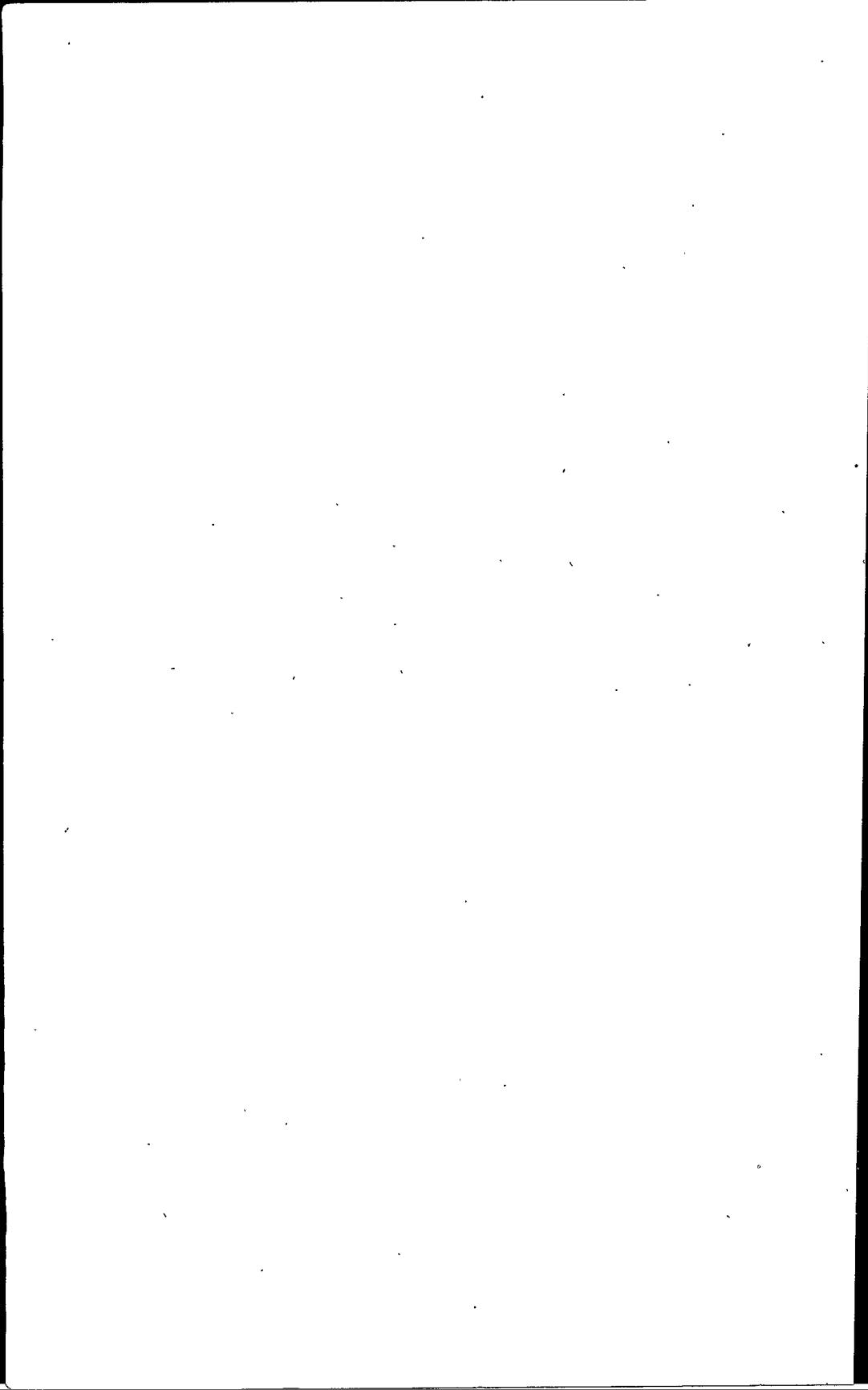
CASES REPORTED OR DIGESTED.

xxi

	Page
Tornanses v. Melsing, 106 Fed. 775, 45 C. C. A. 615.....	696, 697, 700, 713
Tornanses v. Melsing, 109 Fed. 710, 47 C. C. A. 593.....	699, 784
Town of Nome v. Lang.....	593
Town of Nome v. Reed, Com'r.....	395
Town of Nome, Macintosh v.....	492
Treasurer of Nome, Solner, Brace v.....	361
Treasurer of Nome, Solner, Chambers v.....	271
Tyee Cons. Min. Co., The, v. Langstedt.....	439
 United Alaska Min. Co., Pratt v.....	95
United States v. Alaska Packers' Ass'n & Babler.....	217
United States v. Ash (D. C.) 75 Fed. 651.....	726, 727, 764, 765
United States v. Binns.....	553
United States v. Bridleman (D. C.) 7 Fed. 896.....	753
United States v. Brown, 3 Sawy. 602, Fed. Cases No. 14,672.....	816
United States v. Carr, 3 Sawy. 302, Fed. Cases No. 14,730.....	691, 717, 745
United States v. Clark (D. C.) 46 Fed. 633.....	749, 752
United States v. Clark (D. C.) 76 Fed. 560.....	707
United States v. Fideliter, Fed. Cases No. 15,088.....	817
United States v. Florence alias Maud Rice.....	676
United States v. Hillyer.....	47
United States v. Hillyer, 58 Fed. 678, 7 C. C. A. 428.....	835
United States v. Homer Bird.....	379
United States v. Mosely (D. C.) 8 Fed. 688.....	689
United States v. Nelson (D. C.) 29 Fed. 202.....	724, 756, 757, 762, 764
United States v. North-West Trading Co.....	5
United States v. Powers & Robertson.....	180
United States v. Richards & Jourden.....	613
United States v. Seveloff, 2 Sawy. 311, Fed. Cases No. 16,252.....	719, 730, 753, 766
United States v. Sheep Creek John.....	682
United States v. Stephens (C. C.) 12 Fed. 52.....	754, 763
United States v. Waller, 1 Sawy. 701, Fed. Cases No. 16,634.....	755
United States v. Warwick (D. C.) 51 Fed. 280.....	764
United States v. Williams (C. C.) 2 Fed. 61.....	739, 753, 754
United States, Allen v., 115 Fed. 3, 52 C. C. A. 597.....	700, 724, 725, 759

	Page
United States, Bird v., 180 U. S. 356, 21 Sup. Ct. 403, 45 L. Ed. 570	727, 740
United States, Dolan v., 116 Fed. 578, 54 C. C. A. 34.....	771
United States, Earle v., 77 Fed. 744, 23 C. C. A. 438.....	689
United States, Endleman v., 86 Fed. 456, 30 C. C. A. 186.....	
	711, 723, 725, 756, 767, 828
United States, Fitzpatrick v., 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078.....	740, 752, 757, 838
United States, Hardy v., 186 U. S. 224, 22 Sup. Ct. 889, 46 L. Ed. 1137	724, 740, 771
United States, Hawkins v., 116 Fed. 569, 53 C. C. A. 663.....	
	725, 769, 770
United States, Homer Bird v., 187 U. S. 118, 23 Sup. Ct. 42, 47 L. Ed. —.....	719, 727, 728, 752, 838
United States, Jackson v., 102 Fed. 473, 42 C. C. A. 452.....	
	698, 699, 704, 729, 730, 740, 741, 750, 758, 759
United States, Kie v. (C. C.) 27 Fed. 351.....	691, 726, 751, 753, 754, 769
United States, Kinkead v., 150 U. S. 488, 14 Sup. Ct. 172, 37 L. Ed. 1,152.....	691, 739, 803, 819, 829
United States, Lear v. (D. C.) 50 Fed. 65.....	807
United States, McAllister v., 141 U. S. 174, 11 Sup. Ct. 949, 35 L. Ed. 693	717, 828
United States, Nelson v. (C. C.) 30 Fed. 112.....	
	692, 756, 759, 764, 827, 828
United States, Schooner Sylvia Handy v., 143 U. S. 513, 12 Sup. Ct. 464, 36 L. Ed. 246.....	696, 742
United States, Shelp v., 81 Fed. 694, 26 C. C. A. 570.....	
	706, 726, 727, 728, 756, 759
United States, Stockslager v., 116 Fed. 590, 54 C. C. A. 46.....	
	719, 720, 728, 730, 750, 758
United States, Tla-koo-yel-lee v., 167 U. S. 274, 17 Sup. Ct. 855, 42 L. Ed. 166.....	741
United States ex rel. McIntosh v. Price.....	204
Valentine v. Roberts.....	536
Valentine, Marx & Weiss v.....	28
Van Hook, Sawyer v.....	108
Van Schuyver v. Hartman.....	431

	Page
Waller, United States v., 1 Sawy. 701, Fed. Cases No. 16,634...	755
Walsh v. Ford.....	146
Warwick, United States v. (D. C.) 51 Fed. 280.....	764
Washington & Alaska S. S. Co., claimant.....	471
Waters v. Campbell, 4 Sawy. 121, Fed. Cases No. 17,264.....	
	753, 754, 765, 773
Waters v. Campbell, 5 Sawy. 17, Fed. Cases No. 17,265.....	765, 766
Webster v. Good Enough Min. Co.....	246
Webster, Nackkela v. (Mem. Dec.) 109 Fed. 1061, 47 C. C. A. 684.	
Weitzman v. Handy.....	658
Wells, Lewis v. (D. C.) 85 Fed. 896.....	788, 789, 833
Wesson, Reedy v.	570
Whelan, Alaska Treadwell Gold Min. Co. v., 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390.....	791, 792
Whelan, Alaska Treadwell Gold Min. Co. v., 64 Fed. 462, 12 C. C. A. 225.....	794, 832
White, The C. G., 64 Fed. 579, 12 C. C. A. 314.....	733
Whitehead v. New York & Alaska Min. Co.....	245
Wild Goose Min. Co., Steen v.	255
William M. Bennett, In re Estate of.....	159
Williams, Decker v. (D. C.) 73 Fed. 308.....	698, 721
Williams, Holden v. (D. C.) 75 Fed. 798.....	834
Williams, United States v. (C. C.) 2 Fed. 61.....	739, 753, 754
Wilson, Banks v.....	241
Woods v. Beaton.....	344
Wright, Larimore v. (Mem. Dec.) 118 Fed. 1018, 54 C. C. A. 681.	
Wynn-Johnson, In re C. E.....	630
Yager v. Ring	305
Young v. Goldsteen (D. C.) 97 Fed. 308.....	785, 787, 804
Young & Burns, Jorgensen v.....	335
Zimmerly, Ebner v., 118 Fed. 818, 55 C. C. A. 480.....	697, 737



ALASKA REPORTS.

VOLUME 1.

In re JESSE SCOTT OLIVER, Minor.

(Sitka. October 31, 1887.)

No. 95.

1. ARMY AND NAVY—ENLISTMENT—HABEAS CORPUS—INFANTS.

A minor over eighteen and under twenty-one years of age may enter into a binding contract of enlistment in the navy, and will not for that reason alone be discharged on habeas corpus.

Petition for Habeas Corpus. Denied.

W. Clark, for petitioner.

A. McCracken, contra.

DAWSON, District Judge. Petitioner, by his guardian ad litem, sets forth that he is unlawfully restrained of his liberty by Lieutenant Commander J. S. Newell, naval officer in charge at this station, and in command of the United States steamer and man-of-war Pinta. He states that he was enlisted into the United States navy before he had attained his majority, and claims that the contract of enlistment is voidable, and that he is entitled to his discharge.

The contract of enlistment in this case, which is similar to all contracts of enlistment in the United States navy, sets

forth that petitioner was enlisted on the 8th day of July, 1886, at Mare Island, Cal., to serve as a common seaman for 3 years; that he was at the time of his enlistment 18 years and 7 months old, and that the consent of his parents or guardian had not been obtained. A writ of habeas corpus was issued, made returnable on October 29, 1887, at which time the defendant made return to the suit, embodying substantially the contract of enlistment, and producing the body of Scott Oliver in court. The only evidence in the case is the written contract of enlistment, signed by the petitioner, in which he states his age to be 18 years and 7 months. The question presented is, can a minor over 18 years of age bind himself by a contract of enlistment in the United States navy, without the consent of his parents or guardian?

Section 1418, Rev. St. [U. S. Comp. St. 1901, p. 1007], provides that "boys between the ages of sixteen and eighteen years may be enlisted to serve in the navy until they shall arrive at the age of twenty-one years; other persons may be enlisted to serve for a period not exceeding five years, unless sooner discharged by direction of the President."

Again, section 1419 [U. S. Comp. St. 1901, p. 1007], provides that "minors between the age of sixteen and eighteen years shall not be enlisted for the naval service without the consent of their parents or guardian." The sections quoted were enacted by Congress in March, 1837, and have been carried forward in the various revisions of the statute since that time.

By an act of Congress approved May 12, 1879 (21 Stat. 3, c. 5), it is provided that no minor under the age of 15 years shall be enlisted in the naval service. Supplement to Rev. St. vol. 1, p. 484 [U. S. Comp. St. 1901, pp. 1007, 1008]. During the session of Congress of 1881 the former sections in relation to enlistments of minors were again amended as follows:

"That sections fourteen hundred and eighteen, fourteen hundred and nineteen, fourteen hundred and twenty, as heretofore amended, relating to enlistment of minors in the naval service, be and hereby are amended by striking out the word 'fifteen' and inserting in its stead the word 'fourteen.'"

This act was approved on the 23d day of February, 1881 (21 Stat. 338, c. 73). See Rev. St. Supp. p. 595 [U. S. Comp. St. 1901, pp. 1007, 1008]. From these amendments it is quite clear the Congress intended no change as to the right of a minor over the age of 18 years to bind himself by a contract of enlistment. It will be observed that there is a difference in the matter of legal enlistments in the army and in the navy in regard to age. Section 1117, Rev. St. [U. S. Comp. St. 1901, p. 813], in relation to enlistments in the army, forbids the enlistment of any person under the age of 21 years, without the consent of his parents or guardian.

Counsel seems to confound the two provisions, or rather to lose sight of the clear distinction, in the law. The rules of the common law that infants may repudiate their contracts after attaining their majority, except where beneficial—as when made for supplying the necessities of life and the like—can have no application to a contract of this nature. It is unlike a contract between private parties. It is an agreement to serve the government, for a period determined by the law, until the minor shall have attained his majority. The government is entitled, by virtue of its sovereignty, to require the services of any or all of its able-bodied citizens, of whatever age, in cases of public exigency. This right, being exercised for the common good, must be regarded as paramount to all individual claims.

It is a part of the law of public policy that neither the rights at common law of the minor contractor nor those of his parent, guardian, or master shall be asserted against the United States, except when expressly recognized by exist-

ing statute. The right of the parent, or other person in loco parentis, to object to the enlistment of a minor in the navy, is clearly limited to cases where the minor is but 18 years of age. If he is above that age, and under 21 years of age, he can bind himself by enlisting until he attains his majority, at which time his term expires by operation of law, and at which time the law recognizes his right to choose his vocation and pursue it. This is manifestly the meaning of the law, else adult persons enlisting would not be required to enlist to serve for a period of five years. It has been held on very high authority that enlistments in the navy, though made without consent of the parent or guardian, are binding, and the minor cannot avoid them. See U. S. v. Bainbridge, 1 Mason, 71, Fed. Cas. No. 14,497; U. S. v. Blakeney, 3 Grat. 405.

But it is otherwise as to enlistments in the army. The distinction is clearly made in the statute, and has been sustained by the courts. See U. S. v. Bainbridge, 1 Mason, 71, Fed. Cas. No. 14,497; Commonwealth v. Harrison, 11 Mass. 63; Com. v. Cushing, 11 Mass. 67, 6 Am. Dec. 156.

In this case it is not disputed that the petitioner signed his name to the contract of enlistment, and represented his age to be 18 years and 7 months. In certain cases, and under certain circumstances, the law of estoppel will apply to minors. That a minor is responsible in damages for his torts and frauds is well settled in the law. If he falsely represents his age for the purpose of inducing another person to contract with him, he is estopped from afterwards denying it. See Bigelow on Estoppel, pp. 486, 487.

It follows that the prayer of the petitioner must be denied, and that he be remanded to the custody of Lieutenant Commander Newell and his successors until he is 21 years of age, unless discharged for some other cause; and it is so ordered.

UNITED STATES v. THE NORTH-WEST TRADING CO. et al.

(Sitka. August 20, 1888.)

No. 104.

1. EQUITY—INJUNCTION—REMEDY AT LAW.

To entitle the plaintiff to relief in equity, and to invoke remedial relief by injunction, it must be made to appear on the face of the petition that he cannot redress his supposed grievance in an action at law. Equity will not take cognizance of cases where the law affords an ample remedy.

2. QUIETING TITLE—POSSESSION.

In a suit to quiet title the plaintiff must allege and show that he is in possession of the disputed property, owning an estate of freehold, or an unexpired term of not less than 10 years, and that the defendant claims some interest therein adverse to plaintiff.

3. WHARVES—UNITED STATES.

An appropriation of a water front for the purposes of wharfage to the United States can only be made by an act of Congress.

Suit by the United States to quiet title to wharf at Sitka, alleged to have been acquired by the government by virtue of the treaty of March 30, 1867, with Russia.

W. M. Grant, for plaintiff.

J. G. Heid, for defendants.

DAWSON, District Judge. On June 6, 1888, the United States District Attorney for the District of Alaska, representing the United States, filed his petition, in which it is alleged, in substance, that by virtue of the treaty of March 30, 1867, by which Alaska was ceded to the United States by Russia, the wharf in front of what is now designated as lot one in the town of Sitka passed to the United States; that the defendants, James Carroll and the North-West Trading Company, which is admitted to be a body corporate existing un-

der and by virtue of the laws of the state of Oregon, claim to have some interest, lien, or title to said wharf adverse to the title of the United States; that the defendants have been and are threatening to tear down the framework and platform of said wharf; and praying that defendants may be restrained, the title quieted, etc. The defendants, answering, deny that the wharf in controversy passed to the United States by the treaty alluded to, but in substance admit that they did tear down a portion of the framework and platform of said wharf for the purpose of rebuilding and repairing the same, alleging that it had fallen into decay, and was unsafe for the landing of vessels, and that they did this under claim of ownership. Defendants further allege that the repair of said wharf was an immediate necessity, and deny any intention to injure or destroy the property.

Before proceeding to discuss the legal aspect of this case, something of its history may not be amiss. The wharf described in plaintiff's bill was first erected by the Russian-American Company, anterior to the transfer of Alaska to the United States, and remained in the possession and under the control of that company until the transfer. After the transfer the military authorities then stationed at Sitka took possession of the wharf, and held it until 1879, when they abandoned the country. During their occupancy they extended the wharf from the stonework to its present limits. After the wharf was abandoned by the military, the collector of customs, claiming the custody of the property, on the 7th day of September, 1881, turned over and delivered possession of the wharf to the agents of the North-West Trading Company on the following conditions:

"With all the privileges of wharfage, warehouse, storage, etc., connected therewith, for the full term necessary in order to realize from said wharfage and storage receipts the following sums, due as stated and payable out of said wharfage and storage receipts, in the order

to be herein named; that is to say: (1) The sum of three hundred and six dollars and fifty-nine cents (\$306.59) due to said parties, as such agents, for advances on the late repair of said wharf, as per account of myself transferred and assigned to them; (2) the sum of four hundred and eighty dollars and ninety-one cents (\$480.91), due me for advances and commissions, and the sum of six hundred and fifty dollars (\$650.00) on order of Frank Starr, held by A. T. Whitford & Co.; which claims are held in equal merit as liens of the second class, and to be paid by an equal division of all receipts of storage and wharfage, after payment of the first and preferred claim in full, and the application of half of said receipts to each of said debts; but provided that the necessary repairs to said wharf may be made and paid first out of said receipts as the said receipts accrue and the repairs are needed for the safety of said wharf."

The agents of the company remained in possession until 1887. It further appears that in 1881, and prior to the delivery of possession by the collector of customs to the agent of the N. W. T. Co., the framework of the wharf became decayed, and fell down, and that it was rebuilt by private subscription. After the abandonment by the agents of the company, the defendant James Carroll took possession, and in January, 1888, filed his application in the District Court for the appointment of a receiver, and asked to be allowed to use \$1,000 of the earnings of the wharf for the purpose of repairing the same and making it safe for the landing of vessels. The prayer of the petitioner was granted; the wharf has been rebuilt, and is now in a safe condition for landing vessels, making them fast, and discharging and receiving their cargoes.

As I view this case, there is no question of title involved. The plaintiff cannot claim equitable relief, because his petitioner does not show or allege that he has not an adequate remedy at law. To entitle the plaintiff to relief in equity and invoke remedial relief by injunction, it must be made to appear upon the face of the petition that he cannot redress his

supposed grievance in an action at law. It is not; and never was, the province of courts of equity to take cognizance of cases where the law affords an ample remedy. Equity must necessarily have a place in every rational system of jurisprudence. It is impossible that any code or system of laws, however minute, should embrace or provide for the infinite variety of human affairs, or should furnish rules applicable to all of them.

Every system of laws must necessarily contain defects, and cases often occur for which the law based on precedents and fixed rules affords no redress. It is in such cases only that equity interposes to do that justice for which the law fails to make provisions. But the courts in the various states have uniformly held that equity will not interpose when there is ample remedy at law. To entitle a party to relief in equity, his petition must show upon its face that he is without remedy at law, and that, unless equity interposes, he will sustain irreparable loss or injury. The petition in this case most signally fails to show any such ground for invoking the equitable arm of the court, or that petitioner cannot have ample redress at law. The plaintiff has greatly mistaken the manner of quieting title, if that was the object of the suit. The primary object of a suit to quiet title is to compel the outstanding claimant to bring a suit for the purpose of trying the strength of the title to the property in dispute. A condition precedent to this form of proceeding is that plaintiff must allege that he is in possession of the disputed property, owning an estate of freehold or an unexpired term of not less than 10 years. He may then file his petition in a court of competent jurisdiction, setting forth his estate, whether of inheritance for life or years, describing the premises, and averring that he is credibly informed and believes that the defendant makes some claim adverse to the petition, and concluding with a prayer that defendant may be summoned

to show cause why he should not bring an action to try the alleged title. The proceeding is only preliminary to a suit to settle title, and was never intended to determine future or contingent interests not interfering with present possession. Webb v. Donaldson, 60 Mo. 394.

The title to the property not being involved in this controversy, I may remark, obiter dictum, that, while the sea is probably without an owner, and is regarded as an unappropriated waste, yet those parts of the sea which wash the shores of civilized nations have been and are regarded as capable of appropriation, and of being held by possession. If the theory of the plaintiff be true that the portion of the sea upon which the Sitka wharf is erected passed to the United States under the treaty and protocol, still the defendant might have a lawful right to erect and maintain a wharf, since it is clear that portions of the sea may be appropriated, provided such appropriation does not interfere with navigation. The United States Supreme Court has held in an early case, which I believe has not been overruled, that, pursuant to that provision of the Constitution conferring upon Congress the right to dispose of and make all needful rules and regulations respecting the territory or other property of the United States, an appropriation of a water front for the purposes of wharfage to the United States can only be made by an act of Congress. See U. S. v. Fitzgerald, 15 Pet. 407, 10 L. Ed. 785.

It is a fact well known here that great inconvenience has been experienced and expenses augmented because of the defective condition of the wharf and the use of lighters in landing the various articles of merchandise at this port; and it was only through the energy and enterprise of the defendant Carroll, who advanced his own money for the purpose, that the wharf has been rebuilt, and the conveniences of yore re-established. The Sitka wharf is erected on the shore of an

arm of the great ocean, upon whose bosom floats a large portion of the commerce of the world, and it is essential that there should be a safe place of landing and securing the instruments of commerce that ply on this vast highway.

The order of the court is that the plaintiff's petition be dismissed, and the defendant Carroll be left in the true, untrammeled use and occupancy and peaceable possession of said wharf.

MYERS v. SWINEFORD.

(Sitka. August 24, 1888.)

No. 76.

1. JUSTICE OF THE PEACE—JURISDICTION.

Under the organic act of May 17, 1884 (23 Stat. 24, c. 53), a commissioner in Alaska, sitting as a justice of the peace, is limited in his civil jurisdiction to controversies where the amount involved does not exceed \$250.

2. COURTS—CONSENT—JURISDICTION.

If a court of limited jurisdiction assumes to act in a case over which the law does not give it authority, the whole proceeding, from the issuing of the writ to the rendition of the judgment, is void. Consent of parties cannot confer jurisdiction where the law has not.

3. UNITED STATES COMMISSIONER—JURISDICTION.

A judgment was rendered against the defendant before a commissioner at Sitka. The cause was taken before the District Court on certiorari. *Held*, that the commissioner was limited in jurisdiction to \$250.

A. K. Delaney and M. D. Ball, for petitioner.

W. Clarke, for respondent.

DAWSON, District Judge. This was an action of assumpsit, brought by plaintiff against the defendants before

United States Commissioner Brady to recover the sum of \$600. The commissioner issued summons made returnable on the 15th day of July. On that day the counsel for defendants appeared before the commissioner, and for that purpose only filed a demurrer, alleging the want of jurisdiction on the part of the commissioner to hear and determine the cause.

The demurrer was overruled, and judgment entered against the defendants for the amount of plaintiff's claim, being \$600.26. The defendants then applied to the District Court for a writ of certiorari, upon the ground that the commissioner had exceeded his jurisdiction, and that the judgment rendered by him was void. This raises the direct question as to the jurisdiction of United States commissioners under the act of Congress of May 17, 1884 (23 Stat. 24, c. 53). The question is of importance and not easy of solution.

In construing a doubtful statute, the first rule is to ascertain the legislative intent, and, if possible, give effect to every clause and section of it. It is the duty of courts, so far as practicable, to reconcile the different provisions so as to make the whole act consistent and harmonious. We cannot well doubt the proposition that in the use of language uncertainty and ambiguity will almost invariably occur. Statutes, treaties, and even the books of our religions, furnish instances innumerable to the mind of the imperfection of language, and of the doubts arising as to the proper interpretation of words employed in the construction of sections, sentences, and their various subdivisions. Section 5 of the organic act, after providing for the appointment of four commissioners by the President, defines their duties and powers as follows:

"Such commissioners shall exercise all the duties and powers, civil and criminal, now conferred on justices of the peace under the general laws of the state of Oregon, so far as the same may be applicable in said district, and may not be in conflict with this

act or the laws of the United States. They shall also have jurisdiction, subject to the supervision of the District Judge, in all testamentary and probate matters, and for this purpose their courts shall be open at stated terms and be courts of record, and be provided with a seal for the authentication of their official acts. They shall also have power to grant writs of habeas corpus for the purpose of inquiring into the cause of restraint of liberty, which writs shall be made returnable before the said District Judge for said district."

It is lamentably true that the act of Congress of May 17, 1884, known as the "Organic Act," establishing a civil government for Alaska, is unsurpassed for uncertainty. The context and the whole body of the act indicate a want of that consideration which should always characterize an act of Congress establishing a civil government for the people inhabiting newly acquired territory.

In the annals of American legislation, this act stands glaringly and conspicuously forth as a stupendous piece of stupidity. It is, indeed, difficult for the court to sift from its incongruous and ambiguous provisions anything that is tangible to the common sense of mankind in relation to this question. Acts of legislation capable of being construed and applied so as to strike at the right and common sense of the object of the act should receive the interpretation which will make them conform to some reasonable intendment or allowable presumption.

What, then, does section 5 mean? Is it not clearly a limitation of the powers of the commissioner? Does it not circumscribe and limit his jurisdiction in the trial of civil causes to that of justices of the peace under the laws of Oregon?

Investing commissioners with jurisdiction in testamentary and probate matters subject to revision by the District Court cannot be construed as enlarging or extending their jurisdiction in other civil controversies, but clearly indicates an in-

tent to limit and subordinate them in all matters, except the powers specially conferred in section 5, to the jurisdiction conferred by the Code of Oregon (pages 284, 285) upon the justices of the peace. That part of section 5 conferring upon them the jurisdiction and powers of United States Commissioners of Circuit Courts is another indication of an intent to limit their jurisdiction, since Congress has defined the powers of Circuit Court Commissioners. They may hold to bail in criminal cases, may take proof in bankruptcy, may act under the direction of the Circuit Courts as the chief supervisors of elections. But when, and from what source, do they derive power to hear, determine, and render judgment in civil controversies? They may take bail and affidavits in a certain class of civil cases, but all are returnable to the court. They are empowered to enforce awards of foreign consuls in differences arising between the captains and crews of vessels belonging to the nation whose interests are committed to their charge. But such power can only be invoked by petition to the court or commissioner by the consul, vice consul, or commercial agent of the foreign nation to which the petitioner may belong. Section 728, Rev. St. [U. S Comp. St. 1901, p. 584].

But nowhere from section 627, Rev. St. [U. S. Comp. St. 1901, p. 584], to sections 2025, 2026 [U. S. Comp. St. 1901, p. 1272], and 5296 [U. S. Comp. St. 1901, p. 3608], are they authorized and empowered to hear, determine, and render judgment in civil cases, other than those specially mentioned.

Section 7 of the organic act confers upon them unlimited jurisdiction, except in equity cases, cases involving land titles and mining claims, and criminal cases that are capital. There is clearly a conflict between sections 5 and 7 of the act in relation to the question of jurisdiction, and to determine this question properly a resort must be had to known and fixed rules of construction.

Mr. Sedgwick, in his book on Statutory and Constitutional Law, has collected and classified certain rules of interpretation from some of the great legal lights of the world. Vattel says:

"Though a thing appears favorable when viewed in one particular light, yet when the proper meaning of the terms, if taken in its utmost latitude, leads to absurdity or injustice, their signification must be restricted." Sedg. § 297.

Domat says:

"If laws of doubtful meaning be connected with or related to other laws which throw any light on their purport, the interpretation thus derived is the one that should be adopted." Id. § 285.

If doubts or difficulties in regard to the interpretation of the law have been solved by contemporaneous interpretation, then the court should adopt that conclusion.

If Congress intended to confer upon these commissioners unlimited jurisdiction in all matters save the exceptions in section 7, then we should indulge the presumption that the President would have selected men learned in the law to occupy the positions; but from the incipiency of the civil government in Alaska the commissioners provided for in the organic act have been appointed and confirmed by the Senate without reference to their legal acquirements, thus indicating that they were regarded as tribunals of limited jurisdiction. As was well said in the argument of petitioner's counsel, we cannot presume that Congress intended to establish five courts so equal in power, save from the exception in section 7.

The rule to be deduced from the authorities is that, when there is a conflict between two parts of the same law, and a particular thing given is announced or a jurisdiction defined by the preceding part of a legislative act, it shall not be altered or taken away by any subsequent general words in

the same act. Sedgwick, Statutory and Constitutional Law, 601; Stanton v. University of Oxford, 1 Jones, 26.

Applying this rule, which I deem to be a sound one, the mind is led to the conclusion that the lines in section 7 of the organic act which extend the jurisdiction of the commissioners for Alaska must be regarded as superfluous matter, because they are in conflict with section 5 upon the same subject, and in a subsequent part of the act. A court of limited jurisdiction can take cognizance only of those matters conferred by the law of its organization. It can try and determine cases of that description only. If it assumes to act in a case over which the law does not give it authority, the whole proceeding, from the issuing of the writ to the rendition of judgment, is void; and the rights of property cannot be disturbed by means thereof. Blin v. Campbell, 14 Johns. 432.

So strict is this rule that the consent of parties cannot confer upon a court a jurisdiction or a power to act upon subjects which are not submitted to its judgment by the law. The law creates all inferior tribunals, and, with reference to considerations of general public policy, defines and limits their jurisdiction.

The conclusion I have reached under the Alaska act is that the trial of civil causes is limited to that of justices of the peace under the laws of Oregon, extending to controversies only when the amount involved does not exceed \$250, and that the judgment rendered in this cause by the commissioner is void; and it is so ordered.

Ex parte DUBUQUE.

(Sitka. September 20, 1888.)

No. 184.

1. INDICTMENT AND INFORMATION—HABEAS CORPUS—TRESPASS.

Person committed on information will not be released on habeas corpus for mere irregularity in the proceedings. The information, however, must show upon its face that the acts charged constitute a crime, and are not merely a trespass. *Held*, that an information charging that the prisoner did, "on the 17th day of August, 1888, take and appropriate for his own benefit gold dust belonging to Henry Coon & Co., the said gold dust so appropriated by the said Norman Dubuque being more than one hundred dollars in value," does not charge a crime under the laws of Oregon, but only a trespass.

The prisoner was committed by a United States commissioner on an information charging him with larceny under the statutes of Oregon, made applicable to Alaska. The prisoner applied for habeas corpus upon the ground that the information upon which the commitment rests charges no criminal offense. Prisoner discharged.

U. S. Dist. Atty., for marshal.

KEATLEY, District Judge. It appears that on the 21st day of August, 1888, Louis L. Williams, a United States commissioner in and for the District of Alaska, committed the petitioner, in default of bail fixed, to the custody of the United States marshal, on the charge of larceny of property of the value of \$100, to await trial on that charge under the statutes of Oregon defining that offense, and made applicable by Congress to this district. The petitioner complains that he is illegally restrained of his liberty by such commitment, in that the information upon which the arrest was made charges no criminal offense whatever. No minutes or

notes of evidence given at the preliminary examination before the commissioner accompany the papers in the case, and the court, in inquiring into this matter, is confined wholly to the contents of the information, of the warrant, of the transcript, and of the commitment accompanying the return of the marshal.

It is a well-settled principle in proceedings of this kind that neither a judge nor a court will discharge a petitioner where the objection is only to the irregularity of the proceedings by which he is held. The objection must go to the illegality of the commitment. As an instance of an irregularity where there can be no interference by writ of habeas corpus, there is one where the statute provides that a defendant in a criminal proceeding may testify in his own behalf, and is denied this right, though claiming it. The relief in that case is by mandamus to compel the magistrate to allow the exercise of the right, and not by a writ of habeas corpus to review the proceeding and attack it collaterally. Hurd on Habeas Corpus, p. 328, and the cases cited in the note.

The rule in applications for the writ is properly stated in the following terms:

"Where the return shows a detainer under legal process, the only proper points for examination are the existence, validity, and present legal force of the process, except where, in commitments for criminal or supposed criminal matters, the court—or officer—hearing the habeas corpus is vested with a revisory or corrective jurisdiction over the court or officer commanding the imprisonment, in which case the facts constituting the grounds of commitment may be reviewed." Hurd on Habeas Corpus, p. 327. "In the absence of facts extraneous of the papers themselves in the case under consideration, those facts stated in the information cannot be taken as true and confessed, and the ones upon which the investigation must turn."

The question, then, is whether the information charges any crime in any sense as the foundation of the commitment un-

der which the petitioner is now held, or simply contains averments amounting to a trespass for which the complainants had a civil remedy. It is true that an attempt has been made to accuse the petitioner of the crime of larceny, but the legality or illegality of the information, and not its mere irregularity, as already noticed, must still be determined by the facts as stated to constitute the offense of larceny. The allegations in the information are that the petitioner did, "on the 17th day of August, 1888, take and appropriate for his own benefit gold dust belonging to Henry Coon & Co., the said gold dust so appropriated by the said Norman Dubuque being more than \$100 in value." The taking and appropriating of another's personal property is not necessarily a criminal offense. One may do so under a disputed claim of right, and such claim would be a matter of defense; but an information must still be so certain in its statements that on its face such defensive matter cannot be inferred, or the act as to its criminal character rendered doubtful. The offense depends entirely on the intent. In any proceeding charging the offense the intent must be manifestly stated. Such words as "feloniously" or "to steal" are criminally used to express the intent in cases of larceny, when coupled with terms denoting a usurpation of the property. These words have a well-understood signification. The force of the remark of counsel for the marshal that, if the offense is charged in the words of the statute, it is sufficient, is conceded to a certain extent. The words of the statute in this instance were not used. The statute (section 552, Gen. Laws Or. 1843-1872) employs the word "steal," a term not employed in the information in question; and provides that any person, who shall "steal" any of the personal property therein described shall be deemed guilty of larceny. The information does not contain any word equivalent to, or any group of words synonymous with, the words "feloniously," or "steal," or "to steal,"

though the word "larceny" occurs therein only to designate the class to which the offense belongs in case any offense or crime were elsewhere properly charged. It may appear technical to insist that some such word as "feloniously" or "steal" or their equivalents shall be inserted to discriminate a crime from a mere trespass; but the law itself having made the distinction between such acts, and having denounced one as criminal, and deemed that the other is not, these conditions must be adhered to, whether they are technical or not. The statute (section 1546, Hill's Code Or.) makes it essential in an information that the person charged shall have "been guilty of some designated crime." It cannot be understood, then, that it is simply sufficient to name the offense somewhere in the information, without setting out the substantial facts constituting it.

The criminal intent of the petitioner is nowhere set forth in the information drawn in question, and therefore the instrument is illegal as the basis of the commitment, and the petitioner should be discharged from custody. Such is the order to the United States marshal.

GARSIDE v. NORVAL.

(Sitka. October 22, 1888.)

No. 136.

1. TENANCY IN COMMON—PARTNERSHIP—MINES AND MINERALS.

When two persons locate a mining claim together, as to such claim only, their relationship is that of co-tenants of real estate and not copartners in business.

2. SALE—TENANCY IN COMMON—TRUST.

When one co-tenant of a mining claim, acting as the agent of the other, sells his interest to a third party, he assumes no trust

relationship, and a suit in equity will not lie for an accounting, the proper remedy being a suit at law to recover the amount alleged to be due.

Application for Restraining Order.

A. H. Gamel, for plaintiff.

KEATLEY, District Judge. On the 3d of October, 1888, the plaintiff filed a complaint in the office of the clerk of this court, with the averments that on the 26th day of August, 1885, he and the defendant, by their joint efforts, located a quartz mining claim, called the "O. R. O. Quartz Mining Claim," in the Harris mining district, and he describes his interest therein as "an undivided one-half"; that on the 19th day of February, 1886, he constituted the defendant his agent and attorney in fact to sell and dispose of his interest in such mining claim, it being also understood between them that the defendant should sell the interests of both for their common benefit; that the defendant made a sale of the premises, but, instead of selling the entirety of both owners, secretly and fraudulently reserved to himself, as a part of the terms and conditions of sale, some interest not disclosed to the plaintiff; that the defendant also fraudulently concealed from plaintiff the real amount of the purchase money received by him, and only paid over a part of the same to the plaintiff, thus withholding from plaintiff his just share of the proceeds of the sale. Upon this state of facts he prays that an accounting may be had, and a decree entered for any balance that may be found due him. On the 19th of October, 1888, the plaintiff also filed a supplemental petition, asking an order to restrain the defendant from disposing of his property until any such decree as might be obtained should be satisfied, and especially restraining him from conveying his reserved interest in the quartz claim.

The original complaint and the supplemental bill assume that the plaintiff and the defendant, in locating the claim in question, became copartners in a legal sense, and in that respect were doing business as such partners. If that be true, then the plaintiff is entitled to equitable relief in the form in which he has asked it. If they were not copartners, but simply tenants in common of a tract of land, then such form of relief must be denied.

Before considering or taking equity jurisdiction, the court must determine, upon this statement of facts, whether or not the plaintiff has a complete and adequate remedy at law for the injuries he alleges. There is no allegation that the parties were engaged in actual mining operations, such as mining quartz, and either selling the ore or reducing it. Of course, to establish and locate a valid quartz claim, it was necessary to do the statutory amount of work thereon, and to secure the patent from the United States. In addition to this, a further consideration in money was required to be paid to the federal government; but that of itself will not create the relation of copartners between them. The work and labor to be performed, to assert and establish the mining claim, as the basis of the patent for the fee simple of the land, are only a part consideration which the government requires precedent to the issuance of such patent. A partnership is a contract of two or more competent persons, effects, labor, and skill, or some or all of them, engaged in lawful commerce or business, to divide the profit and bear the loss in certain proportions. 3 Kent's Commentaries (6th Ed.) p. 23. This definition implies a course of dealings with others than the members of the partnership themselves, and in the ordinary course of its proposed business. The law has impressed certain different classes of property, so that men cannot alter them at will in their contracts with each other. It has impressed certain classes of property with the

character of real estate, so that it is made to descend, and the proceeds of its sale to be distributed, in a totally different way from that of personality. These distinctions in the law are fundamental, and follow properly into almost all the contract relations of society. In partnership transactions real property belonging to the firm is treated as partnership assets only so long as debts of the firm remain unsatisfied. As between the partners themselves, land remains subject to the rules governing the distribution of real property.

The interest which persons acquire in the mineral lands of the United States by locating claims thereon and doing the specific things required by the mining laws is not a chattel interest, nor any kind of personal property; it is an interest in real estate. It ripens, by successive steps, into a patent, which conveys the fee simple; and each of these steps, including the issuance of the patent, relates back and includes the original and primary location. I assume, from the pleadings now on file, that the parties acquired a valid claim under the laws of the United States. The contrary may appear when that case is once at issue, but for the purpose of the present proceeding this must be taken as true. It is not alleged that a patent has never issued, nor is that material, so far as concerns these parties at this stage. The moment they jointly took the first steps to acquire title by locating the claim in question, and by complying with the law in all its essential particulars, they acquired an interest in real estate as tenants in common. The plaintiff concedes that much in his pleading by describing his interest as "an undivided one-half." If the plaintiff and the defendant were tenants in common in this real estate, and not copartners, a court of equity cannot interpose, for that reason, to compel an accounting between them for any proceeds of sale, but the remedy is by action at law for money had and received to the use of the plaintiff, if it be true that the defendant

made any sale of the moiety of the plaintiff, and, as such agent, has not paid over the whole of such proceeds to the party entitled to them..

There is no allegation that there are any accounts of claims outstanding and unsettled between the plaintiff and defendant, originating and being in existence prior to the time the plaintiff constituted the defendant his agent and attorney so as to sell and dispose of the entire quartz claim. The charge is wholly of fraud, committed by the defendant as agent of the plaintiff, and not as a mere partner, and after such agency was created. If this agent withholds any or all of the purchase price or consideration received in the sale, the plaintiff's remedy is an adequate one at law in an action in damages for the breach of the contract of agency.

The complaint and the supplemental bill do not show that the defendant reserved from sale any part of the moiety owned by the plaintiff. So far as the bill states any facts, it can only be presumed that any secret interest reserved to himself by the defendant in the sale was from his own moiety. That will be presumed, in the absence of any allegation or proof to the contrary. No trust, then, with regard to that moiety, can exist in favor of the plaintiff, which will, under present circumstances, give this court equity jurisdiction, as prayed by him.

If the facts exist as stated in the complaint, the plaintiff has not only a specific claim for damages in a law action, but the elements from which a jury can ascertain the extent of his damages, as measured in money, and on which a court can render a complete judgment. The question is not whether the defendant may defeat an execution eventually. He may be able to do this in the end; yet, as these words are understood in the practice of the courts, the plaintiff has a complete and adequate remedy in a law action. The cases of Ambler v. Choteau, 107 U. S. 590, 1 Sup. Ct. 556, 27 L. Ed.

322, and *Root v. Railway Co.*, 105 U. S. 207, 26 L. Ed. 975, draw very clear distinctions between what actions may be maintained at law and what in equity. In Ambler's Case the contention was a patent for an invention. There was a defect of parties, which narrowed the contest to the question of damages to which the plaintiff might be entitled for the defendant's participation in a fraudulent conspiracy to defeat the entire property rights of the plaintiff, while acting under authority to sell interests in the patent. The Supreme Court says in that case:

"If, as is more than once distinctly alleged, the object of the suit is to recover damages for an unlawful and fraudulent conspiracy to cheat Ambler out of his interest in the original invention which is the subject-matter of the controversy, the remedy is clearly at law, and not in equity."

In that action the prayer was for an accounting of profits growing out of the use of the invention, but the pleadings showed that the real contention was a matter of damages, and the bill in equity was dismissed for that reason.

Root v. Railway Co. was where the assignee, after the expiration of the patent for an invention, sought by bill in equity an accounting for profits which had accrued before the expiration of the patent. The Supreme Court, in reviewing the action of the circuit court in dismissing the bill and thus approving it, says:

"It is a fundamental characteristic and limit of the jurisdiction in equity that it cannot give relief when there is a plain and adequate and complete remedy at law; and hence it had no original, independent, and inherent power to afford redress for breaches of contract or torts by awarding damages."

In ascertaining whether the plaintiff has a complete and adequate remedy at law, the court will take notice of the plaintiff's statutory remedy in a law action by attachment, under such conditions as are prescribed therein. That rem-

edy may be invoked as an independent proceeding or as auxiliary to another law action. I have intimated no opinion of the value of the original complaint standing alone, and have only considered it in connection with the plaintiff's application for a restraining order.

In this view of the case, I am clearly of the opinion that the court is without jurisdiction to grant such order in the present state of the pleadings, and therefore the petition for such order is dismissed, allowing the original complaint to stand as filed.

DUNBAR v DE GROFF.

(Sitka. October 26, 1888.)

No 138.

1. DEPOSITIONS—WITNESSES.

Under the organic act of May 17, 1884 (23 Stat 24, c. 53), the depositions of witnesses residing outside of the District of Alaska can only be taken in strict compliance with sections 806-808 of the General Laws of Oregon, providing for notice to the opposite party, and the filing of interrogatories and cross-interrogatories, and the issuance of a commission to some officer to examine the witnesses, and reduce their answers to writing, and certify the same to the clerk of the District Court of Alaska.

Petition to Take Depositions. Denied.

A. H. Gamel and J. F. Maloney, for plaintiff.

Arthur K. Delaney, for defendant.

KEATLEY, District Judge. This is an application by one of the parties, by petition in open court, for an order for leave to take the deposition, out of the District of Alaska, of certain witnesses, whose testimony is alleged to be material to the party presenting the petitions. Two other motions of

a similar character were filed at the same time, and will be disposed of in the same way.

The General Laws of Oregon of 1843-1872 are, in part, applicable to the taking of such depositions. Section 806 provides that depositions may be taken out of the state—i. e., out of this district—either on commission or without any such commission, if taken before a duly appointed United States commissioner, residing out of this state, within appropriate distances from him.

When depositions are to be taken on commission outside of the District of Alaska, sections 807 and 808 provide how the commission may issue, and I will briefly point out the steps necessary to take such deposition:

(1) The party desiring to take it must serve on the adverse party, or his attorney of record, if there be one, a written notice and a copy thereof, of his intention, at a date certain, to issue such commission from the office of the clerk of this court, with a copy of the questions or interrogatories which he proposes to propound to the witnesses named in the notice and the interrogatories; and, if the notice and the interrogatories are served by an officer, a proper return of such service must be made in the ordinary way by him by indorsement on such original notice; and, if served by the party himself, or by his attorney, such service must be shown on said notice by affidavit, and must, with the said notice and original interrogatories, be filed in the office of the clerk of this court before the commission shall issue:

(2) That any time after the service of said notice of suing out said commission, and before the close of the day named in said notice fixing the date of suing out the same, the adverse party may file cross-interrogatories with the clerk of this court, without being required to serve a copy of said cross-interrogatories on the other party.

(3) On or before the day fixed in the notice of the time of

suing out said commission, the party proposing to take said deposition may file his notice and original interrogatories, together with the proof of service of the same on the adverse party, with the clerk of the court; whereafter said clerk shall issue a commission, with said notice and interrogatories and cross-interrogatories, if any are filed, attached to such commission, and directed to any judge, justice of the peace, notary public, or clerk of the court selected by him, and most convenient for the taking of such deposition, directing said judge or other officer so appointed to summon such witnesses to appear before him for that purpose, and to examine them under oath upon the annexed interrogatories and cross-interrogatories, if any are filed, and to reduce his examination to writing, and cause the same to be signed in his presence by said witnesses. When the deposition is so taken, it must be sealed up, and transmitted to the clerk of this court, according to the provisions of section 809.

(4) If the adverse party either fail or neglect to file cross-interrogatories before the close of business hours on the day named in the notice for suing out said commission, such failure or neglect to file such cross-interrogatories shall not delay the issuance of such commission, unless the party suing out such commission shall consent, in writing, to be attached to such commission; that further time, definitely fixed, be given to file such cross-interrogatories. The adverse party, under the statute, has no right to cross-examine the witness in any other way than in writing, filed with the clerk of the court before the commission is issued by him.

(5) When depositions are taken, either in the district or out of it, on commission, neither party nor his attorney nor agent has a right, under the statute, to be present when such deposition is taken or any witness examined thereunder; and if any party, or his attorney or agent in the cause, be present during such examination, except with the written consent of

both parties, the official taking the deposition should certify whether or not any such party, or his attorney or agent, was present, naming each one. When witnesses are examined under such circumstances, and without consent to the presence of such persons or parties, it is a good ground for suppressing the deposition at the cost of the party at fault.

I have only considered the question of taking depositions out of the district on commission, as there can be no ambiguity in sections 811 and 812, providing for the taking of depositions out of the district on notice simply.

The petitions presented are not in sufficient form, and do not comply with the statute to the extent that would authorize their being filed with the clerk of this court as a foundation for the taking of depositions either by commission or on notice. For that reason the petitions are dismissed without prejudice.

MARX & WEISS v. VALENTINE.

(Sitka. August 16, 1890.)

No. 208.

1. JUDGMENT—DEFAULT.

Judgment by default, entered upon personal service, will not be set aside unless defendant shows clearly that he has been prevented from defending through no fault of his own, and has a good and meritorious defense.

Motion to Set Aside Default Judgment.

Delaney & Gamel, for plaintiffs.

J. G. Heid and W. Clark, for defendant.

BUGBEE, District Judge. Motion by defendant that the judgment entered by default against the defendant and all subsequent proceedings thereunder be set aside, and that defendant have leave to answer.

From the pleadings, papers, and records it appears that the summons and complaint were served on defendant on the 26th day of September, 1889; that, no demurrer, answer, appearance, or other paper on behalf of defendant having been filed, the default was entered by the clerk; that at the May term of the court, held at Sitka on October 29, 1889, the court ordered judgment in favor of plaintiffs; that execution was thereafter duly issued, and on November 22, 1889, levied upon certain property supposed to belong to defendant; that on the day last mentioned one Mrs. Katherine Valentine notified the marshal in writing that said property was claimed by her as her own, and was not the property of the defendant; that thereupon the marshal summoned a jury to try the validity of said claim; that the defendant was present at the trial by the marshal, and made oath that he owed this claim for which the judgment was rendered, but that he had no property with which to pay it.

Defendant swears that he mailed to the clerk of the court at Sitka a general demurrer to the complaint, but does not give any date, and there is no pretense whatever of service upon the attorneys for plaintiffs at any time. The attorney employed by him at the time of service of the summons says that he prepared such a demurrer, and also a motion to dismiss, and handed them, with copies, to the defendant, who, as he is informed and believed, mailed the same to the clerk of the court, with instruction to have the copies served on plaintiffs' attorneys, but he gives no date.

One of plaintiffs' attorneys swears that no demurrer or notice of appearance was ever served, and the clerk in the office of the clerk of the court, who, as such, had charge of the filing of all the papers that came to said office for filing, says that no demurrer was ever received there.

On this state of facts defendant wishes to be relieved from the judgment, and to be allowed to answer, and file in court

his proposed verified answer, in which he pleads that on August 15, 1885, he had a full settlement with plaintiffs, through their attorney at law, under which he paid plaintiffs a certain amount in cash, and gave indorsed notes, for which he holds such attorney's receipt, and that said notes and cash were subsequently received and accepted by plaintiffs in full settlement.

The authority of the court over its judgment has been extended beyond the term by section 102 of the Oregon Laws (Hill's Ann. Laws, p. 242), which provides that the court may, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof relieve a party from a judgment taken against him through his mistake, inadvertence, or excusable neglect.

It is difficult to ascertain from the notice of motion, or from the argument, upon which of these excuses defendant relies. He gives as his reason for the motion:

"That defendant's attorney, at the time the summons was served, and before time to answer the complaint herein had expired, informed him [defendant] that the filing of a general demurrer would constitute an appearance, and, if said demurrer was overruled, he would be notified of the fact, and given a reasonable time to answer; that a demurrer and some other papers were handed to the defendant, and by him mailed to the clerk of the court at Sitka, Alaska; that said judgment was a surprise to the defendant, in that he received no notice of the overruling of the demurrer referred to, nor of judgment by default having been entered against him."

It is true, as his attorney advised him, that the filing of a general demurrer would constitute an appearance, and entitle him to notice of subsequent proceedings; but such demurrer must have been filed in time to effect that object, and, for all that may be ascertained to the contrary, the demurrer here, if ever mailed at all (of which I have my grave doubts), may not have been mailed until after the present motion was made. The summons was served in

Juneau, where defendant and his attorney resided, and where also plaintiffs' attorney resided. It was not necessary that a copy of the demurrer or other paper should have been sent to Sitka for service. They could have been served in Juneau before mailing.

Defendant must have known, of course, at the time of the trial by sheriff's jury in November, 1899, that judgment had been taken against him; yet he made no motion for relief at the succeeding November term, nor was the present motion made until June 9, 1890.

If his alleged settlement was a fact, it was a simple matter to plead it; but he filed, as he claims, a general demurrer instead, apparently for the sole purpose of delay, for it appears to be groundless in law.

His failure to move promptly for immediate relief in the face of a levied execution; his omission to state the date of mailing this general demurrer and other papers, or that it was even within the time allowed to him to demur; his neglect to serve those papers upon the opposite party or their attorneys; his public avowal upon oath that he owed the debt in suit—all tend to create and sustain the impression that his claim for relief has no merit, and that there was no occasion for surprise at any step plaintiffs may have taken. There does not appear to have been any mistake, inadvertence, or excusable neglect whatever on his part, and, if there was any surprise, it was not such as would entitle him to the relief asked for here. There are no other grounds upon which the court, after the term, may, on simple motion, grant relief from the judgment.

Defendant has failed to file an affidavit of merit, and the filing of his verified answer does not supply its place.

Even taking that answer to be literally true, it might be affected by other matters in avoidance well known to defendant, but which he is under no obligation to state. The

indorsed notes with which he claims to have made a settlement may never have been paid. The settlement made with an attorney may have been unauthorized, or it may have been of a different account from that mentioned in the complaint.

It does not appear that the defendant, in addition to having an answer to the complaint, has a defense which is sufficient and meritorious when viewed in all the light that can be thrown upon it by all the facts involved in the action. The answer alone does not show that defendant had a good, full, and perfect defense to the action upon the merits, and, even if there had existed any of the causes for relief mentioned in the statute, it would have had little influence upon the doctrine of the court.

Upon the facts shown, the motion of defendant must be denied, and it is so ordered.

GRÆCO-RUSSIAN CHURCH v. COHEN.

(Sitka. September 3, 1890.)

No. 186.

1. Costs—FEES—MILEAGE.

A witness who is neither subpoenaed nor called to testify is not entitled to either fees or mileage. One called within the courtroom is not entitled to mileage. One who attends without being subpoenaed, though he comes a long distance and testifies, and is a necessary witness, cannot recover mileage under the laws of Oregon, then applicable to Alaska.

Motion to Retax Costs. Plaintiff had judgment as prayed for, with costs, and on July 10, 1890, filed its bill of costs, amounting to \$151.15. On July 14th defendant filed with the clerk his objections to certain items in the bill, but his objections were overruled by the clerk, and the whole amount was

allowed as claimed. On July 16th the defendant, feeling aggrieved by the decision of the clerk in such allowance, appealed from the taxation of certain items, which are as follows: (1) All of the \$134 witness fees of N. G. Metropolisky, except the sum of \$2; (2) the mileage allowed to witnesses Andrew Kasavaroff and George Kostiometinoff in the sum of 20 cents; (3) the witness fees of Vladimir P. Donskoy of \$2. On the hearing of the appeal an affidavit was filed in behalf of plaintiff that N. G. Metropolisky resided at Kenai, in Cook's Inlet, attended court as a witness for plaintiff 27 days, and traveled 800 miles from the place of his residence to the place of attending court; that Andrew Kasavaroff, George Kostiometinoff, and Vladimir P. Donskoy resided at Sitka, the place of holding court, attended 1 day, and traveled 1 mile each; that each and all of said witnesses attended the court as such witnesses for the plaintiff, under the direction and by the request of the attorney for plaintiff, and that each and all of them actually and necessarily attended the number of days and traveled the distances above mentioned.

A. K. Delaney, for plaintiff.

C. S. Johnson and M. P. Berry, for defendant.

BUGBEE, District Judge. There is nothing in the record nor among the papers to show that either of said witnesses was ever subpoenaed to attend as a witness in the action, or attended otherwise than voluntarily, and the main ground of defendant's objection is that neither of them had been subpoenaed, and therefore that plaintiff can recover no mileage whatever, and can recover only the fees for one day's attendance of the witnesses who were actually sworn as such.

"A witness is a person whose declaration under oath or affirmation is received as evidence for any purpose, whether such declar-

tion be made on oral examination or by deposition or affidavit." Gen. Laws Or. § 699, p. 251.

Vladimir P. Donskoy does not come under this definition, and neither fee nor mileage can be allowed him as a witness. It is doubtless true that plaintiff requested his attendance in the belief that it was necessary; but it was not in fact necessary, and he was not called as a witness. It would open too wide a door for the admission of oppressive cost bills if parties were permitted to recover as costs the fees and mileage of persons not placed upon the witness stand nor offered as witnesses, simply because counsel at some stage of the case may have considered their attendance necessary.

Kasavaroff and Kostiometinoff were witnesses, whether subpoenaed or not, having testified on oath at the trial, and were entitled to their fees as such, but neither was entitled to mileage.

"Every person whose fees are prescribed by the statute, and this includes witnesses who shall be required to travel in order to execute or perform any public duty, * * * shall be entitled to mileage."

There is no other provision for mileage. Each of the parties resided in Sitka, where the court was held. Neither was subpoenaed, and for all that is shown to the contrary, each was a voluntary attendant.

The process by which the attendance of a witness is required is a subpoena. Gen. Laws Or. § 779, p. 266. Not having been subpoenaed, neither of these witnesses was required to attend nor required to travel to perform any public duty, and, as it is only such as are required to travel that are entitled to mileage, it is clear that these witnesses cannot claim it.

The case of N. G. Metropolisky presents somewhat greater difficulties, or, more properly speaking, possibly greater hardship for plaintiff, at whose request he was in attendance. His

residence was at Kenai, in Cook's Inlet, in this territory, and it was conceded on argument that, if he were entitled to mileage at all, the amount would not be less than that claimed in the bill of costs, which is \$80, being at the rate of 10 cents per mile for 800 miles. He was in actual attendance upon the court, his attendance was undoubtedly necessary, and his declaration under oath was received as evidence at the trial; but he was not subpoenaed to attend, and was not, therefore, in view of the law, required to attend, nor to travel, in order to execute or perform any public duty. He is not entitled to mileage. He was not obliged to leave his home without a subpoena, nor, even had he been served with a subpoena, could he have been compelled to do so, unless the court, or judge thereof, upon the affidavit of the plaintiff or some one on his behalf, showing that his testimony was material and his oral examination important and desirable, had indorsed upon the subpoena an order for his attendance, and service had been made upon him of such subpoena and order, and payment also made to him of double witness fees. Gen. Laws Or. § 785, p. 267.

Under the section quoted, no witness in Oregon can be obliged to attend for oral examination or otherwise at a place outside of the county in which he resides, or in which he may be served with a subpoena, unless his residence be within 20 miles of such place, except upon the order of the court or judge, as above stated. We have no subdivisions of this territory into counties, but it would be an absurd construction of the statute to hold that for that reason the whole territory must be considered as one great county, and that the witness, if subpoenaed at his place of residence to attend at Juneau or Sitka, 800 miles away, was not thereby called outside of the county in which he resided, or in which he might have been so served. As to the fees to be allowed to him as a witness, it appears that he attended from June 13, 1890, to July 10, 1890, or 27 days in all. The witness, not having

been subpoenaed, must be considered to have been a voluntary attendant at court, and, being present, was, like any other person, required to testify in the same manner as if he had been in attendance under a subpoena. Gen. Laws Or. § 786, p. 267. For this attendance he was entitled to a fee of \$2 only.

For these reasons the defendant's objections must be sustained, and the clerk is ordered to retax the costs in accordance with this decision.

NOLAND v. COON et al.

(Sitka. September 13, 1890.)

No. 196.

1. MINES AND MINING—CONVEYANCES—WATERS AND WATER COURSES.

Mining ditches and flumes are real estate, and do not pass as appurtenant upon the sale of a mining claim. They must be conveyed with as much formality as any other real estate.

2. WATERS AND WATER COURSES—ABANDONMENT—RELOCATION.

Water rights, ditches, and flumes *held* abandoned, and the use and possession thereof lost, under the laws of Oregon applicable to Alaska, for nonuser for one year or more, and they will then be open to relocation and possession by the next locator.

3. ABANDONMENT—INTENT—EVIDENCE.

Abandonment is a question of intent. The evidence in support of the charge must be clear and convincing, and the burden of proof is upon the one alleging abandonment.

Suit in Equity to Restrain Defendants from Interfering with Plaintiff's Water Rights, Ditches, and Flumes.

Delaney & Gamel, for plaintiff.

C. S. Johnson and J. G. Heid, for defendants.

BUGBEE, District Judge. This is an action in equity, brought to restrain defendants from interfering with plaintiff's alleged water rights.

It appears from the evidence that plaintiff, having been authorized by the owners of certain lode claims lying in the Silver Bow Basin, Harris mining district, to work the surface ground thereof for the purpose of taking out gold in the manner usual in placer mining, in furtherance of that end took steps to appropriate the waters in the streams of Snow Slide Gulch by posting and recording notices of location and appropriation on July 29, August 31, and September 2, 1889, respectively, in compliance, substantially, with the local mining laws of the district.

By these acts, as against defendants, plaintiff acquired whatever water rights he claimed thereunder, unless defendants could establish a prior location or appropriation by themselves or their grantors.

To establish such prior appropriation, it was shown by defendants, and, indeed, is not disputed by plaintiff, that on August 22, 1881, one R. T. Harris and one Joseph Juneau, from whom defendants claim to derive title by divers mesne conveyances, made, posted, and recorded a notice of appropriation of the same water rights so subsequently appropriated by plaintiff.

At the time of such appropriation by Harris and Juneau no mining laws relating to water rights in the Harris mining district has been adopted, but it is not controverted that their appropriation was legally made in accordance with local customs.

If, therefore, defendants deraign title from Harris and Juneau, and it is not shown that their rights were abandoned and that their title had ceased prior to the appropriation by plaintiff, then their claims must prevail, for Harris and Juneau had, by priority of possession, a vested right to the

use of the water which they might lawfully transfer to others, and the law provides that:

"Whenever by priority of possession, rights to the use of water for mining * * * purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." Rev. St. U. S. § 2339 [U. S. Comp. St. 1901, p. 1437].

The first question, therefore, is whether defendants have succeeded to the rights of Harris and Juneau.

There is no question that ditches used for mining purposes and mining flumes permanently affixed to the soil are real estate, and are subject to the laws of Oregon applicable to this territory, which govern the sale and transfer of real estate. Code Or. p. 687; Misc. Laws, §§ 7, 8. Conveyances thereof, or of any estate or interest therein, must be made by deed, signed, acknowledged, and recorded. Code Or. p. 515; Misc. Laws, § 1. The conveyance of such ditch or flume might, generally speaking, convey with it, as incidental or appurtenant, the right to the water which it carries, for, as a rule, the right to have water flow in it is coextensive with the right to the ditch itself.

But it does not follow that, because the water and the ditch have been appropriated or used for the purpose of working certain mining grounds, a conveyance of these grounds would carry, as appurtenant thereto, the title to the water and the ditch.

Water rights are a species of realty, and require the formality of a conveyance. Barkley v. Tieleke, 2 Mont. 59. The right to the water exists separate and apart from the mining property upon which it is used. It is a substantive and independent right, an easement without any fixed or limited dominant estate; whatever property it might be used with or upon being such estate for the time being. Bk. of

Brit. N. A. v. Miller (C. C.) 6 Fed. 545, 7 Sawy. 163. The place of diversion might be changed, the ditch might be extended beyond the place where the first use was made, the water might be turned into the channel of another stream and then reclaimed. Mining Laws Harris Mining District, Acts 3 and 5. Its application may be changed from time to time, both as to use and place, at the pleasure of the owner. A water right is, therefore, not appurtenant to a mining claim on which it is used, in the technical sense of that term, so that it would pass with it without special mention or agreement to that effect. Bk. B. N. A. v. Miller, supra. It must be conveyed with as much formality as other realty is conveyed. Tested by these rules, the defendants have not succeeded to the rights of Joseph Juneau, one of the first locators.

The Discovery mining claims were the claims for the working of which the water had been used by Harris and Juneau. No water rights, ditches, or rights of way are mentioned in the deed, and there is no evidence that any were intended to pass by the conveyance; nor did they pass by the words, "including everything appertaining thereto." The deed alone is evidence of nothing relating to this case, except that Juneau parted with his interest in the mine on which the main was used. No other deed from Juneau is produced, and from all that appears to the contrary he has never parted by deed with his title to the property.

The next question is whether the defendants have succeeded to the title of Harris, the co-tenant of Juneau. The only evidence on this point is a copy of what appears to be a marshal's certificate of sale in the suit of N. A. Fuller et al. v. R. T. Harris et al. (commenced in this court), in which one Barton Atkin, then United States marshal for the District of Alaska, certifies that by virtue of an execution in the above cause, attached the 26th day of May and the 29th

day of October, 1886, he was commanded "to make the amount to satisfy the balance on execution in my hands in the said cause to satisfy the judgment in this action, with interest thereon and costs." This certificate, as appears from the copy before me, was not issued until September 18, 1889, more than two years from the day of sale, and was not recorded until September 28, 1889.

The records in the case of Fuller v. Harris, which were put in evidence by the defendant, disclose the facts that an execution was issued therein, attested May 26, 1886, which is the same one referred to in the marshal's return dated December 17, 1886, reciting, among other things, that it was placed in his hands on May 27, 1886, and that subsequently, by an order issued by the court, further proceedings thereon were for the time being stayed; that again on October 18, 1886, by order of the court, he was charged with the execution of the process, whereupon he levied upon, and on November 22, 1886, sold, certain property of the defendant Harris, including, with interests in certain lode claims and town lots, a half interest in certain placer mining ground situate on Silver Bow Basin. The return does not recite that there was any levy upon or sale of any water ditch, flume, right, or privilege whatsoever.

If there had been an alias execution issued, with a proper levy upon and sale of the interest in the property in dispute, there is still lacking an order of the court confirming any sale, and such order is made by statute a conclusive determination of the regularity of the proceedings concerning such sale as to all persons in any other action, suit, or proceeding whatsoever. Civ. Code Or. § 293, p. 169. The date of the order of confirmation also fixes the date after which a lienholder may redeem, and a purchaser demand a conveyance. Sections 298, 301. The interests recited in the marshal's certificate as having been sold were, if sold, sub-

ject to redemption, and in such cases the certificate and return are required to contain a statement that the property is subject to redemption. *Id.* § 296. There is no such statement in the certificate, and the execution and the return (if there ever were one) are missing. Even if there had been an order of confirmation, the property may have been redeemed, or the certificate of sale assigned, and the purchaser not entitled to a conveyance; but, there being no such order, the time for redemption has not yet commenced to run, and a purchaser would not be entitled to the marshal's deed. Under such circumstances the marshal's certificate of sale is wholly incompetent to establish, as against plaintiff, any title in the defendants, either legal or equitable, to the possession of the premises. *McMinn v. O'Connor*, 27 Cal. 239.

Whatever else defendants are required to put in evidence as showing title or right of possession, they should certainly have produced what they have failed to produce, and that is a deed from the marshal. *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441; *Los Angeles Co. Bank v. Raynor*, 61 Cal. 145; *McRae v. Daviner*, 8 Or. 63.

The defendants, having failed to show that they had acquired the interest of Harris through the proceedings in *Fuller v. Harris* or otherwise, and likewise failed to show that they had succeeded to the title of Juneau, have not connected themselves with any location prior to plaintiff. But, even if they had acquired the interests mentioned, I am of the opinion that its assertion would not benefit them in this action, because it appears that such interests had ceased prior to the date of the appropriation by plaintiff.

Under article 2 of the mining laws of the Harris mining district, when the appropriator of a water right ceases to use it for the purpose for which it was appropriated, the right ceases.

The mining laws of the state of Oregon (section 7) provide that any person, being the owner or proprietor of any ditch, flume, or water right, who shall abandon the same, and who shall for one year thereafter cease to exercise ownership over said water right, ditch, or flume, shall be deemed to have lost all title, claim, or interest therein.

The purpose for which Harris and Juneau appropriated this water right, as is shown in their notice of appropriation, was to empty it into Quartz Gulch for mining purposes.

Under the mining laws of the district, if they had at any time ceased to use this water right for mining purposes, the right would have ceased, and there would have been such an abandonment, under the Oregon statute above quoted, that if, for one year thereafter, they had ceased to exercise ownership over the water right, ditch, or flume, they would have been deemed to have lost all title, claim, or interest therein. The law does not favor abandonments. The evidence of an abandonment must be clear, and the burden of proving it is on the party alleging it; but when proved it defeats a prior possession, and the rights abandoned become thereby *publici juris*; the rights of subsequent possession are new and independent.

There must be an intent to abandon, and that intent may be manifested by the declarations and acts of the parties charged with it. *Dodge v. Marden*, 7 Or. 457.

The substance of the evidence in this case is that plaintiff went upon the ground about the 22d of July, 1889, saw the state of the ditch, and found no water running through it. The ditch ends were overgrown with weeds. It was broken and washed out in the middle, although the boxes in the rocks were sound; was washed away at the gates; and there were breaks on the lower side. In June, July, and August, 1888, when he saw it, it was in the same condition as that in which he described it to have been in 1889. No water was

running through it, and from the commencement of the ditch to the gates it could not have carried water. Twice before—in August and September, 1887—he found it about the same, with the ditch full of sand. He was there every season from the time the ditch was dug. In 1886 there was water there, but he could not say whether or not it was wash water from the mountains. It was not water from the gulch. He thinks Harris and Juneau used it right along from the time it was dug in 1882, 1883, 1884, and 1885, and no one worked it after that, so far as he knew. He saw no work done there in 1887 or 1888. He went to work there himself about July 30, 1889, to repair it, but at that time defendant Coon came along and claimed it.

It seems conclusively established by the evidence that the water was not used, and that no work was done on the ditch in 1886 by any one, nor at any time after 1885 by Harris or Juneau or by their successors in interest. So far as the original locators were concerned, the ditch was abandoned in 1885. Juneau parted with his interest in the placer claims on which the water had been used on July 22, 1884, but he made no conveyance at any time of his interest in the water rights, ditch, or right of way. Harris was involved in litigation in the Fuller suit, under which, by virtue of an execution issued in May, 1886, his interests in said placer claims were sold, but not his interests in the water rights here in dispute, although there was, as hereinbefore stated, an ineffectual attempt to sell the property in September, 1887.

As early as the fall of 1885, at least, the evidence is clear that both Harris and Juneau had ceased to use the water rights for mining purposes, and had allowed the ditch to go to decay. So far as they are concerned, there was then an actual abandonment. For one year and more thereafter neither they nor any one claiming under them exercised

ownership over the water rights, ditch, or flume, and they must be deemed to have lost all title, claim, or interest therein. Indeed, there was no actual use of the water by any one from the fall of 1885 until the use by defendants in 1888, although it is true that in the fall of 1887 defendants sent up some lumber and fixed up the boxes. Whatever was done by defendants, however, had no more effect upon subsequently acquired rights of plaintiff than if it had been done by strangers, for defendants failed to connect themselves in any way with the title of the original locators, and never made, nor attempted to make, any independent location or appropriation prior to that of plaintiff. Even if they had so connected themselves with that title, the evidence shows clearly an actual abandonment and a cessation of work for more than a year thereafter, before defendants attempted to exercise any rights of ownership.

There were several deeds and records offered in evidence by defendants, which were admitted temporarily during the trial, subject to objections by plaintiff's counsel, upon the promise of counsel for defendants that their materiality would be shown before the trial was closed; but that promise has not been fulfilled, and the objections of plaintiff are all sustained.

It follows that judgment must be rendered for plaintiff as prayed for, with costs, and counsel for plaintiff will prepare the proper findings and decree.

BAKER & CO. v. HEALEY.

(Sitka. November 20, 1890.)

No. 256.

1. PLEADING—COMPLAINT—DEMURRER—FOREIGN JUDGMENTS.

A complaint in an action to recover on a foreign judgment is good against demurrer, under the laws of Oregon applicable to Alaska, when it sets forth in plain and concise language the name of the court, where and when the judgment was rendered, and the amount thereof. The presumption is in favor of the jurisdiction of the foreign court.

An Action to Recover on Foreign Judgment.

Delaney & Gamel, for plaintiffs.

J. F. Maloney, for defendant.

BUGBEE, District Judge. This is an action upon a judgment of a district court of the territory of Montana in favor of plaintiffs and against the defendant.

The complaint is demurred to on the ground that it does not state facts sufficient to constitute a cause of action, in that it does not state that the judgment was only given or made in accordance with the provisions of section 85 of the Code of Civil Procedure of the state of Oregon, made applicable to the territory of Alaska by the organic act. That section provides that:

"In pleading a judgment or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made." 1 Hill's Ann. Laws, p. 230, § 86.

The complaint avers "that on the 24th day of April, 1886, the plaintiffs did recover in the district court of the Third Judicial District of the territory of Montana, county of Cho-

teau, the sum of \$984.59 * * * against the said defendant, and on the said 24th day of April, A. D. 1886, judgment was duly entered against the said defendant and in favor of the said plaintiffs in the sum of," etc.

The judgment is then set out in full, and is followed by averments of the filing of the complaint, issuance of summons, service thereof, filing of a demurrer, and "that said demurrer was overruled, and judgment given against said defendant as aforesaid," etc.

If it appeared from the complaint that the judgment sued upon had been rendered by a court of special jurisdiction, the objection, if applicable to foreign judgments, might be good, because none of the averments in the complaint are equivalent to the words "duly given and made," used in the statute. *Young v. Wright*, 52 Cal. 410.

Under the common law there was no presumption in favor of the authority of the regularity of the proceedings of courts or officers of special, limited, or inferior jurisdiction, and it was necessary, in pleading their judgments or orders, to show that they had jurisdiction, and that their proceedings were regular. The section of the statute relied upon dispenses with the lengthy and minute statement of the jurisdictional facts that were formerly required, and specifies what shall be sufficient as a substitute for them. That substitute is a concise mode of stating those facts, and must be strictly followed. *Keys v. Grannis*, 3 Nev. 551.

But in this action it does not appear from the complaint, and it will not, in the absence of averment, be presumed, that the court mentioned was a court of special jurisdiction, and the provisions of the statute cited have no application. The true presumption is that the court named was one of general jurisdiction.

It has generally been held that in pleading a judgment of a court of general jurisdiction it is unnecessary to aver that

the court has jurisdiction, and the presumptions in favor of jurisdiction are the same whether the judgment relied on is domestic or one of a court of a sister state or territory.

If the complaint sets forth the name of the court, the date or term at which the judgment was recovered, and the amount of the recovery, it will be sufficient, without stating the proceedings. *Code Pleading*, Boone, § 160.

The precedents in Chitty's *Pleadings* in such cases do not contain any allegation as to the jurisdiction of the court, and these precedents are founded upon decisions made by the highest authority in England, and have been generally followed in this country in the numerous actions upon state judgments that have been brought since their publication. *Phelps v. Duffy*, 11 Nev. 80.

The complaint, although awkwardly drawn, and full of unnecessary averments, is still good against the objections raised, and the demurrer is therefore overruled, with leave to defendant to answer within 30 days from date.

UNITED STATES V. HILLYER et al.

(Sitka. March 8, 1892.)

No. 262.

1. UNITED STATES MARSHAL—ACCOUNTS—APPROVAL BY COURT.

The approval of the accounts of the United States marshal by the court is *prima facie* evidence of the correctness of the items, and, in the absence of clear and unequivocal proof of mistake on the part of the court, it is conclusive.

2. SAME—EMBEZZLEMENT OF PUBLIC FUNDS.

In actions against the marshal to recover for a misappropriation of funds under his charge, where his accounts have been so approved, the burden of proof rests on the government.

3. COSTS—FEES OF JURORS—WITNESSES.

The marshal is bound to obey the order of the court for the payment of fees of jurors and witnesses, and his accounts of fees and costs paid under said order to such jurors and witnesses, even though they be officers of the United States, cannot be so re-examined by the accounting officers of the treasury as to charge him with erroneous taxation, but the payments must be allowed him in his accounts.

4. UNITED STATES MARSHAL—MEDICAL SERVICES—SUPPORT OF PRISONERS.

The marshal is necessarily vested with discretionary power in the disbursement of public funds for medical services and attendances and the support of prisoners, and his accounts therefor, when approved by the court for reasonableness and necessity, are conclusive as to the proper exercise of his discretion, and cannot, in the absence of fraud and unequivocal mistake, be disallowed by the department.

5. ACCOUNTS—COURT EXPENSES.

The court has the inherent power to provide for and direct the payment of the necessary and proper expenses, and when such payments are made by the marshal under the order or with the approval of the court they should be allowed him in his accounts.

6. DEPUTY MARSHAL—EXPENSES—MILEAGE.

No mileage is allowed to deputy marshals while transporting prisoners to prison and returning therefrom. Their actual traveling and subsistence expenses are allowed.

7. UNITED STATES MARSHAL—EMPLOYMENT OF ATTORNEYS.

The power to retain and employ attorneys and counselors for the government rests solely with the Attorney General, and the marshal has no authority to expend funds for that purpose.

This was an action to recover on the bond of the United States marshal for Alaska, and against him and his sureties certain items alleged to have been misappropriated by him by the payment of unauthorized fees. Reversed on one point, 7 C. C. A. 428, 58 Fed. 678.

Charles S. Johnson, U. S. Dist. Atty.
Delaney & Gamel, for defendants.

BUGBEE, District Judge. The petition herein alleges that the defendant Hillyer was appointed marshal for the District of Alaska on the 5th day of July, 1884, and thereafter, on the 15th day of September, 1884, made a bond in favor of the United States, upon which the remaining defendants became sureties, for the sum of \$20,000, conditioned for the faithful performance of all the duties of said office; that during the fiscal year ending June 30, 1885, Hillyer wrongfully appropriated to his own use and paid out and expended for various purposes, unwarranted and unauthorized by law, the sum of \$3,941.89, the money of the United States, advanced and intrusted to him in his official capacity, to be by him paid out and expended as the law required; that the moneys so misappropriated were:

1st. Payment to various persons as witnesses in the United States court	\$ 602 80
2nd. Payment for support of prisoners.....	37 10
3rd. Payment for miscellaneous expenses.....	390 58
4th. Moneys retained as fees and expenses of the marshal..	2,863 09
5th. Moneys retained as traveling expenses.....	48 32
Total	\$3,941 89

—For which sum, with interest from the 30th day of June, 1885, at the rate of 6 per cent. per annum, plaintiff asks judgment.

The answer denies the misappropriation by Hillyer of any sum whatever belonging to plaintiff.

The defendant Hillyer having died, and his death being suggested upon the record, the action was allowed to proceed against the surviving defendants.

It appears from the evidence that the marshal rendered his

accounts for the fiscal year mentioned in the complaint, with the vouchers and items thereof, to the District Court of the United States for the District of Alaska, and, in the presence of the District Attorney, whose presence was noticed on the records of the court, proved in open court, to the satisfaction of the court, by his oath attached to said accounts, that the services therein charged had been actually and necessarily performed, as therein stated, and that the disbursements charged had been fully paid in lawful money; and the court thereupon caused to be entered of record orders approving the several accounts as according to law and just. Act Feb. 22, 1875, c. 95, 18 Stat. 333, 1 Supp. Rev. St. U. S. (2d Ed.) 65 [U. S. Comp. St. 1901, p. 648]. This approval by the court is *prima facie* evidence of the correctness of the items of these accounts, and, in the absence of clear and unequivocal proof of mistake on the part of the court, it should be conclusive. *United States v. Jones*, 134 U. S. 483, 10 Sup. Ct. 615, 33 L. Ed. 1007. The burden of proof to sustain the alleged misappropriation rests with the plaintiff. Civ. Codé Or § 777.

In support of its claim, the government has offered transcripts of the accounts and orders of approval by the court and of statements of the disallowance of certain items of said accounts made by the accounting officers of the Treasury Department, when the accounts were thereafter forwarded to them in accordance with the law. These accounts and statements of disallowance or differences are very voluminous and intricate. I have examined them with great care, with the following results:

First. As to the Account of Fees of Witnesses. It appears that for compensation to witnesses for their attendance on the part of the United States at the term of the said District Court begun and held at Sitka on the 4th day of May, 1885, the marshal, under the orders of the court, paid the

following items of mileage and per diem to certain officers of the government, viz.:

Henry States.....	\$ 30 50
John C. Staples.....	452 70
Geo. Barnett	7 60
Edw. B. Webster.....	21 10
Hugh Wyman	22 60
W. G. G. Wilson.....	39 50
Sheldon Jackson	22 60
Hugh Wyman	4 60
John G. Brady	1 60
<hr/>	
Total	\$602 80

The law provides that, when any officer of the United States is sent away from his place of business as a witness for the government, his necessary expenses, stated in items, and sworn to, in going, returning, and attendance on the court, shall be audited and paid, but no mileage or other compensation in addition to his salary shall in any case be allowed. Rev. St. U. S. § 850 [U. S. Comp. St. 1901, p. 655]. It is claimed on the part of the government, and appears from the statement of differences or disallowances made by the accounting officers of the Treasury Department, that these parties were officers of the United States, drawing salaries from the government; said States being United States commissioner at Juneau, Alaska; Staples, deputy United States marshal, Barnett, second lieutenant of marines; Webster, assistant paymaster U. S. N.; Wyman, acting assistant surgeon M. H. S.; Wilson, past assistant surgeon U. S. N.; Jackson, general agent of education; and Brady, United States commissioner at Sitka; and that no mileage or other compensation in addition to their salaries should have been allowed. Assuming these facts to be true—and I take it that all the allegations contained in the statements of differences

or disallowances not controverted by direct evidence are admitted by the defendants to be true—there was an undoubted error on the part of the judge of the court in ordering the payments complained of. But the law further provides that in cases where the United States are parties the marshal shall, on the order of the court, to be entered on its minutes, pay to the jurors and witnesses all the fees to which they appear by such order to be entitled, which sum shall be allowed him at the treasury in his accounts. Rev. St. U. S. § 855 [U. S. Comp. St. 1901, p. 657]. Also, "that no accounts of fees or costs paid to any witness or juror, upon the order of any judge or commissioner, shall be so re-examined as to charge any marshal for an erroneous taxation of such fees or costs." Rev. St. U. S. § 846 [U. S. Comp. St. 1901, p. 647]. By orders of the court, entered upon its minutes, these witnesses were directed to be paid for their attendance and mileage, as witnesses on behalf of the United States, the respective sums named above, and were so paid under such orders by the marshal. These payments were not subject to re-examination by the Treasury Department. *Harmon v. U. S.* (C. C.) 43 Fed. 560.

If the sections last mentioned are to be considered as having any force whatever, they must be construed so as to protect the marshal in complying with the orders of court for the payment of witnesses and jurors, however erroneous such orders may be. Any other construction would hamper and enfeeble the court and belittle the authority of the government in the enforcement of its laws. Witnesses and jurors are such necessary parts of the judicial machinery that their prompt, willing, and continuous performance of duty should not be endangered by hesitation on the part of the court's executive officer to comply with a judicial order for their compensation through fear that he might not be reimbursed by the government for his outlay. In a very recent case in

the Supreme Court of the United States, Mr. Justice Brown says:

"When the clerk performs a service in obedience to an order of the court, he is as much entitled to compensation as if he were able to put his finger on a particular clause of a statute authorizing compensation for such services." U. S. v. Van Duzee, 140 U. S. 169, 11 Sup. Ct. 758, 35 L. Ed. 399.

This rule applies with equal force to payments by the marshal. I think the payments mentioned were improperly disallowed in the marshal's accounts by the accounting officers of the treasury.

Second. As to the Account for the Support of Prisoners. The first item in this account disallowed by the accounting officers is the payment to Thomas E. McFarland of the sum of \$49.95 for provisions, medicine, transportation of prisoners, servant and nurse for prisoners, etc. The testimony of Adolph A. Meyer, United States deputy marshal, on the part of the defense, shows that the jail at Sitka had not, at the time of this payment, been turned over to the marshal, but was in charge of the United States navy; that one of the prisoners in the marshal's custody was suffering from a loathsome disease, and had been ordered by the physician in attendance upon the prisoners to be taken to the hot springs, some miles from Sitka, and renowned for their curative properties in the treatment of such ailments; that the prisoner was taken there by a guard, nurse, and an Indian attendant, and remained there for a considerable time; that the place was uninhabited; that there were no means of procuring food or supplies at the springs, and no means of access to them, except by water, and all provisions had to be taken from Sitka; that the bill of this trip was necessarily incurred, and that the prices charged were reasonable. I mention this testimony simply to show that the expenses were incurred to meet such an emergency or a contingency

as a marshal, having charge of the lives and health of the prisoners, should be at all times ready, willing, and able to meet, and, in meeting, should be sustained by the government. As the government has shown no reason why the charge should be disallowed in the marshal's accounts, and as the court has approved of it, I shall allow it.

The government has also disallowed a portion of the bill of Joe, a Chinaman, for boarding United States prisoners. The rate charged was \$1 per day, of which only 75 cents per day are allowed, the amount of disallowance by the department being \$15.25. It has also disallowed a portion of the bill of Dr. H. S. Wyman for professional services rendered United States prisoners confined in jail at Sitka, wherein the charge was \$5 per visit and \$3 in each case for medicines. These amounts are arbitrarily reduced by the accounting officers to \$2 per visit, and nothing whatever is allowed by them for medicines. The disallowance by the accounting officer was made because the charge was deemed excessive, and amounts to \$57. No evidence whatever has been produced to show that the charges mentioned in the last two bills were excessive or improper, or not actually paid in good faith, nor is there any claim of fraudulent collusion. In the absence of a showing of fraud or mistake, I cannot inquire into the reasonableness of these charges. The marshal, as disbursing officer, must necessarily be allowed a proper discretion in securing necessary medical services and in purchasing medicines and provisions for his prisoners, as well as in many other matters of disbursement of public funds in his hands. To permit the accounting officers at Washington, who, from the nature of the case, could know little, if anything, of the reasonableness of charges, or of the possible necessity for paying what might be demanded or of going without, or, indeed, of any of the circumstances surrounding each case, thus arbitrarily to question or deny the value of the services while admitting their necessity, would be to ap-

ply to this remote territory a very harsh and unjust rule, with possibly very dangerous results to the community at large. If the accounting officers have the right to reduce a fee approved by the court, they may with equal right and propriety increase it. I do not consider that they have the power to review or reverse disbursements made in the discretion of the marshal, who is charged with the duty of expending public moneys, especially when those disbursements have passed the scrutiny and received the sanction of a judicial officer charged with the examination of them. U. S. v. Waters, 133 U. S. 208, 10 Sup. Ct. 249, 33 L. Ed. 594. Before these accounts were presented to the accounting officers of the treasury, they had met the approval of the judge of the court. To quote again from the opinion of Mr. Justice Brown of the United States Supreme Court:

"If the officers of the treasury were at liberty to question the propriety of every charge in all cases, the approval of the court would be an idle ceremony. We can give no less weight to such approval than to say that it covers all matters within the discretion of the officer rendering the account." U. S. v. Barber, 140 U. S. 177, 11 Sup. Ct. 751, 35 L. Ed. 398.

The charges are therefore allowed by me.

As to the remaining item of disallowance in this account, being the sum of \$1.50 paid to the Sitka Trading Company, the defendants do not dispute the correctness of the Attorney General's ruling. I therefore disallow the charge.

Third. As to the Account for Miscellaneous Expenses. The disallowances in this account are also numerous, and amount in the aggregate to \$690.58. Taking them separately, it appears from the testimony of Mr. Jordan, employed in the office of the First Comptroller of the Treasury at Washington, that the items numbered 1 and 11½ in the statement of differences, viz.: "Error in forwarding balance due U. S. from account ending Dec. 31, 1884, to next account, \$100.40," and, "Error in addition in voucher No. 10, account Pacific

Coast Steamship Co., in account of June 30, 1885, 20 cents," were properly charged to the marshal.

No. 2. Amount paid to James Sullivan for services as janitor for courtroom and office for 3½ months at \$10..	\$35 00
No. 8. Amount paid to Levi Harrod for rent of room for U. S. District Court from Jan. 15 to July 15, 1885....	50 00
No. 9. Amount paid to Sol Rapinsky for copying legal papers per order of court at May term.....	10 00
No. 9½. Amount paid James Carroll for publishing grand jury report	18 65

These items were disallowed because not authorized by the Attorney General. They seem to come properly under the head of expenses of court. I think it must be conceded that the court has the inherent power to provide for the payment of its proper and necessary expenses. In the absence of any evidence that the payments were in any way improper, and inasmuch as they had the sanction of the court, the disallowance of these items is set aside and their payment approved.

No. 6½. Amount paid to Northwest Trading Co. for articles furnished for the courthouse at Juneau.....	\$ 3 90
---	---------

No testimony whatever is given to show that this amount was improperly paid, and I shall therefore allow it.

No. 10. Amount paid to Goldsmith & Loewenburg for stove and fixture for the marshal's office at Sitka.....	\$27 50
--	---------

The only ground alleged for the disallowance of this payment is that it is a duplicate charge, and that the original bill had been paid; but the testimony of Mr. Meyer shows that this is not the fact. No other ground having been shown for its disallowance, it is allowed by me.

No. 11. Amount paid June 26, 1885, to N. P. Cole for a set of furniture	\$88 00
---	---------

This charge was included in a bill for furniture for the court officials, amounting to \$291.55, the remaining charges

not being disallowed. Other bills incurred for furniture for the same purpose at about the same time, and paid by the marshal, amounting to over \$500, were not questioned by the accounting officers. The testimony of Mr. Meyer shows that this particular set of furniture was actually supplied. The only ground for disallowance is that its purchase was not authorized. It is true that the law provides that the marshal shall not incur or be allowed an expense of more than \$20 in any one year for furniture, without first submitting a statement and estimate to the Attorney General, and getting his instructions in the premises (Rev. St. U. S. § 830 [U. S. Comp. St. 1901, p. 639]); but I hardly think this can be meant to apply to a case where a new country was suddenly brought within civil control, and a whole outfit of furniture for government purposes was needed for the civil officials in the first instance; and, besides, the Attorney General, by his letter of March 31, 1885, expressly authorized the marshal to supply such furniture as was absolutely necessary, thus leaving much to his discretion. In the absence of any showing that the furniture was not absolutely necessary, and deeming its purchase authorized by the Attorney General and approved by the judge, I shall allow this item to the marshal.

No. 3. Amount paid to P. Larianoff for putting up stove and
pipe for United States courtroom..... \$ 6 00

The amount of disallowance by the accounting officers
is \$3.

No. 5. Amount paid E. H. James for interpreting in United
States Commissioner's Court, 23 days, at \$5 per day.. \$115 00

The whole bill was specially approved by the judge of the District Court before payment was made. The price was arbitrarily reduced by the Attorney General to \$2 per day,

the amount of disallowance by the accounting officers being \$69.

No. 6. Amount paid H. E. Cutter for portage on 36 arm-chairs, 4 tables, and judge's desk, for the United States District Courtroom at Juneau..... \$ 3 75

The amount disallowed by the accounting officer was \$2.25. There is no evidence whatever that these charges were excessive, which appears to be the only ground upon which they were disallowed. In any event, I think they all come under the rule hereinbefore laid down in relation to the charges of Dr. Wyman and Chinaman Joe in respect of the account for support of prisoners.

No. 4. Payment of E. W. Haskett..... \$ 40 00
No. 7. Payment for traveling expenses..... 241 68

As both of these items appear to have been credited to the marshal in his account for traveling expenses, and allowed therein, the disallowance of the same in this account is sustained.

Fourth. As to the Account for Fees and Expenses. Following the numbering of the items of disallowance shown in the statement of differences, I refer to each separately.

No. 1. Moneys retained for personal service of the marshal in attendance on the United States District Court and United States Commissioner's Court, mileage, summoning jurors, etc..... \$122 62
No. 19. Moneys retained for similar services..... 240 66
No. 35. Moneys retained as commissions on disbursements.. 227 28:

These items are disallowed by the accounting officers upon the ground that under the provisions of the organic act (Act May 17, 1884, c. 53, 23 Stat. 24) the marshal is not entitled to receive or retain any money of the government save his yearly salary of \$2,500 and his actual necessary expenses of

travel in the discharge of his official duties. I do not so construe the law. The organic act, section 9, referring to the governor, attorney, judge, marshal, clerk, and commissioners, says:

"They shall severally receive the fees of office established by law for the several offices the duties of which have been hereby conferred upon them, as the same are determined and allowed in respect of similar offices under the laws of the United States, which fees shall be reported to the attorney-general and paid into the Treasury of the United States."

"The fees of district attorneys, clerks, marshals and commissioners in cases where the United States are liable to pay the same, shall be paid on settling their accounts at the treasury." Rev. St. U. S. § 856 [U. S. Comp. St. 1901, p. 657].

"The fees and compensations of the officers and persons hereinbefore mentioned, except those which are directed to be paid out of the treasury, shall be recovered in like manner as the fees of the officers of the states respectively for like services are recovered." Rev. St. U. S. § 857 [U. S. Comp. St. 1901, p. 658].

"The fees and costs to be allowed to the United States attorneys and marshals, to the clerks of the supreme and district courts, and to jurors, witnesses, commissioners, and printers, in the territories of the United States, shall be the same for similar services by such persons as are prescribed in chapter 16, title The Judiciary, and no other compensation shall be taxed or allowed." Rev. St. U. S. § 1883.

The services covered by these items were all rendered to the United States. They are charged for at the rates established by law for duties conferred upon marshals, as the same are determined and allowed under section 829 of the Revised Statutes [U. S. Comp. St. 1901, p. 636]; and, if the same services had been rendered by any other marshal than that of the District of Alaska, no question could have arisen as to the liability of the United States to pay for them at those rates, on the settlement of accounts at the treasury. Why any distinction should be made in this regard between the marshal of Alaska and the marshals of states and terri-

tories I cannot understand. The words of the organic act, "they shall severally receive the fees of office," quoted above, seem to me to have but one meaning, and that is the one contended for by the defense. If the construction contended for by the government were to prevail, these words must be limited in their application to fees of officers for services rendered to private individuals alone, which are the only fees actually received, or, in other words, come into manual possession, in any case before the settlement of accounts. The act does not so limit the words, nor can I read them in such a restricted sense. Even if the words of the organic act admitted of two interpretations, I think they should be construed in favor of the officer. U. S. v. Morse, 3 Story, 87, Fed. Cas. No. 15,820. These fees are, therefore, allowed by me.

No. 20. Money paid to Ah Sow for board of marshal while attending a special session of the District Court..... \$ 9 00

This item, as appears from the statement of differences, was erroneously supposed by the accounting officers to have been paid for the board of Ah Sow instead of the marshal, and was disallowed as unauthorized. This was the only ground of disallowance. The charge, however, seems to me to have been a proper one, being for board of the marshal, which I consider to be a part of his actual necessary expenses when traveling in the discharge of his official duty. The account was rendered under oath, and approved by the judge, which is sufficient reason for its allowance.

No. 2. Payment to George Kostiometinoff, deputy United States marshal, for official services as bailiff in the United States District Court.....,..... \$22 00

No. 7. Payment to James Sullivan, deputy United States marshal, similar services as bailiff.....,..... 4 00

No. 3. Payment to James Sullivan, deputy United States marshal, similar services as bailiff.....,..... 72 00

These services, rendered to the government by deputy marshals, were covered by their salaries, and were properly disallowed.

Nos. 3 & 4. Payment to George Kostiometinoff, deputy United States marshal, acting as constable, for attending United States Commissioner's Court for eight days, at the rate of \$2 per day..... \$16 00

Item No. 3 of this disallowance by the accounting officers was for the reason that the charge was in excess of that prescribed by law. Under the organic act, a deputy marshal, in addition to the usual fees of constables in Oregon, received a salary from the government. The fees of constables in Oregon are prescribed in the General Laws of Oregon (page 604), and allow for attending a justice's court during a trial therein, 50 cents per day. The deputy attended the Commissioner's Court in the capacity of constable, and could only receive a constable's fees. This charge is, therefore, excessive, and must be reduced by the disallowance of \$1.50 per day, amounting to \$12. Disallowance No. 4 was on the ground that for three of these days charged for as constable he was also paid the sum of \$6 for services as bailiff of the District Court. It would make no difference if he had been so paid, or if he had acted as bailiff, for he was not entitled to receive fees for his services as bailiff, and the services as bailiff did not necessarily interfere with the services as constable. The disallowance is, therefore, not approved.

No. 8. Payment to James Sullivan, deputy United States marshal, attendance as constable on United States Commissioner's Court on December 17..... \$ 2 00

This payment was disallowed by the accounting officers because on the same day he served as bailiff in the United States District Court. The disallowance, for the reason last given, is not sustained.

No. 7 $\frac{3}{4}$. Payment to James Sullivan, United States deputy marshal, for attending as constable United States Commissioner's Court Nov. 24 to Dec. 30, 1884, 7 days, at \$2 per day..... \$14 00

This was disallowed as excessive, and for the reasons given in regard to item No. 3 the disallowance is sustained. From this charge the sum of \$1.50 per day, amounting in all to \$10.50, must be deducted.

For the same reason the following disallowances are sustained:

No. 10 $\frac{1}{2}$.	Payment to G. W. Garside, United States deputy marshal, for attendance as constable on United States Commissioner's Court, in excess of legal fees	\$12 00
No. 15.	Payment to James Carroll, United States special deputy marshal, for attendance as constable on United States Commissioner's Court, in excess of legal fees	3 00
No. 17.	Payment to J. C. Staples, United States deputy marshal, for attendance as constable on United States Commissioner's Court, in excess of legal fees....	22 50
No. 21 $\frac{1}{2}$.	Payment to Geo. W. Garside, deputy United States marshal, for attendance on United States Commissioner's Court, in excess of legal fees.....	22 50
No. 24 $\frac{1}{2}$.	Payment to James Sullivan, deputy United States marshal, for attendance as constable on United States Commissioner's Court, in excess of legal fees	3 00

The following items appear in the statement of differences to have been disallowed by the accounting officers because in excess of the fee prescribed by law, viz.:

No. 4 $\frac{1}{2}$.	Payment to George Kostiometinoff, deputy United States marshal, acting as constable, service of warrant	\$ 3 00
No. 4 $\frac{3}{4}$.	Payment to George Kostiometinoff, deputy United States marshal, acting as constable, service of warrants	11 00

No. 8½.	Payment to James Sullivan, deputy United States marshal, acting as constable, service of warrant..	2 00
No. 8¾.	Payment to same for like service.....	11 00
No. 10.	Payment to G. W. Garside, deputy United States marshal, acting as constable, service of warrant..	8 00
No. 14.	Payment to James Carroll, special deputy marshal, acting as constable, service of warrant.....	2 00
No. 24.	Payment to James Sullivan, deputy United States marshal, acting as constable, service of warrant..	10 00
No. 21.	Payment to G. W. Garside, deputy United States marshal, acting as constable, service of warrants..	15 00

In each of the above cases the charge for service of warrants was at the rate of \$2, while the laws of Oregon, under which they were served by the deputy marshals acting as constables, limited the fee to \$1. These disallowances are therefore sustained.

No. 5.	Payment to George Kostiometinoff.....	\$ 2 00
No. 9.	Payment to James Sullivan.....	2 50
No. 22.	Payment to G. W. Garside.....	7 50
No. 25.	Payment to James Sullivan.....	4 50

These items are claimed as fees of United States Deputy Marshals acting as constables for discharging prisoners. They were all properly disallowed, because not authorized by the laws of Oregon.

No. 6.	Payment to E. C. Sickles.....	\$78 00
--------	-------------------------------	---------

No voucher has been shown to me for this item, although it appears from the statement of differences that one had been forwarded to Washington with a preceding account. It appears from the statement of differences and from the testimony of Mr. Jordan that Sickles was deputy United States marshal, and that the payment was made on account of salary. As the salaries of deputy marshals are payable quarterly out of the treasury of the United States, this payment

by the marshal was unauthorized, and was properly disallowed.

No. 11. Payment to G. W. Garside, deputy United States marshal, for board of Jim, an Indian prisoner..	\$20 00
No. 11½. Payment to same for board of Jack, an Indian prisoner	10 00
No. 12. Payment to same for board of Charlie, an Indian prisoner	10 00

I see no reason for the disallowance of these items in the suit. If properly disallowed by the accounting officers as not payable out of this particular appropriation, as seems to be the case, the same reasons would not hold good in this action, which is brought to recover an alleged misappropriation of public funds. The account having been sworn to, and approved by order of court, and supported by the oral testimony of the witness Garside that the charges were reasonable and actually necessary, there being at the time no contract with the marshal for the subsistence of prisoners, renders the absence of vouchers immaterial, in my opinion. The amounts are allowed.

No. 13. Payment to James Carroll, special deputy United States marshal, for conveyance of Thomas Wilson, a prisoner, for 3 days, at \$5 per day.....	\$ 15 00
No. 16. Payment to same officer as per diem for going from Juneau to San Francisco with an insane person, and returning to Juneau, 28 days, at \$5 per day.....	140 00

Neither of these payments can be allowed. There is no authority in law for payment of a per diem in such cases by the marshal to his deputies. Only mileage, or the necessary and actual expenses, could have been allowed, under any circumstances, to these officers. No statement has been made by either of them of the items of such expense, and no mileage is claimed.

No. 17½. Payment to John C. Staples, deputy United States marshal, as mileage for prisoner John Ainsworth, a guard, and himself, from Unalaska to San Francisco, 2,180 miles each, in all 6,540 miles, at 10 cents.....	\$654 00
No. 18. Payment to same officer as mileage for the same prisoner, guard, and himself from San Francisco to Sitka, 1,612 miles, in all 4,836 miles, at 10 cents	303 60
No. 22¾. Payment to G. W. Garside, deputy United States marshal, for mileage in transporting prisoner from Juneau to Sitka. Amount of disallowance	10 00

Section 829, Rev. St. U. S. [U. S. Comp. St. 1901, p. 636], allows the marshal, for transporting criminals, 10 cents a mile for himself and for each prisoner and necessary guard, with a certain exception, not affecting these charges. The amount of mileage is not questioned, nor is the fact of its payment. It has been passed by the judge, and must be allowed to the marshal.

No. 27. Payment to John C. Staples, deputy United States marshal, of amount paid by him to McClure & Dwinells, attorneys at law, in San Francisco, for legal services in Re John Ainsworth.....	\$250 00
---	----------

This payment was properly disallowed as unauthorized. The power to retain and employ attorneys rests solely with the Attorney General. Rev. St. U. S. § 363 [U. S. Comp. St. 1901, p. 208]. His authority was not obtained in this instance.

No. 28. Payment to the same party for the expense of his board at San Francisco from Nov. 13 to Dec. 1, 1884, 19 days, at \$2.50 per day, while awaiting the departure of the steamer for Sitka.....	\$47 50
--	---------

The item appears to have been suspended for want of a voucher and to ascertain more particularly the necessity for the expense. The necessity for the expenditure very clearly

appears from an examination of the papers annexed to the account, showing the proceedings of the court in the matter of the insane prisoner under the officer's charge. The account is sworn to, and approved by the court. The charge is therefore allowed.

The same remarks apply to:

No. 30. Payment to same officer for the expense of his board
at Port Townsend on his return trip to Sitka..... \$ 9 00

This item is therefore allowed.

No. 29. Payment to same officer for expense of omnibus hire
in carrying prisoner Ainsworth to steamer in San
Francisco \$ 2 00

The amount is disallowed by the accounting officers as excessive. No testimony has been adduced to show it to be so. The bill is sworn to, and has been approved by the court. The disallowance is not sustained.

No. 31. Payment to John C. Staples, deputy United States
marshal, for expense incurred in conveying a Unit-
ed States prisoner..... \$43 50

The item was suspended in the marshal's accounts by the officers of the treasury for want of proper vouchers, and to ascertain more clearly the necessity for the charge and the circumstances of the case. The only voucher accompanying the accounts is for a per diem amounting to \$35. As the deputy was not entitled to a per diem, this charge was properly suspended, and I disallow it. As to the remaining sum of \$8.50, I find a proper voucher in the account for support of prisoner. The bill is sworn to, and appears to be a part of the reasonable, actual expense of transporting a criminal to prison. It seems to come within the provisions of Rev. St. U. S. § 829, and is therefore allowed.

No. 32, disallowance of the sum of \$155.10. The statement of differences says of this item: "The following amounts are

suspended until proper vouchers are submitted, no vouchers accompanying the account: \$48, \$4.10, \$103." (See, further, Rep. 113,292.) I find proper vouchers for the above items attached to the accounts for the support of prisoners, No. 113,293. As that appears to be the only ground for disallowance, the amount having been paid, and the accounts approved by the judge, the charges are allowed.

No. 33. Payment to John C. Staples, deputy United States marshal, for mileage for himself and guard from Sitka to San Francisco, after delivering a prisoner John Ainsworth at Sitka..... \$322 40

The amount of disallowance is \$42.40. No mileage is allowed in such cases to deputy marshals. Reasonable actual expenses and necessary subsistence and hire only are given them in the transportation of prisoners (Rev. St. U. S. § 830 [U. S. Comp. St. 1901, p. 639]), and, if anything were to be allowed them in this case, it could not exceed that amount. No vouchers are produced, and no itemized account or sworn statement has been furnished. The department, however, waiving the formal proof which would be required in this court (which, under the authority of U. S. v. Van Duzee, 140 U. S. 169, 11 Sup. Ct. 758, 35 L. Ed. 399, it had the undoubtedly right to do), has allowed \$140 as a reasonable charge, and I sustain the disallowance of the remainder.

No. 34. Payment to same officer for mileage of himself from San Francisco to Unalaska..... \$218 00

I sustain the disallowance for the reason last stated.

Fifthly. As to the Account for Traveling Expenses. In this account two items are disallowed by the accounting officers of the treasury. They appear in the bill of the Pacific Coast Steamship Company as the fare from Sitka to Juneau of A. T. Lewis Clark and George Kostiometinoff, interpreter of the court, and they amount together to the sum of \$30. The ground given by the department for disallowing them is that

they were not authorized by law. As they seem to me to belong properly to the expenses of the court—the attendance of these officers upon the court being necessary—were actually paid by the marshal, and approved by order of the court, I shall allow them.

The principles of law which have guided me in reaching these conclusions may be thus summarized: That the approval by the court of the accounts of the marshal is *prima facie* evidence of the correctness of the items of the account. That in actions of this character, the burden of proof to sustain its allegation of the misappropriation of public funds rests with the government. That the marshal is bound to obey the order of the court for the payment of fees to jurors and witnesses; and his accounts of fees and costs paid under said order to such jurors and witnesses, even though they be officers of the United States, cannot be so re-examined by the accounting officers of the treasury as to charge him with erroneous taxation, but the payments must be allowed him in his account. That the marshal of the District of Alaska is entitled to receive the fees of office established by law as payable to other United States marshals, to be paid to him on settling his accounts at the treasury. That actual and necessary payments by court officials for their board and lodging, while attending a session of court in a place other than their official residence, are properly a part of their "actual necessary expenses when traveling in the discharge of their official duties," as those words are used in the organic act. That deputy marshals of Alaska are not, under the organic act, entitled as such to per diem or pay when acting as constables, other than such as is allowed to constables under the laws of Oregon. That the power to retain and employ attorneys and counselors for the government rests solely with the Attorney General of the United States.

From the testimony adduced I do not find that there has been, except in the strictest legal sense, any wrongful misappropriation of public moneys to his own use by the deceased marshal during his term of office, nor any unlawful use thereof, except such as might naturally occur under the peculiar conditions of the then newly organized territory of Alaska. Its offices remote from Washington, and, indeed, from civilization, were shut off from any immediate communication with the department, and precedents were in most cases wholly wanting. It was difficult, and often impossible, to follow the ambiguous organic act, and to reconcile the innumerable conflicts and discrepancies between the laws of the United States and the statutes of Oregon by that act made applicable to the territory. Under the circumstances, if the defendants are to be held liable, under the necessarily rigid rules of the Treasury Department, for the errors of the late marshal, many of which, if he had lived, might have been corrected, it can justly be said that his accounts were kept and rendered honestly and in good faith.

The amounts which I find to have been properly disallowed by the Department of the Treasury, and for the payment of which the defendants are liable, are as follows:

Account for support of prisoners.....	\$ 1 50
Account of miscellaneous expenses.....	382 28
Account of fees and expenses.....	1,180 40
<hr/>	
Total	\$1,564 18

—For which sum, with interest as prayed for, plaintiff is entitled to judgment.

THE CHALLENGE.

(Sitka. July 5, 1892.)

No. 326.

1. FORFEITURE—ANIMALS—GAME.

A vessel and her tackle, boats, apparel, furniture, cargo, engines, and fixtures are forfeited to the United States for violation of section 1956, Rev. St., for the protection of the fur-bearing animals of Alaska.

Condemnation for Killing Fur Seals on St. George Island in Violation of Section 1956, Rev. St.

C. S. Johnson, U. S. Dist. Atty.

TRUITT, District Judge. The libel of information in this case was filed by Chas. S. Johnson, United States District Attorney, on the 29th day of April, 1892, in said court, against said steam schooner Challenge, her boats, tackle, apparel, furniture, cargo, engines, and fixtures, in which it is alleged that said vessel, her captain, officers, and crew, on the 17th day of November, 1891, were engaged in killing, and did kill, within the limits of Alaskan territory, to wit, on St. George Island, in Bering Sea, a large number of fur seals, viz., 37, in violation of section 1956 of the Revised Statutes of the United States and acts of Congress and the proclamation of the President thereunder.

The hearing of said case was set for June 20, 1892, and the usual monition was issued and published as by law required. On the day set for hearing no appearance was made on behalf of said vessel, or any person as claimant, no answer or pleading of any kind being filed. The libelants appeared by said United States attorney. A default was entered against all claimants of said schooner, her tackle, boats, apparel, furniture, engines, and fixtures, the testimony

of the libelants was submitted to the court, and, after the hearing was closed, the case was taken under advisement.

From the testimony I find that on the night of November 17th or early in the morning of the 18th of November, 1891, said steam schooner Challenge was at or near the coast of St. George Island, in Bering Sea; that at said time 10 men, employed on her, landed upon said island, and did then and there unlawfully club and kill a large number of fur seals, amounting to about 100 in all. Some of them, however, were lost, and from the evidence it appears that only 37 skins were secured on board of the vessel, and those were seized with it, and are now in the hands of the United States marshal of this district.

The facts established by the evidence show a plain violation of section 1956, Rev. St. U. S., together with the acts of Congress and the proclamation of the President relating thereto. A decree of forfeiture as prayed for in the libel of information must, therefore, be entered.

THE ST. PAUL.

(February 6, 1894.)

No. 379.

1 ADMIRALTY—FORFEITURE—GAME.

An application by a third party claiming to be the owner of certain boats and parts of the cargo of a schooner forfeited to the United States for a violation of the acts of Congress prohibiting the taking of the fur-bearing animals in Alaska, comes too late after decree and without notice to the United States. All such boats and property on board were subject to forfeiture.

Application by Third Parties to Reclaim Property on Vessel Forfeited for Violation of Section 1956, Rev. St.

Charles S. Johnson, U. S. Dist. Atty.
John S. Bugbee, for claimant.

TRUITT, District Judge. The libel herein was filed July 13, 1893, and the case argued and submitted September 27, 1893, with the case of the schooner Alexander. The seizure was made the same day the Alexander was seized, and took place at Chirikoff Island. The vessels belong to different parties, but they were both engaged in hunting fur-bearing animals in the same hunting grounds, and the facts are so nearly identical in the two cases that they were both argued together, and the decision filed in the Alexander Case applies to this case. The Alexander (D. C.) 60 Fed. 914, reversed 21 C. C. A. 441, 75 Fed. 519. I would not, therefore, file a separate decision for the St. Paul Case but for the fact that, after it was tried and submitted, certain affidavits were filed with the papers herein touching the ownership of some of the boats and part of the cargo found upon the schooner when seized. I do not see that these affidavits have any standing in the case, but, as they were put on the record, I will state my views in regard to them, so that the Court of Appeals may know they were not overlooked. There are two reasons why I cannot grant any relief to the parties claiming these boats and the portion of the cargo named in the affidavits: First. They were filed too late. If my decision and findings of fact and conclusions of law are correct, then the St. Paul, her boats, tackle, apparel, furniture, and cargo are forfeited to the United States, and the government should not lose any part of such property without being heard in relation thereto. As the issues were made up and the case tried upon the declaration and theory that all this property was owned by Harold Vanelines, if, after the trial is over, and the case submitted, other parties can come in, and upon ex parte application obtain

a portion of said property, substantial rights of the libelant would be affected without it being heard. But there is another reason why such relief cannot be granted, which I think is conclusive, and that is that, if the St. Paul was, at the time mentioned, engaged in violating section 1956 of the Revised Statutes, then the vessel, her boats, tackle, apparel, furniture, and cargo are all subject to ownership. I think, out upon such a voyage or cruise as this vessel was engaged in, it is so at their peril, and, if the vessel violates the law, their property becomes liable to forfeiture. There might be special circumstances which would perhaps make an exception to this rule, but they are not in this case. A decree must therefore be entered in accordance with my findings of fact and conclusions of law filed herewith.

In re THOMPKINS McINTIRE ESTATE.

(Sitka. August 17, 1894.)

No. 405.

1. APPEAL AND ERROR—PLEADING.

A commissioner sitting as a probate judge should pass upon a demurrer to a petition to remove an administrator before hearing the cause on its merits and allowing an appeal.

2. ESTATES—ACCOUNTS—ADMINISTRATOR—REMOVAL.

A petition for the removal of an administrator should be heard as a distinct and separate proceeding from the settlement of his accounts.

3. APPEAL AND ERROR—ADMINISTRATOR—ESTATES—REMOVAL.

The District Court of Alaska, while exercising jurisdiction according to the laws of Oregon, will exercise its supervisory control over a proceeding in the probate court for the removal of an administrator through an appeal.

Motion to Dismiss an Appeal from the Probate Court.

Johnson & Heid, for appellant.
John S. Bugbee, for respondent.

TRUITT, District Judge. As shown by the petition for letters of administration, the said Thompkins McIntire was a resident of Juneau, Alaska, where he died, intestate, on the 2d day of March, 1888, and unfortunately left a small estate, consisting wholly of personal property, of the probable value of \$600. The records in the matter show that John G. Heid was duly appointed administrator of said estate by the commissioner at Juneau on the 5th day of March, 1888; that he qualified at once, entered upon his duties, and has been acting as such administrator ever since. The inventory was made and filed, some of the debts were collected, and the claims against the estate all paid. I infer that the personal property was sold, though the records do not show any petition for the sale of it, any order of the court authorizing its sale, or any report in relation thereto. An administrator has no right to sell property of an estate without an order of court directing the sale thereof, and, unless at public auction, no property shall be sold for less than its appraised value. The administrator in this case filed several accounts showing the condition of his trust from time to time, but it seems to me it should have been finally settled and closed as soon as he paid all legal claims, so far as presented, after disposing of the property and collecting all the debts due the estate which could be collected. In transacting the business of an estate, where his course is not prescribed by law or directed by the court, an administrator is required to exercise the same degree of diligence and caution that a prudent man would exercise in transacting his own business, and no more. If the decedent in this case left any heirs at law, they were unknown at the time letters of administration were issued, and have not been found since. This is probably the reason

why the administration has not been closed, and the affairs of the estate in connection therewith finally settled; but I do not think this alone is a valid reason for such a course. In Oregon the law is that, when the administration of an estate has been completed, and its assets are ready for distribution, when there are no known heirs who do not claim the same within six months thereafter, the administrator shall settle the matter finally, and pay the net proceeds into the treasury of the state, where they are placed with the escheat fund. Now, the organic act (23 Stat. 24, c. 53), providing a civil government for Alaska, makes the clerk of the District Court ex officio secretary and treasurer of this district, and I suppose the net proceeds of an unclaimed estate might be paid over to him by order of the commissioner six months after final settlement of the accounts of the administrator. However, this administration seems to have been allowed to drag slowly along, without anything to break or disturb the monotony of its course, until December 11, 1893. At that date Commissioner Hoyt issued an order to the administrator, directing him to file his final account with said estate within five days from the date of service of said order, and this was the beginning of trouble in connection with the matter. The administrator did not file such an account as the court directed, and thereafter, on January 18, 1894, John S. Bugbee was appointed as attorney to represent the "next of kin and minor heirs of said Thompkins McIntire, deceased," etc. As there were no heirs or next of kin of the deceased known, this was rather an unusual proceeding, especially as the estate is very small, and in no way complicated. On the 23d day of April, 1894, the said John S. Bugbee presented to the Commissioner's Court a petition charging the administrator with carelessness and neglect in the business of said estate and unfaithfulness in his trust, to the probable loss of the heirs thereof. This petition is quite

lengthy, and specially names a number of cases and facts going to show the neglect and want of diligence of said administrator. A citation was thereupon issued by the commissioner directed to the said John G. Heid, administrator, requiring him to appear on the 26th day of April, 1894, and show cause why the prayer of said petition should not be granted. On that day said administrator appeared, and filed a paper in form of a motion, but it is more in the nature of a demurrer; in fact, it is a demurrer. It asks that the petition be dismissed for the following reasons:

“(1) That said John S. Bugbee appears in his own person, and is not a person interested in said estate, and as such is the applicant herein; (2) that it does not appear by said petition that there are any heirs of said deceased in existence whom the said John S. Bugbee pretends to represent; (3) that it does not appear by said petition that anything complained of by said John S. Bugbee in said petition will cause injury to, or may prove a probable loss to, the applicant.”

The Oregon law in force in this district gives seven grounds of demurrer, and two of them are substantially set up in this pleading, to wit, “that the plaintiff has no legal capacity to sue,” and “that the complaint does not state facts sufficient to constitute a cause of action.” It does not appear that this pleading was overruled or disposed of in any manner, but without any action upon it, and without any answer to the petition being filed, some kind of a trial before the court took place, which resulted in a judgment or decree removing said administrator from his trust. It also goes further, and adjusts his accounts with the estate, but I am unable to determine the result arrived at from the figures given in the judgment. By it the administrator is charged with the aggregate sum of \$757.63, and credited with \$150 for fees and \$50 paid by order of court to John S. Bugbee, leaving, as is stated, a “net balance due the estate from said

administrator of \$557.63." This is all plain enough, but the record further states "that, through the negligence of said administrator, several accounts of the estate have become outlawed, but some of which may yet be collected." Now, these accounts should be specified, and, if the intention was to charge them against the administrator, it should be so stated. Again, the record sets out "that, aside from the expense of last sickness and burial, and cost of administration, and the claim of Bennett, the claims were paid without being verified by claimants, but were paid in good faith, and are here now allowed." This is so indefinite that I cannot understand what accounts are referred to, nor the amounts of credit the administrator should have. But, if entitled to any credit from these accounts, then there is error in the net balance which is declared to be due the estate. However, it was error to try the case, or to give any judgment, without first passing upon the demurrer interposed by the administrator. *Hestres v. Clements*, 21 Cal. 425. And, whether treated as a motion or a demurrer, it should have been disposed of before trial and judgment. After this, the defendant should have been allowed to file his answer to the petition in case the demurrer was overruled. If he refused to answer, there would be no need for a trial on the merits, as the allegations of the petition would then stand admitted. Furthermore, the allegations of the petition are specific, and the object of the same is the removal of the administrator, and, if denied by an answer, then the issues to be tried would have been made by such allegations and denials, and the matter should not have been complicated by an accounting between the administrator and the court. The accounting should have been conducted in a separate proceeding. The mode of proceeding in any probate case is in the nature of a suit in equity, as distinguished from an action at law. *Hill's Ann. Code Or.* § 1078. In a case like the one I am

now considering, it would be best to take the evidence in writing, as that would save time and expense of witnesses if an appeal should be taken. There are two well-considered cases involving questions similar to this in the Oregon Reports. *Ramp v. McDaniel*, 12 Or. 108, 6 Pac. 456, and *In re Holladay's Estate*, 18 Or. 168, 22 Pac. 750.

And now, after this somewhat lengthy statement and criticism of the case as shown by the record before me, I come to the consideration of it with reference to its standing in this court. The defendant has attempted to perfect an appeal, and in that way bring the case here, and the plaintiff has filed his motion to dismiss the appeal, in which the following grounds are specified: "(1) That this court has no jurisdiction on said appeal; (2) that the said order is not appealable."

This motion has been argued and submitted to me for consideration and disposal. On the argument of this motion it was urged by the plaintiff that whatever jurisdiction this court has over the orders and judgments of Commissioners' Courts when made in probate proceedings is conferred by section 5 of the organic act, in which it is declared that these courts shall have jurisdiction in all testamentary and probate matters, "subject to the supervision of the district judge." And it was argued that, as no mode of exercising this supervision is given by said act, therefore this part of it is in fact void for uncertainty; or, even though it may give some kind of jurisdiction in cases of flagrant error or gross abuse of discretion, it does not give appellate jurisdiction in cases like the one at bar. The defendant contended that this court is empowered by said section 5 of the organic act to take cognizance of such cases, but admitted some doubt as to whether its jurisdiction should be invoked by appeal or by a writ of review. The language of the organic act under consideration is not ambiguous or uncertain. An examina-

tion of textbooks, statutes, and decisions touching the matter will show that the word "supervision" or the phrase "supervisory control" are commonly used to designate the jurisdiction of a higher court over an inferior one, and especially when referring to the actions of the latter in probate matters. Section 9, art. 7, of the Constitution of Oregon, declares that the circuit courts of that state shall have "appellate jurisdiction and supervisory control over the county courts and all other inferior courts, officers, and tribunals." And in the opinion in *Re Holladay's Estate*, *supra* (at the bottom of page 171, 18 Or., and page 751, 22 Pac.), in speaking of the powers of the county court over executors and administrators, Judge Strahan says, "It is not absolute or arbitrary power, but is subject to the supervisory control of the circuit court." If, therefore, the only law relating to the subject was confined to the section referred to, then I think this court would clearly have jurisdiction in such cases as the one now under consideration, but whether it should be invoked and exercised by way of an appeal or by a writ of certiorari or review would be a question that would have to be settled by rules of practice. It seems to me that counsel on neither side gave the case a very careful examination, or they would have noticed that section 7 of the organic act has an important bearing upon it. This section provides:

"That the general laws of the state of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States."

This is the very section which provides the mode of procedure for commissioners when exercising jurisdiction in all testamentary and probate matters, by adopting the Oregon laws then in force upon the subject. And it also furnishes the key to the way in which the "supervision" mentioned in section 5 of said act shall be exercised. The Oregon

laws provide that the circuit court shall have supervisory control over the county court by appeal, review—which is in the nature of the common-law writ of certiorari—and mandamus, respectively. And as these laws were by the organic act adopted for this district, they are applicable here when it is sought to appeal from or review the proceedings of a Commissioner's Court, or when such officer fails or refuses to perform an act or duty resulting from his office. Under the laws of Oregon, appeal and review are not concurrent remedies, and which is the proper one in any given case must be decided by the interested party at his own peril. *Ramsey v. Pettengill*, 14 Or. 207, 12 Pac. 439. But under the law and the decisions thereon these remedies are plainly distinguishable, and it is unnecessary, in passing upon this case, to consume time in pointing out their distinguishing features. I will only say that, if the proceedings herein had been regular in the court below, and the administrator removed, then, if dissatisfied, his remedy would have been by appeal to this court. In other words, I hold that the Oregon laws on appeal and review apply to this district, that the order or judgment entered against said administrator is of the appealable class, and that, if perfected as by law required, the appeal in this case would lie. As to whether this appeal is perfected in the manner prescribed by law, is a question that I do not decide at this time, for the reason that the issues were not properly made up in the court below, and therefore, even if the appeal is regularly here, I could not very well try the case. Furthermore, on the argument of this motion, it was stated by counsel that the question of the proper remedy for the party seeking it from an order or judgment of a commissioner while acting in probate business is a new one, which has never been brought into this court, and I have thought I ought not, for this reason, to be technical in the matter, but could so dispose

of it that substantial justice may be done to all parties concerned. There are two provisions of the Oregon Code which authorize the county court to remove an administrator or executor—sections 1094 and 1100. The former section authorizes it upon the application of any heir, legatee, devisee, creditor, or other person interested in the estate; and the latter section would seem to authorize the court to remove him upon its own motion, though the grounds of removal are the same in both cases. I think a commissioner in this district might, under these sections, remove such officer from his trust, if warranted by the facts.

The motion in this case might have been disposed of very briefly, but, for the purpose of settling the practice, and giving some suggestions as to proceedings of this character in the Commissioner's Court, I have reviewed it generally, and touched upon points not strictly within the purview of the motion. I shall now order that the judgment of the Commissioner's Court be wholly reversed, and the case remanded for a new trial in accordance with the principles of this decision.

SUTTER et al. v. HECKMAN et al.

(First Division. Juneau. July Term, 1900.)

No. 1,164.

1. FISH—GAME.

The right to take fish in the sea or tidal waters of Alaska is one common to all persons, and no exclusive grant will be presumed.

2. PUBLIC LAND—STATE—TIDE LANDS.

The owner of uplands bordering upon the sea in Alaska has no proprietorship in the tide lands lying immediately in front of his property. The title to such tide lands is held by the United States, in trust for the future state.

3. SAME—PRESCRIPTION—TIDE LANDS.

The title to tide lands in Alaska being held in trust by the United States for the future state, no presumption of a grant to an occupier will be admitted, nor title by prescription recognized.

4. SAME—EASEMENT—INJUNCTION—TIDE LANDS.

The owner of uplands bordering on the seashore in Alaska has the right of ingress and egress between his land and the sea over tide lands. Injunction will protect him in the exclusive enjoyment of his rights.

The complainants, on July 30, 1900, filed their bill in this court, praying for a perpetual injunction against respondents. Upon reading the bill of complaint, an order was issued out of this court to the respondents, requiring them to show cause why a temporary restraining order should not issue against them. On the 8th of August, 1900, the defendants presented and filed a general demurrer to the bill of complaint, and on the 9th day of August, 1900, on the order to show cause, respondents offered certain oral evidence in support of their contention, and the complainants offered evidence in support of their bill of complaint and the relief therein prayed for.

The evidence submitted and the demurrer, so far as the same may bear upon the order to show cause, will be considered together. It is alleged in the bill that on May 17, 1884, the date of the passage of the act of Congress providing for a civil government for Alaska (23 Stat. 24, c. 53), Charles Dickson, a native Alaskan Indian, was the owner, by right of appropriation and possession, of a certain parcel of land thereafter described, situated at Ketchikan, on Tongass Narrows, in the District of Alaska; that the said Dickson and his ancestors had for more than 100 years been the occupants and possessors of said land, subject only to the paramount title, before the cession, of the Russian crown, and thereafter of the United States; that said Dickson con-

veyed to one Berry; that the title of said Dickson, by various conveyances, has come down to the complainants in 1899 (all of which said conveyances are set forth in the bill), and that the plaintiffs have been in possession since the date last aforesaid; that the land so conveyed borders on Tongass Narrows at high-water mark, and runs from a monument on the eastern bank of Ketchikan creek along the shore of Tongass Narrows one mile to a second monument, and back from the shore a quarter of a mile, the land claimed being a tract of about 160 acres; that plaintiffs and their grantors have been in possession of said lands since conveyed by said Indian, and have improved the same, from time to time, by the erection of valuable buildings thereon, such as "boarding houses, packing houses for fishing, store, dwelling," etc., of a value of more than \$40,000; that they have, from year to year, cleared the beach from débris, so as to make it valuable and convenient for landing fish thereon; that from the 17th day of April, A. D. 1888, when conveyance was made by Dickson, to the present time, complainants and their grantors have made useful, valuable, and profitable use of the said land and improvements; that there are valuable fishing grounds along the water front of said lands on either side of Ketchikan creek, and large numbers of salmon are taken yearly from said waters; that on either side of said creek are tide flats that are alternately covered and uncovered by the ebb and flow of the sea, and which afford excellent ground for taking and landing salmon during the fishing season; that the flats have been used by complainants and their grantors and by the Indian and his ancestors for a hundred years or more; that said fishing business is a profitable industry; that in pursuing said business the complainants have sold to Carl A. Sutter certain of the uplands above described, and he has erected thereon a large cannery at an expense of

\$50,000; that by the terms of the contract of sale it was covenanted that said Sutter should be kept and maintained in all the fishing and riparian rights on said tide flats and connected with the said water front along the land before described, and that he should be protected in the possession thereof, and from interference therewith for fishing purposes; that plaintiffs and their grantors have had and enjoyed the exclusive right of fishing on the waters abutting on said uplands and of using said beach and tide flats for landing fish for all times mentioned in their complaint to the 21st day of July, 1900, at which time the respondents so arranged and planted their nets as to wholly exclude plaintiffs from said fishing grounds, and prevent them from casting their nets or from taking or landing any salmon whatsoever; that respondents have ever since, and now are, so using said fishing grounds and so planting their nets as to cork the nets of complainants, and are intentionally excluding complainants therefrom, and from all use thereof in fishing; that respondents' purpose is to crush complainants, and to destroy their business; and that they have done complainants great injury, and will, by continuing such practice, do them irreparable injury, unless restrained.

The evidence of complainants and respondents tends to show that each party put out its nets and landed fish in turn, neither interfering with the other; that nets of respondents were sometimes landed upon the possessions of the complainants above high tide; that there was some slight friction between the fishermen, the respondents taking the lion's share, to the detriment of the complainants; that the shore line where fish were in the main taken and landed was about 500 feet long, and that nets of any party taking salmon at this point would occupy the entire shore line of 500 feet to the exclusion of all others; that no two parties could take fish at this point, near and at the mouth

of Ketchikan creek, at the same time; that when more than one is engaged in fishing they must spread their nets in turn, one party waiting while the other makes its haul; that until this year respondents have never fished at this point, and complainants have had the unrestricted use of the fishing grounds, the respondents buying of complainants; and that the "tide flats" each year become incumbered with rocks, logs, and débris, and complainants are compelled to clear this away each year before the salmon season, in order to land fish thereon. No denial is made, either by answer, oral evidence, or affidavit, of complainants' claimed ownership of the upland above high tide.

Winn & Shackleford, for plaintiffs.

Oscar Foote, for defendants.

BROWN, District Judge (after stating the facts as above). It is claimed by complainants that their ownership and possession of the upland bordering on the tide waters gives them certain exclusive rights to the tide flats; that no one except the United States can or should be permitted to prevent their ingress or egress to and from their upland possessions to the fishing grounds adjacent, and that the occupation of said tide flats by others in taking and landing thereon does hinder, delay, and for a time prevent the free enjoyment of their upland property, and their egress therefrom and ingress thereto in landing fish upon their own possessions, to the practical destruction of their fishing rights. It is also claimed that they have certain prescriptive rights.

On the other hand, it is claimed by the respondents that they have a right, in common with all others, to take salmon in and about the mouth of Ketchikan creek, to spread their nets in tide waters, and to occupy said tide flats in landing their fish; that complainants have no exclusive right, nor

better right than they or others desiring to take fish at the same point.

We have, then, these questions for consideration, viz.: (1) Have all persons, subject to regulations by Congress, a common and equal right to fish in the tide waters and to utilize the tide flats in common for such fishing purposes? (2) Do those persons owning and occupying uplands bordering on the tide waters acquire any exclusive or superior right to fishing grounds and the tide flats lying opposite such uplands and adjacent thereto by reason of such ownership of the upland? (3) Have complainants acquired prescriptive rights which entitle them to exclude others from the fishing grounds in question?

It would seem that to discuss the question of the common right of persons to fish in the navigable waters of the United States, after the many decisions of the courts of our country upon the question, would be a work of supererogation. That the right is one common to all, except in cases of private grant, cannot be doubted, if, indeed, there has ever been chance of doubt since the Magna Charta. Chalker v. Dickenson, 1 Conn. 382, 6 Am. Dec. 250; Collins v. Benbury, 25 N. C. 277, 38 Am. Dec. 722; Carson v. Blazer, 4 Am. Dec. 463; Commonwealth v. Chapin, 5 Pick. 199, 16 Am. Dec. 386; Cobb v. Davenport, 33 N. J. Law, 223, 97 Am. Dec. 718.

In Tinicum Fishing Co. v. Carter, 61 Pa. 21, 100 Am. Dec. 597, Judge Sharswood says:

"Independently of the acts of assembly, there are no exclusive rights of fishing by riparian proprietor opposite to his shore in any navigable river. In England the king has no power, and since the Magna Charta never had, to grant an exclusive right of fishing in an arm of the sea. A private and several right to fish in a navigable river must have had its origin before the Magna Charta."

In Shively v. Bowlby, 152 U. S. 5, 14 Sup. Ct. 548, 38 L. Ed. 331, it is said:

"Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high-water mark. They are of great value to the public for the purposes of commerce, navigation, and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use or right. Therefore the title and control of them are vested in the sovereign for the benefit of the whole people."

The title and rights of riparian or littoral proprietors of the soil below high-water mark are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution. The United States, while they hold the country as a territory, having all the powers both of the national and municipal government, may grant, for appropriate purposes, titles or rights in the soil below high-water mark or tide waters. But they have never done so by their general laws.

The court is forced to hold in this case that the right to fish in the tide waters about the mouth of Ketchikan creek is a common one, and the complainants and respondents were and are upon an equality in taking fish in the said tide waters, unless the complainants have acquired some exclusive rights or privileges by grant, prescription, possession, or as owners of the uplands. The rights of the owners of uplands in tide flats and fishing grounds have been frequently determined by state and federal courts, and the law governing them seems to be well settled.

It has been held by many of the state courts of last resort that the owner of lands adjoining navigable water, whether within or above the ebb and flow of the tide, has, independently of local law, a right of property in the soil below high-water mark, and a right to build out wharves, so far at least as to reach water really navigable. This same theory, un-

der the influence of the state statutes, has been indulged in by the federal courts in a few cases; especially in *Dutton v. Strong*, 1 Black, 23, 17 L. Ed. 29; *R. R. Co. v. Schurmeier*, 7 Wall. 272, 19 L. Ed. 74; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984; *St. Clair v. Lovingston*, 23 Wall. 46, 23 L. Ed. 59. But by the later decisions of the courts it is established that the rights of riparian or littoral proprietors in the soil below high-water mark of navigable waters are governed by local laws of the several states, subject only to the rights granted to the United States by the Constitution. In the case of *Weber v. Harbor Commissioners*, 18 Wall. 65, 21 L. Ed. 798, Mr. Justice Field, in speaking of the right to occupy the tide lands, said:

"Any erection thereon without license is, therefore, deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a 'purpresture,' which he may remove at pleasure, whether it tend to obstruct navigation or otherwise."

Again, in *Atlee v. Packet Co.*, 21 Wall. 389, 22 L. Ed. 619, a riparian proprietor had no right, without statutory authority, to build out piers into the Mississippi river, as necessary parts of the boom to receive and retain logs until needed for sawing at its mill by the water side. In *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428, the court said:

"With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted inures to the state within which they are situated, if a state has been organized and established there."

Mr. Justice Gray, in *Shively v. Bowlby*, 152 U. S. 49, 14 Sup. Ct. 566, 38 L. Ed. 331, says:

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands,

whether in the interior, or on the coast above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation, and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government."

After discussing a great many cases, state and federal, involving this question, this same distinguished jurist states his conclusions as follow:

"Lands under tide waters are incapable of cultivation and improvement in the manner of lands above high-water mark. They are of great value to the public for the purposes of commerce, navigation, and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and control of them are vested in the sovereign for the benefit of the whole people. At common law the title and dominion in lands flowed by the tide were in the king for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution these rights, charged with a like trust, were vested in the original states, within their respective borders, subject to the rights surrendered by the Constitution of the United States. * * * The new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tide waters and in the lands under them within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high-water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution."

The conclusion reached by the Supreme Court of the United States in *Shively v. Bowlby* controls this court. To the conclusions reached by the court in that case I give my most hearty assent. There is no longer room for the discussion of the question, and it should be deemed settled for all time.

The court is therefore compelled to hold in this case that, if the complainants were the owners in fee of the uplands claimed by them, their riparian or littoral rights would give them no control whatsoever of the tide lands or lands below high-water mark.

But it is claimed by the learned attorney for complainants that they have acquired interests in the tide flats below high-water mark by prescription. It has been sometimes held that, where parties had held fishing grounds from time immemorial, a grant would be presumed. The tide lands in all territory acquired by the United States have been held in trust, it is said, by the United States for the benefit of the new states that might be carved out of such territory. The United States has avoided making grants of the tide lands to individuals or corporations, and, while the general government undoubtedly has the right and power to grant, for appropriate purposes, rights in the soil below high-water mark of tide waters, the fact that it has never done so destroys any claim of grant from the United States by reason of control of such lands for a great period of time. No presumption of a grant can arise where no grant has ever been made by the only authority having power to make it. The lands below high water in tide waters and in navigable streams under control of the states have been disposed of by grant under the authority of the Legislature of the several states. Where grants have been made under such conditions, it has sometimes been held that a party holding the possession, or exercising the right of fishery within certain limits for a number of years might obtain a title by prescription; a grant presumed because of the lapse of years and the continuous right exercised by the party. But statutes of limitation do not run against the king or against the state. *Jaynes v. Wilkinson* (Kan. App.) 42 Pac. 735; *Redfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. 83, 33 L. Ed. 327;

Smith v. Smith (Kan. Sup.) 8 Pac. 385; Rhodes v. Smith, Id. 391. It is believed to be clear that the complainants in this case and their grantors have gained no rights by prescription in the tide lands in complainants' petition described.

But it is said that the respondents have at times landed their nets, when taking fish, upon the lands of the complainants above high-water mark. As the complainants allege ownership in this land, and nothing has been presented, either by allegation or evidence, to controvert their right of ownership, it will be accepted for the purposes of this case. As the owner of the uplands, the complainants have an unquestioned right of way over the tide flats lying below high-water mark to the deep water. It appears by the testimony of some of the witnesses that there is only about 500 feet along the line of the complainants' lands where the tide and overflowed lands are of a character suitable for landing fish with seines. It also appears, or is claimed, that the plaintiffs and their grantors have, from time immemorial, used these lands along the 500 feet of their shore line as a fishery, and for the purpose of passing from their land to the deep water of the sea, and landing fish from their seines in returning from the sea. The unrestricted right of free passage to and from the deep waters for such purpose is one that may be properly maintained by the plaintiffs as an exclusive right, and may be maintained by them as against all persons except the United States. In Weber v. Harbor Commissioners, the court seems clearly to recognize the propriety of this doctrine in the use of the following language:

"That a riparian proprietor, whose land is bounded by a navigable stream, has the right of access to the part of the navigable stream in front of his land, and to construct a wharf or pier projecting into the stream for his own use or the use of others, subject to such general rules and regulations as the Legislature may prescribe for the protection of the public. * * *"

This is a right of highway; an easement, but not an ownership. It is, however, a valuable right to the owner of land bordering upon tide waters, and should be protected.

The United States undoubtedly holds the title to these lands, and might dispose of them according to its choice; but no rules or regulations have been adopted by the United States for the control of its tide lands under circumstances like those presented in this case, and it is believed the riparian owner may only properly use these lands and have the exclusive right of user for the purpose of going to the deep water and returning from it in landing fish, etc., but that the riparian owners might build wharves upon those lands, and occupy them to the exclusion of all others, until required to remove the same by the United States.

The Congress of the United States has enacted some rules governing the right of fishery in Alaskan waters, among which is the following:

"That it shall be unlawful to fish, catch, or kill any salmon of any variety, except with rod or spear, above the tide-water of any creek or river of less than five hundred feet in width in the territory of Alaska, except only for the purpose of propagation, or to lay or set any drift net, set net, trap, pond net, or seine, for any purpose, across the tide-waters of any river or stream for a distance of more than one-third the width of such stream or channel, or lay or set any seine within one hundred yards of any other net or seine which is being laid or set in said stream or channel," etc. Act June 9, 1896, c. 387, 29 Stat. 316.

The testimony in this case discloses the fact that the respondents used seines of more than 150 fathoms in length, that would cross, when spread, the entire channel of the mouth of Ketchikan creek, and that they used their nets in drawing in their fish, not only upon the tide flats, but at times to points above high water on the lands of the complainants, and that they held the same upon the tide flats

from time to time in such a manner as prevented the egress and ingress of the riparian owners across these tide flats to deep water, and in returning to deep water after having spread their nets. It is said that the respondents "alternated" with the complainants in spreading their seines and drawing in the seines upon the banks, but that, when complainants did not move as quickly as respondents seemed to think they should, the latter did not wait for complainants to alternate with them, but again occupied the grounds to the exclusion of complainants. It is evident to the court that the complainants were hindered and prevented by respondents from the free use of their right of way from the uplands to the deep waters, over the 500 or 600 feet of tide lands described by the witness Martin in his testimony; that such hindrance and delay by the respondents, and their action in preventing the complainants' free access to the deep water and return therefrom, were unlawful, and should not be permitted. The court is unable to understand why the respondents, who are engaged in the business of canning and taking salmon at various points along the coast, should seek to interfere with others in like business. Ordinary respect for the rights of others, and common decency and discretion in the management of their business, would seem to require these men, who are occupying other grounds, to the exclusion, perhaps, of other fishermen, to seek at least to establish a custom of protection of their own fishing rights and grounds by noninterference with others, instead of wantonly encroaching upon their ground. To allow such things to continue would result in quarrels, and probably bloodshed, as well as in destroying the business of fishermen conducting the same in a fair and legitimate way. Public policy seems to indicate that this should not be permitted. It is evident from the testimony that respondents have used seines in an unlawful manner in setting them across the entire mouth of

the creek. It is the evident intention of the law that seines should not be so set as to prevent the passage of salmon to their spawning places; hence the requirement that they should not be permitted to extend more than one-third the width of the stream.

Until Congress shall have enacted some laws that shall fully determine the rights of parties situated as these complainants are, or until some higher court shall overturn the decision of this court, the court will endeavor at least to protect persons who have made settlement upon lands bordering upon tide waters, and made valuable improvements thereon, in their rights of exclusive highway from their own lands over the tide lands between themselves and the deeper water of the sea for purposes of taking salmon and landing fish without hindrance from others. It must not be understood that persons can claim unlimited rights in this behalf. And, though complainants claim to own a mile of the shore, it seems that only 500 or 600 feet thereof are used and necessary for spreading seines and landing the same. Such a width of highway for this business is not unreasonable, and in the exclusive use of this complainants will be protected by the order of the court.

A temporary injunction and restraining order will be allowed to the complainants pending the trial of this cause upon filing a good and sufficient bond, to be approved by the clerk of this court.

PRATT et al. v. UNITED ALASKA MIN. CO.

(First Division. Juneau. October Term, 1900.)

No. 1,148.

1. TRIAL—CONTINUANCE.

A continuance will not be granted when the applicants had notice of the time and place of the trial, and their efforts to be present do not appear to have been made in good faith.

2. EQUITY—TRIAL—VERDICT.

In a suit in equity the court is not bound by the findings of a jury, but may make its own findings under the evidence, or may adopt the findings of the jury for its own, if they are sustained by the evidence to the satisfaction of the judge.

3. MINES AND MINERALS—EXCESS—LOCATION—NOTICE.

A mining location embracing more than 20 acres by mistake does not invalidate the claim. Quære: Does a mining notice, which includes by its terms more land than is permitted by the mineral laws of the United States, invalidate the location? Richmond Min. Co. v. Rose, 5 Sup. Ct. 1055, 114 U. S. 576, 29 L. Ed. 273; Jupiter Min. Co. v. Bodie Min. Co. (C. C.) 11 Fed. 666; Stemwinder Min. Co. v. Emma Min. Co. (Idaho) 21 Pac. 1040; Rose v. Richmond Min. Co. (Nev.) 27 Pac. 1105; Price v. McIntosh (2d Div., Nome, Nov. 16, 1901) post, 286.

This was a suit in equity to quiet title to conflicting locations upon a mining claim on McKinley creek, in the Porcupine mining district, Alaska. Plaintiffs claimed under the Pratt location of August 3, 1899, and the defendant under an alleged location of the same ground by Hanson on October 6, 1898. Questions of fact were submitted to a jury by the court. Verdict for plaintiffs. The opinion of the court is upon the motion of defendant for a new trial, with the affidavits thereto attached.

Pratt & Jennings, for plaintiffs.

Maloney & Cobb, for defendant.

BROWN, District Judge. The first question presented by the motion for a new trial was "error of the court in refusing the continuance applied for by the defendant." The court will, therefore, first consider this question. It may be well to recall the circumstances under which the case was originally set for trial. Mr. John F. Maloney, senior counsel for the defendant, was in court when counsel for plaintiffs moved the court to set the case for trial. Mr. Maloney urged the injury to his clients by the trial of the case before the close of the mining season, and asked that the case go over. The plaintiffs insisted upon an early trial, notwithstanding some offers of favor made by Mr. Maloney. The court suggested a later day for the trial of the case, whereupon Mr. Maloney stated very positively that, if the case was to be tried during the term, the sooner it was set for trial the better it would please him; that he would be ready for trial; and he warned the plaintiffs that they must also be ready. Under these circumstances the court set the case for trial two days later than the time suggested by Mr. Maloney. Thereafter Mr. Cobb, junior counsel for the defendant, on the day the case was for trial, appeared before the court, and presented the affidavit of Mr. Maloney setting out the absence of his clients, the inability of Hanson to attend court because of a lame back, and also setting forth the testimony of Hanson and Sutherland, two of his clients. On the presentation of this motion, and on the 10th day of October, the plaintiffs filed several affidavits, showing that Hanson was in good health, the means of travel by which witnesses could have come to court from Porcupine, and that there was nothing in the situation that should necessarily cause the absence of the defendant from court, but, on the contrary, showing very clearly that they could have been present at the trial, unless they had chosen willfully to absent themselves. The strange part of the proposition is that

these several defendants came to Haines Mission, as shown by their affidavits in said amended motion, on the 10th of the month, and had the same opportunity to be present at the trial as Sol Rapinsky, who saw one of said defendants at Haines, namely, Hanson, and Rapinsky appeared in court before the close of the testimony for the plaintiffs, and testified as a witness. He came by the steamer Alert, by which the defendants could all have come; and yet they seek to excuse themselves because they say that they heard at Haines that the trial was over, whereupon they immediately returned to Porcupine. By the affidavit of Hanson himself, attached to this amended motion for a rehearing, it clearly appears that he was able to travel, and did travel from Porcupine to Haines, and then returned the next day, giving negation to the statement in the affidavit for continuance that he was sick, lame, and so disordered as to be unable to travel. It will be further remembered that all that the witnesses Hanson and Sutherland could testify to, as set out by the affidavit of their counsel, was admitted by the plaintiffs as testimony in the case, or that the defendants would swear as stated by their attorney, if present in court. Upon that admission, under the statute, the court permitted the case to go to trial. It was apparent to the court at the time that the effort for a continuance of the case sprang from a desire for a continuance on the part of the defendants, and not from any well-grounded reason therefor; that the effort to continue the case by the defendants was a scheme to serve some purpose of their own, rather than to secure a just and impartial trial. The affidavits filed by counsel since the trial confirm the court in its former opinion.

I cannot permit this matter to pass without referring to a statement made on the third page of defendant's brief presented in support of its motion for a new trial: "In the case at bar the plaintiffs were allowed to force the defendant to a

trial with almost indecent haste, and secure a manifestly unfair trial; and we think the interests of justice require that on this ground alone a new trial should be granted." Without referring to what immediately precedes this statement, which, if quoted, would make the statement appear more offensive and untruthful, the court will simply say that men have been disbarred for less offensive statements than this, when deliberately made, and long after the excitement of the trial had passed away.

But let us consider the real situation. The several defendants were at work 30 or 35 miles from Haines, within 3 miles of the Klahena river, from which point, at the mouth of the Porcupine, boats could have conveyed them in a few hours, and the steamer Alert, which made its trips every second day, would have brought them either on the 9th or 11th to Skagway, the same day on which they left their homes on the Porcupine. They had been notified to be present, had been notified by their counsel of the day set for the trial, and yet, while only a day's travel distant from the court, they deliberately chose to remain away. And yet their counsel has the supreme hardihood to come into court and say that the defendants were forced into trial in almost "indecent haste." The facts and circumstances of the case not only show that the trial was set for a day desirable and satisfactory to senior counsel for defendants—and for that reason alone the defendants cannot complain—but it also clearly appears that the application for a continuance on the day set for trial was a mere subterfuge, not made in good faith or in the interests of justice. If the court were to denounce this matter as it deserves, it would be necessary to say more harsh and unkind things than the court desires to utter on this occasion. It is sufficient to remark that the conduct of counsel has not been worthy, and it is hoped that the result thereof will prove

a salutary lesson to them. The court can find no error in its action in overruling the motion for continuance.

The next objection made by counsel is that the third finding of fact returned by the jury is not sustained by the evidence. The jury found from the evidence that Hanson had not, prior to August 3d, corrected the boundary line of his claim by marking the same on the ground so as to make the north boundary line of his claim coincide with the south boundary of the Wooden claim. The jury also found that the initial stake of Hanson's location of October 6, 1898, was at the dead tree pitched down the embankment with the top in the ground at the creek bed, referred to in the testimony of Cahoon. The defendant does not question the correctness of this finding; indeed, the evidence in the case is overwhelming in support of this finding by the jury. The notice of location that was placed on the tree indicated by the finding of the jury claimed 1,500 feet running with the creek, and was recorded by Hanson in the mining record at Porcupine and in the public record at Juneau, which said location notice is in the words and figures following:

"Notice is hereby given that I, the undersigned, have, this 6th day of October, 1898, located a placer mining claim, 1500 feet, running with the creek, and 300 feet on each side of center of creek, known as McKinley creek, in Porcupine mining district, running into Porcupine river. This claim is the west extension of Dan Sutherland's claim, about 4000 feet above First Falls in district of Alaska.

"James Hanson, Locator.

"Witness: Dan Sutherland."

This notice does not seem to have been amended at any time since the original record thereof. The evidence of the disinterested witness who was present when said location was made clearly shows where the initial stake was placed, and that the claim of Dan Sutherland ran in one direction therefrom and the claim of Hanson in the other direction

toward the end of the Wooden claim, which was some 1,900 feet away; that the other end of the Hanson claim, at the time of said location on the 6th of October, was not marked, staked, or bounded in any way, although, if Hanson had been entitled to the 1,500 feet claimed by him in his notice, and running down the creek from the point of location, there would yet have been left, between the Wooden claim and the end of the claim, about 4,000 feet of unclaimed and unoccupied mineral land. The answer of the defendants alleges that on the 6th day of October, 1898—giving the same date shown by the notice of location of Hanson—Hanson located a placer mining claim, beginning at a tree on the south boundary line of the claim of Wooden, which said tree is the original monument on which said Hanson's notice was posted; thence up the creek to a center line, 1,500 feet, etc. All of which, by the notice of location, which ran from another and different point and in the reverse direction, and from the testimony of the several disinterested witnesses present at the time said location was made, shows that the answer of the defendants in this respect is without any foundation in fact, and is wholly unsupported by the evidence, except the statements of Hanson and Sutherland as the same appear in the affidavit of their attorney, Mr. Maloney; and it is to be remembered that these were interested witnesses. The claim of Hanson, which began at the tree, as specified by the jury, and ran thence down the creek 1,500 feet, could not have had its boundaries so marked on the ground that by any possibility the north boundary line of his claim could coincide with the south boundary of the Wooden claim. The answer of the jury and its finding upon that question is not only supported by testimony, but by the weight of the evidence in the case.

The next objection taken is to the fifth finding of the jury that the excess of ground in Hanson's original location had

not been cut out of said location by the Dalton location of May 22, 1899. There is no evidence to indicate a Dalton location, except the bare notice recorded, a copy of which is found in the record of evidence. This, in itself, could by no possibility warrant the jury in finding that Dalton had made a lawful location of 400 feet of ground at the upper end of the Hanson claim. It is true that on October 20th, after the Hanson location was made on October 6th, Dalton placed some notice on the south boundary line of the Wooden claim, thereby fixing a second boundary to his claim, the other end boundary having been fixed by the monument and location notice of October 6th. In an effort to determine what ground within his location Hanson was entitled to, and what, if any, was excess, it is necessary to begin the measurement from the initial point of his claim, found by the jury to be (and with which finding the court agrees) the tree that had slid from the mountain, and the top of which rested in the ground at the bottom of the creek, whence measurement was made down the creek 1,500 feet, according to the specifications of this notice. No matter who had claimed ground within that limit, it could not affect the right of Hanson to the 1,500 feet along the creek from that notice, and it could not affect the right of any other persons to whatever excess ground there was between the end of the 1,500 feet of the Hanson claim and the Wooden claim. The finding of the jury, therefore, in this regard, was unquestionably correct, both as a matter of law and of fact.

As to the sixth finding of fact, it is only necessary to refer to the evidence in the case, showing that Hanson claimed by his two notices all the ground between his original notice of October 6th and the Wooden claim, to make it appear that the answer of the jury that there was an excess of ground in the Hanson location was undoubtedly correct. As to the number of feet of the excess ground in the Hanson

location, designated in the seventh finding by the jury, there may be some uncertainty under the evidence in the case. By the testimony of Hill it would appear that there was less than 400 feet in excess; while by the testimony of Parker, another surveyor, the excess was fixed at 428 feet and a fraction of a foot. The jury, by its answer, finds the Parker measurement a true one. It therefore cannot be said that said finding is not supported by evidence.

The next objection of counsel in his motion for a new trial was to the eighth finding of the jury, which is general, and to the effect that the plaintiff had the better right to the land in controversy. Is this finding of the jury supported by the evidence in the case? Leaving the number of feet in dispute out of the question, and confining the answer to the single proposition whether the plaintiff or defendant had the better right to whatever excess there was in the Hanson location, it must be conceded that the finding is supported by the weight of evidence.

The several objections raised by the motion for a new trial are thus answered; and, if the case were an action at law, the court would go no further in considering the motion of the defendants for a new trial or for a rehearing, but, as it is a suit in equity, the court is not bound by the findings of the jury, and may make its own findings under the evidence, or may adopt the findings of the jury for its own, if it thinks them to be sustained by the evidence. The court will consider the findings as a whole, and more particularly the general finding that the plaintiff has the better right to the ground in controversy. It may be well to remember that the defendant Hanson, by the terms of his notice, claimed a piece of land 1,500 feet in length by 600 feet in width, making as a whole 20 acres and a fraction, or more ground than any man is allowed to take as a single claim under the mining laws of the United States. Can a claim to mineral

land, then, which by the notice of the claimant embraces more than is allowed by law, be held to be a lawful claim?

Embracing by accident more than the lawful quantity of ground within a location has never been held, unless the excess was very great, to invalidate the location; but the question of taking more land within a claim as staked by faulty measurement and that of claiming by the terms of a location notice are entirely different. In the one case the error is merely accidental; in the other the excess is taken with deliberate purpose. Question: Does a mining notice, which includes by its terms more land than is permitted by the mineral laws of the United States, invalidate the location? The court is not aware of any decision upon this precise point, and, while the question is not passed upon at this time, it would seem that such a notice clearly in violation of the law would invalidate the entire location. This suggestion is made because of other locations of like character, that the parties in interest may take warning in advance, and so correct their locations as to avoid the danger that is presented here. The court is of the opinion that under the evidence in this case and all the facts and circumstances surrounding this trial, and as a matter of justice, the plaintiff has the better right to the excess in the Hanson claim, and that he is entitled to have his right and title quieted by the decree of this court.

Specific findings of the court in accordance with this opinion will be filed in this case, and the motion by the defendants for a new trial is overruled. To which ruling of the court defendants, by their counsel, except.

MOODY v. THE FIRST BANK OF SKAGWAY.

(First Division. Skagway. October Term, 1900.)

No. 951.

1. ATTACHMENT—JUSTICE OF THE PEACE.

A justice of the peace in Alaska, under the laws of Oregon then in force there, was without jurisdiction to render a judgment in attachment upon a note payable in Victoria, B. C.

This was an application of McRae and Tarrant for an order making their judgment in attachment a preferred claim.

Louis K. Pratt, for the motion.

J. G. Price, contra.

BROWN, District Judge. It seems that the matter now before the court had its origin in the Commissioner's Court, before C. A. Sehlbrede, United States Commissioner, on the 11th day of March, 1899, in A. McRae v. A. D. McLennan; that an affidavit in attachment was filed in said case, in which it was alleged that the defendant was indebted to plaintiff in the sum of \$211.15 and interest, upon contract for the payment of money; that the sum for which attachment was asked was an actual, bona fide, existing debt due and owing from the defendant to the plaintiff, and not secured by any mortgage, lien, or pledge upon any real or personal property; and that said action was not brought, nor said attachment sought, to hinder, delay, or defraud any creditor of the defendant. This affidavit was signed March 6th, and the bond seems to have been filed on March 11th. An attachment was issued some time in March, but bears no date whatever. The marshal, however, certifies in his return that the writ came into his hands on March 13, 1899, and that he executed the same by attaching as garnishee the First Na-

tional Bank of Skagway and C. S. Moody, manager of the Bank of Skagway, and also serving upon Moody a copy of the garnishment bearing date March 18, 1899. There also appears an answer, made by Moody, in writing, as president and manager of the First Bank of Skagway, admitting that the bank had in its possession the sum of \$621, in the name, to the credit, or payable to A. D. McLennan. No date is attached to this paper, and no file mark is found thereon. There also appears in the record of proceedings in that case an affidavit for publication, alleging that the defendant is a nonresident. A complaint was also filed in the action, describing the claim on which suit was brought, as follows:

"\$211.15.

Skagway, Alaska, May 25th, 1898.

"Six months after date, I promise to pay to A. McRae, or order, at the Bank of British Columbia, Victoria, B. C., the sum of \$211.15, with interest at ten per cent. till paid.

"A. D. McLennan."

The docket entries of the justice or commissioner before whom the suit was brought recite:

"March 18, 1899. Complaint was filed, summons issued, returnable March 20th at 10 o'clock. Placed in the hands of Deputy Marshal Tanner for service. Summons returned 'Defendant not found.' Affidavit for publication of summons filed March 27th," etc.

It appears by the record generally that no service was made upon the defendant; that a constructive service was made, or attempted to be made, by publication of summons; that many of the proceedings in the matter of issuing summons and the publication of service were irregular; and, by the affidavit of the publisher, attached to the brief of the receiver in this case, it appears that the publication was made in the name of "A. M. Rae," and not in the name of "A. McRae"; and that the proof of service in that case, when filed in the justice court, had the "c" inserted therein with a pen, the same not appearing at all in the publication. In

other words, the affidavit of the publisher undertakes to show that the publication, after it was made, and after the proof thereof was made, was tampered with by inserting such letter as would make the publication and service in the action valid. There are many other irregularities apparent on the face of the record as presented to the court.

By the record as a whole we are brought squarely to face this proposition: Had the court that proceeded to enter judgment in the case under suit in attachment and the subsequent proceedings acquired jurisdiction, so that any of the steps taken in the case were legal or binding? If the court had jurisdiction, whatever minor defects in the record were unchallenged would not invalidate the proceedings; but, if the affidavit in attachment was insufficient to support the action taken, then the court was without jurisdiction, and all its proceedings void ab initio. At the time this action was brought the laws of Oregon provided in substance, if not in exact words, that the remedy by attachment is given upon those contracts for the direct payment of money which are made or are payable in the state. No writ of attachment could issue in Oregon under this statute, and no attachment be maintained, unless there was an express stipulation that the contract should be paid in that state; and, if the affidavit did not show the claim to be one of those upon which a suit in attachment could be brought, it was insufficient in law to sustain an attachment, and therefore wholly void. The affidavit in this case not only did not state that the claim was payable within the District of Alaska, but the complaint that was filed with, or at the time of, the affidavit for attachment, shows in express terms that the claim upon which suit was brought was by its terms made payable in British Columbia. This same statute has been construed, both in California and Oregon, in one way only, viz., that no proceedings upon a claim, not by its terms payable within the state could be

maintained by action in attachment. *Trabant v. Rummell*, 12 Pac. 56, 14 Or. 17; *Dulton v. Shelton*, 3 Cal. 206; *O'Connor v. Frasher*, 56 Cal. 501; *Cooper v. McGrew*, 8 Or. 328.

We are, then, confronted with the question whether the statute of Oregon referring to this matter was in force and effect in this jurisdiction at the time of the proceedings in question. By the act of Congress of 1884 (Act May 17, 1884, c. 53, § 7, 23 Stat. 25) all the laws of Oregon in force in that state, and not locally inapplicable or in conflict with the laws of the United States, were declared to be in force in Alaska. If the statutes of Oregon on the subject of attachment were not in force, then no such proceeding as the one instituted in this cause could have been maintained. The proceeding was begun solely under the authority of the attachment laws of Oregon, and under no other. If we were to say that this particular branch of the attachment law was not in force in Alaska, because it uses the language "within the state," then we should be compelled to hold that the entire statute, for the same reason, was not in force. The statute could only be made applicable to conditions in Alaska by holding that, where the law was made to apply to conditions in the state of Oregon, the Congress of the United States, by putting those laws into force in Alaska, intended that, where conditions in Alaska were like, the law of Oregon should be in force.

Without considering other questions presented by the record in this case, I am impelled to the conclusion that the proceedings in attachment originally instituted, and upon which the motion under consideration was framed, were wholly void, and of no effect. The motion to make the claims preferred claims against the bank and against the receiver is denied.

SAWYER v. VAN HOOK.

(Third Division. Eagle. October 20, 1900.)

No. 10.

1. PUBLIC LANDS—TOWN SITE.

It was the aim of Congress to dispose of town lots in Alaska only to actual settlers and occupants. Improvements are evidence of the intention of the settler to use and occupy.

2. SAME—TOWN SITE—EVIDENCE.

Whoever enters upon a vacant town lot and makes the first act of settlement or occupancy in good faith, with the intention of following it up and claiming the benefit of the law, is the first settler or occupant. The first settler or occupant in point of time is entitled to the lot.

Prior to any of the acts complained of in this action, the town of Eagle had been built upon the unsurveyed public domain in Alaska, and had been, by its inhabitants, platted into lots, blocks, streets, and alleys. The lot in controversy had been settled upon by some unknown claimant prior to the time when either of the parties to this action laid claim to it, and on August 23, 1900, the defendant filed in the office of the recorder a notice of his intention to relocate the same. About a week thereafter he left Eagle for St. Michael, where he had been employed as topographer by the military authorities. Before leaving he informed plaintiff that he would not return until next summer. He made no entry or improvement upon the lot, nor did he at any time occupy it in any way. When he left the town, the lot still remained in the vacant and abandoned condition in which it was left by the prior claimant, and the only act performed by defendant showing any intention on his part to claim the lot was the notice filed in the recorder's office.

On September 22d the plaintiff also filed in the recorder's

office a notice of his intention to claim and relocate the said lot. On September 30th the defendant unexpectedly returned from St. Michael, and, although he was fully informed in regard to plaintiff's relocation of the lot, made no entry or improvement thereon. On October 13th the plaintiff made the first act of settlement and improvement upon the lot by delivering two loads of lumber at and upon the same. This lumber was part of the material which the plaintiff had then purchased for the erection of two dwelling houses on the property, and it was delivered there with the intention on the part of the plaintiff of immediately building the houses. On the day following this act of possession and settlement the defendant entered upon the lot and began to tear down a small log structure which had been built thereon and abandoned by the first occupant, threatened to remove plaintiff's building material, and sought to oust the plaintiff from the possession of the premises. Upon application of the plaintiff, a restraining order was issued, after which the cause came to issue and trial.

Prescott Sawyer, for plaintiff.

George K. French, for defendant.

WICKERSHAM, District Judge. The laws of the United States relating to town sites on the public domain are extended to Alaska by the eleventh section of "An act to repeal timber culture laws and for other purposes," approved March 3, 1891. 26 Stat. 1095, c. 561 [U. S. Comp. St. 1901, p. 1467]. It is there provided:

"That, until otherwise ordered by Congress, lands in Alaska may be entered for townsite purposes, for the several use and benefit of the occupants of such townsites, by such trustee or trustees as may be named by the Secretary of the Interior for that purpose, such entries to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be."

Section 2387 of the Revised Statutes [U. S. Comp. St. 1901, p. 1457] provides that "whenever any portion of the public lands has been, or may be, settled upon or occupied as a townsite," it shall be lawful to enter "the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests."

These statutory provisions show that it was the intention of Congress to dispose of lots in town sites in Alaska only to those who would possess and use them. Title thereto can be obtained only through settlement occupancy. "Settled upon" means taken possession of. It includes such an improvement of the lot by the erection of buildings or fences, or by actual residence thereon, or by such other acts of possession and improvement, as clearly and unmistakably show that it is bona fide the intention of the settler to take and hold possession of the lot, and that his possession and improvement is intended to be permanent, and for himself. "Occupied" also means taken and held in possession, and one who uses a lot and occupies it in good faith with buildings or other improvements or property, which show his intention to possess and claim it under the town-site law, although he may not reside upon it, can acquire title thereto. *Stringfellow v. Cain*, 98 U. S. 610, 25 L. Ed. 421; *Hussey v. Smith*, 99 U. S. 20, 25 L. Ed. 314. The improvements of a settler upon a town lot, by which he gains possession, are in themselves equivalent to an announcement of his intention to claim and hold the property under the law, and a notice of such intention, filed in the recorder's office, adds nothing to his rights.

In case more than one person shall claim the same lot under the town-site law, the person having the prior claim by settlement or occupation is authorized to acquire the title. Settlement or occupancy are generally made up of a series of acts, often extending over a considerable period of time;

but whoever enters upon such property and makes the first act of settlement or occupancy in good faith, with the intention of following it up and claiming the benefit of the law, is thereby recognized as the first settler or occupant. As two settlers or occupants cannot at the same time acquire title thereto, the first in point of time is entitled to the lot.

Applying these well-established principles to the case at bar, it follows that by his entry upon the lot in controversy on October 13th, and the act of depositing building material thereon with the intention of erecting a dwelling house, the plaintiff settled upon the lot under the provisions of the town-site act. He acquired the right thereby to the exclusive possession of the property and to its quiet use and enjoyment, and when, on the following day, the defendant entered, and began to tear down structures standing thereon, and not belonging to, erected by, or in the occupancy of himself, he became a trespasser and a wrongdoer. Plaintiff is entitled to an injunction to prevent the threatened attack upon his property, and to the decree prayed for in his complaint.

In re BURTON.

(First Division. Juneau. November 3, 1900.)

1. ALIEN—INDIAN—NATURALIZATION.

An Indian born in British Columbia will not be admitted to citizenship by naturalization in the United States.

Application for Naturalization Papers.

BROWN, District Judge. The petition of Samuel Burton states that he is a native of British Columbia, now and for many years a resident of Alaska, and he prays to be admitted to citizenship in the United States.

Burton is evidently not a "free white person or an alien of African nativity or African descent," and is not, therefore, entitled to naturalization under the acts of Congress. Section 2169, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1333].

Section 8, art. I, of the Constitution of the United States, provides that Congress shall have the power "to establish an uniform rule of naturalization." In exercising this right, Congress has enacted that a free white person, or an alien of African nativity or of African descent, may be admitted to citizenship. This is the uniform rule established by Congress under the Constitution.

Indians sustaining tribal relations have never, so far as this court is advised, been permitted to exercise the rights of citizenship. By the treaty of cession between the United States and Russia it is provided that "the uncivilized tribes will be subject to such laws and regulations as the United States may from time to time adopt in regard to aboriginal tribes of that country." In legislation by Congress we do not find any indication that Congress intends to deal differently with the Indians of Alaska than with any of the aboriginal tribes within the territorial limits of the United States.

In the late acts of Congress affecting Alaska, particularly the act of 1899 (Act March 3, 1899, c. 429, 30 Stat. 1338), giving Alaska a Criminal Code, and fixing a license fee to be paid by those engaging in various kinds of business in Alaska, and, among other things, providing for license to retail liquor dealers, a sale of liquor "to any minor, Indian, or intoxicated person, or to a habitual drunkard" is prohibited under heavy penalty. It will be observed that here the Indian is protected under the law the same as a minor or intoxicated person.

Again, the act providing for a license to retail liquor dealers, requires, as a condition precedent to the issue thereof, the consent of "a majority of the white male and female resi-

dents over the age of eighteen years, other than Indians, within two miles of the place where the intoxicating liquor is to be sold," to the issue of such license.

The act of June 6, 1900, commonly known as the "Carter Act," at section 27 (31 Stat. 330) thereof, refers to "Indian lands," "missions," etc., thereby giving certain protection to them as a race or peculiar people, and in no way treating them, or any of them, as persons having the rights of citizens of the United States.

It was at one time the practice of our government to enter into contract with certain Indian tribes by treaty, but in 1871 it was enacted that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty." Rev. St. U. S. § 2079.

Section 2103, Rev. St. U. S., seems to indicate that under some circumstances an Indian may acquire the rights of citizenship. By the act of February 8, 1887 (24 Stat. 388), it is provided that allotment of land may be made to Indians, and by section 6 of said act it is further provided that an Indian born within the United States, to whom land has been allotted, and who has severed his tribal relations, and adopted the habits of civilized life, thereby becomes a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizenship. This seems to be the only method provided by law whereby an Indian may become a citizen.

It will be seen, from an examination of the acts of Congress above referred to, and many others not cited, that prior to the act of Congress in 1871 it was the practice of our government to treat with Indian tribes much as we treat with foreign or independent nations, and quite generally as with

peoples or tribes unfriendly to our government, living under conditions of barbarism.

No provision has been made by Congress for the naturalization of Indians or other peoples of color or their descendants, except Africans.

Burton is an Indian, and, if born within the territorial limits of the United States, and having severed his tribal relations, adopted the habits of civilized life, and otherwise complied with the law above referred to, then he is a citizen of the United States by the declaration of the statute, and needs no papers from the court. If he was not born within the territorial limits of the United States, but in British Columbia, as asserted by him, having no rights of citizenship there, and treated under the law of that government as an Indian without civil rights, then there is no law of the United States, of which this court is advised, whereby he may be admitted to citizenship by the court.

The application is therefore denied.

ALLEN v. MYERS et al.

(Third Division. Rampart. March 4, 1901.)

No. 2.

1. ACTION—LAW—REMEDY

A suit in equity will not be sustained where a plain, adequate, and complete remedy may be had at law.

2. COURTS—TERRITORIES—UNITED STATES.

The District Court of Alaska is not, strictly speaking, a court of the United States, and does not come within the purview of the acts of Congress which speak of "courts of the United States" only.

3. TERRITORIES—CONGRESS—LEGISLATIVE POWER.

In legislating for Alaska, Congress exercises the combined powers of the general and state government. The Alaska Code

is to be considered and construed as if enacted by the Legislature of a state.

4. ACTIONS—MINES AND MINERALS.

An action at law to recover possession when plaintiff is out of possession, or a suit in equity to quiet title when he is in possession, is an appropriate remedy to determine the right of possession of a mining claim, as between claimants, under Rev. St. U. S. § 2326 [U. S. Comp. St. 1901, p. 1430].

5. MINES AND MINERALS—PATENT—LAND OFFICE.

After the applicant for patent has once initiated the proceeding in the land office under sections 2325, 2326, Rev. St. [U. S. Comp. St. 1901, pp. 1429, 1430], an independent suit in equity to quiet title, not in any way connected with the patent proceeding, will be dismissed, because the plaintiff has in the patent proceeding a plain, adequate, and complete remedy at law.

This is a suit in equity to quiet complainant's title to a placer mining claim situated in the Little Minook Creek, Jr., mining district, Alaska. Complainant alleges that he located the claim on September 12 and November 7, 1899. In addition to the formal allegations necessary in a complaint to quiet title, the bill alleges that the plaintiff had complied with the mining laws in respect to locating, recording, and labor, and that he had instituted the preliminary steps to secure patent under sections 2325 and 2326 of the United States Revised Statutes of 1878.

The defendants and interveners deny all of plaintiff's equities, and allege prior location of the same ground, and a compliance with the mining laws in respect to staking, recording, and working. Upon the allegations of the complaint, supported by affidavits, an injunction was granted enjoining defendants from trespassing or mining upon the claim pending the litigation, but with a clause providing that the net product of the mine should be delivered to a trustee appointed by the court, to await the final disposition of the action.

A. J. Balliett and A. M. Post, for plaintiff.

J. Lindley Green, for defendant Myers.

George K. French, for defendant W. T. Garratt.

WICKERSHAM, District Judge. The suit is brought under section 475 of the Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 410), which reads as follows:

"Sec. 475. Any person in possession by himself or his tenant, of real property, may maintain an action of an equitable nature against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate or interest."

The complaint would state a cause of action, and be unobjectionable, if it did not allege the inception of the special proceedings by the plaintiff to obtain patent to the claim under the provisions of sections 2325 and 2326 of the United States Revised Statutes [U. S. Comp. St. 1901, pp. 1429, 1430]. Do not these sections, and the method therein pointed out for quieting his title, afford the complainant full, speedy, and adequate remedy without the aid of a court of equity? If they do, this court has no jurisdiction to hear or determine this action. No objection has been made to the jurisdiction of this court by demurrer or otherwise, and it is left to the court to settle jurisdictional questions without the aid of counsel.

The sixteenth section of the judiciary act of 1789 (1 Stat. 82, c. 20) declares "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law." This is the general rule in all courts, "and the result of the argument is that, whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional

right to a trial by jury." *Hipp v. Babin*, 60 U. S. 271, 15 L. Ed. 633; *Grand Chute v. Winegar*, 92 U. S. 373, 21 L. Ed. 174.

In *Parker v. Winnipiseogee, etc., Co.*, 67 U. S. 545, 17 L. Ed. 333, the Supreme Court of the United States says:

"It was urged at hearing, as an insuperable objection to the relief prayed for, that the appellant has not established his right by an action at law. The objection was not taken by demurrer or in the answer. In the courts of the United States it is regarded as jurisdictional, and may be enforced by the court *sua sponte*, though not raised by the pleadings, nor suggested by counsel. *Graves v. Bos. Mar. Ins. Co.*, 2 Cranch, 419, 2 L. Ed. 324; *Fowle v. Lawrason*, 5 Pet. 496, 8 L. Ed. 204; *Dade v. Irwin*, 2 How. 383, 11 L. Ed. 308."

The real question, then, is, has the plaintiff plain, speedy, and adequate remedy at law by a continuance of the special statutory proceeding which he instituted to secure a patent to the mine in controversy? Among other provisions, section 2325 contains the following:

"If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days' publication, it shall be assumed that the applicant is entitled to a patent, upon payment to the proper officer of five dollars per acre, and that no adverse claims exist; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

It does not appear that any such adverse claim has been filed in the land office. If the proceedings there are continued until the end of the 60-days' publication, and no adverse claims are then begun, plaintiff's title to the mine in controversy will be quieted by operation of law, and without the aid of a court of equity.

If, however, adverse claims are filed, then, under the provisions of section 2326.

"It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim."

Whether adverse claims are filed or not, when the plaintiff once began the special proceedings for patent under sections 2325 and 2326, Rev. St., a plain, speedy, and adequate remedy was afforded to quiet all adverse claims against his title, either by a suit begun by his adversary or by force of the bar of the statute.

It has been repeatedly held by the District Courts of the United States, and affirmed by the Circuit Court of Appeals in the Ninth Circuit, that suits brought in the courts of the United States in pursuance of sections 2325 and 2326, Rev. St., to determine adverse claims to mining grounds, are in their nature equitable, and not legal, actions. *Doe v. Mining Co.* (C. C.) 43 Fed. 219; *Rutter v. Shoshone Min. Co.* (C. C.) 75 Fed. 37; *Shoshone Min. Co. v. Rutter*, 31 C. C. A. 223, 87 Fed. 801. The District Court for the District of Alaska, however, is not, strictly speaking, a court of the United States, and does not come within the purview of the acts of Congress which speak of "courts of the United States" only. *Jackson v. United States*, 42 C. C. A. 452, 102 Fed. 473; *McAllister v. United States*, 141 U. S. 174, 11 Sup. Ct. 949, 35 L. Ed. 693; *Ex parte Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232. In legislating for Alaska, "Congress exercises the combined powers of the general and of a state government." *American Ins. Co. v. 356 Bales of Cotton*, 26 U. S. 511, 546, 7 L. Ed. 242, 256; *Benner v. Porter*, 50 U. S. 235, 13 L. Ed. 119. In passing the act of June 6, 1900 (31 Stat. 321, c. 786), commonly called the "Alaska Code," Congress exercised its power as a state government, and that Code, which is practically identical with

that in Oregon and other code states, is to be considered and construed as if enacted by the Legislature of a state.

The Circuit Court of Appeals for the Ninth Circuit, in the case of Shoshone Min. Co. v. Rutter, 31 C. C. A. 223, 87 Fed. 801, said:

"The proceedings required to be commenced, under the provisions of section 2326, in a court of competent jurisdiction, may be brought either in the state or national courts, at law or in equity, as the facts may warrant; but section 2326 does not confer any special jurisdiction on the state court."

And to the same effect are the decisions in Blackburn v. Portland Co. (U. S. Supreme Court, January 8, 1900) 20 Sup. Ct. 222, 44 L. Ed. 276; Perego v. Dodge, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 113; Wolverton v. Nichols, 119 U. S. 485, 7 Sup. Ct. 289, 30 L. Ed. 474; Hammer v. Garfield Co., 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964. In Perego v. Dodge it is said of a suit under section 2326:

"Thus, the determination of the right of possession between the parties is referred to a court of competent jurisdiction in aid of the land office, but the form of action is not provided for by the statute; and apparently an action at law or a suit in equity would lie, as either might be appropriate under the particular circumstances—an action to recover possession when the plaintiff is out of possession, and a suit to quiet title when he is in possession." Young v. Goldsteen (D. C.) 97 Fed. 303.

The District Court of Alaska is a court of general jurisdiction, and is competent to determine the issues necessarily involved in a suit instituted under section 2326. This court has ample power to pass upon all questions involved, whether at law or in equity. The suit, after it is once authorized under the provisions of section 2326, must be brought under the provisions of the Alaska Code for trying title to real estate in any other case—"an action to recover possession

when plaintiff is out of possession, and a suit to quiet title when he is in possession."

The Code of Alaska provides both an action at law and a suit in equity, according to the facts, for determining the title or right of possession to real estate. The equitable title may be litigated by one in possession under section 475, supra. An action in the nature of ejectment may be maintained under section 301 of the Code of Civil Procedure, which reads as follows:

"Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action. Such action shall be commenced against the person in the actual possession of the property at the time, or if the property be not in the actual possession of anyone, then against the person acting as the owner thereof."

The proceeding to obtain a patent to a mining claim under section 2326 is judicial in character. The publication of the notice is process, and "suits in court to settle the title are to be begun and conducted as declared in the act of Congress, which must be regarded as full and complete on that subject." *Steves v. Carson* (C. C.) 42 Fed. 821; *Wight v. DuBois* (C. C.) 21 Fed. 693. The Land Department will not be guided by judicial proceedings instituted outside of the sanction of section 2326 of the Revised Statutes, nor will a judgment rendered in any ordinary action like the one at bar, wholly disconnected from the patent proceedings, be considered as aiding that department. *Lindley on Mines*, 755; *Nichols v. Becker*, 11 Land Dec. Dept. Int. 8; *Cain v. Addenda Min. Co.*, 24 Land Dec. Dept. Int. 18-20; *Brandt v. Wheaton*, 52 Cal. 430.

It seems conclusive, from the principles announced by the authorities, that the proceedings begun by the plaintiff in the land office in applying for a patent are exclusive; that a continuation of the proceeding is a plain, speedy, and ade-

quate remedy for the wrongs complained of in the action at bar; that the defendants and interveners in this action will be entitled to a jury trial in that proceeding; that the District Court of Alaska, by analogy with the courts of code states, has jurisdiction to hear and determine adverse interests to mining claims in suits begun under section 2326, either at law or in equity; that, because of the remedy at law in the suit already instituted in the patent proceeding, this court is without jurisdiction in equity to hear the cause and render a valid judgment; and that the action ought to be dismissed, but without prejudice to any of the parties to maintain such other suits or proceedings as may be proper (Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. Ed. 577), and it is so ordered.

JOSEPH F. MOORE v. GEORGE STEELSMITH, CHARLES McDONALD, CHARLES HAUGE, M. T. ROWLAND, JOHN DOE AND RICHARD ROE, whose True Names are Unknown to Plaintiff.

(United States District Court for District of Alaska, Division No.

1. March 14, 1901.)

1. DISCOVERY.

As a condition precedent to the appropriation of the mineral lands of the United States by persons lawfully entitled to make such appropriation, a discovery of some of the precious metals therein in some appreciable quantity is necessary.

2. NOTICE OF LOCATION.

A stake placed at each end of a mining claim on the center line thereof, with a notice thereon claiming 1,320 feet up and down the creek and 330 feet on each side of said stake and center line for placer mining purposes, is a sufficient marking of the claim to comply with section 2324, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1426]. If, however, there is a great amount

of brush and timber on the ground, and the posts marking the claim and the notices thereon are established in an inaccessible place, or where the brush and timber are so thick that a person honestly looking for indications of mineral and for vacant ground would not be able to see such stakes or notices, then such marking would be insufficient.

3. REMOVAL OF NOTICES OR MONUMENTS, ETC.

When a location is once lawfully made, and the ground constituting the same thereby severed from the great body of the mineral lands of the United States, the locator's right of possession becomes fully vested, and cannot be divested by the removal or obliteration of notices, stakes, or monuments without the act or fault of the locator.

4. CHARACTER OF THE TITLE.

The possessory right of a locator of the mineral lands of the United States, when a location thereof has been lawfully made, though the ultimate title remains in the United States, is as much property, and under his control, as if the fee thereof was vested in him, as long as he conforms to the laws of the United States and local regulations in the exercise of his possessory right.

5. POWER OF ATTORNEY

A location made under power of attorney is as lawful as if made by the locator in his own proper person.

6 NEW TRIAL.

A ground of motion stated in the language of the statute that "the verdict is against the law" or "error in law occurring at the trial, and excepted to by the party making the application," states no ground for a new trial upon which the court is required to pass.

Tried July 12, 1900. March 14, 1901, motion for new trial overruled, and judgment entered for the plaintiff.

BROWN, District Judge. The plaintiff in this case seeks to recover from the defendants certain mining lands situate on Jack Wade creek, in the District of Alaska, and in his complaint alleges that on the 18th day of June, 1898, plaintiff,

after a discovery of gold thereon, did locate and stake a mining claim upon said Jack Wade creek, in said Jack Wade Creek mining district, which said claim was then called, numbered and known as "Claim No. 5 Above Discovery," and which extended 1,320 feet up and down stream by 660 feet wide; that said location was made by duly marking and staking the boundaries of said claim as required by law and the rules and regulations of said mining district, and by posting notice on said claim to the effect that the claim had been so located, which notice was in writing, and contained the name of plaintiff as locator, the date of location, and described the claim so that its boundaries could be readily traced. The defendants deny these several allegations, and allege a location on the 29th of September, 1898, of the same lands, after having made a discovery of gold, etc. Briefly stated, the question litigated, is, which of the parties, plaintiff or defendants, has the better right to the ground in controversy? The case was tried at Skagway, Alaska, before a jury, beginning on the 12th of July, 1900, and, after the testimony was all in, the court instructed the jury as follows:

"The plaintiff in this case claims that, after the discovery of auriferous gravel on Jack Wade creek, he did, on or about the 18th day of June, 1898, locate a placer mining claim thereon of twenty acres, which said claim was called, numbered, and known as 'Claim No. 5 Above Discovery,' 1,320 feet up and down the stream and 660 feet wide, 330 feet on each side of the center stake, by duly marking said location on the ground so that the boundaries thereof might be readily traced on the ground.

"The defendants deny these allegations, and thereby put the plaintiff to proof.

"The defendants allege that Steelsmith and McDonald thereafter, on or about the 29th day of September, 1898, after a discovery of gold thereon, located practically the same land in two different claims or parts of claims. That they located their said claims in accordance with the laws of the United States, one of which was No. 5 Above Discovery, 1,320 feet in length and 660 feet in width. That

said location was duly marked on the ground by stakes or monuments, so that the boundaries thereof could be readily traced on the ground. Defendants further allege that, if the plaintiff ever had a valid location of said claim, that he abandoned the same, which said abandonment has continued up to the present time. This is denied by plaintiff's reply.

"You have this issue to try in this case, gentlemen: If the plaintiff, after the discovery of auriferous gravel on said claim, made a lawful location thereon, and has since done the necessary representation work prior to December 31, 1899, he is entitled to a verdict in this case at your hands. If, on the other hand, he did not make such discovery and legal location, then the defendants had a right to locate the same; and, if the defendants made a discovery and lawful location under the laws of the United States, under such conditions, they are entitled to a verdict.

"Let me say to you at this time that your oaths require you to take the law of this case from the court. If you will reflect for a moment, you will see how necessary this is. If I make mistakes in giving you the law, the attorneys, who are ever watchful of their clients' interests, will take timely exceptions, and my mistakes may be corrected by a higher and more efficient court. But should you undertake to decide the case upon some theory of the law existing alone in your own minds, neither court nor counsel can be advised of your conception of the law, and, should you err, the result of your action could not be remedied. You will perceive, therefore, how necessary it is, in the interest of justice, that you accept the law as given by the court, and be guided thereby in considering of your verdict.

"Under the mining laws of the United States, if a citizen of the United States goes upon the unappropriated public mining lands of the United States, makes a discovery of gold therein in some appreciable amount, however small, and thereupon makes a location of a placer mining claim by so staking and marking the same that the boundaries of his claim may be readily traced upon the ground, that the amount of land so claimed does not exceed twenty acres, he thereby severs so much of said land as constitutes said mining location from the public mineral lands of the United States; and he has a right to hold and possess the mining location so made, as against all the world, except the United States. By such location, when lawfully made, the locator acquires a legal interest therein.

As long as the original locator does one hundred dollars' worth of work on said mining claim, or puts one hundred dollars' worth of improvements thereon, annually, the right to hold and possess said claim cannot be successfully challenged by any one except the United States.

"The Congress of the United States has made ample provision by law for the disposition of its mineral lands. Citizens of the United States, and those who have declared their intention to become such, may enter upon and explore such lands of the United States, for the purpose of finding mineral therein, such as gold, silver, and other precious metals. These laws are in force in the district and territory of Alaska, and we are to be governed by them in the disposition of this case. Congress has dealt liberally by its citizens and those who have declared their intentions to become such, in authorizing them to go upon the public mineral lands, and by discovery and location of ground containing minerals, and authorizing them to acquire legal interests therein, which the law protects, and that may be possessed and conveyed as real property. The possessory right of the locator to the mineral lands of the United States, when a location thereof has been lawfully made, though the ultimate title remains in the United States, is as much property and under his control as if the fee thereof was vested in him, as long as he conforms to the laws of the United States and its requirements in the exercise of his possessory rights.

"As a condition precedent to the appropriation of the mineral lands of the United States by such person or persons as are lawfully entitled to make such appropriation, discovery of some of the precious metals therein is necessary. In order that you may determine, under the evidence in this case, whether a discovery of any of the precious metals was made by the plaintiff before he made a location, if he did make one, it seems proper that the court should give some definition or explanation of the word 'discovery' as applicable to this case. What is meant by discovery as applied to quartz or lode claims has been frequently determined by the courts, and is easily understood.

"The Supreme Court of Idaho gave the following definition: 'Under the requirements of the law, a valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following with the expectation of finding ore; and a valid location of

a mining claim may be made of a ledge deep in the ground, and appearing at the surface, not in the shape of ore, but in vein matter only.'

"It will be observed that under this definition of the term 'discovery' no actual finding of ore or the precious metals was required. The courts seem to think it sufficient if the prospector had discovered such indications of mineral that he was willing to spend his time and money in following with expectations of finding ore; if, of course, a prospector had found in a vein or lode rock in place.

"It has sometimes been thought sufficient as a discovery if the prospector found some small strata of gravel or sand containing some slight or merely appreciable quantity of gold, if it induced the miner to make further exploration. Just what amount of labor, examination, or development may be necessary to satisfy the terms of the statute in the matter of a discovery in placer ground is difficult to define. A man may wash a single pan of dirt taken from the surface or along the bank of a stream, and obtain such results as satisfy him that the ground contains precious metals in such quantity as induces him to make a location. He may, with an ordinary miner's shovel, wash sufficient sand or gravel that he finds upon the bank of a stream, using the shovel as a pan, and obtain results that induce him to believe that such amount of the precious metals are to be found in the land as will warrant him in taking it and working it as a placer claim. And, however slight the work in this behalf, if any of the precious metals are found, no matter how light the prospect, it is sufficient to be termed a discovery. Indeed, important discoveries are known to have been made by miners in digging in the sand and gravel upon the banks of a stream with nothing more than a common sheath knife. In other cases large and expensive excavations have been made before mineral was discovered, and even without a discovery of mineral at all. Gold has sometimes been found in the gravel along the banks of streams, or the naked bedrock, without any excavation whatsoever. But that the discovery must be made in some form, as a necessary prerequisite to a lawful location of mineral land, is an imperative requirement of the mineral laws of the United States.

"The foregoing examples or illustrations have been given, not as a definite definition of the term 'discovery,' as used in the statute, but to indicate to the jury along what lines proof of discovery may be made to your satisfaction. Whatever evidence there may be before

you touching this matter is not for the court to repeat or indicate; but, if it is sufficient to satisfy your minds that a discovery of gold was in fact made, then you should so find.

"Before a prospector can acquire a legal interest—and by a legal interest I mean a bona fide right of possession—in mineral lands, he must, after making a discovery of precious metal, make a location of his mining claim in accordance with the provisions of the acts of Congress. The term 'location' has in law a certain legal significance or definition. And before the person seeking to hold a mining claim can obtain a legal title therein, after a discovery of precious metals has been made thereon, he must segregate the ground he seeks to claim from the remainder of the public mineral land, and this is done by what is commonly called a 'location.'

"For the purposes of this case, I shall adopt practically as a definition of 'location' the language of Judge Sawyer in the North Noonday Mining Co. v. Orient Mining Co. (C. C.) 1 Fed. 522: If the center line of a location lengthwise of the claim up and down the creek is marked by a stake or monument at each end thereof, upon one or both of which is placed a written notice showing that the locator claims the length of said line upon the claim from stake to stake, and a certain specified number of feet in width on each side of said line, such location of the claim is so marked that the boundaries may be readily traced, and, so far as the marking of the location is concerned, is a sufficient compliance with the law, unless the condition or topography of the country, or the great amount of brush and timber on the land, would prevent a person making an honest and bona fide effort to trace or ascertain the boundaries from doing so.

"If, therefore, you find from the testimony in this case that Jamison, acting for the plaintiff, planted a stake or blazed a tree at each end of the claim No. 5 Above Discovery, and placed thereon a notice claiming 1,320 feet up and down the creek and 660 feet in width for placer mining purposes, 330 feet of which was on each side of said stake and center line, then the location was distinctly marked on the ground, so that its boundaries could be readily traced, within the meaning of the act of Congress, and in compliance with the law in that particular, unless you further find from the evidence in the case that the topography of the ground upon which said claim was located was such, or that the great amount of brush and timber thereon rendered the condition such, that a person of ordinary intelligence, seeing said stakes and notices, or either of them, and de-

siring by a bona fide effort to ascertain or trace the boundaries of said claim, was unable to do so.

"The defendants claim that on or about the 29th day of September, 1898, they entered upon the same tract of land claimed by plaintiff, after having discovered gold thereon; made a lawful location of said ground as a placer mining claim by properly staking and marking the boundaries thereof. If the jury find from the preponderance of the evidence in this case that the plaintiff, after discovery, made a lawful location of said mining ground as heretofore described in these instructions, then the same was not open to location by the defendants, and could not be lawfully located by them; and if they entered upon said land, and undertook to possess and control the same, they acquired no rights thereby, and were there as naked trespassers only. They did not and could not acquire a lawful interest in said claim by such acts of possession or attempted location.

"But if the jury find from a preponderance of the evidence that no discovery or lawful location of said mineral land was made by the plaintiff, as explained in these instructions, at the time he claims to have made said location, then he acquired no right or interest therein; and if you further find that these defendants thereafter, in the month of September, 1898, entered upon said land, made a lawful location of a mining claim thereon after making a discovery of gold within the limits of said claim, and they have since done the necessary work on said claim to the amount of one hundred dollars on or before the last day of December, 1899, then the defendants have a lawful right to the possession of said claim, and you should so find.

"If the plaintiff, Moore, either in person or by agent duly appointed, on the 18th day of June, 1898, after he made a discovery of gold in some appreciable amount on Jack Wade creek, within the limits of a claim thereafter located, and thereupon made a location of a placer mining claim by so staking and marking the same on the ground that the boundaries of said claim could be definitely traced, then the plaintiff thereby made a legal appropriation of so much of the mineral lands of the United States as constituted said claim, and was entitled to hold the same against all the world, except the United States, so long as he should do the annual representation work thereon to the amount of one hundred dollars. A person who lawfully locates a mining claim in the month of June, 1898, has until the last day of December, 1899, under the mining laws of the

United States, in which to put thereon one hundred dollars' worth of improvements, or do what is called the 'annual representation work.'

"If you find, therefore, from the preponderance of the evidence, that the plaintiff, Moore, having made discovery, and a lawful location of said mining claim in June, 1898, caused one hundred dollars' worth of improvements to be put thereon, or caused one hundred dollars' worth of labor called 'annual assessment work' to be done on said claim on or before the last day of December, 1899, he had a legal interest in said claim, and a right to hold and possess the same against all persons whomsoever, and now has such right to hold and possess such claim.

"A citizen of the United States, or one who has declared his intention to become such, who is in the actual possession or occupancy of the public lands, cannot be dispossessed therefrom by a naked trespasser or intruder; and if you find from the evidence that at the time this action was commenced the defendants were in actual possession of the ground in conflict, the plaintiff cannot recover, unless you find further from the evidence that by virtue of a valid location, such as I have heretofore described to you, the plaintiff was entitled to the possession of the ground; or, in other words, if you find that the plaintiff did not make any discovery of the precious minerals on the ground, or did not make a valid location within the rules I have given you, and that the defendants were in actual possession of the ground in controversy when this action was commenced, then the plaintiff has no rights that he could legally assert in relation thereto, and your verdict must be for the defendants.

"I further instruct you, gentlemen of the jury, that 'when a location is marked so that its boundaries can be readily traced, the locator's right of possession becomes fully vested, and cannot be divested by the removal or by the obliteration of the stakes, monuments, or notices without the act or fault of the locator'; that if you find from the evidence that the reorganizers ordered the plaintiff or first locator to refile his claim within thirty days, or within any other time, a failure to comply therewith upon the part of plaintiff, even had he notice of such order, would not work a forfeiture of plaintiff's title therein, nor give defendants the right to enter upon said claim or any rights therein whatever.

"You are further instructed, gentlemen of the jury, that it is absolutely immaterial whether the defendants, their agents, servants, or

employés, did or did not perform work upon the claim in question. A person gains no rights whatsoever by doing work upon a mining claim, unless the same legally belongs to him; and then the only amount of work the law requires him to do is the annual assessment work.

"Upon the question of marking the boundaries so that they could be readily traced, the court further instructs you that if the defendants knew, or had actual knowledge, at the time when they re-located, of the position of the two end stakes that had been set on plaintiff's claim, and knew that the same marked the center line and the ends of said claim, such knowledge tends to indicate that the two stakes or trees so representing the ends of said former location marked the ground in such a way that the boundaries of said claim could be readily traced.

"The questions you are to determine, gentlemen, in this case, are these: Did the plaintiff, Moore, make a lawful discovery and location of the claim in question in June, 1898, as he has alleged in his complaint? If you find that he did, and thereafter did his assessment work before the last day of December, 1899, the lands constituting his said claim No. 5 Above Discovery were severed from the mineral lands of the United States, and have not, since said location, been subject to any subsequent relocation, and you should, therefore, find for the plaintiff. If, on the other hand, you find that he did not make discovery and lawful location of said claim as alleged, then he has no standing in this court whatsoever, and he cannot recover.

"The court further instructs you that under the mineral laws of the United States a record of a miner's notice of location is not required, unless such record of notice is required by some local law or regulation of miners; and no such local laws or rules have been put in evidence in this case.

"The court instructs the jury that you are the exclusive judges of the credibility of the witnesses and the weight to be given to the testimony of each. If the court has indicated in any manner in these instructions given you an opinion as to the testimony of any witness, or the weight to be given such testimony, you will disregard it. It is your exclusive right and your province to pass upon these questions.

"Counsel for the plaintiff and defendants have requested of the court a large number of instructions. These, no doubt, present the law of the case with more vigor than the instructions that the court

gives you; but the court has deemed it best to instruct you in his own language, and according to his own methods. The court, therefore, refuses all instructions requested by counsel on either side, except as the substance of the same are included in the instructions that I give you.

"Counsel for the plaintiff has requested that you make special findings upon the several subjects set forth in the special verdict that is herewith submitted to you. You will answer these questions as far as you can by writing after each one the word 'Yes' or 'No,' according to your finding. Such other questions as you cannot so answer you will answer in such manner as you think proper. Forms of a general verdict are also submitted herewith—one for the plaintiff, the other for the defendants. If you find generally for the plaintiff, your foreman will sign your verdict as prepared. If you find generally for the defendants, you will sign the verdict prepared by the defendants."

From the foregoing instructions it will be seen that the plaintiff requested special findings as well as a general verdict, and the request for special findings on the part of the plaintiff and those ordered by the court to be answered were as follows:

- (1) Did or did not W. R. Jamison, on or about June 18, 1898, hold a power of attorney from Joseph F. Moore?
- (2) Did or did not the said power of attorney authorize the said Jamison to stake, locate, and record creek placer mining claims in the District of Alaska for and upon behalf of the said Joseph F. Moore?
- (3) Did or did not the said Jamison, by virtue of and in pursuance of the said power of attorney, stake, locate, and record creek placer mining claim No. 5 Above Discovery, Jack Wade creek, the Jack Wade Creek mining district, Alaska, for and in behalf of the said Joseph F. Moore?
- (4) Was or was not the said claim so located by or for plaintiff that its boundaries could be readily traced?
- (5) Was or was not auriferous gravel discovered within the limits of said claim prior to its location?

(6) Was or was there not such indications discovered within the limits of said claim prior to its location as would lead an experienced miner to further exploit the same with the expectation of finding pay gravel?

(7) Was or was not the said claim staked subsequent to the location of discovery claim?

(8) Was or was not the ground covered by location of June 18, 1898, vacant, unoccupied, and unappropriated mineral land at the time of the location thereof by the said Jamison for and in behalf of the said Joseph F. Moore?

(9) Did or did not the said defendants Charles McDonald and George Steelsmith stake, locate, and record the same ground in dispute on September 29, 1898, according to the laws of the United States?

(10) Did or did not the said defendants know at the time they located the same that it had already been located by some one else?

(11) Has or has not the said Joseph F. Moore ever parted with his interest therein?

(12) Was or was there not a discovery of gold made within the boundaries of said claim by W. R. Jamison prior to its location?

(13) Was or was not the said claim staked by center stakes and the placing of a notice thereon showing, among other things, the length of the claim, its width, with the words, "three hundred and thirty feet on each side of the stake," thereon?

At the time the jury retired to consider of their verdict it was agreed by counsel that the jury, if they agreed upon a verdict during the night, might sign the same, together with their special findings, seal them in an envelope, and place them in charge of their foreman; that in the morning following upon the meeting of court they should all be present in court, and the foreman might then, in the presence of the entire

jury, present their said verdict to the court. The jury thereupon retired to consider of their verdict, and during the night found a general verdict in favor of the plaintiff, in words and figures following (omitting the caption):

"We, the jury in the above entitled cause, do find for the plaintiff, that he is entitled to the property mentioned in the complaint herein and to the right of possession thereof.

"Frank Bishoprick, Foreman."

This verdict was sealed according to the agreement of counsel and the order of the court, and delivered to the foreman of the jury, and at the proper time the next morning was, in the presence of the jury, presented to the court; but the jury had failed entirely to answer the questions set forth in the special request, and had separated before doing so.

On the 13th day of July, 1900, the defendants filed their motion for a new trial, as follows:

"Come now the above-named defendants, and move the court to make and enter an order herein setting aside the verdict of the jury heretofore rendered herein, and granting a new trial of this cause, for the following reasons materially affecting the substantial rights of defendants:

"I. Misconduct of the jury, which said misconduct of the jury consisted in the fact that, after the said jury had retired to deliberate upon their verdict, and after they had agreed upon their general verdict, they separated, and mingled with the body of the citizens, without having made answer to the special findings submitted to them by the court; that said misconduct is more fully set forth in the affidavit of R. W. Jennings, hereunto attached, and made a part hereof.

"II. Insufficiency of the evidence to justify the verdict, which said insufficiency consists in the fact that there was no sufficient evidence introduced showing or tending to show:

"(1) That a discovery of gold had been made upon the claim in controversy herein prior to its location or attempted location by the plaintiff.

"(2) Nor that the claim in controversy was located by plaintiff in accordance with the provisions of Rev. St. U. S., which require said

location to be marked, so that the boundaries may be readily traced.

"(3) Nor that the record of said claim contains a reference to natural objects or permanent monuments, so that the said claim may be identified.

"(4) Nor that said location and record at all complies with the requirements of Rev. St. U. S. concerning the location and record of mining claims.

"III. Because said verdict is against the law.

"IV. Errors in law occurring at the trial, and excepted to by the defendants.

"This motion is based on the records and files thereof, and on the affidavit of R. W. Jennings, hereunto attached.

"A. K. Delaney,

"R. W. Jennings,

"Attorneys for Defendants."

The affidavit referred to recites the particulars of the failure of the jury to answer the special findings, and their separation and mingling with the body of the citizens before answering said findings, and also the objection of defendants to the reading of the verdict until such special findings should have been made, the ruling of the court on said objection, and the exception of defendants to the order of the court requiring the clerk to read the general verdict so returned and file the same. The affidavit is signed by Mr. Jennings, but the jurat is not executed.

The hearing of the motion for a new trial was continued over the term, and was finally decided by the court at the next term, on the 14th day of March, 1901. The court overruled the motion, and entered judgment for the plaintiff. In considering the motion for new trial, the court announced its oral decision as follows:

It will be observed that, while the motion for a new trial in this case is signed by counsel A. K. Delaney and R. W. Jennings on behalf of the defendants, the claimed affidavit attached thereto and signed by Mr. Jennings was not sworn to by him. It is unquestioned that, to sustain a motion for

a new trial on the ground of improper conduct on the part of the jury, a showing must be made by affidavit. Some of the facts connected with the transactions referred to in the claimed affidavit are omitted. It will be conceded that the special findings submitted to the jury were not returned by them with their verdict, nor at all, and that the jury mingled with the body of the citizens without finding as requested by the plaintiff; but, in addition to this, the record discloses the further facts that, when counsel for the plaintiff requested the special findings, counsel for the defendants resisted the same, objected to the special findings as requested and as submitted to the jury, and took an exception to the ruling of the court in ordering the same submitted to the jury. At the time the general verdict was delivered to the court by the jury, and it was ascertained that the special findings had not been signed, counsel for the plaintiff asked leave to withdraw such special findings. These are facts that do not appear in the claimed affidavit.

While it is possible that the withdrawal of the special findings by the plaintiff did not in all respects cure the failure of the jury to pass upon them, the court is satisfied the jury acted in good faith; that their failure to sign and return the special findings was a mistake, and the result of misunderstanding on their part, and not the result of intentional wrong. And, inasmuch as the defendants, by their counsel, objected to these requests for special findings on the part of the plaintiff, and to their being submitted to the jury, the court was of the opinion that the party requesting might even then withdraw them by permission of the court, and that no reasonable objection could be made to such action of the court by defendants. The court is fully satisfied of the honesty and integrity of the jury and their desire to do right in the matter; that there was no willful misconduct on their part; the trial was absolutely fair; the case has been

fairly submitted, and the general verdict returned by the jury is right. Considering all the facts and circumstances of the case as now before the court, the court is of the opinion there was no error in the action of the court or jury that the defendants can take advantage of, or that should seriously affect the judgment of the court in passing upon this motion; and that the motion on that ground cannot be sustained.

The next ground of the motion is that the verdict is not sustained by the evidence, and in specifying the particulars in which the evidence is insufficient the defendants state, first, "that there is no sufficient evidence introduced showing or tending to show a discovery of gold prior to location." The evidence in the case shows that one of the witnesses describing the occurrences at the time of making the location stated that a discovery of gold was made on the claim before location, and no further question touching that matter was asked either on examination in chief or cross-examination. While this showing as to discovery may not be of the most satisfactory character, it is clear that there was evidence upon the question, and, in the failure of the defendants to show anything to the contrary, must certainly be deemed sufficient to sustain the verdict. The second insufficiency pointed out is "that the claim was not sufficiently marked on the ground so that the boundaries thereof could be readily traced, and that there was no reference to natural objects or permanent monuments; that the record of said claim did not comply with the requirements of the Revised Statutes of the United States concerning the location and record of mining claims." Upon these several points the evidence discloses the following facts:

The party locating cut off a standing tree some six feet above the ground, hewed the side thereof, and wrote their notice upon the tree claiming a certain number of feet up the creek and 330 feet on each side, making a claim of 20 acres,

as described in the notice. The notice was dated and signed. At the upper end of the claim a tree was cut in the same way, hewn on four sides, a notice posted thereon showing this to be the upper end of the same claim, indicating its width, the name of the claimants, etc. Upon the question as to what would be considered a proper compliance with the Revised Statutes of the United States, the court instructed the jury as follows:

"If the center line of a location lengthwise of the claim up and down the creek is marked by a stake or monument at each end thereof, upon one or both of which is placed a written notice showing that the locator claims the length of said line upon the claim from stake to stake and a certain specified number of feet in width on each side of the line, such location of the claim is so marked that the boundaries may be readily traced, and, so far as the marking of the location is concerned, is a sufficient compliance with the law, unless the conditions or topography of the country, or the great amount of brush or timber on the land, would prevent a person making an honest and bona fide effort to trace or ascertain the boundaries from doing so. If, therefore, you find from the testimony in this case that Jamison, acting for the plaintiff, planted a stake or blazed a tree at each end of the claim No. 5 Above Discovery, and placed thereon a notice claiming 1,320 feet up and down the creek and 660 feet in width for placer mining purposes, 330 feet of which was on each side of said stake and center line, then the location was distinctly marked on the ground so that its boundaries could be readily traced, within the meaning of the act of Congress, and in compliance with the law in that particular; unless you further find from the evidence in the case that the topography of the ground upon which said claim was located was such, or the great amount of brush and timber thereon rendered the conditions such, that a person of ordinary intelligence, seeing the said stakes or notices, or either of them, and desiring by a bona fide effort to ascertain or trace the boundaries of said claim, was unable to do so."

If any fault can be found with this instruction, it is because it was too favorable to the defendants. It is a matter of great doubt whether the topography of the ground or the

amount of brush or timber growing thereon should in any wise affect the matter of location; but I was, and am still, of the opinion that a legal and fair location of a mining claim would not be made by placing notices upon a tree or stake that was situated in an inaccessible place, or where it was so surrounded by brush and trees growing upon the land that it could not be seen, or that a person passing over said ground, and honestly seeking to make a location, could not, because of such situation, be apprised of the former location having been made. If the conditions were such that a person passing over the land could see nothing to indicate that another had made a location, if whatever had been done towards a location at some prior time was so hidden that persons honestly looking for mineral land upon which to locate could not be expected to observe it, it should not be deemed such a location as the statute contemplates, or such a notice of a location as would sever the particular tract from the mineral lands of the United States, and such an imperfect location should not avail against one in good faith coming upon the ground and making a subsequent location in accordance with law.

But, as before stated, if the court erred in said instruction, it was in favor of the defendants, and therefore it was an error of which the defendants could take no advantage. The plaintiff alone, if any one, might complain of such instruction. It is the opinion of the court, therefore, that this ground of motion for a new trial is not well taken.

On the question as to natural objects, etc., and a record, it is sufficient to say that the Revised Statutes of the United States require a compliance with neither of these propositions in order that a valid location should be made. There was then no mining district, no record whatsoever shown to have been made, and no local mining laws or customs were shown in evidence; so that these matters are not in the case.

The next ground of objection is that the verdict is against the law; but in what respect it is against the law the motion does not point out, and therefore fails to specify any ground which the court is bound to consider. The following ground: "Errors of law occurring at the trial, and excepted to by the defendants," is subject to the same criticism. What errors of law? The court is not required to go through the entire record, and ascertain what objections were made, and what were or are now claimed as errors of law. This ground, in order to challenge the court's attention by motion, must contain specific and definite matters of claimed error. Failing in this, it will not be considered, except as possibly challenging the instructions that were given by the court on the trial, and the court is of the opinion that the case was fairly submitted to the jury on the instructions given.

The trial of this case was fair, and was conducted in an orderly and careful manner by court and counsel; the conduct of the jury was unexceptional; the verdict of the jury commends itself to the judgment of the court, and the court is of the opinion that the verdict was right under the evidence and the law in this case.

Without further discussion of the matters referred to in the motion for a new trial, the motion is overruled, and judgment ordered for the plaintiff.

CARSTENS BROS. v. FRYE-BRUHN & CO.

(First Division. Juneau. April, 1901.)

No. 957.

1. NEW TRIAL—VERDICT.

This action was brought against Frye-Bruhn & Co., a copartnership consisting of Frye-Bruhn Company, a corporation, and Herman Meyer. The answer was a general denial. Meyer admitted an indebtedness to the plaintiffs. The jury found a verdict in favor of Frye-Bruhn & Co. Upon a motion for a new trial the verdict was sustained as to form and effect.

2. PARTNERSHIP—JUDGMENT.

Where a suit is brought against a partnership consisting of a corporation and an individual, though the individual may admit a personal indebtedness, a verdict in favor of the partnership will be upheld. The partnership debt sued on was joint, the indebtedness admitted and proved was several, and not sufficient to sustain a judgment in the action, even against the individual partner.

Motion for New Trial. Denied.

Maloney & Cobb, for plaintiffs.

Winn & Shackleford, for defendants.

BROWN, District Judge. This action was tried to a jury, and, after having retired to consider their verdict, they returned into court, and presented their verdict, which is in the following form:

"We, the jury, duly impaneled and sworn in the above-entitled cause, find for the defendant, Frye-Bruhn and Company.

"Frank E. Burns, Foreman."

A motion for a new trial was filed in due time, one of the grounds of which, among others, is as follows:

"The verdict of the jury rendered herein is defective, and incapable of supporting a judgment, in that it does not dispose of the issues as

to the corporation Frye-Bruhn Company, or as to Herman Meyer, but is a finding only in favor of the defendant, the copartnership, to wit, Frye-Bruhn & Co."

The third ground of the motion is:

"The verdict of the jury is contrary to, and not supported by, the evidence in the case. According to the evidence of the defendant Meyer, and which was not controverted by him or in his behalf, the plaintiffs were entitled to a verdict against him."

The other propositions presented by the motion for a new trial will not be seriously considered by the court at this time.

While the verdict in this case is perhaps somewhat uncertain in its terms, and not all that could be desired, considering the issues submitted to the jury, still it seems to be sufficiently clear to indicate the intention of the jury in returning it in the form in which we find it. It is said:

"Though the verdict may not conclude formally or punctually to the words of the issue, yet, if the point in controversy can be concluded out of the findings, the court shall work it into form, and make it certain." 28 Eng. & Am. Encyc. of Law, p. 286

Again, it is said in Miller v. Shackleford, 4 Dana, 271:

"In considering a verdict with a view to its sufficiency, the first object is to ascertain what the jury intended to find, and this is to be done by considering the verdict liberally, with the sole view of ascertaining the meaning of the jury, and not under the technical rules of construction which are applicable to the pleadings. If the meaning of the jury can be ascertained, and the verdict on the point at issue can be made out, the court will mold it into form, and make it certain."

Again, it is said:

"The utmost favor is always extended to verdicts. They are not to be construed as strictly, as pleadings are. Whenever the court can collect the clear meaning of the jury from the findings, it is bound to mold it into form, and make it certain."

Again, it is said that:

"The verdict must comprehend the whole issue or issues submitted to the jury in the particular case, otherwise the judgment rendered on it may be reversed."

To comply with the requirements of this rule, however, it is generally held that, if the verdict is not expressed formally and technically in the words of the issue, yet, if the point in issue can be concluded from the finding of the jury, the court will work the verdict into form, and make it certain. *Middleton v. Quigley*, 12 N. J. Law, 352.

The converse of this proposition, it is said, is also true.

"Hence it is declared that, if the point on which the verdict is given be so uncertain that it cannot be clearly ascertained whether the jury meant to find the issue or not, it cannot be helped by intendment." In support of this proposition are cited: *Gerrish v. Train*, 3 Pick. 124; *Coffin v. Jones*, 11 Pick. 44; *Jewett v. Davis*, 6 N. H. 518; *Stearns v. Barrett*, 1 Mason, 170, Fed. Cas. No. 13,337.

This action was brought against Frye-Bruhn Company and Herman Meyer, doing business under the firm name and style of Frye-Bruhn & Co. The plaintiffs, among other things, allege that "at all times hereinafter mentioned the defendant Frye-Bruhn Company was and is a corporation existing under and by virtue of the laws of the state of Washington," and that "said corporation and the defendant Herman Meyer were at all times hereinafter mentioned copartners doing business under the firm name and style of Frye-Bruhn & Co."

It is further alleged in the complaint that on a certain day thereafter mentioned a contract was entered into between the plaintiffs and the defendants, whereby the plaintiffs were to furnish to the defendants all meats used by them in their business in Alaska for a period extending from

said date to April 1, 1899, at the market rates, to be shipped by steamer from the city of Seattle to Skagway; that under said contract it is claimed there were meats shipped to the value of \$5,232.09; that \$2,000 was paid thereon; and that there was a balance of \$3,232.09 due and unpaid, for which judgment is prayed.

The answer denies that at the times mentioned in the complaint the defendants were copartners, or were at that time or since then carrying on business under said copartnership of Frye-Bruhn & Co.; denies making the contract of purchase by Frye-Bruhn Company, or by Frye-Bruhn & Co.; denies indebtedness of Frye-Bruhn Company or of Frye-Bruhn & Co., or any agreement to pay plaintiffs for meat in any manner.

In this case the evidence tended to show that a relation at one time existed between Frye-Bruhn Company and Herman Meyer, which probably constituted them a partnership at will; that, prior to the contract of purchase referred to in plaintiffs' complaint, the relation theretofore existing between said Frye-Bruhn Company and Herman Meyer had been terminated; that the partnership had been dissolved, and that the plaintiffs were fully notified of that fact before any shipments of meat, for the value of which suit was brought, had been shipped by the plaintiffs. The instructions to the jury in substance required that, if they found there was no partnership existing at the time that the purchase was claimed to have been made, or that Herman Meyer was no longer the agent of Frye-Bruhn Company, and therefore without authority to bind them in the purchase, they should find for the defendants.

Under the evidence and law as given to the jury by the court the jury may have well found that the defendant Frye-Bruhn Company and Herman Meyer were at one time co-partners, and doing business as such; that at the time of the

purchase such copartnership had ceased to exist, and that no purchase whatever was ever made by the copartnership. The verdict in this case would meet these issues, and could not well be construed in any other way than as meeting these issues as above indicated.

But it is said by counsel for the plaintiffs that Herman Meyer admits an indebtedness, and, if this is a verdict at all, it is a verdict in favor of all the defendants, and, as it is in language only for Frye-Bruhn & Co., it perhaps should not be regarded under the law as a verdict at all. While it is true that a copartnership cannot be sued in a partnership name without setting forth the names of the several copartners, and that a complaint that did not do that would be demurrable, and it is sometimes contended that a verdict should be as complete in this respect as the pleadings in the case, or it is so uncertain in terms as to be practically valueless in determining the issues between the parties, and to be a void verdict, yet, under the liberal rules applied to the construction of verdicts, the court cannot so hold, and is of opinion that the verdict in this case can be construed to be, and was intended to be, a verdict in favor of all the defendants.

It is said, however, by counsel, that Herman Meyer admits his indebtedness, and for that reason the verdict would be bad as to him. It will be observed that Herman Meyer has not answered in this case; that is, no separate answer was filed by him. The general answer denies indebtedness of the copartnership. It will be remembered that the plaintiffs sued these several defendants under the claim that Frye-Bruhn Company and Herman Meyer are jointly indebted to the plaintiffs in the sum named in their complaint. Copartners, or the individual members of a copartnership, are not severally liable for the debts of a copartnership, unless made so by statute. Their liability is a joint, and not a several,

one. The liability being joint, and not several, it is believed that no verdict could be permitted to stand in this case against either of the defendants as a several liability. Being sued on a joint contract, to allow a verdict against either of the partners would be to establish a several liability as against such particular partner. In Kamm v. Harker, 3 Or. 212, in passing upon this question, the court says:

"We often speak of a partnership firm as being the party plaintiff or defendant; but in truth a partnership does not, like a corporation, possess the power to sue and be sued. It is the individuals that compose the firm that can sue, and they only are the persons sued. I have doubts whether it is permissible, where the plaintiff sets up a joint contract made by two or more, to allow the plaintiff to proceed as if upon an individual contract made by one only. In order to amend so as to include Welman and Peck, the plaintiff will be compelled to admit the truth of the plea as to Welman and Peck, in which case there will be no question for the jury. If, however, the plaintiff deems it safe to amend by striking out the name of Asa Harker, he has permission to do so, and the defendant's objection can be considered a motion for a new trial. The plaintiff withdrew his motion, and submitted to a nonsuit."

"The partnership contracts are to be considered during the lifetime of the partners as joint, and not joint and several." Eng. & Am. Encyc. of Law, p. 1062.

Of course, each partner is liable for the debts of the partnership; but bear in mind it is a partnership debt that each member of a partnership is bound to pay. It is not the individual debt of a single partner, or of one who was once a member of the partnership. This is no new doctrine of the law, and it seems unnecessary to cite authorities in support of a proposition of this kind, where they are so multitudinous. If it is true that there was and had been such a partnership as alleged in the complaint, that it is a partnership at will, that it had been dissolved by a single member of the partnership before the purchase of the meats in question, then the

purchase, or a contract to purchase, entered into by Herman Meyer in the name of the copartnership of Frye-Bruhn & Co. could in no wise bind the company, and in a suit on such a joint contract no judgment could be entered as against either of the defendants, though there was a personal liability on the part of Herman Meyer to pay for the goods purchased. A judgment against Herman Meyer in this case would not be permitted to stand.

Construing this verdict to be a verdict in favor of all the defendants, including Herman Meyer, it is plain that it answers every issue presented in this case, and is in entire harmony with the issues made by the pleadings. The instructions of the court upon the law of this case are believed to be an accurate statement of the law as applicable to the facts of the case. The judgment of the court is, therefore, that the motion for a new trial must be overruled, and judgment entered for the defendant on the verdict.

Motion for a new trial overruled.

WALSH v. FORD.

(Third Division. Eagle. April 15, 1901.)

No. 40.

1. PUBLIC LANDS—RESERVATION.

There is nothing in the act of July 5, 1884 (23 Stat. 103, c. 214 [U. S. Comp. St. 1901, p. 1607]), for the disposal of abandoned or useless military reservations, offering or granting to settlers or occupants entering into possession subsequent to the date of the act and the executive order of withdrawal, any preference right of entry or purchase. Subsequent adverse claims to lots or lands in such tract must be determined by the law of possession.

2. SAME—TOWN SITE—POSSESSION.

No citizen may question the occupation or possession of one residing on the lands or lots belonging to the United States, ex-

cept he shows a better right or title in himself. The actual prior possession of the first occupant would be better than the subsequent possession of the last. *Campbell v. Mining Co.*, 1 C. C. A. 155, 49 Fed. 47.

3. SAME—FORCIBLE ENTRY—TRESPASS.

A right to the possession of government lands cannot be initiated by a forcible entry and trespass upon the peaceable possession of another person.

George K. French, for plaintiff.

Carl M. Johanson, for defendant.

WICKERSHAM, District Judge. This is a suit to determine priority of occupancy and the right to the possession of a lot in the town of Eagle, Alaska. The plaintiff alleges that on April 1, 1901, he entered into the occupancy and took possession of lot 5 in block 1 in West Eagle; that the lot was then unoccupied, and that on that day he began to deliver material upon the lot for the erection of a dwelling house, and placed a notice of his claim on a stake thereon; that the building of the dwelling was begun and carried on from day to day until, on the night of April 4th, the defendant wrongfully removed the half-finished structure from the lot, and tore down and destroyed the notice of location posted thereon.

Defendant alleges, and the proof shows, that on May 25, 1900, the property in controversy was situated within the Ft. Egbert military reservation; that on that day the commanding officer of the District of Alaska, at Ft. Egbert, issued to the defendant, upon his application, the following permit:

“Headquarters Dist. of N. A.

“Ft. Egbert, Alaska, May 25, 1900.

“Mr. H. N. Ford, Eagle, Alaska—Sir: Subject to the approval of the Hon. the Secretary of War, you are authorized to occupy for livery stable and residence purposes, the following described grounds

in the city of Eagle, on the military reservation of Ft. Egbert, Alaska: Lots No. Five (5) and Six (6) in block No. One (1) in West Eagle.

"Very respectfully,

P. H. Ray,

"Major 8th Infantry, Commanding District and Post.

"Recorded in Volume 1, p. 38."

Thereafter the defendant procured the survey of the lots described, and on or about September 1, 1900, posted a written notice thereon, claiming the same for residence purposes, erected a residence and a stable on lot 5, cleared both lots, built roads thereto, and graded a way from the front of lot 6 down to the roadway along the Yukon river. He occupied the dwelling house and stable continuously; was in possession thereof on April 1st, when plaintiff entered upon lot 6; and used lot 6 continuously in connection with his residence and stable for storing wood, sleds, other material, and tools.

The plaintiff knew of defendant's possession of lot 5, and his use of lot 6, and had knowledge of and saw defendant's notice of September 1st posted on the corner of lot 6, claiming both lots. Plaintiff alleged in his reply that on April 1st the defendant voluntarily abandoned his possession, and consented to plaintiff's occupancy of lot 6. This was denied by defendant, and the plaintiff failed to sustain the allegation by a preponderance of evidence or any satisfactory proof. It was shown, however, that on April 2d the defendant caused plaintiff to be served with written notice to remove his building material from the premises in controversy, and forbidding him from placing more thereon.

Prior to June 13, 1899, Eagle, Alaska, had been established upon the unsurveyed public domain upon the banks of the Yukon river at the mouth of Mission creek, and had been platted into lots, blocks, streets, and alleys, and residences and buildings for business purposes erected thereon.

By executive order dated June 13, 1899, the whole of the lands included in the town site were included in the Ft. Egbert military reservation. On June 30, 1899, the following order was issued by the Secretary of War:

"War Department, Washington, D. C., June 26, 1899.

"The President of the United States, by order dated June 13, 1899, having reserved from sale and set apart for military purposes the following described public lands located at the mouth of Mission Creek, District of Alaska, at a point known as Eagle City, the same are declared a military reservation for the post of Fort Egbert:

"Commencing at a post at the mouth of Mission Creek, marked 'U. S. M. R.'; thence due west two miles; thence south five miles; thence east eight miles; thence north to the bank of the Yukon river; thence westerly along the shore of the left bank of the Yukon river to the place of beginning. The reservation herein declared is subject to all valid rights existing at the date of the President's order.

R. A. Alger, Secretary of War."

By an executive order of March 31, 1900, that of June 13, 1899, was amended by attaching an additional tract to the reservation. The land in controversy, however, was embraced within the reservation declared by the President's first order of June 13, 1899. Eagle, and the lot in controversy, continued in the military reservation of Ft. Egbert until July 23, 1900, when, by executive order, they were released. The following order was issued by the Secretary of War to carry into effect the executive order:

"War Department, Washington, August 13, 1900.

"The President of the United States, by order dated July 23, 1900, placed under the control of the Secretary of the Interior for disposition under the act of Congress of July 5, 1884 (23 Stat. L. 103), the following described tract of land, the same being a part of the lands formerly embraced within the limits of the military reservation of Fort Egbert, Alaska, which lands were reserved by executive order of June 13, 1899, as amended by executive order of March 31st, 1900:

"Beginning at a point where the center line of C street and the Yukon river intersect; thence running in a southwesterly direction

along the center line of said C street for a distance of two hundred (200) rods; thence southeasterly three hundred and twenty (320) rods on a line at right angles to said C street; thence in a northeasterly direction parallel to and with said C street to the left bank of the Yukon river; thence along the left meander line of said river in a northwesterly direction to place of beginning, containing approximately four hundred (400) acres.

"Elihu Root, Secretary of War."

This order was received and promulgated at Eagle on September 20, 1900. The lands so released from the military reservation embraced the tract or lots in controversy.

By the executive order of July 23, 1900, the lands now embraced within the limits of the town of Eagle are to be disposed of under the provisions of the act of Congress of July 5, 1884 (23 Stat. 103, c. 214 [U. S. Comp. St. 1901, p. 1607]), entitled "An act to provide for the disposal of abandoned and useless military reservations." Section 1 of this act provides for placing useless or abandoned military reservations, or any portion thereof, under the control of the Secretary of the Interior for disposal under the act by an executive order. Section 2 provides that the Secretary of the Interior may, if, in his opinion, the public interests so require, cause the said lands, or any part thereof, to be regularly surveyed, or to be subdivided into tracts of less than 40 acres each, and into town lots, or both. He shall cause them to be appraised, and, upon the approval of the appraisal he shall cause said lands, subdivisions, and lots to be sold at public sale to the highest bidder for cash, at not less than the appraised value thereof:

"Provided, that any settler who was in actual occupation of any portion of such reservation prior to the location of such reservation, or settled thereon prior to January first, eighteen hundred and eighty-four, in good faith for the purpose of securing a home and of entering the same under the general laws, and has continued in such occupation to the present time, and is by law entitled to make a homestead

entry shall be entitled to enter the land so occupied, not exceeding one hundred and sixty acres in a body, according to the government surveys and subdivisions: provided, further, that said lands were subject to entry under the public land laws at the time of their withdrawal."

Section 3 provides for the appraisal and sale of abandoned military buildings, and section 5 provides that mineral lands so released from reservation shall be disposed of under the mineral land laws.

The Ft. Egbert reservation was declared July 13, 1899. The possession and occupancy of Ford began May 25, 1900; that of Walsh April 1, 1901; and it follows that, if the act of July 5, 1884, is applicable to Alaska, and the action of the Secretary of War valid, neither of them is entitled to a preference right in this action under the first proviso of section 2 of the act of July 5, 1884, as neither of them "was in actual occupation of any portion of such reservation prior to the location of such reservation" on June 13, 1899. The lands embraced in the 400-acre tract released from reservation and placed under the control of the Secretary of the Interior for sale under the act above quoted are held by that department for disposal to those who settled thereon prior to June 13, 1900, and to the highest bidder for cash upon survey, appraisal, and sale. There is nothing in the act of July 5, 1884, offering settlers or occupants entering into possession of any subdivision or lot subsequent to the executive order of withdrawal any preference right of entry or purchase. Any subsequent occupant—to which class both parties in this action belong—has only the usual right of any other citizen to purchase at the public sale. He acquires no preference right under this act by settlement, occupation, or possession of the land or lot after June 13, 1899. Notwithstanding that possession, the tract or lot must be appraised at its full value, and, before he can acquire the title, he must bid against

all other citizens at the public sale, and pay at least the appraised value.

Neither of the parties to this action has any legal right of occupancy of the premises in controversy as against the true owner, the United States. Their adverse claims must, therefore, be determined by the law of possession only. No citizen may question the occupation or possession of one residing on the lands or lots belonging to the United States, except he shows a better right or title in himself. Walsh cannot defeat Ford's prior possession, if any such there be, or forcibly intrude thereon, without showing a right or title in himself superior thereto. In *English v. Johnson*, 17 Cal. 108, 76 Am. Dec. 574, the decision of the court, concurred in by Field, C. J., laid down the rule in mining cases:

"The taking up of mineral land in pursuance of the mining regulation of the vicinage gives possessory title to the claims, just as an entry in the land office, or the following of the prescribed rules given by statute, gives a possessory title to public or agricultural land. But it does not follow, because this is the regular and usual way of obtaining possession, that a possession not so obtained would necessarily be without the protection of the law. Possession not taken in pursuance of these rules would still be good as against one not taking possession in accordance with the rules of the vicinage, but merely coming upon the premises in the same manner as the prior possessor. The actual prior possession of the first occupant would be better than the subsequent possession of the last." *Attwood v. Fricot*, 17 Cal. 37, 76 Am. Dec. 567; *Campbell v. Rankin*, 98 U. S. 261, 25 L. Ed. 435.

This rule will apply to the possession of the lots in question. Neither having entered in strict compliance with the act of July 5, 1884, "the actual prior possession of the first occupant would be better than the subsequent possession of the last."

It becomes necessary, then, to determine from the evidence which of the contestants first entered into actual and

continued possession of the lot in controversy. While the permit given by the commanding officer of the District of Alaska to Ford on May 25, 1900, conferred no right as against the United States, nor any title to the land, yet it affords some evidence of his peaceable entry and possession of both lots mentioned therein. His entry upon the lots, the erection of the dwelling and stable, clearing, building roads and graded ways, and the use of both lots for the very purposes mentioned in the permit, leave no doubt that he was in possession of the lot in question at all times from May 25, 1900, to and at the time when the plaintiff entered thereon. It is not necessary, to maintain his possession of both lots, that he should erect a house or dwelling on each, any more than it is necessary for a claimant under the homestead law to build a dwelling on each legal subdivision of his claim. It appears that both lots were reasonably necessary and actually used for the purposes for which he took possession of them. They were contiguous, and the lot in controversy was necessary to the full enjoyment of the adjoining lot upon which the dwelling and stable stood, and was in constant, open, and notorious use in connection therewith; and that is sufficient. The plaintiff acquired no right of possession by intruding upon that of the defendant. His act was a mere naked trespass. It was an unwarranted intrusion upon the peaceable possession of another citizen, and affords plaintiff no ground for relief. *Atherton v. Fowler*, 96 U. S. 513, 24 L. Ed. 732:

It will make no difference in the rule applicable to this case if the lots should be finally disposed of by the United States under the town site act. The evidence clearly establishes the prior occupancy and possession of the defendant, and that effectually defeats any claim that plaintiff might make to the lot in controversy under the town site law. Defendant will have the relief demanded and his costs.

ALASKA COMMERCIAL CO. v. RAYMOND.

(Third Division. Eagle. April 20, 1901.)

No. 36.

1. ARREST IN CIVIL ACTION—JURISDICTION.

Before process in civil arrest will be vacated and the writ dismissed, it must appear that the defects in the affidavit or bond are such as to leave the process without jurisdictional support. Mere errors and irregularities are not sufficient. A substantial compliance with the statute is enough.

2. UNDERTAKING—BOND—SURETIES.

It is not necessary that the principal obligor sign the undertaking on civil arrest, for he is bound without doing so. The undertaking need only be signed by two sureties as security for the principal.

Motion to Quash Affidavit and Bond and Dismiss Writ in Civil Arrest.

George K. French, for plaintiff.

V. L. Bevington, for defendant.

WICKERSHAM, District Judge. The defendant in this case has been arrested in a civil action under the provisions of chapter 12 of the Code of Civil Procedure. The plaintiff filed its complaint to recover from defendant the sum of \$2,466.71 for goods sold and delivered, and filed therewith an affidavit and bond for arrest. A warrant issued, the defendant was arrested thereon, and gave bail. Defendant then appeared in the action, and filed his answer, denying generally the allegations contained in the complaint. He also, and at the same time, filed his affidavit denying all the allegations contained in plaintiff's affidavit upon which the process of arrest issued, and therewith a motion to dismiss the proceedings in arrest because it did not appear that any suffi-

cient cause to allow the writ was shown. This motion was overruled, whereupon the defendant filed a second motion to quash the process in arrest for various defects pointed out in the affidavit and bond. It is urged that the affidavit and bond are deficient in matters of substance required by statute, and were insufficient to support the jurisdiction of the court at the time when the writ issued, and that the defects are of such a nature that they cannot be cured by amendment.

Sections 121 and 122 of the Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 351) provide that a motion to vacate the writ of arrest may be made with or without affidavits or other proofs.

"If, upon the hearing of such motion, it shall satisfactorily appear that there was not sufficient cause to allow the writ, or that there is other good cause which would entitle him to be discharged on habeas corpus, the same shall be vacated, or, in case he has given bail, the court may discharge the same or reduce the amount thereof on good cause shown."

The first ground of attack—that there is not "sufficient cause to allow the writ"—was disposed of under the prior motion; and that leaves only the second—"that there is other good cause which would entitle him to be discharged on habeas corpus"—to be considered on this motion.

The cases where a prisoner is entitled to be discharged on habeas corpus are set out in section 581 of the Code of Civil Procedure. Upon careful examination it seems that the third clause of that section is the only one under which the affidavit and bond in this action could be attacked upon habeas corpus. It is as follows: "Third. When the order or process is defective in some matter of substance required by law, rendering such process void." Under these provisions the sole question upon this motion is whether the affidavit or bond upon which warrant issued is so defective in

some matter of substance required by law as to render such process void. If either is so defective, the process shall be vacated, or the bail discharged. Before the process will be vacated and the writ dismissed, it must appear that the defects in the affidavit or bond are such as to leave the process without jurisdictional support. Mere error and irregularities, matters of form, and failure to comply literally with the statute will not suffice. A substantial compliance with the statute is sufficient to sustain jurisdiction. *Re McKenzie*, 180 U. S. 536, 21 Sup. Ct. 468, 45 L. Ed. 657.

The first objection made to the affidavit is that it does not appear upon its face that the defendant is about to remove from the District of Alaska, or that he has disposed, or is about to dispose, of his property, with intent to defraud his creditors. The affidavit uses this form of expression: "That the said defendant has disposed of all his property in this district, and is about to remove therefrom, with intent to defraud this plaintiff out of the said money so owing and due to this plaintiff." The allegation about his intended removal from the district is clearly sufficient, being in the very words of the statute; and, as this is a ground for issuing the warrant, the affidavit would be sufficient if it contained none other. But the second allegation—that the defendant has disposed of all his property in the district, with intent to defraud plaintiff out of his debt—is also substantially in compliance with the statute. While the affidavit does not use the words "to defraud his creditors," it does disclose that the intention is to defraud plaintiff, who shows that he is a creditor; and that is sufficient. *1 Wade on Attachment*, 93; *Auerbach v. Hitchcock*, 28 Minn. 73, 9 N. W. 79. It is next objected that the affidavit does not show that the goods were furnished to the defendant in the District of Alaska, but it does not appear that the statute requires any such allegation. The objections to the affidavit are not to

matters of substance, and do not render the same void. They are therefore insufficient, and are overruled.

The first objection made to the bond is that it is not signed by the plaintiff or principal obligor, but only by the sureties. The bond is entitled in the same court and action as the complaint. It recites the commencement of the action upon the cause set out in the complaint; discloses that the plaintiff has applied for the arrest of the defendant; sets out the facts upon which the arrest is asked; and recites that the bond is given "in consideration of the premises, and of the issuing of said warrant." It is apparent upon the face of the bond that it was not the intention of the plaintiff to sign the bond, and the sureties could not be misled by supposing that the bond was also to be signed by the plaintiff as the principal. It is just what it appears upon its face it was intended to be, a mere undertaking upon the part of two sureties to become surety for the principal. It is signed by both sureties, and their affidavits are attached, showing their qualifications as sureties. Is this undertaking void because not signed by the plaintiff as principal?

The statute provides that the plaintiff shall be entitled to the warrant for the arrest of the defendant whenever he shall make and file (1) the affidavit, and (2) "shall also make and file with such clerk an undertaking, with sufficient sureties, in a sum not less than three hundred dollars, and equal to the amount for which the plaintiff prays judgment. Such undertaking shall be conditioned that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest if the same be wrongful or without sufficient cause, not exceeding the amount specified in the undertaking." Section 100, p. 165, Carter's Code.

The undertaking in this case was prepared and filed by the plaintiff's agent and attorney. The plaintiff is responsible

for any damage suffered by the defendant by the arrest without an undertaking. The sureties are bound in this undertaking without the principal signing it. The defendant may recover his damages generally from the plaintiff and from the sureties to the extent of their obligation. The statute does not specifically require the principal to sign the undertaking. It only requires an undertaking with sufficient sureties. The fact that the defendant does not lose any rights of recovery against the plaintiff by its failure to sign the undertaking, demonstrates that that fact is not a matter of substance, and does not render the bond void.

An objection is likewise made that the condition of the bond is insufficient, in that it indemnifies the defendant against "all damages which he may sustain by reason of said warrant of arrest or attachment being issued against said defendant," whereas the statute requires that the defendant shall be indemnified against "all damages which he may sustain by reason of the arrest if the same be wrongful or without sufficient cause." It seems that the words of the undertaking are unlimited, and broader than those of the statute, and that under them it might be alleged and proved that the arrest was wrongful, and without sufficient cause.

An objection is also made to the form of the affidavit of the sureties, because it does not appear therefrom that each of them is worth the amount specified in the undertaking. The statute requires the plaintiff to file the affidavits of the sureties, "from which it must appear that such sureties are residents of the district, and that they are, taken together, worth double the amount of the sum specified in the undertaking, over and above all debts and liabilities and property exempt from execution." In compliance with this statutory provision, plaintiff filed the affidavits of the sureties, from which it appears that the sureties, "each for himself, and not one for the other, says that he is a resident and freeholder of Circle

Precinct, Alaska District, and that they are, taken together, worth double the amount of the sum specified in the undertaking, over and above all debts and liabilities and property exempt from execution." While the affidavit is awkwardly drawn, it is substantially in compliance with the statute, and is not void.

It is urged, however, that the affidavit is further defective in not complying with the next clause of the statute, which declares that "no person not qualified to become bail upon arrest is qualified to become surety in an undertaking for arrest." The answer to that objection is that the surety is not required to set out these qualifications in his affidavit. He must have these qualifications, and there is no showing in this case that each of the sureties does not possess them. If each does not possess them, it was the duty of the defendant to have so informed the court by proof.

It does not satisfactorily appear that either the affidavit or bond is so defective in matters of substance as to render it void, and the objections will be overruled, and the motion to vacate the arrest will be denied.

In re ESTATE OF WILLIAM M. BENNETT.

(First Division. Juneau. May Term, 1901.)

No. 798.

I. APPEAL AND ERROR—ABANDONMENT—TRANSCRIPT.

A notice and bond on appeal were filed in the probate department of the Commissioner's Court on January 14, 1898. The office and records were destroyed by fire on January 31, 1898. No application was made to extend the time for filing the transcript. *Held*, that the appeal was abandoned, and the court acquired no jurisdiction upon a transcript and record first filed in the District Court on December 2, 1898. Appeal dismissed.

Motion to Dismiss Appeal from Probate Court.

John G. Heid, for appellant.

Crews & Hellenthal, contra.

BROWN, District Judge. An examination of the files in this case discloses the following facts:

The transcript on appeal was filed in this court on December 2, 1898, and on January 3, 1899, J. H. Cobb, appearing for J. M. Davis, administrator, filed his motion in this court to strike the cause from the docket, and to dismiss the attempted appeal, on the ground that the order and judgment appealed from were entered on the 14th day of January, 1898, and no record was filed in this court until said 2d day of December, 1898, and no order was had and obtained allowing an extension of time in which to file said record; and on the ground that said appeal had thereby been abandoned, and the court acquired no jurisdiction of the cause by reason of the filing of said record at said date. The judgment of the commissioner acting as probate judge, allowing the several accounts of the administrator, was entered on the 14th day of January, 1898. The courthouse in which the commissioner's records and papers were filed was burned on January 31, 1898, and the files and records in this case destroyed. It further appears that notice of appeal was filed on the 14th day of January, 1898, and that thereafter, and on the same day, an appeal bond was filed and approved. On the 30th day of June proceedings were begun in the said commissioner's court to have the files and papers theretofore destroyed restored. An order restoring the said files was made by the said court on the 26th day of September. The records of this court, to which attention is called in the argument, and upon which, in part, the motion to dismiss is based, show that two regular terms of the District Court were held during the year 1898 prior to the filing of said rec-

ord—one beginning on the first Monday in May, at Sitka, and the other on the first Monday of November, at Wrangel.

The question presented to the court by the motion herein is this: Was the transcript on appeal filed in this court within the time allowed by the statute of Oregon at that time in force in Alaska?

The county court, as it was called in the state of Oregon, had jurisdiction in all probate matters. See section 895, p. 637, vol. 1, Hill's Ann. Laws Or. Section 902 of the said Laws of Oregon provides how appeals shall be taken from decisions of that court, and said section reads as follows:

"The provisions of title 4 of chap. 6, relating to appeals, are intended to apply to judgments and decrees of the county courts in all cases, but not to its decisions given or made in the transaction of county business. In the latter case, the decision of the court shall only be reviewed upon writ of review provided by the Code."

Chapter 6, tit. 4, referred to in the foregoing section, seems to be covered by subdivision 5 of section 537:

"An appeal to the Supreme Court shall be taken by serving and filing the notice of appeal within six months from the entry of the judgment or decree appealed from, or to the circuit court within thirty days after such entry, and not otherwise."

Following the statute and its application to appeals, we must treat this court as a circuit court, and the probate court exercising jurisdiction over estates as a county court of Oregon. By the terms of this statute it will be seen that the appeal must be perfected, so far as the notice of appeal may effect the same, within 30 days from the time the judgment or decree was entered. The substituted record in this case shows that the notice of appeal and the appeal bond were filed in the court below within the time required by the statute. This perfected the appeal in the lower court. Section 541 of chapter 6, tit. 4, Hill's Ann. Laws Or., further provides:

"Upon the appeal being perfected, the appellant must, by the second day of the next regular term of the appellate court thereafter, file with the clerk of such court the transcript of the cause, as provided in this section, and thereafter the appellate court has jurisdiction of the cause, and not otherwise."

In Kelley v. Pike, 17 Or. 330, 20 Pac. 685, it was held that, where the appeal was perfected by filing and serving the proper notice of appeal and the appeal bond, but the party appealing failed to file his transcript as provided by the Code on or before the second day of the next term, the court acquired no jurisdiction of the cause by the filing of the record after that period, and had no jurisdiction to grant an order allowing the transcript to be filed *nunc pro tunc*, whatever the reasons occasioning the neglect may have been. In Lindley v. Wallis, 2 Or. 203, it was held: "Transcript must be filed before the close of the second day of the next term, or be deemed abandoned." It would seem from the holdings of the Supreme Court of Oregon on this question that the rule is clear, viz., that the transcript of the record and proceedings in the court below must be filed in this court before the close of the second day of the next term in course.

But it is claimed that the courthouse was burned, and the records destroyed, and it was no fault of the plaintiff that the record was not filed within that time.. The probate court had power and authority to restore its destroyed files and records, if that could be done with reasonable certainty. The parties in this case knew when the regular terms of this court were held, and must have known that the regular term thereof would be begun at Sitka on the first Monday in May following the destruction of the records on the 31st of January of the same year. Promptitude and timely action on the part of the parties in interest would have restored the records as they were finally restored, so that the transcript thereof could have been filed in this court within the time

provided by statute. The first step taken to restore the records in the probate court was the petition of the creditors, filed on the 30th day of April, 1898—only a few days before the time would expire to file the record with the clerk of the court at Sitka. Considering the time that would elapse in necessary notice to the administrator and other parties in interest, it was not possible that an order could have been made in the probate court, and the files and records that had been destroyed supplied, so that a transcript could have been made and filed in this court within the time provided by the statute.

It would seem, therefore, that by the failure of the parties interested in the appeal to move promptly in the matter of restoring the records the transcript thereof could not be made in proper season. This was a matter of their own negligence. They had had from the 1st of January within which to make said application and to have the records restored. If, however, the time had been too short for the restoration of these records, and the appeal could not have been taken for that reason, then subdivision 3 of section 541, Hill's Ann. Laws Or., before referred to, provided a remedy in the following language:

"If the transcript is not filed with the clerk of the appellate court within the time provided, the appeal is to be deemed abandoned and the effect thereof terminated; but the court or judge thereof may, upon notice to the respondent, on such terms as may be just, by order enlarge the time for filing the same; but such order shall be made within the time allowed to file the transcript, and shall not extend it beyond the term of the appellate court next following the appeal."

The parties in interest here had three months in which to make this application to the court for further time in which to file their transcript, but the files and records of this court fail to disclose that any such application was ever made. The appeal is to be deemed abandoned, and the effect there-

of terminated, when the party fails to file his transcript within the period prescribed.

But for the purpose of the argument, and to show more clearly the negligence of the party seeking to appeal, it may be proper to call attention to another fact. The order restoring this record in the probate court was made September 26, 1898, and the transcript and appeal, as before stated, was not filed until the 2d of December of the same year, and more than 30 days after the record was restored by order of the probate court, viz., on the first Monday of November, 1898, another regular term of this court was begun and held. Surely there was ample time to have procured a transcript of the record, and had the same filed in this court, before the second day of the November term had expired.

An examination of all the facts in the case, so far as the same have come to the knowledge of the court, conclusively shows that the failure to file the transcript of the record before the expiration of the second day of the November, 1898, term, was the negligence of the party in interest, and under the laws of Oregon in force in Alaska at that time was an abandonment of the appeal.

It is, therefore, the order of the court that the motion requesting that the above suit be stricken from the docket, and all further proceedings in the attempted appeal be dismissed, be, and it is hereby, sustained. And it is ordered, adjudged, and decreed by the court that the said suit be stricken from the docket, and all proceedings in the attempted appeal be, and the same are hereby, dismissed, and that the administrator, J. M. Davis, have judgment for his costs in this behalf expended.

MARTIN et al. v. HECKMAN et al.

(First Division. Juneau. May Term, 1901.)

No. 1,099.

1. PUBLIC LANDS—TIDE LANDS—INJUNCTION—WHARVES.

An upland owner may extend his wharf across tide lands to deep water at right angles to his shore line, but may not deprive other upland owners of an equal privilege. The defendants erected their wharf on diagonal lines and at an acute angle from their shore line, thereby crossing the line of approach from deep water to plaintiffs' land. A perpetual injunction was granted.

2. TRIAL—FINDINGS OF FACT—CONCLUSIONS OF LAW.

In this court, *held*, that findings of fact and conclusions of law are not of such binding force as to affect adversely the rights of the defendants.

3. PUBLIC LANDS—TIDE LANDS—INJUNCTION—WHARVES.

Where different persons own portions of the upland shore line of a small semicircular bay, each party can have only an equitable portion of the approaches to deep water, and a court of equity will protect their several rights by injunction.

Suit to Enjoin the Erection of a Wharf in Front of Plaintiffs' Property. Injunction granted.

C. K. Delaney, for plaintiffs.

Oscar Foote and Winn & Shackleford, for defendants.

BROWN, District Judge. In the consideration of the case of Carl A. Sutter et al. v. Heckman and the Alaska Packers' Association as to the fishing rights of the complainants, the court has practically passed upon every material question raised in this case as to the right of the complainants to extend their wharf without being hindered by the respondents.

The evidence clearly shows that the complainants were in the actual possession of the uplands adjoining the tide waters

of Tongass Narrows for a long period of time prior to the respondents having secured any rights, possessory or otherwise, in or to the said lands. But, for the purposes of this case, let it be considered that the rights of the complainants and respondents were contemporary, and that their possessory rights and acts of possession were initiated at the same time. The respondents have offered in evidence their plat and map, showing the precise lands that are occupied and held by them on said tide lands, and they describe certain lots that have been surveyed as a part of a town site, and said map shows as well the lots and lands occupied by the complainants. Under the law, if the right of each party to the uplands were equal, the respondents could construct a wharf in front of their upland holdings in a direct line therefrom to the deep water of Tongass Narrows, but they would have no right, even if said land had been patented, and the respondents had an unquestioned right to their holdings, to cross the front of any other man's holdings bordering upon the said tide waters. The respondents' right to wharfage extends from the shore line out to deep water, on a line running nearly at right angles with the general shore line; but they may not cross, nor will they be permitted to cross or occupy, any of the tide flats, or an inequitable proportion thereof, so as to deprive other upland holders adjoining them of the same equitable right to reach deep water over the said tide flats. The complainants have the same right as the respondents to extend the line of their wharf out to deep water, and in such manner as they choose, on lines of their shore holdings.

The respondents, by constructing their wharf on diagonal lines, and at an acute angle with the shore line across the frontage of other upland holders, and particularly across the frontage of lands occupied and possessed by these complainants, have wrongfully and unlawfully interfered with plain-

tiffs' right, and cannot, therefore, be permitted to continue their wharf and floats as at present located and constructed. That it is the complainants' right to have them restrained and enjoined from maintaining their wharf as at present located, and from extending the same to a point where they cross in front of complainants' upland holdings, seems to be supported by ample authority.

The evidence in this case seems to indicate that the shore line of Tongass Narrows is somewhat semicircular, and that, to reach deep water from certain portions thereof, it is necessary to run lines diagonal to the side lines of the lots as surveyed in the town site; and that, while the respondents are entitled to an equitable proportion of the tide flats, so as to permit them to reach deep water, they may not so build or construct their wharf as to interfere with intervening upland holders, nor should they be permitted to extend their wharf so far out into deep water as to make it inconvenient or impracticable for vessels coming into said Tongass Narrows to approach plaintiffs' wharf.

The temporary injunction heretofore granted in this case, restraining the respondents from extending or continuing their wharf as at present located and constructed, will therefore be made perpetual.

On Petition of Defendants for Modification of Decree.

(May, 1901.)

I have examined the petition of defendants in this case presented to the court for the purpose of securing some amendments to the decree heretofore entered herein. The application for the amendment and the claimed error seem to be based wholly upon alleged errors of findings of fact and conclusions of law that accompanied the decree. The findings of fact and conclusions of law were presented to the court by the attorneys for the plaintiffs in the case, and,

while they go somewhat further than the decision of the court on file seems to contemplate, I am of the opinion that, as to the matters wherein the error is claimed to have occurred, such findings are wholly outside of the issues involved under the pleadings in the case, and are, in the main, surplusage. In truth, findings of fact and conclusions of law are confined wholly to actions at law, and were unheard of in proceedings in equity, so far as I am informed, until required by the express language of the Civil Code. The decree in equity settled all matters in controversy between the parties. Unless, by express requirement of the Oregon Code, these findings of fact and conclusions of law were required in an equitable action, I am of the opinion that all such findings and conclusions in this case form no part of the decree, and are without force and effect. They were signed by the court at the time, as a part of the decree to be entered, under the same impression that I now entertain, viz., that the Oregon Code does not, in terms, require the court in suits in equity to make any such findings. The only reference to such findings I am able to find in Hill's Annotated Codes is found in section 396, p. 412, vol. 1, compilation of 1892, which reads as follows:

"The provisions of title 1 of chapter 2, of this code, shall apply to suits, except as in this title otherwise or specially provided; but issues of law and fact shall be tried by the court, unless referred."

Referring to title 1 of chapter 2 (section 178 of said compilation), I find the following: "An issue of law shall be tried by the court, unless referred as provided in title VI of chapter 2;" which is the same provision, in substance, covered by section 396, before referred to. But this section further provides: "An issue of fact shall be tried by a jury, unless tried by the court or referred, as provided in titles V and VI of chapter 2."

Whatever may be the provisions of titles 5 and 6 of chapter 2, it can hardly be said that they form a part of title 1, which is in force in suits by the express terms of section 396. However, title 5 of chapter 2 (section 218) provides for a waiver of a trial by jury and a trial by the court, which clearly could not be in force in suits, because, in all proceedings in courts of equity, juries are dispensed with, unless called for a specific purpose to pass upon some question of fact that may be formulated by the court to submit to the jury. So that in suits the waiver of a jury, required in actions at law, could never be required, and was never intended to be required, by the Oregon Code. Section 219 provides:

"Upon the trial of an issue of facts by the court, its decision shall be given in writing, and filed with the clerk during the term, or within twenty days thereafter. The decision shall state the facts found and the conclusions of law separately, without argument or reason therefor."

It also provides that the decision shall be entered in the journal of the court, etc. This requirement is clearly intended to apply to law actions, and never to affect the proceedings of courts in equity suits. Had the Legislature of Oregon intended titles 5 and 6, or either of them, to apply to suits, express reference would have been made to these titles in section 396, or some other section of the Oregon Code treating the subject of suits. I am clearly of the opinion that cross-references in title 1 of chapter 2 were not put in force in suits by section 396 of title 1 of chapter 5, before referred to. I therefore conclude that these special findings of fact and conclusions of law are not of such binding force as to affect adversely the rights of the defendants in this case.

It is to be remembered that this suit was brought to enjoin the defendants from erecting a certain structure that

was calculated to prevent the plaintiffs from the proper completion of a wharf then in process of construction by them. The defendants answer and set up some affirmative claims and rights of their own in and to certain lands bordering on Tongass Narrows, and neither their answer nor the supplemental answer definitely define the points to which the plaintiffs sought to build their wharf, or the point to which defendants undertook to build their structure, which, in their answer, they claim was intended in part for the purpose of a wharf to be further constructed by them. Both the complaint and the answer stop as soon as they allege that each is trying to construct his wharf from the uplands to the deep waters of Tongass Narrows. To what depth of "deep water" they seek to go is impossible to determine from the pleadings. To what length the plaintiffs seek to extend their wharf the complaint itself fails definitely to inform us. The court was satisfied from the evidence in the case—is satisfied now—that the defendants were encroaching upon the rights of the plaintiffs with their structure, and were erecting it in such a manner, and so placing floats around it, as to prevent the plaintiffs from completing their wharf according to their right, and in the manner originally intended by them.

On the maps offered in evidence it appears that the end of the plaintiffs' wharf, at its furthest extent, reaches a depth of 26 feet of water, and the point of the defendants' structure furthest extended, and the float attached thereto, reaches a depth on one side of 32 feet and 34 feet on the other, and that the furthest point—being the corner of the float extended furthest into the narrows—reaches the depth of 40 feet. The plaintiffs' wharf, called the "Strong & Johnson Wharf," seems to be in part constructed over very shallow water, only the most extended point reaching to a depth of 26 feet. What should be settled as "deep water" is a matter difficult to determine. The greatest depth of water drawn by any ship

attempting to land at these wharves would certainly be sufficient for all wharf purposes. Of the greatest depth drawn by ocean ships landing or attempting to land at these points we are not fully advised by the testimony; but, so far as I recall it, none reached a depth of 30 feet. If the court is right upon this point, the extension of the Strong & Johnson wharf to a point where it would reach the present structure of the defendants would bring it to a depth of 30 or 32 feet. But extending it that far would interfere or displace to some extent the present structure of the defendants. Certainly the court would not permit the plaintiffs to extend their wharf indefinitely, and the decree of the court could not be construed to mean that they could, but that they might extend it to deep water; and by deep water is meant, in connection with wharves, to such depth as will accommodate seagoing craft that might have occasion to stop at these wharves. The court, in referring to "Front street" in the findings, as said street is delineated on the map, intended thereby to indicate a point to which the plaintiffs might go, and that the defendants could not be permitted to meddle with or prevent. In referring to intervening lands, the court said in its decision in this matter that the line of high tide was somewhat circular in form, and that the parties having upland holdings could proceed therefrom in direct lines from their holdings to the deep water. Where the shore line is semicircular in form, the same bending inward from the sea, each party holding land bordering upon the tide water can only have an equitable portion of the approaches to deep water. The right of the defendants in this case to an approach to deep water is unquestioned; but should they construct their approach or their wharf over intervening equities of other owners, the court intimated in its decision and finding that they would be violating the rights of others, and,

if they encroached upon the rights of these plaintiffs, they would be violating their rights.

If the decree of the court is somewhat uncertain in terms, the error is not the error of the court, but the error of the pleadings in failing to properly detail the issues between the parties as to their respective rights. The court did not attempt, nor is it required, under the issues in this case, to determine the rights of the several parties, save and except as to the single question as to whether or not the defendants were in fact encroaching upon the rights of the plaintiffs, and should, therefore, be restrained. Further than that the court attempted to settle nothing in this case, except what might be in its nature advisory to the defendants in their future operations in attempting to wharf out to deep water. In following their present line to deep water, they would prevent persons having rights in lands between their own and plaintiffs' from reaching deep water at all. Therefore, in pursuing their efforts to wharf out to deep water, the court reminds them that they should pay reasonable regard to the equities and rights of others, and by so doing they can preserve their own rights, and construct their wharf without trouble or interference from any. I therefore decline to open up the decree and to make any changes therein; but I attach to the decision I now file the former decision of the court in the premises, that the same, as a whole, may remain upon the files of the court as a clearer and better guide to the parties in their attempt to enforce their several rights under the decree. The petition to open the decree is, therefore, denied.

The motion to modify has apparently been abandoned by the defendants by their filing of petition for modification, but the motion is also denied.

MOORE V. RENNICK.

(First Division. Juneau. June Term, 1901.)

1. APPEAL AND ERROR—CERTIORARI—JUSTICE OF THE PEACE—REVIEW.

Under the laws of Oregon, made applicable to Alaska by the organic act of 1884 (Act May 17, 1884, c. 53, 23 Stat. 24), an appeal from a justice of the peace did not lie where the amount involved was less than \$200. *Held*, that in such cases a writ of certiorari or review would issue from the District Court of Alaska to correct the action of the lower court.

Writ of Review to Correct Judgment of Justice's Court when Amount Involved was Less than \$200.

R. W. Jennings, for plaintiff.

I. N. Wilcoxen, for defendant.

BROWN, District Judge. This action comes before this court on a writ of review duly issued by order of the court while Judge Johnson, my predecessor, was presiding.

The return of this writ presents to the court the entire record of the proceedings in the court below, viz., the court of United States Commissioner Charles A. Sehlbrede.

By the contention of defendant's attorney, the jurisdiction of this court to pass upon the legality of the proceedings of the court below is challenged. As the determination of the jurisdictional question, if decided in accord with the defendant's contention, will render any further consideration of the case unnecessary, it would seem to be proper first to determine that question.

It is claimed that the errors alleged to appear upon the face of the return of the writ are such as cannot be determined by the court in this proceeding; that the writ of review only lies to jurisdictional questions; and that the writ

can in no sense become a writ of error to review in the court below, when the court was acting within its jurisdiction. In support of counsel's contention, attention is called to the list of authorities found in the note to Hill's Ann. Laws Or. pp. 502, 503.

Many California cases seem to support the contention of counsel; the question, and sole question, being whether or not the inferior tribunal exceeded its jurisdiction.

"Error in the exercise of the court's jurisdiction is not a proper case for the writ," was held in *Alexander v. Municipal Court*, 66 Cal. 387, 5 Pac. 675.

It was held in *Cal. Pacific R. R. Co. v. Central Pacific R. R. Co.*, 47 Cal. 528, that where in a proceeding for a condemnation of land the district court makes an order which it has no jurisdiction to make in relation to the use of the property sought to be condemned, and there is no appeal from the order, certiorari is the proper remedy. The fact that the transaction may be enjoined in equity does not prevent the order from being reviewed on certiorari.

A number of California cases are cited by the author of Hill's Code in support of the following proposition: "Mere irregularity intervening in the exercise of an attempted jurisdiction, mere mistakes of law committed in conducting the proceedings in an inquiry which the tribunal had authority to entertain, are not to be considered in certiorari; otherwise that writ would be turned into a writ of review." Many California cases are also cited in support of the following proposition: Errors of law cannot be corrected on certiorari, even if there be no appeal. The court below must have exceeded its jurisdiction. If it had jurisdiction, but decided wrongly, certiorari will not lie. *People v. Burney*, 29 Cal. 460, and other cases. But in *Long v. Sharpe*, 5 Or. 438, it seems to be held that the writ of review lies to an order setting aside an answer.

Section 582, Hill's Ann. Code, in force in 1884, is as follows: "The writ heretofore known as the writ of certiorari is known in this Code as the writ of review." It would seem, therefore, that the office of the writ of certiorari would be the same as that of the writ of review under the Code, except as limited or broadened by the terms of the Code.

Section 583: "Any party to any process or proceeding before or by an inferior court, officer, or tribunal, may have the decision or determination thereof reviewed for errors therein, as in this title prescribed, and not otherwise." "Upon a review, the court may review any intermediate order involving the merits, and necessarily affecting the decision or determination sought to be reviewed." This section seems to make the writ of certiorari or review, under the Oregon Code, broad enough to review any errors made by the court below in the trial of the case that appear on the face of the return.

The case in 5 Or., before referred to, where the court reviews the action of the court below by striking out an answer, surely refers to an error of the court in the exercise of its proper jurisdiction.

But this whole matter seems to be clearly settled by the plain letter of the statute of Oregon in force in 1884. Section 585, then in force, reads as follows:

"The writ shall be allowed in all cases where there is no appeal, or other plain, speedy, and adequate remedy, and where the inferior court, officer, or tribunal in the exercise of judicial functions, appears to have exercised such functions erroneously or to have exceeded its or his jurisdiction, to the injury of some substantial right of the plaintiff, and not otherwise."

The Supreme Court of Oregon has construed this statute in the case of *Evans v. Christian*, 4 Or. 375: "The writ of review will not lie where the right of appeal exists." This determination was reached by the court, although a former

opinion of the court held that "remedies by appeal and writ of review were concurrent."

The Congress of the United States, having by the act of 1884 practically adopted the statutes of Oregon where not inapplicable, has adopted the construction placed upon those statutes by the highest tribunal of that state. If, then, there was right of appeal at the time the writ of review issued in this case, the writ of review was wrongfully and imprudently issued, and, being so issued, gave this court no jurisdiction of the case at bar. Clearly, the right of appeal from the decisions of the justice's court was abundantly provided for by the statutes of Oregon in force in 1884. If those statutes were in force in Alaska, and can be so held, this court is without jurisdiction to hear and determine cases where the amount involved exceeds \$200.

In the case just referred to the court also decides:

"When a question of jurisdiction presents itself in any stage of a proceeding, and it is discovered that the court has no jurisdiction, either over the parties or the subject-matter of the cause, it is the duty of the court on its own motion to refuse to proceed further. Any attempt to exercise judicial functions otherwise than is authorized by law would be a nullity, and an idle waste of time."

I might repeat the language of the Supreme Court of Oregon, and conclude this decision by saying that to pursue the matter further would be "an idle waste of time," if the amount exceeded \$200.

If it has been the practice to allow a writ of review in such cases, it would seem to indicate that in the opinion of the court the laws of Oregon controlling appeals from justices' courts are inapplicable to our conditions in Alaska, and therefore not in force. Only upon this theory can the action of the court in allowing the writ in such cases be deemed to have the semblance of law.

Section 7 of the act of Congress of 1884 (Act May 17,

1884, c. 53, 23 Stat. 24), providing a civil government for Alaska, reads in part as follows:

"That the general laws of the state of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States."

"So far as * * * applicable." What is meant by this language? Wherever counties; or other like legal subdivisions, are mentioned in the general laws of Oregon in force in 1884, it is clear that such acts or parts of acts would have no application to counties in Alaska, because no such subdivisions as counties have been established here. They do not exist. There are many other like provisions in the general laws of Oregon that, in the nature of things, are inapplicable to conditions in Alaska, because of the failure of law to create conditions whereby they might be made applicable. Does the word "applicable" apply to natural conditions of the country, or to its topographical conditions? Shall we say that laws are not applicable to the conditions of this country because it is mountainous, or because of the inclemency of the weather, or because of the great distance between different points and different settlements of people? Laws are enacted for the control of the affairs of men, to protect the rights of property, to protect life and liberty, and to punish those who thrive by preying upon society. If settlements are at great distances from seats of justice, where alone relief for wrongs may be obtained, and the time is fixed by the statutes of Oregon for the performance of certain conditions, by which alone the right of the people may be enforced, it might be said that so much of the general laws of Oregon as requires the performance of conditions within an impossible period would not be held to be in force; but that, in lieu of the impossible period fixed by statute, the courts would properly and fairly hold that a

reasonable time should be given for the performance of such conditions. If, therefore, under the statutes of Oregon, appeals from justice courts are required by law to be taken in such short space of time that the right of appeal would in some instances be cut off, the law controlling appeals would not, for that reason, fail; and we cannot say that, because of that, there is no appeal, but rather when, in the matter of time, an impossibility is required, may we not more properly say that the performance of the required condition, whatever it may be, within a reasonable time, is all that the court can demand? The lawmakers of Oregon, in fixing the short period of time, giving 30 days for appeal from justice court, and requiring the transcript to be filed in the higher court before the beginning of the next term of the circuit court, doubtless intended to give a reasonable time within which such acts might be performed. Following the same theory of "reasonable time," the law of appeal might be enforced in Alaska, giving such reasonable time for filing the transcript in the District Court as the situation of the parties might make necessary.

It seems that such a construction of the law of Oregon is absolutely necessary to our conditions. To hold the law not in force because of inapplicable parts of the statute would be to discard in the main the great body of the laws of that state, and to leave us practically without laws for our guidance.

But have we a remedy in certiorari? Under the decisions of the Supreme Court of Oregon it was at one time held that the writ of certiorari might issue when the term fixed by statute within which appeals should be taken had passed. The later decision of that court holds that the same term controls both remedies, except that a later statute, not in force in this territory, provides that the writ shall issue within a fixed period.

If the law fixing a time within which appeals shall be taken and the transcript filed in the higher court is not in force, is that law in force which gives the right to the writ of certiorari or review, where practically the same period of time is fixed for the issuance of the writ? The statute controlling both remedies as to time should have a reasonable construction, and a reasonable time should be allowed to be given under the law, both for taking an appeal and for the issue of the writ. It is difficult to see where the sparsely settled condition of the territory, and the great distances that separate some communities from the place of holding the District Court, will work greater hardship in one remedy (that of appeals) than in the other (by certiorari). If, then, we hold the remedy by appeals as well as by certiorari to be in force, and the remedies not concurrent—and they are not, unless made so by statute—we find ourselves in the situation of allowing a proceeding of certiorari when there is another adequate legal remedy—a conclusion contrary to the universal holdings of all courts, so far as we know, not committed by statute to a contrary view. But in the case at bar now particularly under consideration, the amount involved being less than \$200, the right of appeal does not exist. We are, then, presented with this proposition: Is there no relief from decisions of the lower courts where the amount in controversy is less than \$200?

It is the opinion of the court that, where an attempt has been made to obtain relief by writ of review within a reasonable time, the case is properly before this court, and relief may be granted where the amount involved is less than \$200.

UNITED STATES v. POWERS AND ROBERTSON.

(Third Division. Eagle. June 7, 1901.)

(No. 25.)

1. INFORMATION—MISDEMEANOR.

Misdemeanors for which no infamous punishment is provided by law may be prosecuted in Alaska upon information; felonies only upon indictment.

2. LICENSES—INTOXICATING LIQUOR.

Under the Alaska Code, a liquor license issues for a particular building, and the liquor seller is without authority or license to sell in any other place or building, unless the transfer is first authorized by the court.

3. STATUTES—CONSTRUCTION.

Where the penalty fixed by statute is or may be one year's imprisonment, without stating whether it is in the penitentiary or the county jail, and where the imprisonment in the penitentiary adds forfeiture of civil or other rights or offices, and makes the offense a felony, the court will give the accused the benefit of the doubt, and fix the term of imprisonment in the county jail.

Carl M. Johanson, for the prosecution.

L. C. Hess, for defendants.

WICKERSHAM, District Judge. The defendants were arrested on an information filed by the United States marshal upon the verified complaint of two reputable citizens, charging them with a violation of the liquor license law. The first count in the information charges the defendants with selling liquor at a certain place without a license, in violation of section 472 of the Code of Procedure of Alaska (Act March 3, 1899, c. 429, 30 Stat. 1340). The second count charges that they obtained a license to sell liquor in a certain building, but that, without first obtaining the consent of

the District Court, they moved their saloon to another locality, and are there maintaining it, and selling liquor from a tent, which cost less than \$500, in violation of sections 469 and 473 of the Code of Procedure. The penalties fixed upon a conviction under these counts are, respectively, for the first, a fine of not less than \$100 nor more than \$2,000, or to be imprisoned for not less than two months nor more than one year; for the second, and for the first conviction, a fine of not less than \$50 nor more than \$200.

The defense filed a motion to set aside the information and discharge the defendants upon the grounds: (1) That prosecutions for the crime alleged to have been committed by the defendants cannot be begun or instituted by information; that the same must be on presentment or indictment by a grand jury; that such information is contrary to the fifth amendment to the Constitution of the United States, which provides that no person shall be held to answer for a capital, or otherwise infamous, crime unless by presentment or indictment by a grand jury. (2) That from the records and files of said court it appears that the defendants are doing business under a barroom license granted by the authority of said court. (3) That it is not a crime, under the Code of Alaska, to remove a barroom from one building to another in the same town, camp, or settlement. (4) That the only locus mentioned in said license is Eagle City. (5) That the said information is defective, in that it is not verified by the oath of the party making it, as made and provided by law.

There is a basis of fact in the second objection made by the defense, for from the records and files of this court it does appear that a license to sell liquor was regularly granted to the defendants on October 3, 1900, and is now in force. By section 465 of the Code of Criminal Procedure it is made necessary that a party applying for a license shall

do so by a verified petition, and it shall contain, among other statements and information, a description of "that particular place for which license is desired, designating the same by reference to street, locality, or settlement, in such manner that the exact location at which such sale of liquor is proposed may be clearly and definitely determined from the description given." In compliance with this provision, the defendants, in their petition, alleged their "desire to procure a barroom license to engage in the sale of intoxicating liquors in the log building situated on B street in said Eagle City, known as the 'Chamber of Commerce,' which building cost and is worth upwards of \$2,000." Before granting the license, the court heard testimony as to the character and value of the building, and, in the order granting the license, after reciting that the application was for the Chamber of Commerce building, found as a fact "that the place where applicants intend to carry on such business is a substantial building, which has cost not less than \$2,000 in its construction." This finding was rendered necessary and jurisdictional by the last clause of section 468, which provides "that no license shall be granted for the sale of liquors, at either wholesale or retail, in any other than a substantial building which shall have cost for construction not less than five hundred dollars." Upon these representations and the order mentioned, the clerk issued a license to the defendants, who opened a saloon in the Chamber of Commerce building. According to the sworn complaint upon which the information issued, on the 3d day of June, 1901, they removed their saloon from this substantial building, without further leave of the court, to a tent building situate on lot 16, block 8, which tent building cost less than \$500. Section 473 provides "that any person, having obtained a license under this act, who shall violate any of its provisions, shall, upon conviction of such violation, be fined not

less than fifty dollars nor more than two hundred dollars," etc. They are accused by the first count in the information with selling liquor at the tent building without a license, and by the second with selling in a tent building costing less than \$500.

The first and important question raised by the motion is whether the crime alleged can be prosecuted by information or only by indictment. It is urged that the proceeding by information is contrary to the fifth amendment to the Constitution of the United States, and that the section of the Alaska Code of Procedure authorizing it is void. The section thus attacked is section 474 of the Code of Procedure, contained in the act of Congress of March 3, 1899, and reads as follows:

"Sec. 474. Procedure. That prosecutions for violations of the provisions of this act shall be on information filed in the District Court or any subdivision thereof, or before a United States commissioner, by the United States marshal or any deputy marshal, or by the district attorney or by any of his assistants. Or such prosecution may be by and through indictment by grand jury, and it shall be the duty of either of said officers, on the representation of two or more reputable citizens, to file such information, or to present the facts alleged to constitute violations of the law to the grand jury."

This section must be considered and construed in connection with section 3 of the same Code of Procedure, which reads as follows:

"Sec. 3. Felonies, How Prosecuted. That no person can be tried for the commission of a felony but upon the indictment of a grand jury."

Section 3 thus limits the scope of section 474 to the prosecution of misdemeanors by information. Section 184 of the Criminal Code defines misdemeanors as follows:

"Sec. 184. Division of Crimes. That crimes are divided into felonies and misdemeanors. A felony is a crime punishable by death,

or which is or may be punishable by imprisonment in the penitentiary. Every other crime is a misdemeanor."

It follows, by the Code of Procedure, that no felony or crime which is or may be punishable by death or imprisonment in the penitentiary can be prosecuted by information, but that all other crimes comprising misdemeanors only may be thus prosecuted.

As thus limited, the inquiry is whether section 474, authorizing the prosecution of misdemeanors by information is constitutional and valid. Happily this court is not required to attempt to solve the constitutional question, or to determine whether or not there is such a question to be solved. If the District Court of Alaska may not declare an act of Congress applicable to Alaska void for supposed conflict with the Constitution of the United States, it follows that by the express provisions of section 474 misdemeanors may be prosecuted by information. If this court may test the validity of the act by the standard of the Constitution, yet the same result must follow, for the question involved in this case has been decided by the higher courts in favor of the right of the government to prosecute misdemeanors by information. U. S. v. Waller, 1 Sawy. 701, Fed. Cas. No. 16,634; U. S. v. Maxwell, 3 Dill. 275, Fed. Cas. No. 15,750; U. S. v. Block, 4 Sawy. 211, Fed. Cas. No. 14,609; U. S. v. Baugh (C. C.) 1 Fed. 784; U. S. v. Ebert, Fed. Cas. No. 15,019; U. S. v. Shepard, Fed. Cas. No. 16,273; *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; U. S. v. Cobb (D. C.) 43 Fed. 570.

In the case of U. S. v. Waller a criminal information was filed in the United States court in California against the defendant for importing distilled spirits into Alaska. The same constitutional objection raised in this case having been urged upon a motion to quash the information, Mr. Justice Field, sitting as circuit justice with Judge Sawyer, said:

"We are of the opinion that an information may be filed by the district attorney, in behalf of the United States, in the national courts, for misdemeanors committed against the laws of the United States. The motion to quash the information in this case is therefore denied."

That case was cited with approval by the Supreme Court of the United States in *Ex parte Wilson*, supra, where the court says:

"The offense which Mr. Justice Field and Judge Sawyer held in U. S. v. Waller, 1 Sawy. 701 [Fed. Cas. No. 16,634], might be prosecuted by information is there described as 'an offense not capital or otherwise infamous,' and, as appears by the statement of Judge Deady in U. S. v. Block, 4 Sawy. 211, 213 [Fed. Cas. No. 14,609], was the introduction of distilled spirits into Alaska, punishable only by fine of not more than \$500 or imprisonment not more than six months. Act of July 27, 1868, c. 273, § 4; 15 Stat. 241."

Neither crime charged in this information is a capital offense. The proceeding by information, however, would still be obnoxious to the fifth amendment of the Constitution if an infamous punishment could be imposed by the court upon a conviction. In *Ex parte Wilson*, supra, it appears that the penalty for importing distilled spirits into Alaska in violation of the act of 1868 was a fine of not more than \$500 or imprisonment not more than six months. The offense was pronounced by Mr. Justice Field "an offense not capital, or otherwise infamous," and this opinion is approved by the Supreme Court. In this case the penalty provided by the Code of Alaska for a violation of the law, as charged in the first count, is a fine of "not less than one hundred dollars nor more than two thousand, or to be imprisoned for not less than one month or more than one year," and by analogy with the opinion in U. S. v. Waller it follows that the punishment is not infamous, and the information is not in conflict with the first prohibition in the fifth amendment to the Constitution.

Neither offense charged in this information is a capital crime nor an infamous crime, unless that contained in the first count is made a felony by that construction of its penalty clause urged by counsel for defendants. He insists with much force that the penalty affixed to the violation of the offense charged in the first count necessarily makes that crime a felony, which can only be prosecuted by indictment. "A felony is a crime punishable by death, or which is or may be punishable by imprisonment in the penitentiary." Section 184, p. 40, Carter's Code. The penalty fixed by section 472 for the crime charged in the first count is a fine "not less than one hundred dollars nor more than two thousand dollars, or to be imprisoned for not less than one month nor more than one year." The place of imprisonment is not fixed by law, and counsel for defendants urges that it may either be in the county jail or penitentiary, at the discretion of the court. The argument is that, because it "may be punishable by imprisonment in the penitentiary," the crime is necessarily a felony, and therefore only liable to prosecution by indictment.

But the true rule of interpretation upon this point is that given by Judge Boise in a leading case from Oregon:

"If we apply the well-known rule that criminal statutes are strictly construed, and not construed against the accused beyond their literal and obvious meaning, then it would follow that, as it is as obvious from the language of the statute that the imprisonment in this case should be in the county jail as in the penitentiary (neither place being mentioned), we think the statute should be construed as only creating a misdemeanor, and not a felony; for to give it the other construction would be construing the statute against the prisoner, beyond its literal meaning, as it would create the offense a felony, which is an offense of a higher grade than a misdemeanor, and inflict upon the convict incurable disabilities, which are not incident to a misdemeanor." Horner v. State, 1 Or. 267; Endlich on the Int. Stat. § 330; Brooks v. People, 14 Colo. 413, 24 Pac. 553.

A sentence to the penitentiary under the Alaska Code "for any term less than life suspends all civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority, or power during the term or duration of such imprisonment." Section 196, Criminal Code of Alaska. No such forfeitures follow upon sentence to the county jail. The general policy of mercy and leniency which the law shows to accused persons in all cases of doubt forbids that such grave and serious consequences be added to a sentence by a forced interpretation of a doubtful phrase. It follows that any imprisonment imposed as a part of a sentence for a violation of section 472 of the Code of Procedure must be in the county jail. By this interpretation the crime charged in the first count is determined to be a misdemeanor, and may be prosecuted by information.

Upon consideration of the other grounds of objection, they are overruled. It does not appear from the records and files of the court that the defendants have a license to sell liquor within the tent building upon lot 16, block 8. While the license issued by the clerk may not contain the description of the property where the defendants were authorized to sell liquor, the verified petition of the defendants for the license, and the order of the court instructing the clerk to issue it, did particularly describe the premises, and defendants had no license or authority to sell at any other place. The Code of Procedure does not specially require a criminal information to be verified by the oath of the marshal or prosecuting attorney. It was filed upon the verified complaint of two reputable witnesses, and that is sufficient.

Under the provisions of section 474 of the Code of Procedure, and upon the authorities cited, it is my opinion that misdemeanors, for which an infamous punishment is not provided by law, may be prosecuted in Alaska upon a criminal information filed by the marshal or any of his deputies, by the

prosecuting attorney or any of his deputies, as well as by indictment by the grand jury. Felonies can only be prosecuted upon indictment. The motion to quash the information is denied.

SUTTER et al. v. HECKMAN et al.

(First Division. Juneau. June 28, 1901.)

No. 1,164.

1. FISH—GRANT.

The right to take fish in the sea and tidal waters of Alaska is one common to all persons and no exclusive grant will be presumed.

2. PUBLIC LANDS—FISH—INJUNCTION—TIDE LANDS—WHARVES.

The owner of uplands bordering on the sea has littoral rights in the fronting tide flats and approaches to the sea, of which he cannot be deprived without due compensation; he may construct wharves and land fish nets thereon, and will be protected in the unobstructed use thereof by injunction.

3. PUBLIC LANDS—INDIANS.

By section 8 of the act of May 17, 1884 (23 Stat. 26, c. 53), Congress intended to protect Indians and settlers in Alaska in the exclusive possession of those lands only which they then actually used or occupied.

The plaintiffs, Carl A. Sutter, M. E. Martin, and H. C. Strong, bring this suit in equity against J. R. Heckman, Thomas Heckman, and the Alaska Packers' Association, a corporation, and in and by their bill allege, briefly, as follows: That, on the 17th day of May, 1884, one Charles Dickson, a native Alaskan Indian, was the owner, by right of occupation, appropriation, and possession, of certain lands described in their bill as 160 acres, and that the said Dickson for many years prior to that time had held, claimed, owned, and possessed said land, which was situated on Ton-

gass Narrows in Alaska, near the present site of the town of Ketchikan. That the tract of land is described as follows:

"Commencing at a point of rock on the eastern bank of Ketchikan creek where it empties into Tongass Narrows, which point is marked by a cross-cut into the rock one foot above high-water mark, thence running northerly and westerly along the shore of Tongass Narrows one mile to a rocky point similarly marked; thence at about a right angle back from said shore one-quarter of a mile to a cedar stake which is cut across; thence to the right at about a right angle, following a straight line generally parallel to said shore line, one-quarter of a mile distant therefrom, to a point one-quarter of a mile back from the said point to place of beginning, marked with a cedar stake; thence at a right angle to the right one-quarter of a mile to the place of beginning—and containing one hundred and sixty acres, more or less."

It is further alleged that the said Charles Dickson, on the 17th day of April, A. D. 1888, conveyed the land described as aforesaid to A. W. Berry, and that by various transfers, deeds, and so forth, title vested in the said complainants. It is further alleged in the said bill that the complainants and their grantors, since said transfer and conveyance to said Berry, have been in the actual possession of said land so claimed and conveyed by the said Indian; have made extensive improvements on said lands, amounting in value to \$40,000, or more; and that their possession has been open, notorious, and continuous during all of the years since said first conveyance by said native Indian.

It is claimed that said native Alaskan Indian used the said ground in and about the mouth of Ketchikan creek for the purpose of fishing and taking salmon at the proper season, and that by his said conveyance of the upland complainants acquired all the rights of the said Indian to the uplands bordering on said Tongass Narrows, and to all the fishing rights theretofore claimed by him on the tide flats.

running out from said uplands to the deep water of the sea; that the complainants have exercised these rights of fishery for many years, and have occupied said tide flats with their nets, taking salmon each year, and have removed the stumps, rocks, and débris from said tide flats every spring, so that they could be made useful for the purpose of landing their nets thereon; that during the last year the Alaska Packers' Association and the other respondents have interfered with the complainants in their right of fishery, and have come in upon said grounds, after they had been so prepared by the plaintiffs, and usurped the same largely, and have attempted to monopolize the grounds and prevent the complainants from fishing thereon; that the complainants' wrongs are irremediable, and that they have no speedy, complete, and adequate remedy at law.

The respondents, by their answer, deny that Dickson was the owner of the land conveyed by him; deny that he did convey; deny the various conveyances alleged in the bill, whereby title is vested in the several complainants; deny that respondents have used their nets in such a way as to interfere with the plaintiffs or their rights of fishing; deny that they have gone upon the said fishing grounds for the purpose of preventing the complainants from taking fish; and, finally, practically deny all the allegations of the bill of complaint.

The complainants reply, denying generally the new matter set forth in the answer.

On the issues so made, the case was referred to a referee to take the testimony, which in due time was taken and reported back to the court, and after argument the case submitted to the court on briefs.

Winn & Shackleford, for plaintiffs.

Oscar Foote, for defendants.

BROWN, District Judge. In passing upon the demurrer to the complainants' bill, and the hearing of notice to show cause, the court considered the various questions of law that have been raised by the briefs and in argument of this case, and, after considering the case anew, sees no reason for changing its view, before expressed, upon the question of law presented. The court held at that time that the complainants, by use and occupation of the lands described, had acquired no rights by prescription in the tide lands described, that the right of fishery in the deep waters and upon the tide flats along the Tongass Narrows on either side of Ketchikan creek was a common one, and that the parties to this suit were equally entitled to take fish in said waters, so long, at least, as neither party interfered with the other in the exercise of such rights of fishery; and, if the complainants were the owners in fee of the uplands claimed by the respondents their littoral rights would give them no control over the tide lands for the purpose of fishing ordinarily. But the court also held that the owners of the uplands which bordered upon the tide waters of Tongass Narrows had certain littoral rights, which at least gave them a right of way from their upland holdings to the deep waters of the sea for purposes of fishing or navigation.

Respondents now contend that the court could not give the complainants an exclusive right of way, and could not restrain the interference with that right by others desiring to fish at the same point, even if in some manner they should, in fishing there, interfere with the unrestricted going and coming of the complainants with their nets from their upland holdings to the deep waters of the sea, and in setting their nets and drawing them in again to the uplands, with the fish they might take therein; and they insist that this is a common right, and that all persons who desire may engage in fishing at this same point, and use all the rights and ad-

vantages that the complainants may, in landing fish either upon their uplands or upon the tide flats.

It may be conceded, for the purpose of this case, that in all navigable waters and arms of the sea in Alaska, and in all rivers where not forbidden by law, the right of navigating said waters and fishing therein is a common one to all the citizens of Alaska, and that no one, other perhaps than the natives, can acquire any exclusive right, either in navigating said waters or fishing therein. But, after admitting this, it is evident to the court that such admission does not aid the respondents in this action. Riparian rights and littoral rights are practically one and the same; certainly the same in principle. The word "riparian" is derived from the Latin "ripa," a river bank, and is used to describe the rights of owners of uplands along running streams or rivers. The word "littoral" is derived from the Latin "litus," the seashore, and is used—and properly so—in describing the rights of the upland owners along the seashore and tide lands. But, as before stated, the principle that controls largely the exercise of riparian and littoral rights is the same, and the authorities upon the rights of the riparian owner apply with equal force to the littoral rights of the owner of the uplands.

In the case of *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984, Justice Miller, speaking for the Supreme Court of the United States, says that the owner of the wharf in that instance "is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public, whatsoever those may be." "This riparian right is property, and is valuable, and, though it must be en-

joyed in due subjection to the rights of the public, which cannot be arbitrarily or capriciously destroyed or impaired, it is a right of which, when once vested, the owner can only be deprived in accordance with the established law, and, if necessary that it be taken for the public good, upon due compensation."

The case of *Yates v. Jude*, 18 Wis. 118, was relied on in argument as conclusive of the case then before the Supreme Court of the United States, the point relied on being that the laws of the state settled certain rights, which controlled in the matter then before the court. The Supreme Court, in answering, used the following language:

"This does not depend upon statute or local state law. The law which governs the case is the common law, on which this court has never acknowledged the right of the state court to control our decisions, except perhaps in a class of cases where the state courts have established, by repeated decisions, a ruling of property in regard to land only peculiar to the state."

The court concludes as follows:

"On the whole, we are of the opinion that Shepherdson, as riparian owner of a lot bounded by a navigable stream, had a right to erect this wharf, and that Yates, the appellant, whether he be regarded as purchaser or licensee, has the same right."

The rights of a riparian or littoral proprietor were well stated by Lord Shelburne in *Lyon v. Fishmongers' Company*, 1 App. Cas. 662. He says:

"The rights of a riparian proprietor, so far as they relate to any natural stream, exist jure nature, because his land has, by nature, the advantage of being washed by the stream; and, if the fact of nature constitute the foundation of the right, I am unable to see why the law should not recognize and follow the course of nature in every part of the same stream."

"The title to the soil constituting the bed of a river does not carry with it any exclusive right or property in the running water of

the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by every one having a right of access to it. It is, of course, necessary for the exercise of the riparian right, that the land should be in contact with the flow of the stream; but lateral contact is as good *jure naturæ* as vertical."

"It is true that the banks of a tidal river, of which the foreshore is left blank at low water, is not always in contact with the flow of the stream; but it is in such contact for a greater part of every day in the ordinary and regular course of nature, which is an ample sufficient foundation for a natural riparian right."

It is believed that all littoral or riparian rights depend upon the ownership of the land which is contiguous to and touches upon the water, and in tide water the upland must come to the edge of the water at low tide. It is said that these rights do not attach to any lands, however near, if they do not touch, tide water. In Gould on Waters, § 149:

"Riparian rights exist on the banks of navigable waters as well as of unnavigable streams. In the former case they are subordinate to the public right of navigation, while in a nonnavigable river all the riparian owners might combine to completely divert, pollute, or diminish the stream. In a navigable river the right of navigation would intervene, and prevent this being done. The rights actually exercised by the proprietors of land on the shores of tide water are often dissimilar to those enjoyed by proprietors above the flow of the tide, since salt water is less available in the arts or for irrigation than fresh; but a littoral proprietor, like a riparian proprietor, has a right to the water frontage belonging by nature to his land, although the only practical advantage of it may consist in the access thereby afforded him to the water for the purpose of using the right of navigation. This right of access is his only, and exists by virtue and in respect of his riparian property. It exists in the case of tide waters, even when the shore is the sovereign's property, both when the tide is out and when it is in. It is distinct from the public right of navigation and an interruption of it is an encroachment upon a private right, whether caused by a public nuisance or authorized by the Legislature."

Again, in Gould on Waters, § 150, it is said:

"This right is limited to the right of entry from one's own estate upon the highway and to pass from the highway to one's estate, and does not include the right of redress for an obstruction which is not against the front of plaintiffs' land, even when it entirely closes the highway."

It is now quite generally held (and it is believed to be the law) that littoral or riparian rights are a property interest of such value that they cannot be taken without compensation. In Wisconsin it was held that a railroad company, acting under the authority of the state, could not deprive the riparian owner of access to and from his land without compensation, although the road was constructed beyond the water's edge, which was the boundary of the riparian owner's land. In Breed v. Lynn, 126 Mass. 367, Haskell v. New Bedford, 108 Mass. 208, and several other Massachusetts cases, and in Pennsylvania v. Wheeling Bridge Co., 13 How. 518, 14 L. Ed. 249, and many other cases, it has been held that, if a city so constructs its sewers and drains discharging their contents into navigable waters that the contents are not carried away by the tides or current, but accumulate in front of the wharf, and obstruct the access of vessels, the owner of the wharf may obtain relief by injunction against the continuance of the nuisance. It is also said:

"The right of unobstructed access is also limited to the front of the land, and does not include the right, if the riparian owner fills out his entire frontage, to have the docks or water spaces on either side kept open in order that he may have access to the sides of his wharf."

It is also said:

"If a wharf is extended not only in front of one's own land, but also in front of that of an adjoining proprietor, it is an encroachment on the latter's right, which may be redressed by injunction."

We, therefore, have these propositions fairly well settled by the decisions: (1) That the owner of the upland adjoining tide waters has littoral rights in the tide flats and the approaches to deep water that are valuable, and are property rights, of which he cannot be deprived without due compensation; (2) that he may construct wharves upon these tide flats running out from his uplands, and in front thereof, to deep water, unless he shall so construct them as to make his wharves a nuisance or a purpresture, and thereby to impede navigation, and the exercise of those rights enjoyed in common by all people. It is also settled by high authority that the right to take fish in the waters of the sea, and even along the tide flats, is one common to all of the citizens. In what, then, are the property rights of the littoral owner greater or more sacred than the common right of all the citizens to take fish? The right of the littoral owner to construct a wharf in front of his land is unquestioned, and it is clear that by such construction he deprives all others of the right to fish or in any other way to occupy the ground covered by his wharf. It is a matter of common information that driving piles and the construction of wharves thereon make the taking of fish beneath the wharf practically impossible. Are we to say, then, that the littoral owner's right of way across the tide flats to deep water permits him to occupy the tide flats with his wharf, whereby the right of fishery is made impossible, and yet that by cleaning the flats from débris and other material that gathers thereon, and making them practical for the use of his nets and for the purpose of drawing them across the same and landing the fish upon the uplands he acquires no higher or better right in this behalf than that which inures in common to all citizens—to fish and navigate the seas and rivers of our country? It is believed that the principle which gives the littoral owner the right of way and the right

to construct a wharf in front of his upland across the tide flats to the deep water may be also as clearly and reasonably applied to a right of way that shall permit the littoral owner to exercise certain possessory rights as a right of way to the deep water of the sea over the tide flats, and that he may acquire certain possessory rights in such right of way by cleaning away the débris and material deposited thereon, and making it a clear and proper roadway from the deep water to the upland, over which he may pass and re-pass with his nets in the act of fishing, unobstructed and uninterrupted by the acts or appliances of those who have a common right to fish in the waters of the sea and the rivers of Alaska.

It appears from the testimony in this case that the nets commonly used by fishermen in taking salmon are from a hundred to several hundreds of fathoms in length. A reasonable right of way to deep water for the purpose of setting and bringing in these nets to the high land would certainly seem to be not less in width than the shortest nets used, viz., 600 feet, and that, in going over this right of way to and from the upland the complainants should not be impeded or obstructed by any others who may have the common rights of fishery at this point. The possessory rights exercised over this right of way by the littoral owners in cleaning the débris, stumps, timber, brush, and stones therefrom gives the complainants as clear a right thereto as if the same was covered by a wharf. It is not intended that this right of way shall give the complainants exclusive rights of fishery upon the tide flats, but it is intended that in pursuing their vocation in taking fish from the deep waters or along the tide flats in going and returning to and from their upland holdings they shall be in no wise interfered with or hindered by other fishermen. It seems clear to the court that to this extent the property rights of the littoral owners

must be protected by law, and that, as in the case of the construction of a wharf, any interference with the right of the littoral owner, or any interference with the littoral rights by the upland owner, may be prevented by the restraining order and injunction issued from this court.

It is claimed by the defendants that under the act of Congress of May 14, 1898 (30 Stat. 413, c. 299), applicable to Alaska, the language used in section 10 of said act [U. S. Comp. St. 1901, p. 1469], gives all persons ingress and egress on the waters of all streams, whether navigable or otherwise. It is even claimed that every upland claim is subject to this servitude. The section referred to contains the following provisions:

"Provided, that no entry shall be allowed under this act on the lands abutting on navigable water of more than eighty rods: provided further, that there shall be reserved by the United States a space of eight rods in width between tracts sold or entered under the provisions of this act on lands abutting on any navigable stream, inlet, gulf, bay, or sea-shore, and that the Secretary of the Interior may grant the use of such reserved land abutting on the waterfront to any citizen or association of citizens, or to any corporation incorporated under the laws of the United States or under the laws of any state or territory, for landings and wharves, with the provision that the public shall have access to and proper use of such wharves and landings at reasonable rates of toll to be prescribed by the Secretary of the Interior. And a roadway sixty feet in width parallel to the shore-line, as near as may be practicable, shall be reserved for the use of the public as a highway."

Without discussing the meaning of the section referred to, it is sufficient to say it has no application to the question now before the court, and, even if it had, it would not give the public generally the right to cross the upland holdings or the uplands held and patented by the United States to its citizens.

The rights of the complainants in this case are determined by the act of Congress approved May 17, 1884 (23 Stat. 24,

c. 53). Section 8 of said act, or that part thereof more particularly applicable to the case under discussion, reads as follows:

"Provided, that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

The words "lands actually in their use or occupation, or now claimed by them," are very broad, and would, perhaps, permit persons to claim any extent of territory, or would permit Indians to claim any extent of territory, and to convey their said possessory claim or right to others. If their claim or possessory right was a valuable one, it would be one that might be conveyed to others; and if, under this act, the Indian Charles Dickson was claiming any particular tract of land at the time said act of Congress was approved, he could convey his possessory right and interest in and to such claim to others, who might continue to occupy and possess the same and use the same thereafter, or who might continue to exercise the same possessory rights over the land as had been exercised by the native Indian Charles Dickson.

The evidence in this case tends to show that the Indian Charles Dickson did occupy certain lands bordering on the tide waters of Tongass Narrows in Alaska, and at the mouth of the Ketchikan river or creek, on the 17th day of May, 1884, and had used, occupied, and claimed the same for fishing purposes for a long period prior thereto; and it is equally apparent from the testimony in this case that the Indian Charles Dickson did not claim and did not use for any purpose the whole of the 160 acres described in the deed made and executed by Dickson to A. W. Berry. This was an effort evidently made by the white man, or a scheme entered into by Mr. Berry, and perhaps others, to secure, under the

act referred to, a possessory claim or title to much more land than ever had been claimed or used by the Indian Dickson. This deed by Dickson, while perhaps not acknowledged in accordance with the statute, was a good common-law deed, and conveyed all the right, interest, claim, and possession held by the Indian Dickson at the time of the passage of said act of Congress, and at the time the deed conveying the title to Berry was signed. This deed conveyed his possessory rights and his fishing rights, whatever they were, in and about the mouth of Ketchikan creek. It gave Berry the right to such uplands as were occupied by him on the said tide waters, in which he and his grantees were and should be protected under the act of Congress, to the same extent that they would be under a patent, until the Congress of the United States shall otherwise legislate. The rights of the Indian and the rights of Berry and his grantees were fixed and determined under the act of 1884, and not by subsequent legislation referred to by defendants in their brief. It is believed that the language used in the act of Congress of May 17, 1884, "used or occupied," limits the following words, "or claimed by them," used in the same connection. Clearly, Congress never intended that an Indian or white man might say to his neighbors, "I claim a hundred thousand acres, or a million acres, or any other amount of land, between certain boundaries or natural landmarks, as my individual property," and that such a claim would be protected by said acts, and made sacred to the rights of the claimant as a property right. Undoubtedly, Congress did intend by the act to protect possessory rights, and to protect the rights of possession of those who were actually in the use and occupation of any particular scope or section of land without reference to the acreage thereof.

I conclude, therefore, from the testimony in this case, although the same is very general, that the Indian Dickson

did use and occupy a few acres of land bordering upon the tide waters of Tongass Narrows, in and about the mouth of Ketchikan creek, that were held and used by him in fishing and taking salmon at that point; that certainly the land used and occupied by him would at least be equal to the 600 feet in width of ground by the court given as a right of way to the deep water—that is, the Indian occupied at least 300 feet on either side of Ketchikan creek, at or near the mouth thereof, where the creek empties into the tide waters of Tongass Narrows; that the grantees of said Dickson, these plaintiffs, have a possessory right to so much of said land, at least, in which they should be protected by said act of 1884, and such other lands as the said grantors have held actual possession of, and have reduced to actual use and occupancy, since said conveyance was made. Considering all the testimony in said case, the court can find no good reason for changing the views before expressed in this case on the hearing for a temporary restraining order. It follows, therefore, that a permanent injunction will be granted to the complainants in this case to restrain all interference with their right of ingress and egress to the uplands in and about the mouth of Ketchikan creek and on the tide flats of Tongass Narrows to the extent of 600 feet—300 feet on each side of said creek.

THE NUGGET.

(Second Division. Nome. September, 1901.)

(No. 21.)

1. COURTS—ADMIRALTY JURISDICTION.

The admiralty jurisdiction of the district court of Alaska is coextensive with that of a district court of the United States. Its common law and equity practice is limited by the codes of Alaska, but its admiralty practice is determined only by the course of admiralty proceedings in the United States district courts.

Libel to Recover Seaman's Wages.

WICKERSHAM, District Judge. This is a suit in admiralty for the recovery of seaman's wages. The matter was referred to a commissioner to take testimony, and report his findings of fact and conclusions to the court. Pending the examination before the commissioner, an amended libel was filed on behalf of the libelants and other persons who worked on board the vessel, and who claim wages therefor. The claimants now object to the report of the referee, and move to set aside the order appointing the referee, and to quash all the proceedings thereunder, upon several grounds. The first objection urged by claimant is that the action could not be sent to a referee under the provisions of chapter 20 of the Civil Code of Alaska (Act June 6, 1900, c. 786, 31 Stat. 364). That may be conceded, and still the reference be perfectly proper under the admiralty rules adopted by the United States courts, as well as under the admiralty rules of this court. The admiralty jurisdiction of this court is not bound by or prescribed in the Code of Alaska. Its admiralty jurisdiction is coextensive with that of District Courts of the United States, and the power of

the court to refer the case to a commissioner is conferred by admiralty rule 44, as well as by admiralty rules 78-85 in this court. While the practice in all common-law and equity practice will be determined by the Code of Alaska, the admiralty practice is determined by the course of admiralty proceedings in the United States courts. The objections made to the referee's report upon those grounds will be overruled; the amended libel will be filed by the clerk, and the objections thereto overruled.

Upon the examination of the testimony taken before the referee, it appears that Dickey and Howard owned the vessel in the latter part of the year 1899, and left her at Nome, in charge of their agent, who, some time in the winter and spring of 1900, sold her to one Abramisky. That this purchaser employed one Clark as captain and manager of the boat, and that Clark employed the libelants, and agreed to pay them the amounts sued for in this action. On December 12, 1899, at San Francisco, Cal., Dickey and Howard sold the steamer to the claimants, the Nome Lighterage & Warehouse Company, but no notice of this fact was received by the agent of Dickey and Howard, or by any one else at Nome, until the opening of navigation in June. The agent of Dickey and Howard had, in the meantime—the date not appearing quite certain—delivered possession of the boat to Abramisky, and in the spring, after the opening of navigation, it was put into commission as a tugboat in the harbor, during which time the services sued for in this action were performed by the libelants. I am satisfied, from all the evidence in this case, that the agent of Dickey and Howard had authority to dispose of the boat in the manner in which he did, and that Abramisky came into possession of her in good faith by purchase from the agent. The fact that she was afterwards forcibly taken away from the purchaser by the revenue cutter Bear, and turned over to the claim-

ants in this action, does not detract anything from the good faith of the libelants. They are entitled to be paid for their services performed on the boat while in the possession of Abramisky under his purchase from Dickey and Howard's agent. The motion of the claimant to vacate and set aside the proceedings before the referee will be denied, and the motion of the libelants to confirm the report of the referee allowed. The libelants will have judgment for the amount found due by the referee, and such further proceedings in this action may be had as are necessary to recover said amount.

U. S. ex rel. McINTOSH v. PRICE et al.

(Second Division. Nome. September 19, 1901.)

No. 48½.

1. INJUNCTION—CONTEMPT.

The defendants were regularly enjoined from working the mine in dispute, and a subsequent order provided that, in the event the defendants gave an indemnifying bond in the sum of \$10,000, "they shall be allowed and permitted, without interference by the plaintiffs, their agents, successors, or employés, to mine and operate" the claim. Plaintiffs thereafter entered, and drove the defendants from the claim. *Held*, that the injunction had been dissolved by the modifying order, and that plaintiffs were not guilty of any act of contempt of court.

This is a contempt proceeding against the defendants under chapter 58, pp. 271-274, Carter's Alaska Code (Act June 6, 1900, c. 786, 31 Stat. 429). The evidence discloses that the defendants, Price and Tremper, brought an action in this court entitled Price v. McIntosh (No. 242) post, 286, and, in that action an injunction was issued November 28, 1900, forbidding the defendants therein from working or mining upon the ground in controversy, known as the "California

Fraction," pending the final determination of the action. The plaintiffs, Price and Tremper, were required to give an injunction bond in that case, which they did, in the sum of \$10,000, and the same was approved by the court.

This injunction continued in force unmodified until August 7, 1901, when, upon application of the defendant McIntosh, an order was made by Judge Noyes, over the objections of the plaintiffs, which provided:

"It is ordered and adjudged that the defendants be, and they are hereby, enjoined and restrained from working said mining claim described in plaintiffs' complaint and defendants' answer, or any part thereof, until the final determination of this action, unless defendants give a good and sufficient bond, to be approved by this court, to the plaintiffs, in the sum of \$10,000, conditioned that they will faithfully account for and pay over to plaintiffs all gold and gold dust extracted by them from said claim, over and above the actual and necessary working expenses incurred in extracting said gold or gold dust, should said plaintiffs ultimately prevail in said suit, and be ultimately decreed and determined to be the owners and entitled to the said mining claim and the gold and gold dust extracted therefrom.

"It is further ordered and adjudged that, in the event said defendants shall give said bond as above required, they shall be allowed and permitted, without interference by the plaintiffs, their agents, successors, or employés, to mine and operate" the "California Fraction."

This modified order of August 7th also provided that the defendants should keep a full account of all their receipts and disbursements, and of the gold extracted, and render an account thereof to the court, so that a full and proper settlement might be made if the title was found to be in the plaintiffs, Price and Tremper.

It appears from the evidence in this proceeding that subsequent to the 7th day of August, the defendants herein, Price and Tremper, went upon the ground in controversy with certain of their employés, and worked the same, and ex-

tracted gold therefrom, and ousted the claimant McIntosh and his associates, for which alleged defiance of the order of August 7th they were, by an order of this court made on September 17th, cited to show cause why they should not be punished for contempt. The matter came on for hearing on the 18th day of September, the defendants, Price and Tremper, being represented by their attorney, who made a special appearance for them, and objected to the jurisdiction of the court, and contended that upon the face of the record the court had no jurisdiction to punish the defendants for contempt.

John L. McGinn, Dep. Dist. Atty., for plaintiff.
Sullivan & Fink, for defendants.

WICKERSHAM, District Judge. If the defendants are guilty of contempt, it is under the fifth subdivision of section 609, p. 271, of Carter's Code (Act June 6, 1900, c. 786, 31 Stat. 429), for the alleged "disobedience of any lawful judgment, order, or process of court." From the admitted facts in this case it appears that, after the court made its order and injunction of November 28, 1900, and also its order of August 7, 1901, the defendants in this proceeding, Price and Tremper, went upon the property in question, and worked the same, and extracted gold therefrom, and forcibly ousted and drove McIntosh and his associates therefrom, and took forcible possession thereof.

It is the duty of every good citizen to obey the law, and to obey the lawful judgments, orders, and processes of the court. It is a contempt of the court not to do so, and the statute has fixed a punishment as for a crime upon the conviction for such contempt. It was the duty of these defendants to obey any lawful orders of the court made in this case, and for any willful disobedience thereto they may be

punished. But it is equally the duty of the court to confine itself within its jurisdiction.

The order made by Judge Noyes on November 28th, enjoining all of the defendants in the original action, No. 242, was an injunction in plain, unmistakable terms. That injunction continued in force until August 7, 1901, when the order was made permitting the defendant McIntosh and his associates to go into possession of the property upon giving a \$10,000 bond. Whatever may be said of this order of August 7th, its effect was to vacate and dissolve the injunction granted at the suit of the plaintiffs on November 28th, and when the defendant McIntosh and his associates had given their bond for \$10,000, and had entered into possession of the "California Fraction," the injunction theretofore made against them was dissolved. The order of August 7th contained no injunction or restraining clause whatever against Price and Tremper. It only provided that, upon giving the bond in the sum of \$10,000, McIntosh and his associates "should be allowed and permitted, without interference by the plaintiffs, their agents, successors, or employés, to mine and operate" the "California Fraction." While the language is somewhat involved and ambiguous, a careful consideration leads persuasively to the conclusion that its legal and only effect was to dissolve the injunction of November 28th, and leave the parties in exactly the same situation in which they were at the time it was issued. When Price and Tremper went upon the claim thereafter, and mined thereon, they violated no order or process of this court forbidding them to do so. It may be possible that they were guilty of a trespass and a wrong, but it was not a violation of any lawful judgment, order, or process of this court, and their act in doing so was no more a contempt of this court than would have been a trespass of any third party. True, the matter was still in litigation between Price

and Tremper as plaintiffs and McIntosh and his associates as defendants, but there was no order of court or injunction restraining either of them from going upon the premises in dispute.

For these reasons this court is without jurisdiction to punish the defendants, or either of them, for contempt in this proceeding, and the motion to vacate and set aside the order upon which this proceeding is based, and to quash and dismiss all the proceedings in relation thereto, will be allowed, and the proceedings will be dismissed, at the cost of the petitioners.

BATES v. MAYOR AND COUNCIL OF NOME.

(Second Division. Nome. September 30, 1901.)

No. 523.

1. MUNICIPAL CORPORATION—ELECTIONS—INJUNCTIONS—TAXPAYERS.

A taxpayer in an incorporated town in Alaska has a sufficient interest to enable him to maintain a suit in equity to restrain municipal officers from incurring or paying the expenses of an election called without authority and in violation of the law.

2. SAME—OFFICERS.

An ordinance providing for the appointment by the mayor of the successor to a councilman who resigns is void for conflict with section 200 of the Civil Code of Alaska, Act June 6, 1900, c. 786 (31 Stat. 520), which provides that such successor shall be "elected."

3. SAME—NOTICE—RULES.

Where the organic act provides that the council shall have power "to make rules for all municipal elections," an election called by the mayor without any general or special action by the council is void, and will be enjoined.

4. SAME—WARDS.

The common council in incorporated towns in Alaska is not authorized by law to divide the town into wards, and cause the

election of councilmen in such wards, by less than a majority of all the electors in the town.

The plaintiff in this action alleges that he is a citizen of the United States, a qualified elector and a resident taxpayer of the city of Nome, and brings the suit on behalf of himself and all others similarly situated. He alleges that he has substantial property interests within the corporate limits of Nome, subject to taxation, and taxed; that by reason of holding the election mentioned in the complaint there will necessarily result a great and useless expenditure of the public funds of said city of Nome out of its public treasury, to the irreparable loss and injury to the plaintiff and other tax-paying citizens. He also alleges and shows that by reason of the passage of the ordinances set out in the complaint, dividing the city into wards, and the election of a single councilman to each ward, he will be deprived of his legal right to vote for all members of the city council of Nome except one. He asks for an injunction to prevent the defendants from holding the election on September 30th, and a decree declaring the ordinances set out in the complaint to be null and void.

The complaint further shows that Geiger, Geise, Rickard, Hoxsie, Harris, and Stevens, together with one McPhee, were elected councilmen of the city of Nome at the first election held in April, 1901, under chapter 21 for "the incorporation of towns" contained in the Civil Code of Alaska, passed June 6, 1900, c. 786 (31 Stat. 520). That thereafter, and on the 4th day of September, the city council passed an ordinance—No. 51—conferring upon the mayor the power to fill vacancies in the city council that might occur through death, resignation, or other cause. On the 9th day of September, 1901, Ordinance No. 52 was passed, dividing the city of Nome into seven wards, and describing the boundaries thereof. On the same day the city council passed Ordin-

nance No. 53, providing for the election of members of the city council by wards, which reads as follows:

"That at the next annual election for said city, the resident electors of each ward, as numbered and described in Ordinance Number fifty-two (52), shall be entitled to elect one qualified person to represent such ward in said municipal council, and a separate polling place shall be provided in each ward for this purpose, and the votes cast in each ward shall be canvassed separately, and the person receiving the highest number of votes cast in each ward shall be declared to be the person representing such ward in said municipal council."

The complaint alleges that after the passage of the ordinances hereinabove mentioned McPhee resigned as member of the council from the Second Ward; that his resignation was accepted, and that, without any further action of the said council, the mayor issued a call for an election to fill the vacancy; that the election will be held on the 30th day of September, 1901; that the mayor appointed the defendant Wilkinson as judge of the said election, and defendants Nestor and Humber as clerks, and that, unless restrained, the said election will be held, and the said useless expenditure of the public funds will be incurred; that by reason of holding the election in the Second Ward, as described in Ordinance No. 52, all the electors residing within in the city of Nome, except those residing in the Second Ward, will be denied permission to vote for councilmen at said special election; and that the accounts incurred in holding the election will be audited and paid by the council, if not restrained. The defendants appear by their attorneys, and demur to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action, or to entitle the plaintiff to the relief prayed for, or any relief.

T. M. Reed, Jr., and C. S. Hannum, for plaintiff.

J. W. Fenton and P. C. Sullivan, for defendants.

WICKERSHAM, District Judge. The first question urged in the argument of the demurrer, though not specially raised by the demurrer itself, was that the plaintiff had no legal capacity to sue and maintain the action as a taxpayer or disfranchised elector. It is contended that the complaint does not state facts which show any such interest in the plaintiff as will justify the court in granting an injunction upon his application. The demurrer admits the truth of the allegations that the plaintiff is a taxpayer, and is taxed for the public fund; that, unless restrained, defendants will hold the election, and incur the expense thereof; and that the plaintiff has no other plain, speedy, and adequate remedy to prevent the fund being thus depleted. It also admits his allegation that he will not be permitted to cast his vote at the election, though a qualified elector residing within the corporate limits of Nome, for the reason that he does not live within the boundaries of the Second Ward. Upon these admitted facts, is not the plaintiff a proper party to bring, and may he not maintain, the suit at this time, to prevent a waste of public funds?

The Supreme Court of the United States, by Mr. Justice Field, has laid down the rule as follows:

"Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they, in common with other property holders of the county, may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the state courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse, and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the taxpayers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their power, to create burdens upon property holders. Certainly, in the absence of

legislation restricting the right to interfere in such cases to public officers of the state or county, there would seem to be no substantial reason why a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate powers." *Cramp-ton v. Zabriski*, 101 U. S. 601, 25 L. Ed. 1070.

Public officers are public servants, and all funds intrusted to them are public trust funds. The jurisdiction of courts of equity in this class of cases rests in the doctrine of trusts, and, while equity will not interfere to control the officers of a municipality while acting within the limits laid down for them by law, yet when they go outside of their well-defined jurisdiction, and threaten to misappropriate the funds intrusted to them, a court of equity will, at the suit of a taxpayer, grant an injunction to restrain the illegal payment. It can make no difference in principle whether the amount threatened to be misappropriated be large or small. If it is a portion of the public funds, and is to be paid out without authority, and in violation of law, the proposed payment may be enjoined at the suit of a taxpayer. It follows that a taxpayer has a sufficient interest to enable him to maintain a suit in equity to restrain the municipal officers from incurring or paying the expenses of an election called without authority and in violation of law.

It is urged in argument, though not raised by the demurrer, that this court will not entertain jurisdiction to control the election of officers by injunction. It would not do so if they were acting within the limits of their jurisdiction as established by the law; it would not undertake to control either the legal judgment or discretion of such officers by an injunction; but where they assume to perform ministerial duties in pursuance to a void ordinance, or in the absence of any legislative authority whatever, the court, in the proper performance of its duty, has jurisdiction by injunction to prevent the proposed illegal action; and this may be done

at the suit of a taxpayer. *State of Wisconsin v. Cunningham* (Wis.) 51 N. W. 724, 15 L. R. A. 561; *State of New Jersey v. Wrightson* (N. J. Sup.) 28 Atl. 56, 22 L. R. A. 548; *State of Kansas v. Eggleston*, 34 Kan. 714, 10 Pac. 3; *Buck v. Fitzgerald* (Mont.) 54 Pac. 942; *Krieschel v. County Commissioners*, 12 Wash. 428, 41 Pac. 186; *Rickey v. Williams*, 8 Wash. 479, 36 Pac. 480. Whether or not a qualified elector, whose right to cast his vote is restricted by the unauthorized and illegal act of public officers, may not also restrain such violation of his lawful right, need not be decided in this case, although very high authority seems to lean toward the affirmative. *State v. Wrightson*, *supra*. I have no doubt of the jurisdiction of this court to hear and determine this action upon the allegations in the complaint showing plaintiff's interest as a taxpayer.

The demurrer raises the single question that the complaint does not state facts sufficient to constitute a cause of action. All the law relating to the incorporation of municipal corporations, their power to hold elections and appoint election officers in Alaska, is found in chapter 21 of the Civil Code of Alaska, Act June 6, 1900, c. 786 (31 Stat. 520). Section 198 of that chapter provides, that any community having 300 permanent inhabitants may incorporate as provided therein. A petition shall be presented to the district judge, which shall set forth the boundaries of the proposed town, and state other facts showing the necessity of the incorporation. Notice shall be given, objections may be heard before the court, which, "if satisfied that the public interests require the incorporation, by order may make changes in the boundaries, and shall set forth the name thereof and give due notice of an election for the purpose of determining whether the same shall be incorporated. At such election, the qualified electors of the community may elect a common council of seven members, who shall have the qualifications of elect-

ors, such election to be under the control of a board of electors composed of three bona fide residents and property owners in the corporation, to be appointed by the court or judge."

Section 199 prescribes the qualifications of an elector within such incorporated town as follows:

"The qualification of an elector for the first and all subsequent municipal elections shall be as follows: He shall be a male citizen of the United States, or one who has declared his intention to become such, and of the age of twenty-one years, and shall have been a bona fide resident of Alaska for one year, and of the proposed corporation for six months, next prior to the date of election, or any subsequent one: provided, there shall be added to the foregoing qualification in any election to determine whether or not a community shall incorporate the following qualification: Every elector shall be the owner of substantial property interests in the corporation."

Section 200 then provides for the canvass of the votes at the first or incorporating election, for declaring the result, and that a certificate shall be filed by the election board with the clerk of the district court, the secretary of the district, and the commissioner residing in the corporation.

"After filing such orders, the corporation shall be deemed complete and the councilmen shall, after duly qualifying before the United States Commissioner residing in the corporation, enter upon the duties of their office, and shall hold the same for one year or until their successors shall be elected and qualified."

Under the provisions of the foregoing sections, the town of Nome was incorporated, and a council of seven members elected in April, 1901. One of the councilmen so elected was McPhee, who, after the passage of the ordinances set out in the complaint, and prior to bringing this action, resigned his office, and left the District of Alaska. Under the provisions of Ordinance No. 54, he had been, just previous to his resig-

nation, assigned to Ward No. 2 as created and bounded in Ordinance No. 52. The election complained of in the complaint is called to provide his successor, and is restricted to the said Second Ward.

Section 201 confers certain powers upon the common council. It contains the only grant of power made by law to the common council. The third subdivision grants the power "to make rules for all municipal elections: provided, no officer shall be elected for a longer term than one year." This is a very comprehensive and important grant of power. It is the only one made by Congress upon that subject to the common council of incorporated towns of Alaska.

Under this grant of legislative power, the council passed Ordinance No. 51, empowering the mayor to appoint a person to act as councilman to fill any vacancy that might thereafter occur by death or resignation. This ordinance is in conflict with the grant of power, as well as the last clause of section 200, which provides that such successor "shall be elected and qualified." This clearly excludes any power on the part of the council to fill vacancies in the council except by election.

It is not claimed, however, that there is any intention on the part of the mayor to appoint a successor to McPhee. The subsequent allegations of the complaint show that soon after his resignation, and upon September 24, 1901, the mayor of Nome, without any action of the common council by rule or ordinance calling for such election, issued a notice for an election to be held on September 30, 1901, in the Second Ward, as bounded and described in Ordinance No. 52, to elect a successor to "fill the vacancy caused by the resignation of Councilman McPhee."

This election seems to have been called by the mayor in pursuance to the supposed authority granted by Ordinance No. 56, supra. The action of the mayor, however, is without

authority or law, for several reasons. First. The action of the council in assigning the original seven councilmen to wards, without regard to their residence in the same, was void, and without authority of law. All members of the common council must be elected at large by all the electors of the town. *State of Minnesota v. Fitzgerald* (Minn.) 32 N. W. 788. Second. The resignation of McPhee created a vacancy in the office of councilman, to be filled by all the electors residing within the limits of the town of Nome, and not those, only, residing within the Second Ward. Third. Because by the terms of Ordinance No. 56, even if the election could be held under its provisions, "one week's notice of such election to fill such vacancy shall be given to the electors of the ward in which said vacancy occurs in such manner as said municipal council may elect."

The only authority given to the council to call or hold such elections is the power "to make rules for all municipal elections." A "rule" is that which is prescribed or laid down as a guide to conduct; that which is settled by authority or custom; a regulation; a prescription; a minor law; a uniform course of things. A rule of court means uniformity, regulation in practice alike to all suitors, established and fixed, as much as a statute itself, and known to all litigants and attorneys. *Spangler v. Atchison Ry. Co.* (C. C.) 42 Fed. 306; 21 Am. & Eng. Ency. of Law, p. 437.

In our American system of managing city elections, the "rule" is always manifested in the form of an ordinance passed with the consent of a majority of the common council, approved by the mayor, and made public as a law. It must have been so understood by Congress. It follows that the council can only provide for calling elections, appointing election officers, canvassing the returns, and declaring the result by ordinances, either general or special. What board, for instance, would canvass the votes as required in Ordin-

nance No. 53, or declare the result of the election, or issue and sign the certificate of election? The action of the mayor in calling the election of September 30th was without the sanction of any ordinance authorizing it, and is void. The appointment of the election officers, defendants herein, was equally without authority by ordinance, and must be held void. The election being wholly without authority, and in violation of law, affords no excuse or justification for incurring the expenses incident thereto, which must be paid from the public fund raised by taxation within the town. The plaintiff, as a taxpayer, has an interest in protecting the fund. The demurrer to the complaint will be overruled, and the injunction prayed for may issue.

UNITED STATES V. ALASKA PACKERS' ASS'N AND BABLER.

(First Division. Juneau. October Term, 1901.)

No. 171.

1. CORPORATION—INDICTMENT.

A corporation may be indicted for any act done or omitted in violation of law within the sphere of its corporate capacity, or to an undefined extent beyond.

2. SAME—FELONY—MISDEMEANOR.

A corporation may not be indicted or punished for the commission of an act which is in the fullest sense ultra vires, and contrary to its corporate nature and purposes; and under this rule it may be indicted for the commission of either a felony or a misdemeanor, where the penalty may be either a fine or a forfeiture.

3. INDICTMENT—INTENT.

An indictment must charge that the act was unlawfully done, with wrongful intent.

The corporation defendant was indicted with another for taking salmon in violation of law.

Robert A. Friedrich, U. S. Dist. Atty., for plaintiff.
Arthur K. Delaney, for defendants.

BROWN, District Judge (orally). In the case of the United States v. The Alaska Packers' Association and J. Babler, an indictment has been returned by the grand jury, which, omitting the formal parts, is as follows:

"The said Alaska Packers' Association, a corporation, and J. Babler, at or near Stikine river, within the said District of Alaska, and within the jurisdiction of this court, on the 25th day of August, in the year of our Lord one thousand nine hundred, and on divers and sundry occasions and days prior thereto, did wrongfully, knowingly, and unlawfully, between the hours of midnight on Friday, the 24th day of August, 1900, and 6 o'clock ante meridian, on Sunday, the 26th day of August, 1900, fish for and take, from the tide waters of the territory of Alaska, by the use of nets and other devices, a large quantity of salmon fish; and as the grand jurors, duly selected, impaneled, sworn, and charged as aforesaid, upon their oaths do say: that the Alaska Packers' Association, a corporation, and J. Babler, did then and there commit the crime of taking and fishing for salmon in waters of the territory of Alaska, between the hours of midnight on Friday and six o'clock ante meridian of the Sunday following, in manner and form as aforesaid, contrary to the form of the statute," etc.

To this indictment there was interposed on behalf of the defendants the following demurrer:

"Come now the defendants, and demur to the indictment herein on the ground that it appears on the face thereof that it does not substantially conform to the requirements of chapter 7, title II, of the Criminal Code [Act June 6, 1900, c. 786, 31 Stat. 342], in that it does not set forth a statement of the facts constituting the offense in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended; that such indictment is not direct and certain as regards the crime charged and the particular circumstances of the crime charged. And the said defendant corporation, the Alaska Packers' Association, separately demurs to said indictment on the-

ground that it appears from the face thereof that the indictment does not set forth any offense against the said defendant corporation; that is to say, said indictment does not charge any offense for which the said defendant corporation can be lawfully indicted."

It was this latter clause of the demurrer that was called to the attention of the court, and which I have considered under the indictment presented, and I will say very frankly that there is no doubt whatever in my mind of the soundness of the contention of counsel for the defendant that the peculiar form of the statute covering this case makes the offense a felony; but I am equally well satisfied that, because it makes such offense a felony, it is no answer to the charge, and that a corporation may be punished upon indictment for a felony as it may for a misdemeanor. It is urged in argument that, if the crime stated in the indictment is a felony, then the corporation could not be punished, and that, therefore, the charge by the grand jury is without force or effect.

It is true that a corporation cannot be imprisoned or hanged, but a corporation can be fined just as a natural person can, when it does any act in the line of its business resulting in a violation of the law. If, in the course of its business, it kill a person, then if the law fix a fine or damages for such unlawful killing, even though it were a felony, the law could be enforced for the payment of such fine, and the property of the corporation made to answer; and where life is taken by a corporation in pursuing its business, and it is compelled to answer civilly because of such wrongful death, there is no good reason why it may not be required to answer criminally for the same act done in the line of its business, if the law so provides. Indeed, it seems from a very slight investigation of the question that this has practically been the law always. There are a few old cases that go to the effect that a corporation cannot be punished for a felony, but all the more modern cases are the other way. In

discussing this question, Bishop, in his work on Criminal Law, puts it very fairly. He first defines what a corporation is in legal contemplation, and then proceeds with the discussion:

"A corporation, especially as viewed from the standpoint of the criminal law, is an artificial creation of the law, consisting of one or several persons endowed with a part of the duties and capabilities of an unincorporated man. To determine what part and how much it covers, we look at its particular nature and objects, and the terms of the act of incorporation. Hence a corporation cannot, in its corporate capacity, commit a crime by an act in the fullest sense ultra vires and contrary to its nature. But within the sphere of its corporate capacity, and to an undefined extent beyond, whenever it assumes to act as a corporation, it has the same capabilities of criminal intent and of act—in other words, of crime—as an individual man sustaining to the thing the like relations."

This definition is new, and, so far as the court is aware, does not appear elsewhere in the book, but it is believed to be as accurate and as exact as the present condition of the legal authorities permit.

Some have stumbled on the impossibility of the artificial and scutless being called a corporation having an evil mind or criminal intent. In this view it was said in an old case that, while a corporation is not indictable, yet its individual members are. But the author explained in another work that, since a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done. If, for example, the invisible, intangible essence of air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can also intend to do those acts, and can act therein as well viciously as virtuously. The ordinary crimes, wherein only general evil, or the mere purpose to do the forbidden thing, suffices for the intent, are plainly within this doctrine. But, to present a sharp contrast, the in-

tent essential to murder in the first degree and the thing itself would palpably be so far ultra vires as to be beyond the competency of the corporation, even if it could be hanged in punishment. Returning affirmatively to its adjudged powers, towns and parishes are corporations of a particular kind, and the courts hold them to be indictable for nuisance in not repairing the highways and bridges, which their duty requires them to repair. The same, also, is adjudged of railroads and turnpike companies, and, generally, corporations can commit criminal nuisance the same as individuals. When the law casts on any corporation an obligation of such a nature that the neglect of it would be indictable in an individual, the corporation neglecting it may be indicted. The wrong in most of the cases just stated is a nonfeasance; and, where there is a corporate duty, it is easy thus to hold a corporation indictable for neglecting it. By some it is denied that the same consequence follows a corporate misfeasance. Accordingly, in Maine, an indictment was adjudged not to lie against a corporation for the nuisance of erecting a dam across a river, and, in Virginia, for obstructing a highway. But the contrary is established in England, and there, if an incorporated railway company obstructs the highway—as, for example, by laying a track over it on a line not conformable to the act of incorporation—criminal proceedings are maintained for the nuisance. "Many occurrences may easily be conceived," said Denman, C. J., "full of annoyance and danger to the public, and involving blame in some individual or corporation, of which the most acute person could not clearly define the cause, or ascribe them with more correctness to mere negligence in preventing safeguards, or to an act rendered improper by nothing but the want of safeguards." This English doctrine prevails also in New Jersey, Massachusetts, Vermont, Pennsylvania, and Tennessee, and evidently is the better in principle. To render a corporation

indictable for nonfeasance, it must have the power of action, the same rule applying to it as to an individual. Thus, if the affairs of a railway corporation are under the sole management of a receiver, over whose acts it has no control, it is not liable to a criminal prosecution for the nuisance of obstructing a highway by stopping its trains thereon, because, said Bennett, J., "no man or corporation should be made criminally responsible for acts which he has no power to prevent."

Not every misfeasance which would be indictable in an individual is so in a corporation. It must be within, or not too far outside of, the corporate duty. Therefore, in a case cited a little way back, Denman, C. J., said:

"Some dicta occur in the old cases, 'a corporation cannot be guilty of treason or of felony.' It might be added, 'of perjury, or offenses against the person.' * * * A corporation which, as such, has no such duties, cannot be guilty in these cases; but it may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large."

So, it is said that a corporation cannot be guilty of an assault, or riot, or other crime involving personal violence, or any felony. But this doctrine is old as to civil cases, and it would seem, therefore, equally so as to criminal, and is, in the main, exploded. In another work we saw the rule to be that the "liabilities of corporations for torts are as broad as their several franchises, namely, each can commit any tort, whether requiring an evil motive or not, which a man, acting within the same limited sphere could do." And among the illustrations are assault and battery, forcible entry, libel, fraud, and malicious prosecution. In principle, the limits of the liability to indictment depend chiefly on the nature and duties of the particular corporation, and the extent of its powers in the special matter. And, though a corporation cannot be hanged, there is no reason why it may

not be fined, or suffer the loss of its franchise, for the same act which would subject an individual to the gallows. A corporation is indictable for a particular wrong, and the individual members and officers who compose it may be also indictable for the same act, though they are not so liable in all cases in which the corporation is. This question is governed by principles sufficiently explained elsewhere. See Bishop's Criminal Law, c. 28. The same matter is discussed in McLain on Criminal Law, §§ 180-185, inclusive, in which the conclusions of Bishop are, in the main, concurred in. There is, in my opinion, no abler nor more accurate law writer in this country than Bishop, and I unhesitatingly accept his theory of the law, as applied to this question, as the true one, and as sustained by both reason and authority.

It was said in old times that a corporation could not be guilty of assault and battery, because of the peculiar nature of its business; but this was not because there was anything in the punishment that would prevent it. If the offense is one that can be punished in a corporation, is committed within the scope of its business, and is either a nonfeasance or a misfeasance, the corporation is liable to such punishment as the law may inflict. Of course, corporations cannot be hanged or imprisoned; but, even if the offense were a misdemeanor, and the penalty a jail sentence, they could no more be imprisoned than if the offense were a felony. But because there is a jail sentence attached to the penalty, can it be said that a fine could not be imposed upon the corporation for its wrongdoing? It has practically been admitted here that in these cases, if the offense were a misdemeanor, it could be punished. If a corporation can be punished for a misdemeanor, it can as well be punished for a felony. There is nothing in the characteristics of the two offenses, such that, if fines attach to both, punishment may be inflicted in one, and not in the other. It has been urged

by counsel for defendants that the intent necessary to support a conviction for a felony cannot be shown to exist in a corporation; but we have seen that this position is untenable. In this case the law provides a fine, and a very substantial one. If the corporation cannot be imprisoned, it can be fined and its property made to answer.

Now, there is nothing before the court to show for what purpose the defendant corporation was formed. It is a matter of mere guess. I take it for granted that the corporation was formed for the purpose of fishing and taking salmon in Alaskan waters. This being true, and its business being the taking of salmon and carrying on the business of fishing, then it must, in the work it is doing, be obedient to the laws governing fishing in Alaska, to the same extent as individuals would have to be obedient; and, if it violate the law in this respect, it is violating it in the direct line of the business for which the corporation was formed. It is not a nonfeasance, or failure to do something, with which the defendant corporation is charged, but it is for an actual misfeasance in the direct line of its business; and Bishop says that, in its particular line of business, it may be punished for the wrongs it commits.

There is another question raised on the face of this indictment that is perhaps serious. There is no doubt that under the statute this offense is a felony; but I have no doubt whatever that the wrong may be punished by indictment against the corporation, notwithstanding it charges a felony. In this case it is not charged as a felony, nor does the indictment even charge that the act was unlawfully done. This is evidently an oversight on the part of the pleader. While, generally, it is sufficient to charge a crime in the language of the statute, there is no court which I have ever heard of in which a felonious charge would be upheld without charging the criminal intent. It is also suggested to counsel for

the government that the statute contains certain exceptions as regards the locus of the particular crime charged.

Inasmuch as this is to be a test case to determine the right to indict a corporation (and, without the right to indict a corporation, I doubt if an indictment would lie against its individual members, simply acting for it), I think it best to put the indictment in accurate technical terms, so that there may be no question raised about any of these minor matters. If you are prepared to go to trial on both sides, the government is certainly ready to resubmit the case to the grand jury, and I recommend that course. In the event of the matter going to the Supreme Court of the United States, an adjudication should not be hampered by technical imperfections in the pleadings.

The demurrer to the indictment in both of these cases, the unlawful taking of fish, and the obstruction of the stream, is overruled on the points raised, and on account of other imperfections appearing in the indictment it is ordered that it be resubmitted to the grand jury, to be put in the best possible form.

MOORE v. MOORE.

(First Division. Skagway. October, 1901.)

No. 1,033.

1. TRUSTS—CONTRACTS—FRAUD.

The trustee in this case, in dealing with the trust property, demanded and obtained a certain six-acre tract of the property to be reserved for and conveyed to him before he would sign necessary contracts of settlement with third parties for the cestui que trust. *Held*, that his act was wrongful, and the conveyance void.

On the 21st day of February, 1901, the complainant, William Moore, filed his complaint in this court on the

equity side thereof against J. Bernard Moore, alleging that the said William Moore is the father of the defendant, J. Bernard Moore; that during the year 1886 the complainant and the defendant, acting together for their mutual welfare, benefit, and profit, pre-empted and located a certain tract of land, containing in all about 160 acres, situate, lying, and being at the head of Lynn canal or inlet, in the District of Alaska, which said land is now known and described and embraced in United States survey No. 13 of the Sitka, Alaska, land district; that the plaintiff and defendant contributed their work and labor for the development of the said tract of land; that the same was located, pre-empted, and held for manufacturing, commercial, and trading purposes; that for convenience it was mutually understood and agreed by and between the plaintiff and defendant that the land so located should be located and held in the name of J. Bernard Moore, the defendant, for the joint benefit and the joint use of the said J. Bernard Moore and the complainant; that the said land, by reason of certain trails that were discovered and laid out across the divide to the headwaters of the Yukon river from said tract of land, became of great value, and the town of Skagway was located and built upon the greater portion of said tract; that long prior to the building of said town or its location the complainant, by reason of his thorough knowledge of the country, and in anticipation of the commercial value of the said location, expended large sums of money in the construction and building of wharves, saw-mills, etc., the establishment of trading posts, and in making other improvements, in all respects fully complying with the law in relation to the location and holding of land for those purposes in the District of Alaska; that the said defendant, J. Bernard Moore, in whose name said tract was located, the son of plaintiff as aforesaid, and who held the same in trust for the joint use and benefit of himself and the complainant,

aided and assisted the complainant in developing and improving said property; that, after the said tract of land became particularly valuable for town-site purposes, the parties, acting together for their mutual welfare and benefit, sold, assigned, and conveyed to the Alaskan & Northwestern Territories Trading Company a portion of their interest in said trust, except certain portions reserved in said conveyance to the parties jointly.

It is further alleged that the consideration for the sale of said property to said company, according to said mutual agreement, was to be divided between the parties, share and share alike. The matters above referred to and stated are all admitted by the defendant.

It is further alleged in said complaint that there was reserved to the said J. Bernard Moore, the defendant above named, a certain tract or parcel of said land, being about six acres in all, which was then inclosed and occupied by said defendant, and which is in said complaint described by metes and bounds; that the complainant then became, and ever since has been, and now is, the owner of the one-half interest in and to the said land (meaning the six-acre tract); that there was a settlement of all matters growing out of the said sale, by the terms of which the complainant was to hold for his own benefit and right a certain lot, 50 by 100 feet, in the town of Skagway, and that the said J. Bernard Moore was to hold, in his own right and for his own benefit, a certain piece or parcel of said land out of said tract which was reserved to the said J. Bernard Moore and the complainant in the contract of sale to the said Alaskan & Northwestern Territories Trading Company. It is admitted that the complainant was to have the town lot, 50 by 100 feet, situated at the corner of Fifth avenue and State street, in the town of Skagway; but it is denied by the defendant, J. Bernard Moore, that the complainant was to have any portion of the said six-acre

tract, it being claimed by the said defendant that the said tract was reserved as his own, and that it now belongs to him, save and except a certain lot conveyed to his wife, and a certain lot, 143 by 120 feet, conveyed by him to the complainant, which said land adjoins what is known as the "McCabe College Ground." It is then alleged that certain contracts that were made by these parties and signed by the complainant were signed by him against his will, and without knowledge of what they contained, and that he was persuaded and induced to sign the same, and that these contracts were inequitable, etc.; all of which is denied by the defendant, J. Bernard Moore.

The defendant, by way of cross-bill, sets up a claim to all of the six-acre tract, alleges that the complainant claims some right or interest therein, and prays that his title be quieted by a decree of the court.

The complainant, in his bill, prays that the defendant, J. Bernard Moore, be ordered to make, execute, and deliver to the complainant a good and sufficient deed of conveyance conveying to him the said tract of land claimed, viz., one-half of the six-acre tract, less what has already been conveyed by said defendant, and that he have his costs in this behalf expended, and he also prays for an accounting of certain moneys.

Crews & Hellenthal, for plaintiff.

R. W. Jennings, for defendant.

BROWN, District Judge. It will be seen at a glance that the entire controversy between these parties grows out of their rival claims to a portion of the six-acre tract, and the proceeds thereof, that may be in the hands of J. Bernard Moore. The question presented is neither unusual nor difficult of adjustment. It is admitted by the pleadings that this

land was located and held in the name of J. Bernard Moore, in trust for the mutual benefit of himself and his father, the complainant in this case; and this single admission, in my opinion, covers and controls the whole controversy between the parties.

It is contended by defendant's counsel that, while this land was held in trust by J. Bernard Moore, the father and son were practically copartners, and it was held for the benefit of the copartnership.

Real estate is rarely, if ever, held in the name of a copartnership, but is held in the name of the individuals, or some one or more of them, belonging to the copartnership, for the benefit of the copartnership. Admitting that the present case is one of that character, it would not change the relation of trust existing between the parties to this action, and the requirements of the law that the trustee shall deal with his cestui que trust on terms of absolute and unquestioned fairness. Indeed, contracts entered into between the trustee and cestui que trust are always subject to criticism, and, if made under circumstances indicating a disposition on the part of the trustee to secure some special advantage to himself at the expense of the cestui que trust, such contracts are always annulled by the court on a proper showing by the cestui que trust. A trustee is never permitted to obtain an advantage by reason of the relation he sustains to trust property in dealing with the same.

I may say here that there is no evidence in this case from first to last indicating in the slightest degree that the defendant, J. Bernard Moore, made any misrepresentations to his father, William Moore, the complainant, whereby complainant was induced to sign the several contracts that have been offered in evidence in this case, for the purpose of showing a full and entire settlement between the parties; but it is evident that the complainant in this case, at the time

of executing the several contracts, was under constraint, and executed the same to save himself and son, perhaps, from long and expensive litigation and great loss in the management of their wharf business in connection with the Alaskan & Northwestern Territories Trading Company, the corporation that had become interested with them in their enterprise.

It will be remembered that the contract referred to was a settlement between said corporation and these parties; that it was a matter of grave importance to both that the affair should be settled, and the contention existing between said corporation and themselves ended and adjusted, in order to avoid loss and expensive litigation, as before stated. In the evidence in this case the defendant testifies that he always intended to reserve the five or six acre tract for his own individual use; and he further states that he would have never signed the contract which settled the controversy existing between him and his father and said corporation unless by the terms thereof he was made secure in the entire six-acre tract for his own use and benefit. Mr. Jennings, who is now the attorney for the defendant in this case, and then the attorney for both parties, testifies that it was perfectly understood by the complainant, William Moore, that J. Bernard Moore was to have, by the terms of that contract, the six-acre tract of land for his own use and benefit; that it was not only so understood by the complainant, but that the defendant, J. Bernard Moore, would not have signed said contract had not this concession been made to him. Thus it appears, by the testimony furnished by the defendant himself, that no settlement could have been made with the corporation at that time, and no adjustment of the complicated affairs that seemed to exist between these parties and the corporation could have been reached, had not the complainant yielded to the demand of the trustee, and allowed, by the terms of the contract, the five or six acre tract of land to be

so reserved to him. I say "the complicated transactions existing between these parties and the corporation" because of what appears by the contracts offered in evidence and the testimony relating to them, viz., that not only were attorneys Heid and Delaney employed to secure this adjustment and settlement, but Mr. Jennings was employed by the parties to the said suit jointly, as against the common enemy in the controversy, the Alaskan & Northwestern Territories Trading Company, to aid them in securing a proper settlement.

It is developed in the testimony that Capt. William Moore, the complainant, was at the time of this transaction a strong, vigorous man intellectually, and, as Mr. Heid describes him, one of the most "far-seeing" men he had ever known. The evidence in the case corresponds with my observation of Mr. Moore in court, from which the conclusion is imperative that he is in no sense a weakling, but a man of vigorous intellectuality and great determination. It is fair, I think, to assume, from the circumstances then surrounding the parties, that the complainant acceded to the demands of this trustee, J. Bernard Moore, as to the six-acre tract of land, in order to obtain a settlement with the corporation, which he deemed exceedingly important—nay, necessary—to his own welfare and that of his son, and that the trustee, J. Bernard Moore, took an unwarranted advantage of his cestui que trust, and practically coerced him, when, by the terms of said contract, he demanded that the six-acre tract should be set aside to his own use, and that the other party, who was equally interested in all the land, should be deprived of any interest therein whatsoever, and that without consideration. Indeed, it is admitted, even by the pleadings in the case, that the great experience of the complainant and his knowledge of the country from Lynn Canal across the divide to the headwaters of the Yukon, and his great energy in push-

ing a trail through this country, were the beginning of what afterwards resulted in a small fortune to both himself and his son. That the son had the advantage of the age and experience of the father, and the benefit of his superior knowledge and energy in this enterprise, is evident. That he should be permitted to retain to himself any more than a just or equal proportion of the benefits of the enterprise is, in the opinion of the court, inequitable and unjust. That J. Bernard Moore should have land set aside to himself of equal value with the lot, 50 by 100 feet, that was set aside to the complainant at the corner of Fifth avenue and State street, is just and proper.

It is claimed that the lot set aside to William Moore was worth about \$1,700; that a lot of the same size where J. Bernard Moore lives was worth about \$800 or \$900. Giving every advantage to J. Bernard Moore that could possibly be claimed, a lot or parcel of land where he lives, 150 by 150 feet, would be fully equal in value to the land reserved to the use of the complainant in this case. Being equally interested in the enterprise, and without reference to any contributions in money that had been made by either or both of the parties—and no testimony was offered on this question—they are entitled to an equal division of all the land. After giving the complainant the lot at the corner of Fifth avenue and State street, and J. Bernard Moore 150 by 150 feet face at the point where he lives, the remainder of the six-acre tract should have been divided equally between the complainant and the defendant.

It is the judgment of this court that such division must be made, and that all contracts looking to a different adjustment must be held as without consideration, and for this reason, and the coercive circumstances under which the contract was signed, it is held of no effect and void as to this particular matter.

PRICE v. BROCKWAY.

(First Division. Skagway. October, 1901.)

No. 1,132.

1. EJECTMENT—PUBLIC LAND—TOWN SITE.

One who erects a cabin upon a town lot in Alaska, and acquires the undisputed possession and occupancy thereof, may maintain ejectment against another, who ousts him of possession by going into his cabin and claiming possession thereby.

2. PUBLIC LANDS—TOWN SITE—IMPROVEMENTS—POSSESSION.

One who lays out a town site into lots, blocks, streets, and alleys acquires no rights thereby. Such lots can be held only by one in the actual use, occupation, or possession thereof, and such use, occupation, and possession may be evidenced by stakes, fencing, buildings, residence, and other improvements showing the fact.

Without referring in detail to the evidence in this case, the court is of the opinion that the evidence as a whole shows substantially the following facts:

That lot No. — in block — in the town of Skagway, the property in question, had been occupied by Mr. Price's grantors for a year, or perhaps more, prior to the time Mrs. Brockway attempted to take possession of the same; that a cabin had been erected on the lot; that some timber had been cut and placed around the lot as a fence, to indicate the boundaries of the same; that the fence, though poorly constructed, and hardly worthy the name of a fence, was evidently sufficient to show the boundaries of the claim made to the lot, and to maintain in part the plaintiff's right of possession; that the cabin, though not a large structure, nor of palatial proportions, was sufficient in itself to enable a person to live therein; and that at the time the defendant

went upon the lot this cabin was there, and some evidence of the fence.

It is not claimed by Mrs. Brockway that she owned the cabin, or that she constructed the same; the most claimed by her being that she had made some repairs upon the cabin in the way of putting in a door and window, and cleaning the same out so as to make it habitable. She claims that after this was done her son went into the cabin, and was in possession at the time this suit was brought, and holding the possession of the same for the benefit of the defendant.

J. G. Price, in propria persona.

I. N. Wilcoxen, for defendant.

BROWN, District Judge. It is clear from these facts that the defendant, Mrs. Brockway, had no right or interest in the cabin, and no right whatsoever to take and occupy the same over the objection of the owner thereof, Mr. Price. Indeed, no contention is made on behalf of Mrs. Brockway that she had a right to the cabin, the only contention of counsel for the defendant being practically this: that a suit in ejectment cannot be maintained under the facts and circumstances of this case, and that the plaintiff has mistaken his remedy, if he has a remedy.

In this connection it may be said that the contention of plaintiff's attorney is sustained by many authorities. However, the court of last resort for Alaska having passed upon the question at issue here, this court is bound by that decision. In the case of Carroll v. Price (D. C.) 81 Fed. 137 (decided by my learned predecessor, Judge Delaney), it is held:

"The possessory right in and to government lands, when once acquired, may be conveyed from one person to another, and instruments in writing making such conveyances are admissible in evidence, and may be considered * * * as tending to establish possession."

The court in that case said:

"While the paramount title to all lands in Alaska is in the United States, Congress and the general government have recognized for a great many years the right of the American citizen to go onto public lands, occupy, possess, use, and improve the same, with the view of ultimately obtaining title thereto from the general government, whenever the same shall be opened to purchase; and in this district this right is expressly recognized by Congress in the first proviso of section 8 of the act of May 17, 1884 [23 Stat. 26, c. 53], providing a civil government for Alaska."

Among other instructions requested and given by the court in that case, I find the following:

"This is an action in what is known as ejectment. The plaintiff, to recover in this action, must do so upon the strength of his own title, and not upon the weakness of the defendants' title."

It will be seen, therefore, that in the case referred to practically the same propositions presented in this case arose, to wit, the propositions, so earnestly contended for on behalf of defendant's counsel, that this is an action for ejectment, and that ejectment cannot be maintained for mere possessory right.

It is clear that this court, in the case referred to, held that an action in ejectment can be maintained under circumstances precisely the same as those involved in this case.

In the case of *Malony v. Adsit*, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163, on appeal to the Supreme Court of the United States, Mr. Justice Shiras, speaking for the court, in discussing the same proposition involved here, says:

"In the condition of things in Alaska under the act of May, 1884, providing a civil government for Alaska, and under the twelfth section of the act of March 3, 1891 (26 Stat. 1100 [U. S. Comp. St. 1901, p. 1467]), the only titles that could be held were those arising by reason of possession and continued possession, which might ultimately ripen into a fee-simple title under letters patent issued to

such prior claimant, when Congress might so provide by extending the general land laws or otherwise."

—Citing *Davenport v. Lamb*, 13 Wall. 418, 20 L. Ed. 655.

Again, this learned justice, quoting Mr. Justice Brewer in *Bennett v. Harkrader*, 158 U. S. 447, 15 Sup. Ct. 863, 39 L. Ed. 1046, says:

"Where the complaint alleges that the plaintiff is entitled to the possession of certain described property, which is unlawfully detained by the defendant, and the possession of which the plaintiff prays to recover, a general verdict for the plaintiff is a finding that he is entitled to the possession of all the property described in the complaint. Again, in this action, brought under a special statute of the United States, in support of an adverse claim, but one estate is involved in the controversy. No title in fee is or can be established. That remains in the United States, and the only question presented is the priority of right to purchase the fee. Hence the inapplicability of a statute regulating generally actions for the recovery of real estate, in which actions different kinds of title may be sufficient to sustain the right of recovery. It would be purely surplusage to find in terms a priority of the right to purchase, when that is the only question that can be litigated in such statutory actions."

Judge Shiras says:

"This principle applies more strongly to the present case, in which the real nature of the plaintiff's estate in the property is truly alleged as ownership by right of prior occupancy and actual possession, and was so found to be by the trial court.

"The same view of the nature of a title to a lot in a town site in Alaska, under these acts of Congress, was expressed by the District Court of the United States for the District of Alaska in the case of *Carroll v. Price* [D. C.] 81 Fed. 187. As, then, the only kind of estate that could be held was that of possession, it was sufficient for the plaintiff to allege that his was of that nature."

It will be seen that the Supreme Court of the United States quotes the case of *Carroll v. Price* approvingly, and settles, as it seems to me, the question so earnestly contended for by counsel for the defendant adversely to his claim.

It has always been held that a person who takes possession of any portion of the public domain may, as long as he continues to possess such tract, hold it against all persons whomsoever, except the United States, where the paramount title to the land is vested. This right of possession, as a legal right, is created and maintained by certain acts on the part of the person asserting it, and it is a legal right that can be maintained by this form of action.

The questions that frequently arise out of such cases present matters of uncertainty as to whether the possession has been actual and continuous, or whether said right of possession was a mere pretense. If a man goes out upon the public domain and causes to be surveyed a town site, laying out streets, lots, and blocks, and duly and properly numbering the same, he does not, by that act alone, acquire rights of possession, nor any right that would give him control of the land so surveyed, or any part thereof. If, in addition to the survey, application is properly and lawfully made to the United States for a grant of the land by letters patent, and all the proceedings are regular in that behalf, showing a bona fide purpose to acquire the title from the United States, and a man goes and settles upon a lot under such circumstances, claiming the same, and putting improvements thereon, such as a cabin, etc., he would thereby evidence his purpose to acquire a title ultimately to said land, when a patent should be regularly granted by the United States; and he might, perhaps, under such circumstances, acquire such title of possession as to enable him to maintain this suit. Or, if he marked the boundaries of his lot by substantial posts set in the ground at the corners, or fenced a lot of ground upon the public domain, and thereby reduced it to possession, and kept the fences or other evidence of description in repair, so that his possession remains continuous, he might maintain his right of possession of the ground so inclosed.

as against all save and except the United States, and might, if his possession were disturbed by another, bring suit in ejectment to recover the same.

It is contended by the defendant in this case that the land was not fenced, and it further appears by her own testimony that she has placed no fence of her own upon the lot; that the only fence now there is one which was erected by an adjoining lot owner upon the line between this and another lot. There is no inclosure now. The defendant has occupied the cabin that does not belong to her, but does belong to the plaintiff. Whatever improvements there may be upon the lot belong to the plaintiff. The defendant's possession is in no respect different from that of the plaintiff during the time that he and his grantors occupied the property. The defendant has simply gone onto this property, dispossessed him, and maintained the possession of the cabin unlawfully.

The court will therefore order judgment for the plaintiff in this case. Judgment accordingly.

McBRIDE v. COY et al.

(Second Division. Nome. October 4, 1901.)

No. 400.

1. PLEADING—OPTION.

A complaint in equity praying for a receiver and an injunction, which shows that plaintiff has only an option to purchase, and fails to disclose the character of defendant's titles, on demurrer, *held*, that it does not state facts sufficient to constitute a cause of action.

It appears from the amended complaint in this case: That prior to the 10th day of July, 1900, Doring, one of the defendants, owned the Daisy claim, and that about the 10th day of July the plaintiff and one McQuade secured an option from him for its purchase. Thereafter this option was disposed of.

by McQuade, in whose name it stood in such a way that Coy, James, Benbrook, Mellon, Gassman, Hager, Ben Matson, the plaintiff, and McQuade each became interested therein as owners. That on July 27th McQuade made a deed to carry out this agreement, in which deed the various shares of the parties are set out. (The deed is Exhibit A, attached to the original complaint.) That on the same day the plaintiff and McQuade, and the other parties mentioned, signed the agreement showing that they had each become interested in the claim, and whereby all the parties except McBride and Doring undertook to meet the payments on the purchase price of the mining claim as contained in the contract made between McQuade and Doring, which contract bears date of July 10, 1900. The other parties than McBride and McQuade also agreed that they would bear the expense of any and all litigation in obtaining possession and title to the property, and that neither McBride nor McQuade should be required to bear any expense connected therewith. It appears that about that time one Durand began a suit against Doring, the owner, and that McQuade, McBride, and the other parties connected with them, intervened in that suit, claiming some interest in the property; that thereafter that suit was settled by the stipulation for the payment of certain sums of money to Durand, and a decree was entered on the 13th day of October, 1900, dismissing the suit. The plaintiff, McBride, now brings this suit against the defendants in this action, and prays for the appointment of a receiver for the mine, and an injunction to prevent them from disposing of it, and that they be required to account to him and be decreed to be trustee, and for general relief.

To this complaint a demurrer is interposed on the part of Doring, by his attorney, and on the part of Freeze and Nugent by their attorneys, and on the part of J. A. Calkins. Freeze, Nugent, and Calkins are alleged to have some in-

terest in the claim subsequent to the contract under which the plaintiff claims his interest.

Gilmore & McConnell and Fenton & Reed, for plaintiff.
P. C. Sullivan and Ira D. Orton, for defendant.

WICKERSHAM, District Judge. The demurrer will be sustained as to Doring. The complaint is insufficient, in that it does not show that Doring ever parted with any of his title to the Daisy claim under the original option to do so. The option is not set out, nor is the substance thereof stated so that the court can ascertain its terms. There is nothing in the complaint to show that McQuade, McBride, and their original associates ever obtained a title from Doring. So far as the complaint shows, Doring has never parted with his original interest.

The demurrer will be sustained as to Nugent, Freeze, and Calkins, and any other defendants situated as they are, for the reason that the complaint does not show under whom these defendants claim, or that they have any connection with the McQuade option. The complaint is indefinite, and gives no clear idea of the facts concerning the connection of Doring with these people at a date subsequent to the option. It would seem that Doring and the McQuade associates became interested together in the claim, but the complaint does not state how, nor does it show in any particular what the interest of the plaintiff and his original associates is in this property. It does not state facts sufficient to constitute a cause of action against either Doring, Calkins, Freeze, or Nugent. It fails to show in any particular that the title ever passed from Doring to McQuade or any of his original associates, and it does not show the interest of Calkins, Freeze, and Nugent.

The demurrer will be sustained as stated, with leave to amend the complaint, if desired.

BANKS v. WILSON.

(Second Division. Nome. October 5, 1901.)

No. 254.

1. NEW TRIAL—ERROR—EXCEPTION.

A motion for a new trial for error in law will not be granted where no exception was taken to the alleged error.

2. NEW TRIAL—INSUFFICIENCY OF EVIDENCE.

Where a nonsuit was granted for the insufficiency of evidence to support a verdict, a new trial will not be granted by a judge who did not hear the trial, where the evidence was not preserved in the record.

3. JUDGMENT—MODIFICATION—TERM TIME.

It is a general rule that, in the absence of legislative direction, no court has the power to change, modify, alter, or vacate any final judgment upon any proceeding begun after the term in which it was rendered has passed.

Motion for New Trial. Motion to Vacate Order of Nonsuit and Reinstate the Cause.

Volney T. Hoggatt, for plaintiff.

Dudley Du Bose and H. T. Freedman, for defendant.

WICKERSHAM, District Judge. This is a motion for a new trial. The record shows that on May 23, 1901, and while Judge NOYES was presiding, the case was tried before a jury. The minute of the court contains the only record, and reads as follows:

"Selina Banks, the plaintiff, was then sworn as a witness in her own behalf, and then Mr. Du Bose moved for a nonsuit, which was granted. Thereupon the jury was excused from further consideration of the case, and excused from court until two o'clock this afternoon."

Upon that record the plaintiff the next day filed a motion for a new trial upon two grounds: "First, that said decision

is against the law; second, error in law made at the trial and excepted to by the plaintiff." Section 237 of the Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 368) provides that:

"A judgment of nonsuit may be given against the plaintiff * * * on motion of the defendant * * * when, upon the trial, the plaintiff fails to prove a cause sufficient to be submitted to the jury."

Section 238 defined sufficient cause as follows:

"A cause not sufficient to be submitted to the jury is one where it appears that if the jury were to find a verdict for the plaintiff, upon any or all of the issues to be tried, the court ought, if required, to set it aside for want of evidence to support it."

That seems to have been what was done in this case, and the question now is whether or not the plaintiff is entitled to a new trial upon the record as it stands. There is no evidence disclosing any facts to the court, and the application must be decided upon the record and files in the suit. The second ground for the application appears to be without foundation, for it does not appear that there was any exception to the action of the court upon the part of the plaintiff. Nor does it appear from the record that the action of the court was error, even if excepted to. The record is very brief, but regular, and this court cannot, at this time, say that there was any evidence sufficient to go to the jury. The evidence has not been preserved or presented to the court in any way, and I am unable to say that it was sufficient or that the court erred in granting the nonsuit.

The first ground in the motion for a new trial is that the decision is against the law. It would not be against the law if there was insufficient evidence upon which to base a verdict for the plaintiff; and the application for a new trial resolves itself into the query whether there was a cause sufficient to be submitted to the jury. This court, not having heard the evidence, cannot now say that there was any such

cause, and is unable, therefore, to determine that the trial court erred, in the absence of any showing of that kind.

For the want of any information on this question, the motion for a new trial will be denied.

Motion to Reinstate and Vacate Order of Nonsuit.

This case now comes up for hearing upon the motion to set aside the order of May 23d, granting the nonsuit, and to reinstate the case upon the calendar. The record shows that on May 23, 1901, the case being then on trial before a jury, "Selina Banks, the plaintiff, was then sworn as a witness in her own behalf, and then Mr. Du Bose moved for a nonsuit, which was granted. Thereupon the jury was excused from further consideration of the case, and excused from court until two o'clock this afternoon." On May 24th a motion for a new trial was filed, and was thereafter argued and decided by me against the moving party. Thereafter, and on the 4th day of December, a motion to set aside the nonsuit and reinstate the case was filed.

At the time of the argument upon the motion for a new trial, this court was not informed as to the correct condition of the case at the time of the granting of the nonsuit by Judge NOYES. From the argument and the record, I gathered the impression that the nonsuit was allowed for the insufficiency of the evidence, as the opinion on file will clearly show. It now appears, however, that no testimony whatever was taken, and that the nonsuit was granted wholly upon a question of law; that the complaint did not state facts sufficient to constitute a cause of action. That matter was not presented to the court in any way in the motion for a new trial, and the court had no opportunity to consider it in that connection.

Section 93 of the Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 346) provides that:

"The court will likewise * * * upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

The motion now before the court cannot be sustained under that section, and there is no other section in our Code under which it may be sustained. It must, therefore, be sustained, if at all, through the inherent power of the court to correct, modify, or vacate its own judgment. Both in Oregon and in the United States Supreme Court, the general rule has been laid down that no court has the power, in the absence of legislative direction, to change, modify, alter, or vacate any final judgment of the court upon any proceeding begun after the term in which it was rendered has passed. So long as the term lasts, it is within the breast of the court to make such corrections in its judgments as ought to be made, but the universal rule is that, after the term expires, the power ceases. *Deering v. Quivey*, 26 Or. 556, 38 Pac. 710; *Brewster v. Norfleet* (Tex. Civ. App.) 22 S. W. 226; *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 997.

However much I may agree with counsel that the action of the court in granting the nonsuit upon the objection to the complaint to which no demurrer or other objection had theretofore been made was error, I am still constrained to overrule his motion because it comes entirely too late.

Section 239, of the Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 368), however, provides that:

"When a judgment of nonsuit is given, the action is dismissed; but such judgment shall not have the effect to bar another action for the same cause."

The motion to set aside the nonsuit and reinstate the case is denied.

WHITEHEAD v. N. Y. AND ALASKA MIN. CO.

(Second Division. Nome. October 7, 1901.)

No. 682.

1. ATTACHMENT—AFFIDAVIT.

Where the plaintiff believed that certain machinery belonged to the defendant and was included in a bill of sale to secure a note, when in fact it belonged to another and was not covered, *held* not sufficient to sustain an attachment upon the ground that the security had been impaired or rendered nugatory by any act of the defendant.

Motion to Dissolve Attachment.

R. N. Stevens, for plaintiff.

John L. McGinn, for defendant.

WICKERSHAM, District Judge. On August 5th the defendant made its note to the plaintiff in the sum of \$3,000, due in 30 days. A suit was brought on September 21st to collect the note. A writ of attachment was issued out of this court, and certain property of the defendant attached. The defendant now enters a special appearance, and moves to dissolve the attachment because the affidavit of attachment does not disclose sufficient facts upon which to sustain the writ. It appears from the affidavit that, at the time the note was made, a bill of sale was made by the defendant to the plaintiff of certain property, to secure the payment of the note. The plaintiff afterwards discovered that certain machinery supposed to belong to the defendant, and to be included in the bill of sale, was not so included and did not belong to the defendant. There is nothing in the record disclosing that the security taken by the plaintiff was rendered nugatory by any act of the defendant. He should have seen to it that the bill of sale included the property in question.

The fact that it did not include it would not sustain an attachment under section 136 of the Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 354).

The writ of attachment will be dissolved, and the property discharged.

BUTLER v. GOOD ENOUGH MIN. CO.

WEBSTER v. GOOD ENOUGH MIN. CO.

(Second Division. Nome. October 14, 1901.)

Nos. 452, 453.

1. MINES AND MINERALS—CUSTOMS—JUDICIAL NOTICE.

Courts will take judicial notice of those general methods which are common to all districts of locating and designating mines by serial number above and below a common base known as "discovery" or "No. 1."

2. SAME—STAKES—MONUMENTS.

Where a mining claim is located by number above or below "discovery" or "No. 1," the court will presume, in the absence of proof to the contrary, that the adjoining claims of the system of which the one in question is part and described by serial number are well-known natural objects or permanent monuments.

3. SAME—NOTICE OF LOCATION—RECORDING.

After June 6, 1900, the date of the approval of the Alaska Code, a miner had "ninety days within" which to record his notice of location. This meant that he might safely record at any time "not beyond ninety days" from discovery and staking.

4. SAME—MINERS' RULES.

Since the passage of the act of June 6, 1900, c. 786 (31 Stat. 321), a miners' rule, regulation, or custom cannot limit the time within which a miner may file his notice of location to less than 90 days.

5. SAME—FORFEITURES.

It is a sound principle of equity and good conscience that forfeitures are odious in the law, and courts will not resolve a doubt, either of law or fact, in favor of a forfeiture of property rights.

These causes are submitted together upon a stipulation that the decision in one case shall control in the other. The findings of fact in the first case have now been made by the court, and submitted to the attorneys for the respective parties, and have been examined and agreed to by each as a true statement of the facts in the case. Only such reference will, therefore, be made to the facts in this opinion as is necessary to explain the court's application of the law.

The facts necessary to state are: That on July 3, 1900, one H. E. Marple discovered gold upon, and staked and located, a placer mining claim called by him No. 3, on Lulu creek, a tributary of Iron creek, in the Golden Gate mining district, near Nome, Alaska. That he set stakes at the corners thereof, as described in the following notice of location. That upon the initial stake he posted the following location notice:

"Notice of Placer Location.

"I, H. M. Marple, the undersigned, a citizen of the United States, having complied with the statutes of the United States and the local regulations of the Golden Gate mining district, do hereby give notice that I have this day located and do claim twenty acres of placer mining ground for placer mining purposes; said claim shall be known as number three located on stream known as Lulu creek (a tributary of Iron creek), in the Golden Gate mining district, territory of Alaska, and particularly described as follows: Beginning at initial stake at east end of claim No. 2; thence running 330 feet in a northerly direction to corner stake No. 1; thence 1320 feet in an easterly direction to stake No. 2; thence 660 feet in a southerly direction to stake No. 3; thence 1320 feet in a westerly direction to stake no 4; thence 330 feet in a northerly direction to initial stake or place of beginning.

"Located this 3rd day of July, 1900, by

H. M. Marple.

"Witness: H. Webster.

"[10 c. U. S. Rev. stamp affixed and canceled.]"

The agreed findings of fact contain this finding in relation to Marple's stakes: "That the stakes were sufficient to mark

the location of the claim." On July 27, 1900, Marple offered to file his notice of location with the clerk of the district court at Nome. At that time the Golden Gate mining district was yet in existence under its organization by the miners prior to June 6, 1900. The clerk refused to receive or record his location, and informed him that he had 90 days, under the recently enacted Alaska Code, to record the notice. He did not record it, nor offer it for record with the recorder of the Golden Gate mining district, but waited until the court had created the Port Clarence and Kougarok commissioners' districts and appointed recorders therein. On the 24th day of August, 1900, he recorded the notice in the Port Clarence commissioner's district with the recorder appointed by the court. Having doubt about the boundaries of the commissioners' districts, the notice was again recorded on the 28th of September, 1900, in the Kougarok district, which last district seems to have actually embraced the old Golden Gate mining district and the mining ground in question.

On August 3, 1900, one W. B. Martin also entered upon the same ground, discovered gold, set similar stakes by the side of those of Marple, and, on a similar initial stake, posted a similar notice of location to that posted on July 3d by Marple. He also described his claim as No. 3 on Lulu creek, a tributary of Iron creek, and gave the same courses and distances. Martin filed his notice with the recorder of the Golden Gate mining district on August 3d, and the same was duly recorded in the records of that district. Martin afterwards sold his claims to the defendant, the Good Enough Mining Company, which on August 7th filed and recorded an amended notice of location, giving a more particular description of the location by reference to natural objects. The claims of Marple were conveyed to the plaintiff, who, being in possession, brought this suit to quiet his title to the claim.

O. P. Hubbard and T. J. Geary, for plaintiffs.
Thompson, Murane & Thompson, for defendants.

WICKERSHAM, District Judge. The first point urged against Marple's location is that his notice is insufficient because it does not contain such reference to natural objects or permanent monuments as to certainly identify the claim. Section 2324 of the revised statutes [U. S. Comp. St. 1901, p. 1426] lays down this mandatory requirement in relation to marking and the notice:

"The location must be distinctly marked on the ground so that its boundaries can be readily traced. 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."

It is claimed on the part of the defendant that Marple's notice of location and his staking did not comply with these provisions, and are therefore insufficient to base a valid location upon.

It must be conceded that the notice is not a model one, yet it is in nearly the same form as that first made by Martin. It does contain the name of the locator, the date of the location, and attempts to describe the claim. If it does so with sufficient accuracy, it is sufficient to form a basis for the miner's title.

This court will take judicial notice of those general methods and rules of locating and marking mines upon the public domain in Alaska that are so widespread and well known and fixed in the mining system as to be familiar to all miners and in all the mining districts. Of these familiar and general rules, one is that the first discovery is generally called and known as the "discovery" claim, and that, when the same is within a gulch or on a stream, the claims are marked or

numbered from discovery claim up or down the gulch or stream.

Another is that claims are frequently numbered or marked by reference to one which is so definitely established as to be used by all the miners along the same course as the initial claim, and is so used by other locators as a permanent monument. These matters are so widely known to miners and accepted by them, and are so commonly used and depended upon in making locations, that, if the court failed to recognize them and follow them, it would disorganize the entire mining system in this territory, and render titles void and insecure which have been acquired in good faith in full reliance upon this system. So well known and fixed are these methods of locating mining claims that it may be fairly said that on placer mining gulches and streams there exists a well recognized and established system of surveys having the discovery or first claim as the base line. To destroy that system by refusing to recognize it as a permanent monument, when in fact it is used as such, would be a calamity. In all proper cases this court will feel bound to so recognize such system, and support claims fairly described in accordance therewith.

The description in question is based upon that system of locating and describing the boundaries of mines. It is described as claim "number three located on stream known as Lulu creek (a tributary of Iron creek) in the Golden Gate mining district, territory of Alaska, and particularly described as follows: Beginning at initial stake, at east end of claim No. 2; thence" following a plain line of permanent stakes around the premises to the point of beginning. It is apparent from this tie to the initial stake on the east end of No. 2 that the claim was a part of a general system of locating claims on Lulu creek, either above "discovery" or

No. 1. The initial stake is situated on the east end of claim No. 2, and there is no evidence to show that claim No. 2 is not a well-known natural object or permanent monument. There is no evidence to inform the court that the system beginning with "discovery" or No. 1 is not such a well-known system of surveys and locations that the mine in question cannot be easily and certainly located thereby. Nor is there any evidence to show that, with the notice before him, a miner could not, by beginning at the initial stake at the east end of No. 2, readily trace the boundaries from stake to stake along the courses from the point of beginning back to that point. Martin, who came upon the ground 31 days later than the senior locator, seems to have been able to find all of Marple's stakes, for he set his own side by side with them.

In the leading cases decided by the Supreme Court of the United States, Judge Field has laid down this broad rule:

"These provisions, as appears on their face, are designed to secure a definite description—one so plain that the claim can be readily ascertained. A reference to some natural object or permanent monument is named for that purpose. Of course, the section means, when such reference can be made. Mining lode claims are frequently found where there are no permanent monuments or natural objects other than rocks or neighboring hills. Stakes driven into the ground are in such cases the most certain means of identification. Such stakes were placed here, with a description of the premises by metes; and, to comply with the requirements of the statute as far as possible, the location of the lode is also indicated by stating its distance south of 'Vaughan's Little Jennie Mine,' probably the best known and most easily defined object in the vicinity. We agree with the court below that the Little Jennie mine will be presumed to be a well-known natural object or permanent monument, until the contrary appears, where a location is described as in this notice, and is further described 'as being 1,500 feet south from a well known quartz location, and there is nothing in the evidence to contradict such a description, distance, and direction.' Hammer v. Garfield Min. Co., 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964."

A careful comparison of the notice of location contained in the reported decision of Hammer v. Garfield Min. Co. with that given by Marple discloses no difference, except that Marple ties his boundary directly to the east end of claim No. 2, instead of "about 1,500 feet south of Vaughan's Little Jennie mine." It is more certain and definite, and under the rule laid down by the Supreme Court it is sufficient. The staking is also a sufficient marking of the boundaries, and the original location of Marple valid and effectual to reserve the property as a mine.

The conclusions reached as to the Marple notice of location are applicable to that by Cooper. His notice contains the name of the locator, the date of the location, and the claim is described as "number four (4) on Lulu creek, tributary of Iron creek." The finding is that he set his stakes, and that they were sufficient to mark the boundaries of the claim so that they could be readily traced. His stakes and his location, according to the well-recognized system by numbering above the base line, are sufficient, and his notice of location and marking of boundaries is sustained.

It is also urged with much force that Marple's location became void and the ground open for relocation on August 3d, through the failure of Marple to record his notice within 30 days. The rule adopted prior to June 6, 1900, by the miners in the Golden Gate mining district provided:

"All locators must file for record notices of location on or before 30 days from the date of location. Failure to comply with this rule forfeits all rights to the claims located and such claims are open for relocation."

Twenty-seven days before Marple made his location, however, the Alaska Code came into effect. Section 15 of the Political Code (Act June 6, 1900, c. 786, 31 Stat. 327) contains this provision:

"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, and, where the property or subject-matter is not situated in any established recording district, the instrument affecting the same shall be recorded in the office of the clerk of the division of the court having supervision over the recording division in which the property or subject-matter is situated."

Section 16 of the Political Code reiterates the general provisions of law that the miners in district meeting cannot enact and enforce a rule in conflict with the laws of the United States, and the provision in section 15, providing that the notices of location shall be filed for record within 90 days, if in conflict with the miners' rules depended on by the defendants, must be held to repeal it. "Within ninety days" means that it shall be done "not beyond ninety days" from the date of discovery. Chicago Ry. Co. v. Eubanks, 32 Mo. App. 189; 29 Am. & Eng. Ency. of Law, p. 521; Young v. The Orpheus, 119 Mass. 179; Adams v. Cummiskey, 4 Cush. 420. And a compliance with the act at any time before the last day has expired is within the statute. It is answered by the defendants that while it is true that Congress has given 90 days within which to do the recording, yet a miners' rule may limit the time; it may shorten the period, though it cannot extend it beyond the 90 days. It is a sound principle of equity and good conscience that forfeitures are deemed odious, and courts will not resolve a doubt, either of law or fact, in favor of a forfeiture of property rights once fully and fairly vested. The intention of the law to forfeit the estate must be so clear as to leave the court no room for other action, before it will enter the decree. Equity often interferes to relieve against forfeitures, but never to divest estates by enforcing them.

But I think a fair construction of the act of June 6, 1900,

c. 786 (31 Stat. 321), places this class of cases upon even a firmer basis. This act was in effect when Marple made his location, and it gave him the right to file his notice for record at any time within 90 days, or, as was said, he might file it safely at any time "not beyond" 90 days from his date of discovery. The provision in the act of June 6th is in direct conflict with the Golden Gate miners' rule. It is upon the same subject-matter, and is the expression of the supreme legislative will. There are no exceptions, reservations, or saving clauses in the act. It is quite clear to my mind, too, that the provision giving 90 days within which to record such notices is reasonable and necessary in this country of great distances, bad trails, and rigorous climate, and that any miners' rule or regulation, even if permissible under any canon of construction, would be unreasonable and destructive of the very right which the act of Congress sought to protect, and would for that reason, if for none other, be void and of no effect.

It follows that this court is of the opinion that the original location of Marple was valid, that the record of his notice within 90 days in the Kougarok recording district was a compliance with the act of June 6th, and that the location of his claim by Martin on August 3d was an invasion of his rights, void, and of no effect. This conclusion disposes of all the locations in both suits, and a decree may be entered for the plaintiffs, quieting their titles against the claims of the defendants.

STEEN v. WILD GOOSE MIN. CO.

(Second Division. Nome. October 28, 1901.)

No. 351.

1. MINES AND MINERALS—BOUNDARIES—NOTICE OF LOCATION.

Where there is a discrepancy between the courses and distances mentioned in the notice of location of a placer mining claim and the stakes and monuments set by the locator, the latter must prevail. Section 682, Code Civ. Proc. (Act June 6, 1900, c. 786, 31 Stat. 440).

2. SAME—NOTICE OF LOCATION—CONSTRUCTION.

When the notice of location of a placer mine describes the claim as "commencing at the upper or north end of claim No. 4, thence running along the bed of the creek 1,500 feet, thence 300 feet east and west from the center stake," and there were two center stakes, one at each end, *held*, that the claim was correctly located as a parallelogram 1,500 feet long by 300 feet in width on each side of a straight line drawn from one center stake to the other, and not along the sinuosities of the stream.

This is an action by the plaintiff to quiet his title to bench claim No. 15 on Ophir creek, Eldorado mining district, Alaska. He claims the property through a location made by him on the 28th day of January, 1901. After alleging the discovery of gold, the posting, filing, and recording of the certificate of location, and describing his claim, he alleges that the defendant claims some interest in the property, and is in possession thereof, extracting gold therefrom, and prays that their respective claims may be adjudicated, and his title thereto quieted.

The defendant, answering, denies all the equities set up by the plaintiff; denies that the plaintiff made any discovery of gold on the premises; and for its first defense alleges title in itself through a senior location, made by one A. Karl-

son on the 31st day of May, 1898. It is alleged that Karlson made a discovery of gold, placed monuments to mark the boundaries, and filed and recorded his notice of location within the time prescribed by law; that ever since that time either Karlson or some of his grantees have been in possession of the claim, working upon and extracting gold therefrom; that on or about the 7th day of August, 1900, the defendant caused the claim to be surveyed according to the original stakes, and caused substantial stone monuments to be located at the four corners thereof; that at the time of making his claim in January, 1901, the plaintiff well knew that the defendant was in possession, working as a grantee under the Karlson location, and had buildings and other substantial improvements thereon; and generally alleges want of equity against the plaintiff.

For a second answer and defense, the defendant alleges that on the 15th day of September, 1899, one Henry Shuman located what is known as the "Ophir Flat Placer Mining Claim," which overlapped the Karlson claim, and included nearly all of that portion of the Karlson claim now in controversy between the plaintiff and the defendant; that by reason of the conflict between the Karlson claim and the Ophir Flat claim the defendant, about August 7, 1900, purchased the Ophir Flat claim from the grantees of Shuman, and has ever since remained in the possession thereof, and working the ground. It appears from the answer that the defendant claims title to the ground in controversy through both the Karlson and Shuman locations.

The plaintiff, in his reply, admits the Karlson location, but alleges that the survey made in August, 1900, by the defendant, embraced a tract not included within the original Karlson location certificate, and that it is upon the tract not included within the Karlson certificate that he has filed his bench claim No. 15. He admits the Shuman location on the

15th day of September, 1899, but alleges that for want of a definite description of courses it was void, and insufficient to reserve the ground from subsequent location.

J. W. Loman, for plaintiff.

Johnson & Daly, Sullivan & Fink, and Gordon Hall, for defendant.

WICKERSHAM, District Judge. The case has been fully heard upon the merits, and the whole matter is now before the court for final determination. From the evidence it appears that on May 21, 1898, Karlson, assisted by Englestadt, Helfberg, and others, located claims Nos. 15, 16, 17, and 18 on Ophir creek. The evidence shows conclusively that the parties located the Karlson claim in relation to No. 14, previously located by one Brevig. They began at Brevig's lower initial stake, and measured off the supposed distance of the Brevig claim, and there established the Karlson initial stake on the right bank of Ophir creek. They then measured as near as they could in a straight course up the stream 1,500 feet, when, finding that the stake could not be located at that exact point on account of the accumulated ice, they set an upper end stake some distance further to the north, where it could be permanently fixed, and where it yet remains. There is some testimony by Englestadt that they found the upper initial stake of the Brevig location at the point where the initial stake of No. 15 was placed by Karlson.

In May, 1898, at Unalakleet, Karlson employed McDonald to set the corner stakes on claim No. 15. Leonhurtz was employed to perform that labor, and in August, 1898, so he testifies, he set the corner stakes at both ends of Karlson's claim, beginning at the lower initial stake. There is other evidence that other parties were employed to set the corner stakes of the Karlson claim also, and there seems to have

been more than one attempt to set those corner stakes in compliance with the original location notice. The Golovin Bay Mining Company came into possession of the Karlson claim under a lease, and employed some 14 men in working and extracting gold therefrom, until, in July, 1900, the claim was sold to the defendant company, which entered into possession of it, and has ever since remained in possession. On August 7, 1900, it procured Englestadt and other parties, who were familiar with the original stakes, to assist in surveying and locating the ground according to the original stakes. The survey was begun at the initial stake of the Karlson claim. The center of Ophir creek was taken as the center line of the claim, and a stake some 50 or 60 feet east of the initial stake, which had been set there in 1898 by Leonhurtz for Karlson, was taken as the southeast corner, and from these two, with the center of Ophir creek as a base line, in connection with the original north center stake, which was yet standing, the surveyor located Karlson's claim No. 15 in the form of a parallelogram. In locating the claim 1,500 feet north from the lower initial stake, the surveyor discovered, as was expected, that the upper center stake was too far north, and the upper end stakes were set only 1,500 feet up stream from the lower initial stake, which caused the abandonment of all of the ground between the upper end stake, as surveyed, and the old upper center stake.

From all the evidence in the case I am satisfied that on August 7, 1900, the defendant did cause the Karlson claim to be fairly located upon the exact spot marked by the stakes theretofore set by Karlson and those whom he had employed to mark the ground. At that time the defendant was in possession of the ground, had buildings and a large force of men there at work, and continued to mine thereon up to the time when the plaintiff made his location of a portion of the same ground.

The whole difficulty in this case arises from the certificate of location, which reads as follows:

"Placer Mining Claim No. 15 Above on Ophir Creek.

"Notice is hereby given that the undersigned, having complied with the requirements of chapter 6, title 32 of the Revised Statutes of the United States, and the local customs, laws, and regulations, has this day located twenty acres of placer mining ground on Ophir creek, Eldorado mining district, N. W. Alaska, and described as follows: Commencing at the upper or north end stake of claim No. 14, thence running along the bed of the creek 1,500 feet, thence 300 feet east and west from the center stake.

"Located May 21, 1898.

A. Karlson, Locator.

"Recorded May 23, 1898.

"A. T. Mordaunt, Recorder."

On January 28, 1901, the plaintiff, noting the fact that the certificate of location called for the lines of No. 15 to run up the bed of the creek 1,500 feet, thence 300 feet east and west from the center stake, determined that, because claim No. 15 has been finally surveyed and staked in the form of a parallelogram, instead of following the sinuosities of the bed of Ophir creek, it was, therefore, void as to all the ground more than 300 feet distant from the center of Ophir creek. He thereupon located that portion of the claim No. 15, then in the possession of the defendant, which he thought to be more than 300 feet distant from the center of Ophir creek.

The dispute arises over that portion of No. 15 lying more than 300 feet west of the center line of Ophir creek, and between that line and the west line of the claim. This would include the buildings of the defendant and its most valuable mine workings. The question for determination by the court is whether or not claim No. 15 shall be sustained as originally staked by Karlson and those who staked for him, and as surveyed and staked by the defendant in August, 1900.

It is apparent that there is a discrepancy between the courses mentioned in the Karlson location notice and the

monuments set by Karlson and his employés, and reset after the survey by the defendant in August, 1900. It appears from the evidence that, at the time when the original stakes of the Karlson claim were set the valley of Ophir creek was yet filled with the snow and ice of the previous winter, and that it was impossible at that time to determine with any accuracy the exact location of the stream. It is in evidence, however, that Karlson sought to make his location in the form of a parallelogram directly up stream along the valley where the claim is now located, seeking to keep to the left of a prominent rocky bluff, which he desired to avoid. The monuments set by him at that time, and the corner stakes afterwards set by his employés, and the monuments set by the defendant upon the survey in August, 1900, all located the claim in accordance with that general idea. The plaintiff now insists, however, that all those locations are mistaken, because they did not follow the sinuosities of the creek. Such a construction is not necessary from the language of the location certificate itself, and especially when it is considered that at the time that the notice was written it was impossible for Karlson to know where the creek was located, and that his only idea was to take a parallelogram up stream across the valley, avoiding the rocky bluff on the right hand.

Apply the rule of construction demanded by the plaintiff to his own location certificate, and it, too, would be indefinite and void. It begins 300 feet west of Karlson's initial stake, and the two first courses are as follows: "Then following the western boundary of No. 15 creek claim, as located and recorded by A. Karlson in 1898, for 1,300 feet upstream, thence 660 feet in a westerly direction." If, now, we attempt to fit these courses to the stakes set by Steen and shown on his map Exhibit A, it will be seen that the same difficulties arise as those urged by plaintiff to Karlson's notice. In the Karlson case the plaintiff insists that the no-

tice of location describes a sinuous line. If that is true, is it not true that the Steen notice also describes the same sinuous line for his east boundary? If the plaintiff succeeds on that point, he goes out of court upon his own certificate, for in that description it is the Karlson certificate repeated.

The Karlson notice commences at the upper or northern end of claim No. 14, thence running along up the bed of the creek 1,500 feet, and thence 300 feet east and west from the center stake. Two things are certain from this notice. The first is that there was an upper and lower stake; and the second is that the claim is to be 300 feet on each side of a line drawn from the upper to the lower stake. The plaintiff insists that this line is a sinuous one, while the defendant insists that it is to be straight. From the evidence in this case it is clear to the court that Karlson's intention was that it was to be straight. He drew a straight line at the time of his original staking from the lower to the upper stake. Those whom he employed to set the corner stakes have testified that these were set with a view of making the claim a parallelogram. The resetting of these stakes in August, 1900, was in the form of a parallelogram, and from all the evidence in the case I am satisfied that every person who set any stakes upon this claim from the first location in 1898 to the survey in 1900 set them with a view of making the claim a parallelogram, and not sinuous or snake-like. The court will not shut its eyes, either, to the fact that every claim on Ophir creek is a parallelogram, including those immediately above and below the one in question. While the act of Karlson in setting his stakes in the form of a parallelogram may not be taken to contradict the plain language of his location notice, yet it is of some service to the court in determining the construction of its language when a question arises about it. The similar construction of every location certificate along Ophir creek is also of assistance to the

court. It would be ruinous to the best interests of this region if the court should refuse to recognize this contemporaneous construction of these location notices by the miners themselves. Such a local construction has been given to similar notices along Ophir and other creeks, and in every case that construction has been consistent with the one given by Karlson and the defendant in this case. The court will not overturn that construction for the purpose of forfeiting a title acquired in good faith and for a valuable consideration. It will not enforce a different construction for the purpose of taking one man's property, for which he has paid value received, and upon which he has expended large sums of money, that it may be given to another man, whose claim is wholly without either law or equity to support it. This determination finds abundant authority in the law. Section 682 of the Code of Civil Procedure, contained in the act of June 6, 1900, c. 786, 31 Stat. 440, lays down these rules for construing the descriptive part of a conveyance of real property when the construction is doubtful, and there are no other sufficient circumstances to determine it:

"First. Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false does not frustrate the conveyance, but it is to be construed by such particulars, if they constitute a sufficient description to ascertain its application.

"Second. When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount."

While the location notice in this case is not a conveyance in the strict sense, yet it is the foundation of a conveyance from the government, and the same rule may be adopted in construing it. Now, there are in this certificate at least two definite and ascertained particulars, to wit, the

upper and lower initial stakes, and the 300 feet east and west. These definite and ascertained particulars in the description are sufficient, taken in connection with the construction given by Karlson and all of his employés, to fix the form of the mining claim in question, and the court will not permit that which is definite and certain to be destroyed by that which is indefinite and uncertain.

In accordance with the second rule, the court will accept the permanent and visible boundaries set by Karlson and his employés as the real description of the property, and will reject the doubtful effort to fix a sinuous line, even if such were ever intended. The plain good sense of a certificate of this kind has not given the miners of Ophir creek any trouble. Upon exactly similar location notices they have uniformly located a parallelogram upon the line of the creek from initial stake to initial stake; and this court will not overturn what thus appears to be a fair compliance with the correct rules for construing a location notice of that kind.

A question similar to this seems to have arisen in the case of Book v. The Justice Mining Company (C. C.) 58 Fed. 106. The court in that case said:

"But it is argued that the locations are invalid because notices were posted that did not correctly describe the lode, and because the notices were not posted on the lode. In construing notices of this character, where, under the mining rules and local regulations or state laws, such notices are required to be posted on the ground, the courts are naturally inclined to be exceedingly liberal in their construction. Such notices are often drawn by practical miners, unaccustomed to legal forms and technical phraseology; hence the language used in the notices is often subject to more or less criticism by counsel learned in the law, and engaged in preparing documents in legal shape and form. Then, again, locations are often made without any accurate knowledge of the true course and directions which a compass would readily give, and mistakes in the notice as to the direction and course of the ground located often occur. But such mistakes do not invalidate the location. Positive exactness in

such matters should never be required. It is the marking of the location by posts and monuments that determines the particular ground located." Book v. Justice Min. Co. (C. C.) 58 Fed. 106; McEvoy v. Hyman (C. C.) 25 Fed. 596; 1 Lindley on Mines, § 382.

Upon all the evidence in this case I am satisfied that the Karlson location is a valid one; that the monuments fixed by the survey made by the defendant on August 7, 1900, should be sustained, for the reason that they are approximately, if not exactly, in accordance with the prior staking of the claim by Karlson and his employés, except as to the north end, where monuments or stakes could not be set as far north as the original stakes, for the reason heretofore given. I am satisfied with the common-sense construction given by the miners of Ophir creek to location notices of this kind. Their construction is in accordance with the well-established rules of law, and will be sustained by the court in this case.

A decree may be entered in this case denying the prayer of the plaintiff, and adjudging the defendant to be the owner of all the property in question within the limits of the Karlson claim as surveyed by the defendant on August 7, 1900. So far as the Steen claim overlaps and conflicts with the Karlson claim as surveyed, it is void, and of no effect.

HEMAN v. GRIFFITH et al.

(Second Division. Nome. October 29, 1901.)

No. 330.

1. MINES AND MINERALS—DISCOVERY—LOCATION.

It is immaterial in what order the acts necessary to constitute a valid placer mining claim are performed, as that the marking of the boundaries preceded the discovery. If all the necessary acts are done prior to an attempted location by another locator, it is sufficient, and the claim is valid.

J. W. Loman, for plaintiff.
John Rustgard, for Griffith.
Johnson & Daly, Sullivan & Fink, and Gordon Hall, for
Wild Goose Co.
Volney T. Hoggatt, for Rice.

WICKERSHAM, District Judge. The court is relieved from the consideration of some questions in this case by having determined similar ones in the case of Steen v. The Wild Goose Mining Co., ante, 255, and, so far as the same is applicable, that opinion may be taken in connection with this one in determining the findings of fact, conclusions of law, and decree to be prepared in this case.

The Brevig location is far from being as satisfactory at the beginning as was the Karlson claim. Melsing was employed by Brevig in May, 1898, to make a location for him above No. 13 on Ophir creek, and about midnight of May 14, 1898, he reached that point with his dog team, attended by a native, and tied a notice of location, prepared by Brevig, upon a willow bush at the upper end of No. 13. This notice of location has the same weakness that the Karlson notice had, in that it followed the bed of Ophir creek as a center line. Little seems to have been done immediately toward perfecting the Brevig location, although Englestadt testifies that on May 21, 1898, when he and Karlson located No. 15, they found Brevig's upper stake, and placed the lower stake of No. 15 where it now remains, by the side of the upper stake of No. 14. The testimony on that point is not satisfactory; certainly not so satisfactory as that with regard to the upper and lower stakes of No. 15. The Brevig claim lacks the early integrity which No. 15 had, by reason of the fact that it was unworked and without attention for so long after his claim was first made. It was not until July 15, 1899, that No. 14 was staked by Pearson. The evidence

shows that either in July or August of that year he staked the ground, made a discovery of gold, and did the assessment work upon the claim. Almost a year previous to this time, Leonhurtz marked the boundaries of No. 15, and during the year 1899, about the time Pearson first gave any legal life to No. 14, the Golovin Bay Mining Company was in possession of No. 15, working the claim with a large force of men. As between these two claims, I have no question but that No. 15 was located by Karlson in good faith. The monuments were set and a discovery made almost a year before similar work was done upon No. 14. From all the evidence, I can reach but one conclusion between these two claims, and that is that No. 15 is entitled to be preserved entire, and that any overlap must be lost to No. 14, by reason of being subsequent in location, discovery, and marking of the boundaries.

I am satisfied from all the evidence, however, that No. 14 was staked, practically as claimed by the plaintiffs in this case, by Pearson in July or August, 1899, in the form of a parallelogram extending from the initial stake up stream. It is very earnestly urged that the Brevig location is void because a discovery did not precede the posting of Melsing's notice and the filing and recording of the certificate of location. I am in some doubt upon that question, but the general rule is that it is immaterial as to the order of events in the location of a mining claim. If it appears that each act required by statute has been performed, and the claimant is in possession thereunder prior to any intervening rights, the claim will be sustained; and I am satisfied that everything required by law to be done to establish this mining claim had been done in good faith by Brevig, prior to the time of the attempted location of any of the overlapping claims. The Black Mars claim was not located until October 2, 1899, and, so far as it overlaps No. 14 as now surveyed, the evi-

dence shows that No. 14 was staked prior thereto and is entitled to be sustained. The Griffith location of Sweet Silence was not made until October 12, 1899. He recognized the location and existence of No. 14, but attempted, like Steen in the other case, to locate his claim along the sinuous line of Ophir creek, and for the same reasons his claim must fail. Rico's claim, the Lucky San Francisco, was not located until July 19, 1900, and, so far as it conflicts with the Brevig location of No. 14, it must fail.

From all the evidence in this case I am satisfied, and so determine, that the Brevig location of No. 14 was located, staked, and marked in compliance with the law, between May 14, 1898, and August 2, 1899, and that it must be sustained as now surveyed. As between these two claims, the Karlson claim is entitled to be sustained, and No. 14 must give way.

Findings of fact may be prepared in accordance with the conclusions.

MALONE et al. v. HOXSIE.

(Second Division. Nome. October 31, 1901.)

No. 271.

1. PUBLIC LANDS—ESTOPPEL—LANDLORD AND TENANT.

One who purchased a town lot and obtained possession thereby from the owner without paying the whole of the purchase price will not be permitted and is estopped to deny the title of the owner, and to repudiate the balance of the purchase price, and assert hostile possessory title, as an original occupant and settler under the land laws of the United States.

In the spring of 1899, C. E. Hoxsie, the defendant, entered into the occupancy of a lot in the town of Nome 100 feet by 150 feet square. Thereafter he laid out one portion of it as Front street and another portion as Hunter way, and built a large saloon building upon the lot at the junction

of Front street and Hunter way, which is known as the "Dexter Saloon." In 1899 he lived upon the property in a tent, and continued in the sole use and occupancy of the whole of it at all times from the time of his first settlement until the sale to Pope, hereinafter mentioned. In May, 1900, he was in possession thereof, occupying a large building known as the "Dexter" for business purposes. Immediately adjoining the Dexter on the west was a space 25 feet in width by about 100 feet in depth. Upon this vacant space, which was a portion of his original lot, he had a tent building erected, in which resided a native and his family. Across the front of the vacant space he placed a large boat to prevent access. Upon this vacant ground he also maintained a coal bin, and the stairway from Front street to the second story of the Dexter building stood upon it.

About the 23d day of May, 1900, he sold the vacant space mentioned to Arthur M. Pope for the sum of \$10,000, and received \$5,000 in cash and a mortgage to secure the payment of the balance. Pope immediately entered into possession of the ground, and erected a fence across the front, and fully inclosed the property and entered into complete possession of it. A month later Pope sold the lot to the plaintiffs in this action for the sum of \$15,000. They agreed to pay him \$400 per month for three months, and then to pay the balance of the \$15,000, the \$1,200 paid as rent to apply on the purchase price. The plaintiffs were informed at that time by Pope of the condition of the title, and were informed by him that Hoxsie held a mortgage against the property for the balance due on the note given by Pope to Hoxsie for \$5,000. The plaintiffs entered into possession and paid the first two months' rent to Pope. In the meantime they erected a two-story building upon the property, which is known as the "Warwick Saloon," at a cost of about \$7,000. About this time Pope seems to have failed in business, and

then informed the plaintiffs that the Alaska Commercial Company was the real party in interest in the purchase of the property. They made no further payments thereafter. In the meantime the plaintiffs found that they had made a losing venture, and after some persuasion the Alaska Commercial Company returned to the plaintiffs the money which had been left with it by Pope for the two months' rent. The condition then was that the plaintiffs were in possession of the property, with their building completed and occupied as a saloon; Hoxsie held a mortgage against the property for \$5,000 to secure the payment of the balance due upon the sale to Pope. An opportunity was given to the plaintiffs to take up the Pope obligation and pay the mortgage and take the property, but Malone, who seems to have acted for the plaintiffs, refused to do this, and announced that the plaintiffs were unable to pay their debts and continue in business.

The defendant, Hoxsie, began a suit on August 28, 1900, to foreclose his mortgage upon the property, and such proceedings were had in that suit thereafter that Hoxsie obtained judgment on the 5th day of November, 1900, a decree of sale was entered, the property was sold, and bid in by Hoxsie for the full amount of the mortgage and the costs of the suit. The sale was confirmed by an order of the court, whereupon the plaintiffs brought this action to restrain the marshal from executing a deed to Hoxsie upon the foreclosure proceedings, and set up as a ground for relief that they now claimed the property as occupiers of the public land under the town-site law.

Hoxsie answered, and set up the facts hereinabove alleged, claiming title to the property under his settlement on the lot, and his use and occupation thereof as a portion of the public domain of the United States. Upon the pleadings as they now stand, the plaintiffs claim by virtue of their possession of public land, while Hoxsie claims by reason of

his prior possession of the whole lot. The evidence has been taken, and the whole matter is now submitted to the court for determination.

P. C. Sullivan, for plaintiffs.

Bard & Schofield, for defendant.

WICKERSHAM, District Judge (after stating the facts as above). The fact is undisputed that Hoxsie entered into the possession of this lot in 1899, and continued in the sole use and occupation thereof up to the time of the sale of that portion now in dispute to Pope. It is beyond question that at the time of the purchase from Pope the plaintiffs knew of Hoxsie's interest in the property, and knew that he had sold it to Pope, and held a mortgage to secure the payment of the sum of \$5,000 upon the purchase price thereof. It is admitted that Hoxsie offered to accept his money from them, and continue them in the use and occupation of the property upon the payment of the money due from Pope, which they refused. They then first set up a claim as original occupiers under the United States land laws. Their action is void of equity or law to support it. By virtue of his use and occupancy Hoxsie came into possession of the lot, and the plaintiffs entered upon it, not ~~as~~ original settlers, but by virtue of a lease or option to purchase from Pope, and they ought not to be heard to deny the title through which they gained possession of it. A court of equity will not assist them in maintaining a possession so gained, by enjoining the marshal from making the deed in the foreclosure proceeding against Pope. The plaintiffs assume the position that, under the facts in this case, the defendant could not have foreclosed his mortgage against the plaintiffs. It would be immaterial, under their theory, whether he could or not. They have now assumed the position of original occupants, and repudiated everything in con-

nection with the title except their own possession under the paramount proprietor, the United States. They must either stand upon that foundation or fail, and the other question is immaterial. They argue, too, that the defendant Hoxsie cannot enforce his foreclosure proceedings. The answer to that argument is that they are claiming under their rights as original occupants under the United States, and they must stand upon that foundation or fail. If they are original occupants, and have the exclusive right of possession, subject only to the paramount ownership of the government, it follows that no foreclosure or other proceedings will have any validity against them. Such is not their position, however. They are not, and never were, original occupants of this property. They entered as tenants under Pope with an option to purchase, which they repudiated. They ought not to be heard, and this court will not assist them, to deny the title of the party who let them into possession of the property. They must either pay the purchase price of the property or surrender it to the owner.

Findings of fact, conclusions of law, and a decree in conformity with this view may be entered for the defendant.

CHAMBERS et al. v. SOLNER, Treasurer of Nome.

(Second Division. Nome. November 2, 1901.)

No. 535.

1. STATUTES—CONSTRUCTION.

Such a construction must be given to statutes as will sustain and give fair effect to each part when possible.

2. TOWNS—SCHOOLS—TAXATION.

Under the laws of Alaska, the legislative duty is imposed on town councils "by ordinance to provide for the maintenance of public schools" by taxation or other methods necessary to meet that demand.

3. SCHOOL FUND—COMMON COUNCIL.

The town council has no other direction over the school fund paid into the school treasury by the clerk of the District Court from licenses, than to consider the amounts in determining the budget to be raised by taxation or otherwise under their duty to provide for the maintenance of the public schools.

4. SAME—SCHOOL BOARD.

The school board has "the exclusive supervision, management, and control of the public schools and school property" within the school district, including the power and duty of expending the funds paid in by the clerk of the District Court.

5. SAME—MUNICIPAL PURPOSES.

The common council has no control for municipal purposes over the school fund or any portion thereof until such portion is segregated and set apart for municipal use by an order of the District Court.

6. SAME—SCHOOL PROPERTY.

That part of the school fund paid in by the clerk of the District Court from license receipts is a part of "the school property within the said corporation," over which the school board is given "exclusive supervision, management, and control" by section 202 of the Civil Code (Act June 6, 1900, c. 786, 31 Stat. 521).

The plaintiffs in this action show that they are citizens and taxpayers of the city of Nome, and together with one Collin Beaton constitute the school board, and that the city of Nome is regularly incorporated under chapter 21 of the Civil Code of Alaska, approved June 6, 1900; that the defendant is the duly elected, qualified, and acting treasurer of the city of Nome; that prior to the bringing of this action the common council of Nome authorized certain warrants to be drawn on the treasurer of the city of Nome in favor of the clerk for the sum of \$50 per month, to be paid out of the school fund in the hands of the city treasurer as ex officio treasurer of the school board; that the defendant will, unless restrained by an order of this court, pay the said war-

rants out of the school fund, and that the public funds for the support of the public schools will be thereby depleted, to the irreparable injury and damage of the plaintiffs and the general public of the city of Nome. They deny that the city clerk or treasurer has ever been employed to perform any service whatever for or by the said school board; and show that the services performed were such as followed from the performance of their respective duties as city clerk and city treasurer of Nome. Plaintiffs pray for an order restraining the defendant from paying the warrants out of the school funds in his hands as treasurer of the school board.

The defendant appears, and demurs to the complaint that it does not state facts sufficient to constitute a cause of action, or to entitle the plaintiffs to any relief.

Alonzo Rawson, for plaintiffs.

V. T. Hoggatt, for defendant.

WICKERSHAM, District Judge (after stating the facts as above). The contention in this case arises over the respective claims of the common council and the school board of the city of Nome to the control and management of the school funds. The common council insists that it has the direction and control of this fund, and is authorized and empowered by statute to expend it; the school board traverses this claim, and asserts its jurisdiction over the school fund, and urges that the school board alone has the legal authority to manage the expenditures of these funds; and it is to determine the respective powers of these departments that this case is submitted to the court.

The case presents some anomalous features, and the court finds few precedents to assist it in the determination of the important questions at issue. The statutory provisions are very general in their phraseology, and the case must be de-

terminated wholly upon the construction given to them by the court.

Section 201 of the Civil Code, found in chapter 21, at page 394 of Carter's Annotated Alaska Codes (Act June 6, 1900, c. 786, 31 Stat. 521), gives to the common council certain powers, and among others:

"Fourth. By ordinance to provide for necessary street improvements, fire protection, water supply, lights, wharfage, sewerage, maintenance of public schools, protection of public health, police protection, and the expense of assessment and collection of taxes."

The next provision in that section empowers the council to levy and collect taxes.

Section 202 is as follows:

"In addition to the officers heretofore provided by this act, there shall be elected a school board of three directors, who shall have the exclusive supervision, management, and control of the public schools and school property within said corporation, and shall be elected in the same manner and for the same term as the council."

If these two sections stood alone, the court would have little difficulty in determining the respective spheres of the two bodies in question. Section 203, as amended by the act approved March 3, 1901 (31 Stat. 1438, c. 859), however, contains a clause which, it is claimed, gives to the common council the control of the funds in question. This section provides that the treasurer of the corporation shall be "ex officio treasurer of the school board," and then provides for the treasurer's bond and oath of office. It then provides that 50 per cent. of all license moneys paid within the corporation shall be paid over by the clerk of the District Court to the treasurer of the said corporation, and then follows this clause:

"All moneys received by the treasurer from the clerk of the court for licenses shall be used, under the direction of the council, for school purposes."

These are the clauses of the statute which, it is claimed, give to the council or the board their respective powers over the school fund, and, under them, each of these bodies claims the right to control the fund. In the absence of any precedent, the court can only follow the general rule that such a construction should be given to these statutory provisions as will sustain and give force and effect to each of them.

There is no territorial Legislature in the District of Alaska. In the creation of a municipal corporation it is essential to the proper management of its affairs that there be such a body, and Congress, in providing for the incorporation of towns, wisely gave to the common council certain restricted legislative powers. They constitute the only legislative bodies within the territory of Alaska, and are to be viewed within their respective corporate boundaries as having the powers given to them by Congress, and such other powers as are to be inferred from the responsibilities and duties imposed upon them by law. The duty and power is imposed upon them, by the fourth clause of section 201, "by ordinance to provide for * * * the maintenance of public schools." This clause in the organic act imposes upon the council the duty to provide by ordinance for the maintenance of the public schools by taxation, and by such other methods of raising money as are necessary to meet that requirement. No other duty or power is given to the common council until we reach that clause in the amendment of March 3, 1901, providing that "the money received by the treasurer of the corporation from the clerk of the court for licenses shall be used, under the direction of the council, for school purposes." Viewing this clause in the light of the legislative duty of the common council to provide the funds for the maintenance of the public schools, and the clause in section 202, vesting "exclusive supervision, management, and control" in the school board, I have no doubt as to the construction which

ought to be given to it. The fund received by the treasurer from the clerk of the court for licenses shall be added to the fund required to be raised by ordinance for the maintenance of public schools. The council is thereby relieved from the duty of raising that fund by ordinance imposing a license or tax upon the people of the corporation. The clause, "under the direction of the council," if construed merely as a reference to the duty of the legislative body to provide for the maintenance of the public schools, gives a reasonable construction to all clauses of the statute, and recognizes the well-defined boundaries between the legislative duty to provide for the maintenance of the public schools, and the duty imposed on the school board as to the exclusive supervision, management, and control of the public schools and school property within said corporation. To give the words, "under direction of the city council," the force and meaning claimed for them by defendant, is to contradict the whole spirit of the law, and to render the plain provisions of section 202 useless and nugatory. I am of the opinion that the only power which the common council has in the management of the public schools under these statutory provisions is the legislative duty of providing the funds necessary for their maintenance. Their duty is legislative, and neither ministerial nor executive. The duty of the school board is ministerial and executive. It has "the exclusive supervision, management, and control of the public schools and school property within the said corporation."

This view is further borne out by the fact that section 203, as amended, provides that "the treasurer of the corporation shall be ex officio treasurer of the school board." While this clause is not of much force as a guide to the construction of the statute, yet it affords some light. It shows that there was in the mind of Congress a distinction between the functions of the municipal corporation and the school board. The

treasurer of the corporation was to serve as ex officio treasurer of the school board. No salary is necessary for his services, for that must be provided for as treasurer of the corporation. Then, too, he is ex officio treasurer of the "school board." As treasurer of the "school board," he holds the school fund, and is responsible to the "school board" for the custody of the fund. This idea would be incompatible with the theory of the defendant that he is only responsible to the common council for the school fund.

Another clause in this amendment of March 3, 1901, affords some light upon the gloom of the situation. It is the last proviso, which reads as follows:

"Provided, that where it is made to appear to the satisfaction of the district court that the whole amount heretofore or hereafter received by the treasurer of the corporation from the clerk of the court is not required for school purposes, the court may from time to time, by orders duly made and entered with a statement of the facts upon which they are based, authorize the expenditure of the accumulated surplus, or any part thereof, for any of the municipal purposes enumerated in this chapter."

This clause makes it clear that the common council has no control, for municipal purposes at least, over any portion of the school fund, until it is segregated and set apart for the use of the corporation by the order of the District Court. If, now, the council had control of both the municipal and school funds, why should Congress impose upon the District Court the duty of ascertaining the fact and making the segregation of the school fund? This clause is persuasive that Congress meant that the court should hear the contention between these two bodies, and set apart any surplus of the school fund to the control of the council. It would seem reasonable to conclude that otherwise the council could not control any part of it.

It must be a fair construction of this statute to say, too,

that the school fund is a part of "the school property within the said corporation," and, if that is conceded, then section 202 gives "the exclusive supervision, management, and control" thereof to the school board.

From a full comparison and reasonable construction of all these provisions, it appears clear to the court that the purpose of the common council is the legislative duty to provide for "the maintenance of public schools" within the corporation. The council has no authority to expend any portion of the school fund, except that portion which is segregated by the court under the amendment of March 3, 1901, and set apart for municipal purposes. Section 202 is adopted from the Code of Oregon, where the school board has the exclusive supervision, management, and control of the public schools and school property, which is claimed for the board here, and I am constrained to accept that construction of the statute which confers upon the school board the same broad powers and duties imposed by the laws of Oregon. The school board of Nome is the only body having any authority to expend the school fund. It is the duty of that board to employ teachers, provide for school buildings, and to supervise, manage, and control the public schools and school property, so long as there is a fund for the maintenance of the same, derived either through ordinances passed by the common council of Nome or from funds received from the clerk of the District Court.

It follows that the common council of Nome has no authority to order the treasurer to pay any sums of money out of the school fund, for any purpose whatever, much less to pay a portion of the salary of the town clerk and town treasurer therefrom. The demurrer to the complaint will be overruled, and, upon answer or other pleading admitting the facts in the complaint to be true, the injunction prayed for may issue against the payment of the warrants in question.

In re BRUNO MUNRO.

(Second Division. Nome. November 4, 1901.)

No. 139.

1. MUNICIPAL CORPORATIONS—TOWNS—POWERS.

Towns in Alaska have only such powers as are expressly granted to them by Congress, and such as are necessary to enable them to carry into effect those that are expressly granted.

2. COURTS—MUNICIPAL CORPORATIONS.

The whole range of judicial power in Alaska having been expressly vested by Congress in district and justices' courts, and there being no apparent necessity for it, there is no authority in incorporated towns to create municipal courts independent of those created by Congress, and from which there is neither appeal nor other supervision.

3. HABEAS CORPUS—MUNICIPAL COURT.

Where one is in custody by virtue of a judgment of a municipal court created by a town in Alaska, he may be discharged on habeas corpus.

This is an application of Bruno Munro for a writ of habeas corpus to test the legality of his imprisonment, upon conviction by the municipal court of Nome for the violation of a town ordinance. The petition raises the question of the power of the town to provide a municipal court, and challenges its jurisdiction and existence.

The chief of police appeared in answer to the writ, and produced the body of the prisoner. The cause has been heard upon the allegations of the petition and submitted upon briefs, one of which is prepared and filed by R. N. Stevens, Esq., the municipal judge.

Cochran & Grimm, for petitioner.

John L. McGinn, Dep. Dist. Atty.

WICKERSHAM, District Judge. An ordinance creating a municipal court was passed by the common council of the

town of Nome, and approved May 13, 1901. The first section, creating the court and defining its jurisdiction, reads as follows:

"Section 1. That there be and is hereby established a municipal and police judge, whose duty it shall be to hear and determine all complaints against inhabitants of said city, against whom complaints may be made of having violated any of the ordinances passed by the council and applicable to the inhabitants of said city, and to administer the punishment provided in said ordinance on such persons as may be found guilty by him of the violation thereof."

Had the town of Nome power to create a municipal court and to confer jurisdiction upon it to impose sentences for the violations of municipal ordinances?

It is not claimed that there is any statutory authority to a municipality in Alaska to create courts, but it is earnestly argued that the power is conferred as a necessary incident to the duties imposed upon towns incorporated under the provisions of chapter 21 of the Civil Code of June 6, 1900 (31 Stat. 521, c. 786). It is urged that, without that power, the other powers and duties conferred by that chapter are left without the proper means of execution, under the rule that, where a general power is conferred or duty enjoined, every particular power necessary for the exercise of the one or the performance of the other is conferred by implication.

The general rule in such cases is stated by the Supreme Court of the United States in the following language:

"Municipal corporations are created to aid the state government in the regulation and administration of local affairs. They have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established. 1 Dill. on Mun. Corp. (3d Ed.) § 89, and cases there cited." Ottawa v. Carey, 108 U. S. 110, 121, 2 Sup. Ct. 361, 27 L. Ed. 669.

It being conceded that Congress has not expressly granted the power to towns in Alaska to create such courts, we are

left to determine whether it is such a power as is "necessary to carry into effect those that are granted." If such a power is necessary, the argument that it, too, is granted by necessary implication, may have some weight.

All the powers expressly granted to towns in this territory are contained in section 201 of the Civil Code, as follows:

"Sec. 201. Powers of Town Council. The council shall have the following powers:

"First. To provide suitable rules governing their own body, and to elect one of their members president, who shall be ex officio mayor.

"Second. They may appoint, and at their pleasure remove, a clerk, treasurer, assessor, and such other officers as they deem necessary.

"Third. To make rules for all municipal elections: provided, no officer shall be elected for a longer term than one year.

"Fourth. By ordinance to provide for necessary street improvements, fire protection, water supply, lights, wharfage, sewerage, maintenance of public schools, protection of public health, police protection, and the expense of assessment and collection of taxes.

"Fifth. To impose and collect a poll tax on electors, tax on dogs, a general tax on real and personal property, possessory rights and improvements, and such license tax on business conducted within the corporate limits as the council may deem reasonable: provided, no such tax shall exceed one per centum on the assessed valuation of property, and all assessments made by the corporation assessor shall be subject to review by the council, and appeals may be taken from their decisions to the district court: provided, further, no bonded indebtedness whatever shall be authorized for any purpose."

A very persuasive argument is made by counsel that a municipal court is a necessary aid to carry into effect these express powers. He urges that no effective police protection can be offered without such a court, and states, by way of illustration, that the sum of \$9,000 has been collected from fines imposed for the violations of municipal ordinances and paid into the town treasury within the last year. The matter of revenue, however, is not material to the inquiry. The

real question which presents itself to the court is whether the existence of a municipal court is necessary to enable the town to carry into effect all the powers expressly granted to it by Congress.

That inquiry suggests an examination into the jurisdiction of those courts already provided for by Congress in this territory. Do not these courts possess jurisdiction to assist the town in carrying into effect their granted powers?

Chapter 70 of the Code of Civil Procedure, in the act of Congress approved June 6, 1900, and commonly called the "Alaska Civil Code," contains this grant of judicial power:

"Sec. 698. Judicial Power, How Vested. The judicial power in the District of Alaska is vested in a District Court, in commissioners exercising the powers of probate courts, and in commissioners as ex officio justices of the peace.

"Sec. 699. The District Court. The District Court is a court of general jurisdiction, civil and criminal, and also shall have admiralty jurisdiction.

"Sec. 700. Justice's Court. A justice's court is a court held by a commissioner as ex officio justice of the peace within the precinct for which he may be appointed. There are no particular terms of such court, but the same is always open for the transaction of business, according to the mode of proceeding prescribed for it."

Then follow the sections fixing the civil jurisdiction of the justice. The criminal jurisdiction, which alone is important in this cause, was granted by section 410 of the act of Congress of March 3, 1899, c. 429, 30 Stat. 1330, and is as follows:

"Sec. 410. Criminal jurisdiction of a justice's court. That a justice's court has jurisdiction of the following crimes:

"First. Larceny, where the punishment therefor may be imprisonment in the county jail or by fine.

"Second. Assault, or assault and battery, not charged to have been committed with intent to commit a felony, or in the course

of a riot, or with a dangerous weapon, or upon a public officer in the discharge of his duties.

"Third. Of any misdemeanor punishable by imprisonment in the county jail or by fine, or by both."

It thus appears that the District Court of Alaska has general jurisdiction in civil and criminal causes; that the justice's court has a wide jurisdiction in civil matters, and general jurisdiction of any misdemeanor punishable by imprisonment in the county jail, or by fine, or by both.

Upon this statement of the powers expressly granted to town councils, and of the jurisdiction expressly conferred upon the district and justices' courts, by Congress, I am fully persuaded:

(1) That if the town council of Nome has power, by implication, to create a municipal court, the same implied power will enable it to confer authority upon the justice of the peace residing within its boundaries to try violations of its ordinances. The power, if it exists, is not limited to the creation of a new or municipal court; it may as well be exercised by conferring the necessary authority upon an existing court of competent jurisdiction, such as is the justice's court.

(2) Even if the council has not the power to create a municipal court and confer criminal jurisdiction, still, if necessary to enable it to carry out the powers expressly granted to it to afford police and other protection, it may, by ordinance, provide penalties which may be enforced under the grant of criminal jurisdiction in the justice's court. This conclusion seems to follow as well from the necessities of the situation as from the principles announced by the Supreme Court of the United States in the case of *Ferris v. Higley*. That was a case where the Legislature of the territory of Utah had conferred general chancery and common-law jurisdiction upon the probate courts established by the organic act. While denying the power of the Legislature

thus to change the very nature of a court established within the territory by Congress, the court nevertheless held:

"There may be cases when that Legislature, conferring new rights or new remedies, or establishing anomalous rules of proceedings within their legislative power, may direct in what court they shall be had. Nor are we called on to deny that the functions and powers of the probate courts may be more specifically defined by the territorial statutes within the limit of the general idea of the nature of probate courts, or that certain duties not strictly of that character may be imposed on them by that legislation." *Ferris v. Higley*, 20 Wall. 375, 22 L. Ed. 383.

(3) That the town council would not have any implied power to establish a court and confer jurisdiction in aid of its express powers if there is present a court with sufficient jurisdiction to perform that duty.

(4) That the justice's court now established in the town of Nome has jurisdiction of all misdemeanors, and that no crime created by the common council by town ordinance can rise above that dignity. It only remains for the council to provide, by ordinance, for the trial of such matters in the justice's court, and every requirement imposed by their express powers is met and complied with, and a court is provided with unquestioned jurisdiction given by the very power which created the council.

(5) That the criminal and civil jurisdiction of justices of the peace cannot be interfered with or taken away by any ordinance of a town council. Since the judicial power in the territory is vested wholly in the district and justices' courts, and since that express power covers the whole range of jurisdiction and is ample to meet every requirement imposed upon the judiciary within the district, it cannot be necessary for the court to sustain a doubtful and implied power in the common council to create a new court and divide that jurisdiction.

Let us examine this new court for a moment in view of these general provisions of law guarantying the right of trial to citizens. Every person accused of crime before a justice is entitled to a trial by jury. Section 419, Cr. Code (Act March 3, 1899, c. 429, 30 Stat. 1331). All of his rights and the method of securing them are clearly pointed out by law. He is entitled to an appeal from the justice's to the district court (section 441, Cr. Code), where his rights may be fully protected. But no such protection is given to the person tried in the municipal court. There is no provision for a jury trial, and no method of re-examination by appeal. Under such a jurisdiction, the municipal court would be an arbitrary tribunal, sitting without a jury, and from which no appeal would lie. It would have no relation to the courts already created by Congress, neither of which could exercise any supervisory control over it. While it would usurp the jurisdiction expressly conferred by the organic act upon the justice's court, it would continue to be entirely independent from the control of any appellate tribunal. Such a court has no place in the judiciary existing under the organic laws of Alaska.

"The fact that the judges of these latter courts are appointed by the federal power, paid by that power, and that other officers of these courts are appointed and paid in like manner—strongly repels the idea that Congress, in conferring on these courts all the powers of courts of general jurisdiction, both civil and criminal, intended to leave to the territorial Legislature the power to practically evade or obstruct the exercise of those powers by conferring precisely the same jurisdiction on courts created and appointed by the territory."

Ferris v. Higley, *supra*.

It is clearly unnecessary for the council to create such a court to enable it to carry into effect the powers expressly conferred upon it by Congress. The ordinance creating it is void, and the court is without jurisdiction to fine or imprison

for a violation of a municipal ordinance. The pretended judgment against the petitioner in this case was and is void for want of jurisdiction, and he must be discharged from the imprisonment and fine inflicted thereby. *People v. Maxon*, 1 Idaho, 330; *Ducheneau v. House* (Utah) 10 Pac. 838; *McCray v. Baker* (Wyo.) 18 Pac. 749; *In re Cloherty* (Wash.) 27 Pac. 1064.

PRICE et al. v. McINTOSH et al.

(Second Division. Nome. November 16, 1901.)

No. 242.

1. MINES AND MINERALS—LOCATION NOTICE—MONUMENTS—STAKES.

A placer claim is not void because there is a discrepancy between the courses and distances mentioned and called for in the location notice and the stakes and monuments set by the locator to mark the boundaries of his claim. Where there is such a conflict, the stakes and monuments must prevail, if they are sufficient to identify the claim, as they are in the case at bar.

2. SAME—PUBLIC LANDS—SURVEYS.

A mining claim located on surveyed lands "shall conform as nearly as practicable with the United States system of public-land surveys, and the rectangular system of such surveys" (Act May 10, 1872, c. 152, 17 Stat. 91). On unsurveyed lands they may be located, surveyed, platted, and patented without regard to the public surveys, and need not conform thereto in any particular.

3. SAME—LIMITATIONS UPON LOCATION.

The only limitation placed by law upon a placer mining claim located upon the unsurveyed public domain in Alaska is that it shall not exceed 20 acres in area.

4. SAME—LIMITATIONS UPON AREA—MINERS' RULES.

A miners' rule, custom, or regulation arbitrarily fixing the size of all placer claims at 1,320 feet long by 660 feet wide is

void. A miners' rule, custom, or regulation cannot limit a placer mining claim to less than 20 acres; nor fix its unvarying form upon the unsurveyed public domain; and such a rule, custom, or regulation is void.

5. MINING LOCATION—EXCESS AREA—RELOCATION.

As between two locator's, and as affecting their rights only, one cannot locate ground of which the other is in actual possession under claim or color of right, because such ground would not be vacant and unappropriated. Where a junior locator attempts to relocate the excess in area in a placer claim, he must locate some portion of the excessive claim not actually occupied by the diggings or property of the senior locator.

This is a suit in ejectment to recover possession of a portion of a mining claim which is known to all parties to this action, and will be hereafter referred to as the "California Fraction." Plaintiffs allege two sources of title. The first is derived through a placer mining location made on May 29, 1899, by one Thorolf Kjelsberg; and the second through a placer mining location upon the same ground made on August 18, 1900, by Magnus Kjelsberg. The defendants claim title through a location of the California fraction by one E. G. Gould, made on August 22, 1900. By stipulation in open court, a jury trial was waived, and the cause submitted to the decision of the court upon the merits.

It is not denied that each of the Kjelsbergs made his location at the dates claimed. It is admitted that their southeast and southwest corner stakes are identical in place with those of the California fraction, and it is admitted that the California fraction was located, and intended to be located, within the Kjelsbergs' claims, with the intent to locate and claim the excess in width therein over 660 feet. The following diagram shows the respective locations of the parties,

and gives, at least approximately, the admitted corners and distances of their claims:

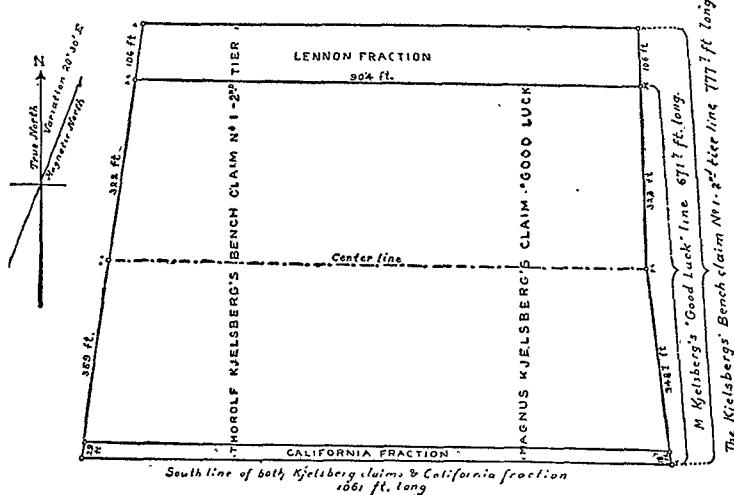


Diagram showing respective locations of Thorolf and Magnus Kjelberg's Cloisters, also California's largest traction

Chas. S. Johnson, P. C. Sullivan, A. J. Daly, Ira D. Orton,
and Alfred Fink, for plaintiffs.

Thompson, Murane & Thompson, for defendants.

WICKERSHAM, District Judge (after stating the facts as above). Under the admitted facts in this case these questions arise for determination by the court: (1) Was Thorolf Kjelsberg's placer location void because his notice of location called for a tract 1,320 feet long by 660 feet wide, while the stakes and monuments actually set by him at the corners of his claim inclosed a space described in the foregoing map 1,061 feet on the south line, 787 feet on the west line, 904 feet on the north line, and 777.7 feet on the east line? (2)

Was it void as to the excess in width over 660 feet? (3) Was the junior location made by Magnus Kjelsberg valid or void for conflict with the senior location made by his brother? (4) Was the location of the Gould or California fraction, which is conceded to be within the exterior boundaries of both the prior Kjelsberg locations, valid or void, in view of the actual possession of the ground by the prior locators with their diggings at the time of its location?

The mining laws of the United States were extended to Alaska by section 8 of "An act providing a civil government for Alaska," approved May 17, 1884, c. 53, 23 Stat. 24.

The first inquiry arising in this cause must be decided in the negative. The court has had occasion to examine into that question in the case of Steen v. The Wild Goose Mining Co., ante, 255, and held that a placer location would not be void for a discrepancy between the courses and distances mentioned in the notice and the stakes and monuments set by the locator to mark the boundaries of his claim; that, where there is such a conflict, the stakes and monuments must prevail, if they are sufficient to identify the claim, as they are in the case at bar. Section 682, Code Civ. Proc. p. 286; Carter's Alaska Code (Act June 6, 1900, c. 786, 31 Stat. 440) Bennett v. Harkrader, 158 U. S. 441, 15 Sup. Ct. 863, 39 L. Ed. 1046; Book v. Justice Min. Co. (C. C.) 58 Fed. 106; 1 Lindley on Mines, §§ 381, 382. The adoption of any other rule would wholly defeat even the claims of the defendants in this action, for the notice of their location of the California fraction begins at their southeast corner stake, and carries their claim 1,320 feet south, whereas their stakes and monuments locate it 1,061 feet west from that point. Miners in the mountains, without surveying instruments, or even a compass, to guide them, or any present method of making accurate measurements, are not expected to get their courses or distances accurately. The court will pay more attention

to their stakes and monuments. The purpose of both the notice and the monuments is to "identify the claim," and generally this can be done most certainly by the stakes set on the ground by the miner himself. Certainly, they must govern when there is a difference between them and the calls in the notice. The Kjelsberg claim is not void for that reason.

The second objection made to the Thorolf Kjelsberg location, which is really the point in this case, too, is much more serious, and seems never to have been clearly passed upon by the courts. Conceding this claim to be of the dimensions shown upon the diagram, is it void as to the excess in width over 660 feet, or may it be sustained, though wider than 660 feet, because as actually located and marked upon the ground it does not contain more than 20 acres of land?

It may save time to suggest at the beginning that a different rule is fixed by statute for determining the shape and area of lode and placer claims. Section 2320, Rev. St., being section 2 of the act of 1872 (Act May 10, 1872, c. 152, 17 Stat. 91 [U. S. Comp. St. 1901, p. 1424]), provides that a lode claim located after the 10th day of May, 1872, "may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode. * * * No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface. * * * The end-lines of each claim shall be parallel to each other."

Here is a specific statutory limitation upon the maximum length of a lode claim, and a specific limitation upon both the maximum and minimum width, with a specific direction that the end lines shall be parallel to each other. And yet in the Eureka Case in the United States Circuit Court of

Nevada, decided by Judge Field, and concurred in by Judge Sawyer, it is said that "the provision of the statute of 1872, requiring the lines of each claim to be parallel to each other, is merely directory, and no consequence is attached to a deviation from its direction." *Eureka M. Co. v. Richmond M. Co.*, 4 Sawy. 302, Fed. Cas. No. 4,548, 9 Morr. Min. Rep. 578. Nor is it necessary that the side lines of a lode claim should be parallel, or that the location should be in the form of a parallelogram. A lode claim may be in any form bounded by lines, not exceeding the maximum length and width, which enables the miner to follow the vein of ore. A horse-shoe shape has passed the Supreme Court of the United States without criticism, a wedge shape has been sustained by the Supreme Court of California, and a triangle by the United States Circuit Court in Montana. *Iron Silver Co. v. Elgin Co.*, 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98; *Doe v. Sanger* (Cal.) 23 Pac. 365; *Montana v. Clark* (C. C.) 42 Fed. 626.

Attention is called to the fact that the lode law was first enacted by Congress in 1866 (Act July 4, 1866, c. 166, 14 Stat. 85) while the first placer law was not passed until 1870 (Act July 9, 1870, c. 235, 16 Stat. 217). They are different acts, and largely independent of each other. The provisions necessary to a determination of this case are entirely separate and distinct from the lode law, and the decisions applicable to lode claims may or not apply to placer claims. None of the provisions fixing the size and extent of lode claims apply to placer claims.

The courts have frequently decided that the location of more ground than is allowed by law is void only as to the excess, and that to that extent the location is void. *Richmond M. Co. v. Rose*, 114 U. S. 576, 5 Sup. Ct. 1055, 29 L. Ed. 273; *Jupiter M. Co. v. Bodie M. Co.* (C. C.) 11 Fed. 666; *Stemwinder M. Co. v. Emma M. Co.* (Idaho) 21 Pac. 1040,

affirmed on appeal to Supreme Court of the United States, 13 Sup. Ct. 1052, 37 L. Ed. 960; *Rose v. Richmond M. Co.* (Nev.) 27 Pac. 1105. All the authorities cited by the defendant to sustain this point are those relating to lode, and not to placer, claims. The leading case of *Richmond v. Rose*, 114 U. S. 576, 5 Sup. Ct. 1055, 29 L. Ed. 273, was decided upon the early lode act of 1866, while the others above cited are either in construction of that or later lode acts. They are, then, in point only so far as principles are to be considered. Still the general principle may be considered as settled by these and other decisions that a mining location, whether lode or placer, containing more ground than allowed by the statute, must be held void as to the excess. To the extent allowed by law it will be sustained.

Is there an excess in area in this case? Can there be an excess in a placer mining claim, however wide or long it may be, unless the area exceeds 20 acres? To answer these questions involves a brief examination of the United States mining laws, and the conditions which preceded their enactment by Congress. The necessary information upon these matters, however, is authoritatively stated in the decision of the Supreme Court of the United States and in the statutes themselves.

From the discovery of gold in California to the passage of the act providing for a District and Circuit Court for the District of Nevada, approved February 27, 1865 (13 Stat. 440, c. 64), there was no national legislation upon the subject of the western gold-bearing mineral lands. The act of February 27, 1865, only recognized the right of litigants to maintain suits for the possession of such lands, without regard to the paramount ownership of the United States. From the beginning of mining in California, however, local rules and regulations adopted by the miners in district meetings had been recognized as the common law of the diggings.

In *Jennison v. Kirk*, 98 U. S. 453, 25 L. Ed. 240, Judge Field continues this historical review:

"These regulations and customs were appealed to in controversies in the state courts, and received their sanction; and properties to the value of many millions rested upon them. For eighteen years —from 1848 to 1866—the regulations and customs of miners, as enforced and molded by the courts and sanctioned by the legislation of the state, constituted the law governing property in mines and in water on the public mineral lands."

The act of Congress of July 26, 1866 (14 Stat. 251, c. 262), known as the "Lode and Water Law," was the first of the great mining statutes. It gave no recognition, however, to placer deposits, but was confined exclusively to lode and quartz mines. As the real wealth of California had, up to that time, been extracted from her placer deposits, it was not long before Congress passed the act of July 9, 1870. Section 12 of this act first fixed a statutory limit upon the quantity of land which might be embraced in a placer claim in the following language: "That no location of a placer claim, hereafter made, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys." 16 Stat. 217, c. 235. See section 2330, Rev. St. U. S. 1878 [U. S. Comp. St. 1901, p. 1432]. Again we quote from Judge Field, in *Smelting Co. v. Kemp*:

"Previously to the act of July 9, 1870, 16 Stat. 217, Congress imposed no limitation to the area which might be included in the location of a placer claim. This, as well as every other thing relating to the acquisition and continued possession of a mining claim, was determined by rules and regulations established by miners themselves. * * * Placer claims first became the subject of regulation by the mining act of July 9, 1870, which provided that patents for them might be issued under like circumstances and conditions as for vein or lode claims, and that persons having contiguous claims of any size might make joint entry thereof. But it also provided

that no location of a placer claim thereafter made should exceed one hundred and sixty acres for one person or association of persons." *Smelting Co. v. Kemp*, 104 U. S. 636, 650, 26 L. Ed. 875.

Prior, then, to 1870, there was no limit to the area of placer mines, nor any provision fixing their form, except such as was imposed by the miners by their local rules and regulations. The act of 1870 limited the area to 160 acres in each location, and also provided that each "location shall conform to the United States surveys." This latter provision is important in the consideration of the question at bar, for it provided a new and unyielding rule in fixing both the area and form of placer claims. They could not exceed 160 acres in extent, as theretofore they might, and must conform to the rectangular system of the public surveys. The law of 1870, however, was so unsatisfactory, and so widely at variance with the methods theretofore prevailing in locating placers, that Congress was speedily prevailed upon to change the law in these respects.

The act of May 10, 1872, was then passed, very largely to relieve the objections raised to the act of 1870 in requiring each placer location to "conform to the United States surveys." The act of 1872 re-enacted the old rule. It again gave freedom to the miner in locating his mine according as the ground was valuable for mineral or not. To be more accurate, it recognized two rules, which will be more apparent upon quoting the law. Section 10 of the act of May 10, 1872 (17 Stat. 94, c. 152), is now section 2331 of the Revised Statutes of the United States of 1878 [U. S. Comp. St. 1901, p. 1432], and that clause in question reads:

"Sec. 2331. Where placer-claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public-land surveys, and

the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer-claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands."

Two rules are thus recognized in locating and fixing the exterior boundaries of placer claims under the act of 1872. The first one provides that all claims located after May 10, 1872, "shall conform as near as practicable with the United States system of public land surveys, and the rectangular system of such surveys." The second—and the one always in force until the act of 1870 was passed—and now given legislative recognition, is in this language: "But where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands." These two rules for determining the form and extent of placers, together with the provision reducing the area to 20 acres in each location, continue to be the law to this day, and must determine the controversy at bar.

The court will take judicial notice that the "public land surveys and the rectangular subdivisions of such surveys" have not been extended to this part of Alaska, and do not embrace the claim in question, but that all the public domain within this division of the court is unsurveyed. It follows that all placer claims within this division may be located, surveyed, platted, and patented without regard to the public surveys, and need not conform thereto in any particular. When the surveys are extended over this region, such claims will be noted upon the map of such surveys as lots in the usual manner.

The only limitation, then, imposed by statute upon the location of a placer mining claim upon the unsurveyed public land in Alaska is that it shall not include an area of more than 20 acres. It need not conform to the public surveys. No limit is fixed by statute to its length, breadth, or form.

Section 2320, Rev. St., fixing the maximum length and width of lode claims, does not apply; and unless some rule, regulation, or custom of miners within the district limits the locator, it seems as if he may locate his placer claim to follow the pay streak, in any form he chooses, but not to exceed 20 acres in extent.

Counsel for defendant seem to have recognized this, for they pleaded and offered proof to support both a rule and a custom of that kind. The rule proved was adopted by the miners in the Cape Nome mining district on October 15, 1898, and is in the following language: "2nd: A motion by Eric O. Lindbloom, and seconded by John Bryndeson, that placer claims shall be located 1320 (thirteen hundred and twenty) feet by 660 (six hundred and sixty) feet. Carried." They also proved by the deputy recorder of the district that nearly 15,000 mining locations had been filed in his office, and that more than 95 per cent. thereof described the claim as 1,320 by 660 feet square.

Conceding both the rule and custom to have been established, what effect shall be given to them? Literally, they both say that placer claims shall be 1,320x660 feet square; no more, no less. It cannot be pretended that a maximum width alone is established by either, nor is it attempted to be shown that any forfeiture clause or custom is in force in such cases. Neither the rule nor the custom makes any concessions to fractions, such as all parties in this cause claim, and a literal adherence to the rule will render each claim in this case void. To enforce either the rule or custom literally would require a miner who desired to locate one acre of placer deposit fraudulently to include nineteen acres of agricultural or nonmineral land in his location. Under such a condition no prospector would be safe to locate a mine, except when accompanied by a surveyor, or having with him some means of accurately measuring the ground. It

cannot be seriously argued that either a rule or a custom of that kind would be reasonable, or ought to be upheld by the courts. If neither the rule nor the custom can be maintained literally, then what effect shall be given to them? Counsel for defendant answers: This effect—that no claim shall be longer than 1,320 feet nor wider than 660 feet. Two objections appear to this answer. The first is that neither the rule nor custom is to that effect; and, second, the court ought not to infer a construction which does not fairly exist for the purpose of forfeiting the prior claim of another. *Jupiter M. Co. v. Bodie M. Co. (C. C.)* 11 Fed. 666.

Why not determine the construction to be given to both the rule and custom by the construction given to a similar rule in the lode law of 1872? Neither the rule nor the custom relied on by defendant does more than to fix an ideal maximum containing 20 acres. The statutory provisions relating to the length and width of lode claims in section 2320, Rev. St. U. S., do identically that, yet in the celebrated *Eureka* opinion, written by Judge Field, and concurred in by Judge Sawyer, the United States Circuit Court of Nevada declared: "In the second place, the provision of the statute of 1872, requiring the lines of each claim to be parallel to each other, is merely directory, and no consequence is attached to a deviation from its direction." By a parity of reasoning it seems fair to conclude that the rule and custom in question are each only directory, and not mandatory, and no consequence can be attached to a deviation from either of them. *Eureka M. Co. v. Richmond M. Co.*, 4 Sawy. 302, Fed. Cas. No. 4,548, 9 Morr. Min. Rep. 578.

More important questions, however, are involved: Can a placer mining location be limited by a miners' rule, regulation, or custom either, first, to an area less than 20 acres, or, second, in form, upon the unsurveyed public land?

While the construction given to the mining laws by the

Department of the Interior may not be binding upon the court, a contemporaneous and long accepted construction by that department is entitled to great consideration. And especially is this true when it appears that for many years the titles through all placer patents have vested under that construction, which has not once been questioned by the courts.

The sixty-first rule or regulation promulgated by that department under its authority to dispose of the mining lands of the United States concludes with this sentence: "And no local laws or mining regulations can restrict a placer location to less than twenty acres, although the locator is not compelled to take so much." Regulations of 1891, approved by Secretary Noble, reissued 1894, approved by Secretary Roke Smith; 2 Lindley on Mines, p. 1200; Barringer and Adams, pp. 259, 260.

Without seeking for decisions for support, it must be conceded that every miner has the statutory right to locate 20 acres for placer deposits, nor is he required or permitted thus to acquire title to agricultural or nonmineral land. If, then, he be obliged by miners' rule or regulation to take a tract in no case longer than 1,320 feet nor wider than 660 feet, he may be even limited to one acre. Suppose the mining ground is in a narrow valley only 100 feet wide, such a construction would allow him only a strip 100 feet wide by 1,320 feet long, or 3 acres, whereas the law allows him 20. These questions have repeatedly been determined by the Land Office and the Interior Department.

Application was made to this department to enter the Bear river extension placer claim in sections 12, 13, and 14, Tp. 15 N., R. 9 E., California, along the bed of Bear river 12,000 feet. Upon appeal to Secretary Teller, he said:

"It was the intention of the mining laws, generally, to permit persons to take a certain quantity of land fit for mining, and not to compel them to take such a quantity irrespective of its fitness for mining.

The act of July 9, 1871, which expressly required placer locations to conform to the lines of the public surveys, was unreasonable, a hardship, and in contravention of the established customs of the mining region. Therefore it was modified by the act of May 10, 1872, so as to provide for exceptional cases where reason and common sense required a different regulation. Such an exceptional case, in my judgment, is now before me, where the entire placer deposit in a cañon within certain limits is claimed, and where the adjoining land on either side is totally unfit for mining or agriculture." In re William Rablin, 2 Land Dec. Dept. Int. 764.

Secretary Teller's decision was approved in later decisions by that department (In re Pearsall and Freeman, 6 Land Dec. Dept. Int. 227; Esperance Mining Claim, 10 Copp's Land Owner, 338), and in approving it Lindley says:

"There can be no question but that this ruling is in harmony with the customs of miners in California. * * * Evidently, there was some reason for the modification of the original placer act in this respect, and there can be no doubt that Secretary Teller states the 'old law, the mischief, and the remedy' correctly." 1 Lindley on Mines, p. 448.

At the end of this section Lindley lays down what is undoubtedly the correct rule in this forceful language:

"Locations upon unsurveyed lands may be made in any form, so long as the statutory area is not exceeded."

Barringer and Adams reach the same conclusion, and say:

"A placer location may be in any shape, but should conform to legal subdivisions when the land has been surveyed." Page 260.

A single case only upholds a different rule. The Idaho court in the case of Rosenthal v. Ives says:

"Was it error to find the existence of a mining custom at the date of the Ives location, limiting all placer claims in that locality to eighty rods in length, and will this finding support the conclusions of law based thereon? Rules and customs of miners, reasonable in themselves, and not in conflict with any higher law, have long been

recognized and sanctioned by legislative enactments and judicial decisions. That such rules may still be adopted and enforced as a part of the law of this country is too well settled to admit of argument. We cannot see that the custom in question in any way conflicts either with the acts of Congress or the laws of the territory, but, on the contrary, think the custom a reasonable one, and entirely in harmony with the spirit of the laws." *Rosenthal v. Ives* (Idaho) 12 Pac. 904, 15 Morr. Min. R. 324.

Nor does the Idaho court cite a single authority to support its contention in this respect. Its conclusion is in direct opposition to the construction given for many years by the Land Department, and approved by every other authority having occasion to pass upon it. To gain that advantage to the miner, Congress passed the amendment of 1872, at the same time reducing the area from 160 to 20 acres, and the advantage ought not to be surrendered by construction. It is a fair inference, too, from the language used in *Rosenthal v. Ives* (1) that in the opinion of that court a rule or custom of miners was necessary to limit the length of placer claims to 80 rods, or 1,320 feet; and (2) that without such a rule or custom it might be of any length or width, providing only that the claim did not exceed 20 acres in area. In the case at bar the court finds that the rule and customs pleaded do not have that effect, and *Rosenthal v. Ives* is, by reason of that difference, an authority against the defendant.

Until corrected by a superior tribunal, or convinced that it is in error, this court will maintain that a miner may locate 20 acres, or less, if he desires, of placer mining ground in any form he chooses, excluding known nonmineral land; that no miners' rule, regulation, or custom can limit him in the area or form of his claim, nor in its width or length; that any such rule, regulation, or custom is void for conflict with both the spirit and letter of the placer mining law.

It follows, in my judgment, that the location of Thorolf

Kjelsberg was not void in any part, for, as staked and located, it did not contain more than 20 acres. The evidence does not convince the court that he and Grenier, his partner, ever abandoned that part, at least, in the Good Luck location, for they were so far recognized as its owners that they sold it and received the consideration therefor.

The last query in this case—whether or not the location of the California fraction upon ground actually and notoriously then in possession of an adverse claimant is valid or void—is fully answered by the language of the Supreme Court of Utah as follows:

"It is conceded by the respondents, and it is doubtless true, that, as between two locator's, and as affecting their rights only, one cannot locate ground of which the other is in actual possession under claim or color of right, because such ground would not be vacant and unoccupied. This would affect the appellant's right to recover for the conflict area in dispute, it being an undisputed fact that at the very time when the Virginia was located by him, the respondents, the locator's of the Nabob, were in actual possession, sinking their incline shaft, and occupying a shanty on the ground." Eilers v. Boatman, 3 Utah, 159, 2 Pac. 66, 15 Morr. Min. R. 462.

Upon appeal to the Supreme Court of the United States, this case was distinctly affirmed, because it was "right on the facts." Eilers v. Boatman, 111 U. S. 356, 4 Sup. Ct. 432, 28 L. Ed. 454. Under the principle thus approved by the Supreme Court of the United States, a junior location of an excess over the maximum allowed by law ought not to be sustained, unless it is taken from that part of the claim not actually occupied by the diggings or property of the senior locator.

The location of the California fraction was and is void, because there was no excess or fraction upon which to locate. It was void for the further reason that at the time of its attempted location the strip or fraction was in the actual oc-

cipation of Thorolf Kjelsberg and his partner, and was then actually being worked and mined. Findings and decision will be in favor of the plaintiffs.

NODINE v. HANNUM.

(Second Division. Nome. November 23, 1901.)

No. 571.

1. ATTORNEY—CLIENT—ATTORNEY FEE.

An attorney has the statutory right to retain money in his hands belonging to his client for the payment of his attorney fees. When a single member of a firm was cited to pay money into court belonging to the client, the court ordered the firm made parties, and when it appeared that a contention existed in good faith the cause was set for trial by jury.

Cochran & Grimm, for plaintiff.

C. S. Hannum, in propria persona.

WICKERSHAM, District Judge. This is a proceeding begun by the plaintiff under the provisions of chapter 76 of the Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 449), to compel the defendant, as attorney of this court, to pay over to the plaintiff the sum of \$404, which plaintiff alleges the defendant received in his professional employment for her use.

Section 751 of chapter 76 provides that:

"When an attorney refuses to deliver over money or papers to a person from or for whom he has received them in the course of professional employment, whether in a judicial proceeding or not, he may be required by an order of the court to do so within a specified time, or show cause why he should not be punished for a contempt."

Upon an application under this section an order was granted, requiring the defendant to make payment or show cause. To this order the defendant answered, alleging that as a

member of the firm of Milroy, Hannum & Milroy he did receive the money in question; that theretofore the firm had been employed by the defendant in two suits; and that, for the various services rendered in those two suits, mentioned in the answer, the plaintiff in this action became indebted to the firm in the sum of about \$1,250; and that the money received by him was applied on the payment of the sums due from Mrs. Nodine to the firm, and the defendant set up his attorney's lien upon the property.

Section 742 of chapter 76 provides that:

"An attorney has a lien for his compensation, whether specially agreed upon or implied, as provided in this section—First. Upon the papers of his client which have come into his possession in the course of his professional employment. Second. Upon money in his hands belonging to his client."

To the defendant's answer there was a reply admitting some of the facts and denying others. Upon the pleadings the court heard the testimony of both the plaintiff and the defendant in full, and has examined the records in both the suits mentioned in the defendant's answer. From all the evidence in the case the court is now satisfied that there has been no misconduct on the part of the defendant; that his refusal to deliver the money obtained by him in the course of his professional employment was in accordance with the rule of law as laid down by statute. Whether or not the defendant is entitled to charge for the services the sum which he did charge, and which he did retain from the funds in his hands, is not now a matter for this court to determine. The only question which the court now intends to determine is that the defendant acted in good faith, and without any misconduct or fraudulent intent upon his part. Every phase of this case is determined in favor of the defendant in the case determined by the Supreme Court of the United States entitled *In re Paschal*, 10 Wall. 483, 19 L. Ed. 992.

Section 752 provides:

"If, however, the attorney claim a lien upon the money or papers under the provisions of section seven hundred and forty-two, the court shall:—

"First; impose, as a condition of making the order, that the client give security, in form and amount to be directed, to satisfy the lien, when determined in an action; or,

"Second; summarily inquire into the facts on which the claim of a lien is founded, and determine the same; or,

"Third; direct the trial of the controversy by a jury or refer it, and upon the verdict or report, determine the same as in other cases."

The subject of controversy between the plaintiff and defendant in this action is the amount which the plaintiff owes the firm of Milroy, Hannum & Milroy. It is a question to be determined by a jury, and the court will order that the matter be referred to a jury for determination. However, it is unfair to the defendant to single him out of the firm, and prosecute the case against him alone. He acted for and on account of the firm, and the firm is the real party in interest, and not the defendant. There will be a further order that the firm be substituted as defendant, instead of C. S. Hannum alone. The cause will then be placed upon the trial calendar for determination by a jury upon the pleadings as they now stand between the plaintiff and the defendant in this action.

YAGER et al. v. RING.

(Second Division. Nome. November 23, 1901.)

No. 829.

1. EJECTMENT—ABATEMENT—TRESPASS.

Where the defendants in a suit in ejectment bring a subsequent suit against the plaintiff in the ejectment suit for damages for trespass upon the same property, the suit in trespass will be stayed until that in ejectment is tried, or the two may be consolidated and tried as an ejectment suit.

Plea in Abatement. Another action pending for the same cause. Plea allowed; suit stayed.

W. T. Humes and Jackson, Pittman & Fink, for plaintiffs. Keller & Fuller, for defendant.

WICKERSHAM, District Judge. This suit is brought by the plaintiffs to recover from the defendant the sum of \$60,000 damages for an alleged trespass in forcibly entering upon placer mining claim No. 7 on Gold Run, and extracting and appropriating gold dust therefrom of that value, belonging to plaintiffs. It is alleged in the complaint that Yager located the claim on or about July 1, 1900, complied with the law in the matter of staking and recording, and "after the location of said placer claim" by Yager conveyed certain interests therein to the other plaintiffs, no date being given. It is alleged that after these conveyances "the defendant, Herman A. Ring, unlawfully entered upon the above-described placer mining claim without the consent of said owners thereof, or any of them, and did trespass upon the said placer mining claim, and did unlawfully extract therefrom and from the limits thereof gold dust of the value of sixty thousand (\$60,000) dollars, which said gold dust the defendant, Herman A. Ring, has appropriated to his own use and ben-

efit." Judgment for \$60,000 is asked against Ring, with costs. The complaint was filed in this court April 13, 1901, and the cause is No. 329. The defendant, Ring, answered by a special plea in abatement, alleging the pendency of another suit between the same parties for the same cause of action, being No. 287, now undetermined in this court. Plaintiff filed a reply of general denial. Upon hearing, the defendant in this action offered the complaint, answer, and reply in No. 287, and no further testimony was offered by either party.

The sole question to be determined from the proofs so offered is whether No. 287 in this court is another action pending between the same parties for the same cause of action.

The complaint in No. 287 was filed in this court on February 16, 1901. The parties are Herman A. Ring, plaintiff, and Charles C. Yager, James A. Ryan, H. M. Carpenter, William T. Hume, B. O. Williams, Gordon Hall, and A. L. Halstead, defendants. No. 287 is an ejectment suit by Ring to recover possession of No. 7 on Gold Run, together with damages in the sum of \$25,000 from the defendants for withholding the same from him. The answer in No. 287 is general for all the defendants named in the action. It first denies the material allegations of the complaint, and then sets up six separate defenses. The first four may be massed in one allegation that the defendant Yager located, marked, and recorded No. 7 on Gold Run prior to the time when Ring claims to have done so. The sixth is a plea of res judicata, while the fifth sets out a new cause of action for damages against Ring in favor of the defendants. This fifth separate answer alleges that "while the said defendant was in the quiet, peaceful, and lawful possession and occupation of said placer mining claim described in this answer and in the use and occupation thereof, and on or about the _____ day of August, 1900," the plaintiff Ring, together with Kron-

quist and Nelson, forcibly took possession thereof, and "did extract large quantities of gold therefrom, and embezzle, steal, and convert the same to their own use," etc., "to the damage of the defendants in the sum of forty thousand dollars."

From the pleadings in the two causes it is clear that the principal ground of contention between the parties is placer claim No. 7 on Gold Run, claimed by Ring, as well as by Yager and his grantees. The first suit, No. 287, by Ring, is to recover it, together with \$25,000 damages for withholding it. The answer in that cause asks judgment, and the complaint in No. 329 also asks judgment for \$60,000 for extracting gold from the same claim. In No. 287 Ring is the sole plaintiff. He is sole defendant in No. 329. In No. 287, Yager, Ryan, Hall, and Halstead are defendants, as are also Carpenter, Hume, and Williams. It is nowhere shown, however, that these three have any special interest or ownership in No. 7 in cause No. 287, while in No. 329 it is affirmatively shown that only Yager, Ryan, Hall, and Halstead have such interest. Upon a fair construction of the pleadings it appears that the real parties in interest in both cases are Ring on the one side, and Yager, Ryan, Hall, and Halstead on the other.

Both suits are between the same real parties in interest, and for substantially the same cause of action, to wit, damages for extracting and appropriating the gold dust from claim No. 7 on Gold Run. The first case (No. 287) is ejectment; the second (No. 329) for damages in trespass. It is a question whether a suit for damages in trespass will lie while the title is in contest between the same parties in ejectment. *Shoenberger v. Baker*, 22 Pa. 398; 14 *Morr. Min. R.* 412.

The further proceedings in this cause must be governed by the rule applied by the Supreme Court of Oregon in a

similar case. There must be a stay of proceedings in this suit until the ejectment suit is decided; or, upon motion of counsel for plaintiff in this action, the two may be consolidated, and tried as an ejectment suit. *Crane v. Larsen*, 15 Or. 345, 15 Pac. 326.

RIGLEY v. HAYDEN et al.

(Second Division. Nome. November 25, 1901.)

No. 157.

1. APPEAL AND ERROR—JURISDICTION—VACATING APPEAL.

When an appeal has been regularly taken by giving the necessary notice, bonds, bill of exceptions, assignment of errors, and supersedeas bond, and has been regularly allowed in the District Court, there is no jurisdiction in the latter court to vacate the order allowing the appeal, and to reinstate the cause for further action, for failure to file transcript in the appellate court.

2. SAME—ABANDONMENT—DISMISSAL.

Where the appellant has regularly perfected his appeal, and will not forward the transcript to and file the cause in the Circuit Court of Appeals, the respondent may apply to that court for leave to docket the cause and dismiss the appeal.

Motion to vacate an appeal regularly entered and allowed to the Circuit Court of Appeals for failure to forward transcript. Denied.

Bard & Schofield, for plaintiff.

Du Bose & Stevens, for defendants.

WICKERSHAM, District Judge. This cause comes before the court upon a motion by the plaintiff to vacate an order entered April 17, 1901, allowing an appeal to the Circuit Court of Appeals.

From an examination of the record it appears that, the case being at issue, the judge of this court, on December

12, 1900, referred it to Arthur H. Wright, to hear the testimony and make and report findings of facts and conclusions of law upon the merits. Notice was given to the attorney for the plaintiff on the 12th, and the case was set for trial the next morning at 10 o'clock. The plaintiff was not present, nor did his counsel appear. The counsel for defendants thereupon moved to dismiss for want of prosecution, which was allowed by the referee, and this disposition of the case was reported by him to the court, which approved his findings and dismissed the case on January 10, 1901. Thereafter a motion to vacate this judgment was made, and on April 8th it was vacated, and the case reinstated on the calendar. On April 17th the defendants appealed to the Circuit Court of Appeals from the order vacating the judgment of dismissal. The record contains their petition for appeal and stay of proceedings, the notice of appeal, bill of exceptions, assignment of errors, order allowing appeal and stay of proceedings, and the appeal and supersedeas bond. On the 23d of April a citation was issued, and served upon the respondent. The present attorneys for the respondent entered their appearance in the case on April 16th, the day before the appeal to the Circuit Court of Appeals. On May 3d the respondent filed a motion in this court to vacate the order of April 17th allowing the appeal and fixing the bond, and it is this motion which now comes on for hearing. No further effort has been made by the appellants to prosecute their appeal to the Circuit Court of Appeals. No transcript has been prepared and forwarded, and no other step has been taken to procure a decision from that court. The record yet remains in this court, and no effort is being made by the appellants to transfer the cause to the appellate court.

An examination of the record leads to the conclusion that an abuse of the process of this court has been accomplished. That fact, however, will be as apparent to the Circuit Court

of Appeals as to this court, if once called to its attention. This court has no power to hear the motion now before it. However clearly it may appear that an abuse of its process has resulted, it further appears that an appeal has actually been taken and allowed by the court. The objection that the order appealed from is not a final judgment can only be determined by the appellate court. Respondent's remedy is not by motion to this court to vacate its order allowing the appeal, but seems to be provided for in the rules of the Circuit Court of Appeals. Rule 14 (31 C. C. A. clviii, 90 Fed. clviii) provides, in subdivision 5, that:

"All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return-day fall in vacation or in term-time and be served before the return-day."

The citation in this case, dated April 23d, is directed to the respondent, and admonishes him to appear within 30 days in the Circuit Court of Appeals at San Francisco, and show cause why the judgment appealed from should not be corrected. Rule 16 requires the appellant to docket the case and file a record thereof with the clerk of the Circuit Court of Appeals by or before the return day. No attempt was made by the appellants to comply with these rules, and in such case rule 16 further provides:

"If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed, upon producing a certificate, whether in term-time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case, and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court." Rules U. S. Cir. Ct. App., 31 C. C. A. clix, 90 Fed. clix.

Rule 16, subd. 2 (31 C. C. A. clx, 90 Fed. clx), also provides that the respondent may docket the case in the Circuit Court of Appeals, and file a copy of the record there, at any time after the appeal has been perfected in the lower court, and may have the same heard upon its merits. This would have enabled the plaintiff in this cause to have determined the question of the appealable nature of the order complained of upon the failure of the appellants to perfect their appeal within the 30 days. The attorneys who now ask to vacate the order allowing the appeal have been the respondent's attorneys since April 16th, and could have adopted the correct practice during the open season, but did not do so. For the reason that the cause has been regularly appealed to the Circuit Court of Appeals, and for the want of jurisdiction to do so, this court is now compelled to overrule the motion to vacate, and leave the respondent to his remedy in the Circuit Court of Appeals. The motion to vacate is denied.

THE ALASKA GOLD MIN. CO. V. BARBRIDGE et al.

(First Division. Juneau. December Term, 1901.)

No. 49a.

1. TIDE LANDS—MINES AND MINING.

Lands lying below ordinary high tide on the shore of the ocean and arms of the sea in the District of Alaska are not subject to location under the mining laws of the United States.

2. MINES AND MINERALS—EVIDENCE—PATENT.

As a general rule the recitals in a mining patent are conclusive evidence of the extent and boundaries of the claim; other evidence may be admitted to determine the location of the monuments and boundaries called for by the patent.

3. INJUNCTION—TRESPASS.

One who, within the District of Alaska, trespasses upon the tide lands not subject to location under the mineral laws of the United States, may be enjoined from sinking shafts thereon, and

causing an increased flow of water into, and threatening the complete flooding and irreparable injury to, lower levels excavated by an adjoining mine owner underneath the same tide lands in following his vein or lode beyond his boundary line.

Action to Restrain Damage to Mine.

Maloney & Cobb, for plaintiff.

Crews & Hellenthal, for defendants.

BROWN, District Judge. This action was brought to restrain and enjoin the defendants from sinking a certain shaft situated at a point where the surface of the earth is below mean high tide on Gastineau channel, and immediately above the workings of the plaintiff corporation on a vein or lode, the apex of which is within the surface boundaries of the mining claim of the corporation. It is alleged that, by following the vein or lode on the dip thereof, the plaintiff has passed beyond the side line of its lode mining claim and beyond the shore line of Gastineau channel, which said channel is an arm of the sea, and is now working under said arm of the sea, the greatest working depth attained being about 900 feet; that the defendants, in sinking their shaft and discharging blasts in that behalf, cause the ground beneath to vibrate and the waters of the sea to flow through fissures in the rock that forms the roof above the workings of the plaintiff, thereby causing large quantities of the water of the sea to flow in upon the plaintiff, to its great and irreparable injury; and that, unless the defendants are restrained from further pursuing the work of sinking their said shaft, the plaintiff's mine will become flooded and made valueless. The defendants deny these matters generally, but admit they are engaged in sinking a shaft, etc.; allege it to be on a lode mining claim properly located by them, and that their work in no wise damages plaintiff. This is practically the case before the court.

The evidence shows that plaintiff has a patent to its certain mining claim, and the patents offered in evidence show by reference to points, distances, courses, etc., that the line of said claim, at some points, is some little distance from the shore line of mean high tide of said channel. It further appears that the defendants have sunk shafts a few feet in depth, the surface at the point of sinking being above mean high tide, and have exposed rock in place of some value, the quartz taken therefrom showing good value; that shafts have been sunk at one or more places, the defendants claiming a lawful location of a lode mining claim, and that they are entitled to work the same even though some injury should result therefrom to the plaintiff. It is admitted that the particular shaft complained of is on what defendants claim to be the strike of their vein, and that the surface where said shaft was begun is below mean high tide. It further appears from the evidence, the admitted facts, and the personal observation of the court when present upon the ground, on invitation of the parties to this action, that only a few feet of the vein claimed by defendants extends, at either end thereof, above mean high tide, and that, following the strike of the vein or lode a few feet from the point of discovery, the vein passed below the tide line, and that the apex of the vein, except at low tide, other than these few feet, is beneath the sea, and a considerable portion is below even low tide.

It is contended by the defendants that, under the mining laws of the United States, all of the public mineral lands of the United States are subject to exploration and location; that mineral lands below high tide are a part of the public mineral lands of the United States, and therefore subject to exploration and location the same as the like character of land above high tide; that, beginning at or near the shore line, the defendants have a right to follow a vein upon the

strike thereof beyond the shore line beneath tide waters for the entire length of a claim. As before stated, except for a few feet, the apex of the entire vein claimed by the defendants is below the tide line. The above proposition is denied and contested by plaintiff. It is further claimed by plaintiff that plaintiff's land runs to the shore line of Gastineau channel and to mean high tide thereof; that the points designated by stakes constitute the meander line, and, though these are a few feet back from the point of mean high tide, their patented land in fact runs to mean high tide; and that therefore there is no land above shore line on which defendants could sink a shaft, make explorations, or locate a lode mining claim or any part thereof.

Thus are outlined the main points contested in this case. To what extent it is necessary for the court to follow these in order to determine the rights of the parties under the pleadings, the court does not at this time determine. It is sufficient to say that some of them will be examined. The arguments of counsel have been long, learned, and highly interesting, but, if counsel will excuse the court for so saying, unnecessary to follow at length in order to determine this case.

It seems to be expedient to determine, first, whether a mining claim can be located on lodes situated on the shore of the sea below mean high tide, or whether, where the vein or lode extends on its strike beyond the shore line under the sea, the discoverer can lawfully locate the part of the lode above mean high tide, and include in such location the larger part thereof that lies below the waters. Stating the proposition in another way, can the locator of a mining claim lawfully include in his claim any mineral lands of the United States that may extend into and under the sea below mean high tide, or must his claim end at the shore line?

Section 2319 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1424] provides 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.

It is claimed that the language of the section is broad enough to include land below, as well as above, high tide. Considering the language of the section, it might possibly include any of the mineral lands of the United States; but, under the policy of our government, the tide lands have never been sold by the general government. The original states, upon the formation of the Union, held the tide lands subject to their several control. In order that new states, carved out of the various portions of the public domain, should, when admitted as states of the Union, be admitted on an equality with all the other states, it has been deemed wise—and perhaps obligatory upon the general government—to so hold these tide lands that, when the new states should be formed, they should be transferred to the sole control of such states, to be disposed of as might seem wise to them. Considering this policy of the government in dealing with this class of lands, it would seem that the legislation by Congress relative to the disposition of its agricultural and mineral lands should be treated as subject in this respect to this general policy. It has been frequently said by our courts of last resort that these tide lands do not really belong to the United States, and are not subject to disposition, but are simply by the United States held in trust for the new states that shall be carved out of the public domain. *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428. See, also, *Shively v. Bowlby*, 152 U. S. 47, 14 Sup. Ct. 548, 38 L. Ed. 331; *Knight v. The U. S. Land Ass'n*, 142 U. S. 163,

12 Sup. Ct. 258, 35 L. Ed. 974; *Weber v. Commissioners*, 18 Wall. 65, 21 L. Ed. 798.

While this doctrine is supported by high authority, it seems to me that it is true only in the sense that the general government has established this policy in dealing with its lands. That the general government is the owner, and might, if it chose, dispose of them as it pleased, I have no doubt. But it is not difficult to perceive that the disposition of the tide lands in the outlying district of the United States might, when new states should be carved out of the public domain, create difficulties in the admission of the same as states of the Union; hence the policy of the government. It is fair to conclude, in construing the act of Congress providing for the disposition of the public lands of the United States, that the Congress only intended to provide for the disposition of such lands as had been held for disposition under the general policy of the government. In *Weber v. Harbor Commissioners*, 18 Wall. 57, 21 L. Ed. 798, Mr. Justice Field, delivering the opinion in the case, said:

"Although the title to the soil under the tide waters of the bay was acquired by the United States by cession from Mexico equally with the title to the upland, they held it only in trust for the future state. Upon the admission of California into the Union on an equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits, passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters."

In *Knight v. U. S. Land Association*, Mr. Justice Lamar said:

"It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original states, were reserved to the several states, and that the new states since admitted have the same rights, sover-

eignty, and jurisdiction in that behalf as the original states possessed within their respective borders."

In the case of Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428, Mr. Justice Bradley, speaking for a majority of the court, said:

"With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted inures to the state in which they are situated, if a state has been organized and established there."

In many other cases in the Supreme Court, the dictum is frequently found that the lands belonging to the United States, in territories, below high-water mark, are held in trust for the future state, and title therein is not vested in the United States, to the extent that the same might be sold. If this should be deemed to be true as a legal proposition, then, of course, as before stated, the laws of Congress providing for the disposition of the public mineral lands could by no possibility include the lands below ordinary high tide.

But another result might follow if this were true. If the general government has no title in these lands, and holds them simply in trust, the title being in the future state, then a person having a lode location near the shore of the sea might not be permitted to follow his ledge on the dip beyond the shore line, because it is very apparent that, if the United States cannot dispose of this land, any grant it may convey in the sale of a mining claim must stop at the line of the grant, and cannot extend into lands that the United States does not own. It is well settled that, where agricultural lands have been conveyed by patent, a party obtaining title to a contiguous mining claim cannot follow the dip of his vein beyond a point where a line let fall perpendicularly from the boundaries of the agricultural land would strike the dip of the vein. This is true because, where agricultural

land is conveyed by the United States, it carries everything with it, not only within its boundaries upon the surface, but to any depth which the party may seek to go to explore it. But, as before stated, it is not believed that these dicta—by our very learned Supreme Court in many cases—can be the true theory of the law in these matters.

Mr. Justice Gray, in *Shively v. Bowlby*, 152 U. S. 47, 14 Sup. Ct. 565, 38 L. Ed. 331, after quoting many of the decisions on this question, says:

"Notwithstanding the dicta contained in some of the opinions of this court already quoted to the effect that Congress has no power to grant any land below high-water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true."

Judge Gray in this case, referring to the opinion of Chief Justice Taney, says:

"One delivering an opinion already cited, after the subject has been much considered, in cases from Alabama, said, 'Undoubtedly Congress might have granted this land to a patentee, or confirmed his Spanish grant, before Alabama became a state.' "

Again, Judge Gray says:

"By the Constitution, as is now well settled, the United States, having rightfully acquired the territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, federal and state, over all the territories so long as they remain in a territorial condition"—citing many cases. "We cannot doubt, therefore," continues Judge Gray, "that Congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territories. But Congress has never undertaken by general laws to dispose of such lands. And the reasons are not far to seek."

Speaking of the policy of the general government in reference to these particular lands, Judge Gray says:

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country, but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways, and, being chiefly valuable for the purposes of commerce, navigation, and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government, but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states."

Concluding this opinion, which is very learned and reviews all the cases upon this subject, Judge Gray says:

"The United States, while they hold the country as a territory, having all the powers both of national and municipal government, may grant, for appropriate purposes, titles or rights in the soil below high-water mark of tide waters. But they have never done so by general laws, and, unless in some cases of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters and the soil under them to the control of the states, respectively, when organized and admitted into the Union."

From the discussion of this question by the learned Mr. Justice Gray, we think it is evident, considering the general policy of the government, that Congress never intended, by its act giving to citizens the right to go upon the public lands and explore the same for mineral, and obtain title thereto on proper discovery and location, that such right should ever extend to the lands lying below ordinary high

tide on the shore of the ocean and the arms of the sea. The conclusion of the court, therefore, in this case, is that, if the defendants have acquired any right in the lands upon the shore of Gastineau channel, so soon as their vein on the strike thereof goes beyond the shore line and below mean high tide, they can make no claim whatever thereto; and in going upon a ledge or lode at any such place, and undertaking to occupy the same and acquire title, they place themselves in the position of trespassers having no rights whatever in the land or the lode, and no right to occupy or possess the same.

Second. It is claimed on the part of the plaintiff that the patented lands constituting their several lode mining claims run to the shore of Gastineau channel, and that there is no land between their lode claim and the said channel upon which the defendants could lawfully enter to make exploration or discovery; that the apices of any veins that can be found above mean high tide along the shore of said channel, opposite their several patented claims, are all within the boundary lines of their several patented claims; that the meander line fixing the boundaries of their several claims, while indicated in the patent and survey by several stakes and monuments, is in fact the meander line of Gastineau channel, notwithstanding such fixed boundary points as are described in the patent. In aid of the description of the land covered by their several patents, they offer the field notes of the survey made by the United States mineral surveyor Garside, and also the oral testimony of Garside, to show the intent and purpose of said survey in fixing said boundary line along Gastineau channel. When this evidence was offered, objection was made by the defendants, on the ground that the same was incompetent, and that the patent is the only competent evidence that can be offered in this case to show the lands embraced by the same. It is believed that

the legal effect of a conveyance must be determined by the terms employed therein, and that nothing can be added to or taken from the same by parol testimony. This is undoubtedly the general rule controlling the question of testimony. Fletcher v. Phelps, 28 Vt. 262; Platt v. Jones, 43 Cal. 219; Bartlett v. Corliss, 63 Me. 287. But if there is a latent ambiguity in the description itself as furnished by the deed or patent, then the true intent and meaning may be added by parol. White v. Lunning, 93 U. S. 515, 23 L. Ed. 938; Pride v. Lunt, 19 Me. 115.

As to patent for mining claims, as a general rule, a patent is conclusive as to the limits of a location, and it cannot be assailed by showing that its actual boundaries are different from those described in the patent. In Waterloo Min. Co. v. Doe, 27 C. C. A. 50, 82 Fed. 45, it was claimed that a certain portion of the ground had been omitted from the patent through the fraudulent acts of one Bohton. The acts of Bohton, the court thought, did not amount to fraud, and, in the absence of fraud, it was held that the patent was conclusive evidence as to the limits of the claim patented. In 27 C. C. A. 50, 82 Fed. 45-50, the question arose as to whether the party in possession under the patent could follow the dip of their vein beyond the side lines extended down vertically. The defendant in that case contended that the plaintiff had no extralateral rights, as his end lines were not parallel. The plaintiff's patent, however, described the end lines as being parallel. The court held that, since the patent described the end lines as parallel, the court was bound by the terms thereof, and no evidence could be received that tended to show that the end lines were not parallel. The court said:

"The presumptions are in favor of the correctness of the land department in issuing these patents. Its action was within its jurisdiction, and we cannot go behind the same in a collateral action."

Again, in *Golden Reward Min. Co. v. Buxton Min. Co.*, 38 C. C. A. 228, 97 Fed. 413, the contest was between two patented claims—the Bonanza and the Silver Case. Fraud was alleged, but not proven. The court held that, in the absence of fraud or mistake, the boundaries as described in the patent were conclusive.

It is said in the case at bar that the field notes that have been offered in evidence make reference to the meander line of Gastineau channel, but the patent offered in evidence makes no reference to Gastineau channel whatever, and determines the lines by the monuments and courses and distances run. The contention of the defendants is that the field notes of the surveyor cannot be introduced to help out the lines established by the patent, or to explain the same; that there is no latent or patent ambiguity in the conveyance issued by the government, and that there is therefore nothing to explain. It is not claimed by the plaintiff that there is any mistake in the patent. And not only are the field notes of the surveyor that were offered in evidence objected to by the defendants, but also the oral testimony of Surveyor C. W. Garside as to what his intentions were in fixing the line of the claim owned by plaintiff bordering on Gastineau channel. My recollection is that the field notes referred but once to the tide water of the channel. Nothing in the field notes and nothing in the patent is found fixing the boundaries of the claim on that side by the line of the sea or the shore line of Gastineau channel. The court is unable to see in what particular the field notes of the surveyor aid or explain the directions and distances given in the patent itself. The field notes are therefore rejected as evidence in this case, as also are the statements of the witness Garside as to his intentions in making the survey of said claim. It is evident that the surveyor's intentions did not enter into the consideration of the land department when title was con-

veyed to the land in question. They cannot, therefore, be considered in determining what land the government intended to convey by its patent. Garside's testimony, however, that he placed the different stakes that bounded the claim on the side next to Gastineau channel, upon the line of ordinary tide is, perhaps, testimony of importance in the case.

Third. Another fact that may be considered of some importance in determining the rights of the parties to this action is the width of the claim that was patented, and that is now owned by the plaintiff. An examination of the maps offered in evidence, and the patent itself, as to the distances, shows that the claim is not 600 feet wide, and that the claimants did not take 300 feet on each side of their vein, as was their right under the law. Having taken less than the full width on the side bordering on Gastineau channel, the only possible reason that could exist to indicate why the claim was not taken of its usual width must have been the limit that was fixed by natural conditions, viz., the shore line of Gastineau channel.

The defendant Barbridge, in testifying in this case, says that a certain stake, that was pointed out to the judge of this court when examining the ground in person and while the attorneys and officers and parties were present, is now where it has stood for many years and where it was originally placed. This stake was placed upon the bank, as close to the edge of the same as it could be planted, and where the bank from the beach rises abruptly some six feet or more, and as close to the tide line as it could well be placed without danger of being washed away by the waves that would roll up at times from the sea, the waves having evidently at times washed away the ground up the edge of the embankment on which the post was placed. MacDonald, the manager of the plaintiff corporation, stated in the presence of the court that this stake, so far as he knew, was one of the posts

marking the boundary of plaintiff's claim. Another point marked and designated on this line as at the corner of the mill was evidently below mean high tide before the beach at the shore of the sea had been filled in by débris and waste from the mill. But at the point where the stake is there was a controversy between MacDonald, on behalf of the corporation, and Barbridge, one of the defendants, as to whether the shaft of the defendants, a hole about six or eight feet deep that had been sunk near the post referred to, was in part within the boundaries of the patented claim, or whether the same was all outside. The court is of the opinion that it is not important whether said shaft is in part within, or in part or wholly without, the lines of the patented claim. In Railroad Co. v. Schurmeier, 7 Wall. 272, 19 L. Ed. 74, it is said:

"Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser."

It is very earnestly contended by counsel for the plaintiff that this case is an authority in support of his claim that the line as indicated by the patent, and the survey as shown by the field notes, were simply the establishment of a meander line on the shores of Gastineau channel for the convenience of the government in determining the acreage of land within the proposed claim, and not with a view of excluding from the patent any portion of the land which might rightfully come within said claim that was above the tide waters of Gastineau channel. Many cases of this character are presented, but they all refer to surveys of the public agricultural lands of the United States and certain rules of the department that require the United States surveyors, in subdividing

sections where a portion thereof would border upon the sea or upon lakes or river or tide waters, not with a view of excluding any of the land from the fractional portion of the section, but to determine the price to be paid, etc.; and that, notwithstanding such meander line so established on the shore of a lake or sea, the land should run to the sea. But I fail to see the force of the principles and theories announced by the court in *Railroad v. Schurmeier*, and many other cases to the same effect, when applied to the case at bar. No authority has been shown vesting in the United States mineral surveyor any right or authority to establish a meander line, and the department very evidently refrains from any mention of such a line in the patent. No authority is shown under the rules of the Department of the Interior, having the sale of the public lands in charge, for arranging or establishing any such meander lines upon the mineral lands. It would, therefore, seem that in this case the court is bound by the usual rule that the language of the patent governs, and I am therefore compelled to hold practically that the lines of the claim in controversy are established according to the points, lines, courses, and distances mentioned in the patent.

In *White v. Luning*, 93 U. S. 524, 23 L. Ed. 938, the court says:

"It is true that, as a general rule, monuments, natural or artificial, referred to in a deed, control, on its construction, rather than courses and distances; but this rule is not inflexible. It yields wherever, taking all the particulars of the deed together, it will be absurd to apply it."

At common law the ordinary high-water mark is the boundary of the adjoining lands. *Commonwealth v. Alger*, 7 Cushing 53; *Rogers v. Jones*, 1 Wend. 237, 19 Am. Dec. 493. Had the land in question been bounded by the sea, the tide water, or by the harbor, bay, cove, creek, or any such words, or had the patent described a corner set upon the tide line at the

sea, and thence running with the sinuosities of the shore to another point, there would have been no question as to what land would have been included within the grant in this case. Whatever may be the rule for determining grants where they run to the sea—and unquestionably under all such descriptions they run to ordinary high tide and are bounded thereby—we have no such description in this patent, and we are bound to determine the boundaries of the land by the patent itself. But it is not always easy to determine to just what point the land embraced in the patent extends, because of the monuments being destroyed and thrown down or removed, as it is claimed in some instances they were in this case. We may be compelled to resort to parol evidence, surveys, and measurements, to determine the point at which monuments were placed and should be found. Such evidence has been offered and received in this case. The testimony of Garside, the original surveyor of these claims, is to the effect that the posts and monuments, as originally set, were placed upon the tide line, and that the line indicated between the monuments was as near on the tide line as it could be placed. Considering this testimony, and considering further the width of this claim, its relation to the tide line, the quantity of land conveyed being less than is usually covered in a full-sized mining claim, 600 by 1,500 feet; the fact that the full 300 feet is not taken on the side line next to Gastineau channel—all these matters may be reasonably considered in determining where the line of this claim really was and is, and what and where the lands are as described in the terms of the patent. While this question is not one necessary for the court to decide in this case, I am inclined to the opinion that the patented claim owned by the plaintiff company ran to ordinary high tide and included all the land above high tide within its limits, and that there was, in fact, no land above high tide upon which a location could be properly

made by the defendants. But, as stated, this is not a matter of any special interest to the court, and one that the court does not now definitely pass upon.

Fourth. The proposition before the court is in reality a simple one. The defendants were about to sink a shaft at a point close to the shore of Gastineau channel, over which the tide ebbed and flowed every day, and which was immediately above some of the workings of plaintiff in this case. These people were here upon this land below mean high tide, where they could acquire no right whatsoever, and where they were trespassers upon the lands and rights of the United States. The plaintiff is the owner of several patented claims; has expended many hundreds of thousands of dollars in developing the same and in extracting minerals from the orés therein; has, it is said, distributed among its stockholders from \$4,000,000 to \$5,000,000; is employing about a thousand men; and has followed down on the dip of its vein until it is now beneath the waters of an arm of the sea called "Gastineau Channel," and immediately beneath this particular shaft of the defendants. It further appears that any work on the shaft of defendants in question, and the blasts being exploded there, so increase the flow of water through the roof above where the plaintiff is taking out ore that, if continued, it will drive plaintiff from its mine and prevent the further working of the same; and because of this result plaintiff asks that the defendants be restrained from such work.

If these defendants had an unquestioned right to occupy the ground where they now are, and to develop a lode which they may have undertaken to locate and that is situated below tide water, they could hardly use their own in such a way as to bring inevitable calamity on their neighbor. One may not sink on the line of his own ground and excavate it in such a way as to allow his neighbor's land to fall into

the excavation so made. Matters of this character have been so frequently determined that they now need no discussion and no citation of authorities; the proposition is settled beyond controversy. Can it be said, then, that these defendants, having no rights whatever below tide water in the location and development of a mine so situated, may be permitted to enter upon and so work the same as to destroy the property of the plaintiff, which is engaged in a like business, but has reached the point beneath the tide waters by following the dip of a vein the apex of which is within its patented land? While it is true that, under the general policy of the government, lands below tide water are not for sale and disposition, and have never been held for sale and disposition by the United States, these tide lands having been reserved to the states that might be organized out of the territories of the United States, the purposes for which these lands are held in trust for the future state are trade, commerce, navigation, and the convenience of the public, and for such purposes only. If the plaintiff is usurping any of the rights of the government in the land it now possesses, by the working of its mining claim beneath the water of the sea, no one, save the United States, through its proper channels, can complain. They are in possession, and by their efforts are adding millions to the wealth of the country. The defendants, though trespassers upon the rights of the United States in going upon and locating land below ordinary high tide, were they in nowise damaging any one else, could not be stopped, perhaps, except upon complaint by the government. But, as before stated, even if they were rightfully in possession of the ground where their shaft is being sunk, and were operating in a way to injure and destroy property owned by the plaintiff, the court is of the opinion that the defendants should be restrained and enjoined from further work. Under the facts and circumstances of this

case, the court is compelled to the conclusion that the defendants should be restrained and enjoined from further continuing the sinking of their shaft, or further interfering in this behalf with the rights of the plaintiff.

It may be said in this connection that the situation of the parties plaintiff and defendant are not the same. The plaintiff has a lawful location, and, under the mining laws of the United States, a lawful right to pursue its vein on its dips beyond the side lines of its claim and wherever it may run; and while, as before observed, the lands below mean high tide are reserved from sale, it is believed that the law giving a party the right to follow all veins, the apices of which are within the limits of his claim, even outside of the side lines thereof, would permit him to go below the waters of the sea in following such vein, without trespassing any law of property existing in the United States.

The temporary injunction heretofore issued under the order of this court will therefore be made perpetual, and the plaintiffs are awarded their costs and disbursements.

FOX, Administrator, et al. v. MACKAY et al.

(First Division. Juneau. December Term, 1901.)

No. 483.

1. PARTIES—ABATEMENT—ADMINISTRATOR—SURVIVORSHIP.

While, under section 956, Rev. St. [U. S. Comp. St. 1901, p. 697], an action may be continued by one surviving plaintiff against a surviving defendant without abatement, an administrator can neither continue nor defend an action of this character.

2. MINES AND MINERALS—ADVERSE SUIT—PUBLIC LANDS.

When an application is made to the United States Land Department for a patent to a mining claim, and an adverse claim

thereto is regularly made, and a suit brought in a court of competent jurisdiction to determine the right of possession, all proceedings in the Land Office shall be stayed until the determination of such suit, and the judgment therein shall determine the rights of possession.

3. SAME—CONCLUSIVENESS OF PATENT.

The issuance of a patent to a mining claim necessarily determines the priority of right thereto, the discovery of mineral in place, and that the claim was properly located and marked, so that its boundaries could readily be traced.

4. SAME—PATENT—WAIVER.

When the applicant for a mining patent, pending an adverse suit over a conflicting overlap with another location, obtains a patent for the part not in dispute, he does not thereby waive his right to contest for the part in litigation.

Adverse suit over conflicting mining locations in aid of an application for the patent in the Land Office.

Arthur K. Delaney and John G. Heid, for plaintiffs.

Maloney & Cobb, for defendants.

BROWN, District Judge. In the trial of this case the court has indulged in a theory, based on section 956 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 697], that this action could be continued, tried, and determined without a revivor thereof, both as against the surviving defendant for himself and others interested with him, and that the action is not one of those that could be properly revived in the name of the administrator, because the administrator could neither bring nor properly defend, as I view the law, an action of this character. The defendants assert, by their answer, a legal interest in that certain mining claim called the "Drum Lummond," and their defense is predicated on the theory that they have the better right to the ground in controversy in this case, basing it upon their location and improvements of the Drum Lummond.

claim. Having tried this case thus far under this theory of the law, it would be futile at this time to indulge in any other theory of the case under the contention of counsel for the defendants. Disposing of so much of the defendants' contention, the defendants' attorneys then urge, with a great deal of force and determination, that the fact that a conveyance was made by the plaintiff Sanders to one Minnie Ross Holman of a certain interest in the Ready Bullion No. 2 lode claim in 1898, after these proceedings were begun, makes her a necessary party to the suit, and that the defendants' interests cannot be properly protected without her joinder in this action.

The court admitted the deed from Sanders to Minnie Ross Holman for the time being, stating that a ruling would be made later as to its admissibility. It is now believed that the deed so offered in evidence is wholly irrelevant and immaterial as to any of the issues presented in this case, and is therefore withdrawn from consideration as evidence in the trial of this case; to which ruling of the court in so withdrawing said deed from consideration the defendants are given an exception in accordance with their request. It is believed that the person to whom said deed was made by Sanders stands in privity with Sanders; that she has no right or interest, save and except such as she may obtain through him; and that the giving of such deed and an interest in the Ready Bullion No. 2 lode claim in 1898, years after the bringing of this action, in no wise changes the nature of the action or the result thereof.

The introduction in evidence of the patent to the Ready Bullion No. 2 raises some peculiar questions. After the defendants in this action had proceeded regularly in the Land Office to procure a patent to their claim called the "Drum Lummond," and after the plaintiffs had filed their adverse in the Land Department and brought this action in support

of the same, it seems that the plaintiffs took the necessary steps to have their land surveyed, and procured a patent for all that portion thereof outside of the ground in dispute, viz., a portion of the Drum Lummond claim. This proceeding was taken while the adverse and the suit in support thereof were pending in this court. It is believed that, under the law controlling proceedings of this nature, when an adverse is filed in the Land Office, and a suit brought within the 30 days in support thereof, and the Land Office is notified of the pendency of that suit, all proceedings in the Land Department should thereupon cease and determine until after the action has been settled in court, and that then the Land Office should proceed according to the determination of the suit in court. Indeed, this rule has frequently been declared by state and federal courts. It is believed by the judge of this court that such a proceeding as was taken in this case was wrong—that it should not be tolerated under any circumstances. When permitted, although the Land Office proceeds only in reference to land not in dispute, the patent that issues for such land necessarily determines priority of right, a discovery of mineral in place, and that thereafter the claim had been properly located and marked, so that its boundaries might be readily traced. A patent is ordinarily conclusive upon these questions, and, being so, it places the parties in the trial of a case in court at a disadvantage. The case at bar is an illustration. The patent shows that the lode claimed to have been discovered in the Ready Bullion No. 2 was within the limits of the patented ground. The parties bringing this suit have secured the principal thing for which their location was made, viz., the Ready Bullion No. 2 lode, by the issuance of the patent. Nothing is now in controversy between the parties plaintiff and defendant save the remainder of the surface ground that was formerly included within the limits of Ready Bullion No. 2 lode claim.

as originally located and as surveyed for patent. The patent being conclusive on all the preliminary steps leading up to the same, it will be seen that the question of location and discovery of the Ready Bullion No. 2 lode is thereby settled and determined, at least to all lands covered by the patent. The only question then remaining to be determined, as to the remainder of the land formerly embraced in the Ready Bullion No. 2, is the question of priority of location, and, under the testimony, there is no room for doubt on that proposition. The undisputed and uncontradicted testimony shows that the Ready Bullion No. 2 lode claim was located some nine years prior to the location of the Drum Lummond.

Under these conditions, and accepting the finality of the patent, no question is presented for the determination of the jury, and the court can only give to the jury the instruction requested on the part of the plaintiffs, to return a verdict for the plaintiffs, unless there has been a waiver by plaintiffs by obtaining patent. In doing this I wish to say that my own personal conviction is that the patent of the Ready Bullion No. 2 by the Land Department was, in view of the pending suit, an error; that it was a procedure not contemplated by sections 2325 and 2326 of the Revised Statutes [U. S. Comp. St. 1901, pp. 1429, 1430], and as a method of procedure should not be tolerated. I am further of the opinion in this case that when the plaintiffs filed their adverse and brought their suit in support thereof, and then patented the portion of the Ready Bullion No. 2 claim outside of the disputed ground, and thereby obtained a patent to the principal thing, viz., the Ready Bullion No. 2 lode and the larger portion of the surface ground, they waived any right to the remainder of the ground, and that, upon proof thereof, this action should have been dismissed. But while this is my opinion, I am constrained to take a different course because of the decision of the Supreme Court of the United States in:

the case of Last Chance Mining Co. v. Tyler Mining Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859. While the view expressed by the distinguished Justice Brewer, speaking for the court, does not directly oppose the theory that I believe to be the true one (although the Tyler Company in that case, who were the parties proceeding, and who were adversed by the Last Chance Company, obtained a patent for that portion of their ground not in dispute), yet the court holds that such action on the part of those originally undertaking to obtain patent was not a waiver of their right to contest for the remainder of the ground that was in dispute. But it will be observed that the parties to this proceeding for patent were reversed. In that case, the adversees—if I may be allowed the expression—established a new end line to the Tyler claim, and then even withdrew their answer in pending suit. In this case the adversee obtains patent. It would seem that those undertaking the suit obtained patent only to the ground not in dispute, and it is very plain that the party adversed obtaining patent for the undisputed territory within the lines of their claim, could waive nothing by so doing, and could not in that way escape from a court of competent jurisdiction. In the case at bar, the parties who filed the adverse and brought suit in support thereof, based upon their ownership and right of possession of the Ready Bullion No. 2 lode claim, go into the Land Office, and procure a patent for so much of said Ready Bullion No. 2 as is not covered by the location of the Drum Lummond. The patent extends the entire length of the Ready Bullion No. 2, 1,500 feet, and in width 300 feet or thereabouts, the ground remaining in dispute being a part of the surface claimed in the original Ready Bullion No. 2 location. I say that this procedure, as it seems to me, ought to be regarded as a waiver of the right of the Ready Bullion No. 2 people to contest for the further surface ground involved in this case;

the Ready Bullion No. 2 claimant having obtained the principal thing involved, viz., the Ready Bullion No. 2 lode.

But, as I say, because of the inferences naturally to be drawn from the decision of the Supreme Court referred to, as I understand the same, I feel compelled to yield my opinion in the premises, and follow what seems to be the intimation of the learned justice in that case. I might add with propriety that I do this the more readily because of the many legal questions raised on the trial, believing that by taking this course the defendants will have a clearer and plainer road to pursue in having their case reviewed by the higher court. There are questions presented in this record that ought to be so reviewed, and I sincerely hope that counsel may take such action in the premises as will secure this result.

JORGENSEN v. YOUNG AND BURNS.

(First Division. Juneau. December Term, 1901.)

No. 47a.

1. MORTGAGE—FUTURE ADVANCES—OPEN ACCOUNT.

Burns made a note and mortgage upon the property in controversy to secure both present and future credit from Young. He made a payment consisting of drafts and gold dust sufficient at that time to pay the amount then due, but before the value of the deposit of gold dust was known from the assay office he procured further advances, and afterwards sold the mortgaged property to the plaintiff, who brought this suit to cancel the mortgage, upon the allegation that it had been paid and discharged by the gold dust and drafts. *Held*, that the payment was on an open account secured by note and mortgage.

Suit to cancel mortgage alleging payment. Denied.

John G. Heid, for plaintiff.

R. W. Jennings, for defendants.

BROWN, District Judge. The plaintiff brings this suit against the defendants to secure the cancellation of a certain mortgage of record against the property described in the complaint, alleging payment of the note secured by the mortgage, and that the mortgage should be canceled. The defendants deny payment; allege, in substance, that the note and mortgage were given to secure future advances, and not a present debt, and such advances as might be made by the defendants Young and Archie Burns in their general business transactions; it further appearing that at the time the note and mortgage were given the actual debt existing between the parties was between four and five hundred dollars, and not the amount specified in the note.

The plaintiff contends that at a period subsequent to the giving of the note and mortgage the same was paid; and the defendant Young admits that on a certain date a sum of money was paid to him, and a credit entered in his books sufficient to discharge the entire debt then existing between the parties; but that the same was not paid for the purpose of canceling the mortgage. The defendant further testifies in this connection that the gold dust turned over to him at that time, though sufficient in amount, with the drafts, to have paid the indebtedness then existing, was sent to an assay office or to the mint to be assayed, and the value determined, and that when this was accomplished a credit was given to Burns on the defendant Young's books for the amount. He further testifies that on the very day that these sums were turned over to the defendant Young, or on the next day, and before the ascertainment of the value of the gold dust, Burns had become indebted to Young for other advances in a larger sum than the value of the gold dust and drafts turned over to him by Burns at the time before referred to.

From these statements, which are uncontradicted, it appears that the indebtedness was never at any time fully ex-

tinguished, and that the credits were made upon a general account between the parties, as had been their habit of business prior thereto.

It is contended by the plaintiff, as a legal proposition, that, if the mortgage was given to secure a specific debt, and defendant had been paid, the mortgage could not afterwards be revived by parol agreement to secure another and different debt. As a legal proposition, this is unquestionably true. A mortgage is a conveyance of real estate, or an interest therein, and can only be made in writing, to avoid the statute of frauds. To attempt to revive a mortgage to secure another debt is practically to give a new mortgage, and this by parol agreement. Such a transaction would be a violation of the statute of frauds, and a conveyance of real property attempted, at least, by parol. But where a mortgage is given to secure future advances up to a certain limit, the limit being shown by the note and mortgage executed at the time, evidence that the purpose of the giving of the mortgage was to secure such future advances may be shown by parol. And such a mortgage is valid and binding, as between the parties and as against future incumbrancers or purchasers in good faith, up to the amount of the actual indebtedness between the parties to the mortgage at the time of the making of the future incumbrances, or the acquirement of title by a third party in good faith and for a valuable consideration. If the mortgage in question was ever extinguished by payment, and so understood by the parties to the mortgage, even where the mortgage is for future advances, it could not be revived by subsequent parol agreement.

But from the testimony in this case it does not appear that the debt intended to be secured by the mortgage was ever paid in full, or that upon the turning over of the checks and gold dust by Burns to Young there was any understanding between them that the note and mortgage were thereby can-

celed, or to be canceled. The contrary appears by the testimony of Young—which is practically undisputed—and the subsequent talk of the parties when they had a final settlement, wherein it was agreed that the debt of Burns to Young should be limited to \$5,000, although the real indebtedness was claimed to have been much greater, and the giving of the additional security by Burns, such as the lot or lots in Dawson and certain other property, and a reference in the conversation then had to the security now in question being then in force. This, as I recall the evidence, was not a misunderstanding between them, nor was it an understanding that the mortgage should be revived to secure a part of this indebtedness, but was referred to by them as an existing security for the amount named in the mortgage. If this was the state of facts existing between the parties as to this mortgage, and the understanding and agreement between them at the time it was given being for future advances, and these advances having been made long before Jorgensen acquired an interest in the property, and he being advised that the mortgage had not been canceled, and that the holder thereof refused to cancel the same, then Jorgensen took the property subject to the equities existing in favor of Young and against Burns, and, with such knowledge with reference thereto, he cannot now claim to have been deceived by Young as to his claim, at least, that the mortgage was yet in force.

Whatever the testimony of Jorgensen is upon this question, and whatever testimony may have been offered in support of Jorgensen's claim, it is not sufficient to constitute the weight or preponderance of the evidence in favor of the plaintiff's contention, and it devolves on him to show, under his pleadings, by the weight of evidence, that the mortgage debt had been paid and the mortgage subject to cancellation. My opinion is that he has not so sustained his contention, and the relief prayed for in his bill is denied.

The defendant, in his cross-bill, prays for a foreclosure of the mortgage for the sum secured thereby. It is the opinion of the court that he is entitled to such foreclosure for the sum named in the note and mortgage. Judgment will be entered accordingly. Counsel for defendant Young will present a proper decree in the premises, and the court will sign the same.

MITCHELL v. GALEN et al.

(Second Division. Nome. December, 1901.)

No. 562.

1. JUSTICE OF THE PEACE—ACTION—CIVIL LIABILITY.

A justice of the peace is an inferior judicial officer, and for any judicial act performed by him outside of his jurisdiction he may be sued in a civil action.

2. SAME—CIVIL ACTION AGAINST.

Where a justice of the peace acts in collusion with other persons, and issues a warrant for the arrest of a mine owner for an alleged trespass or crime upon his own property, in order that he may be removed therefrom, so that these other persons, acting with the justice, may get into possession, and thereby secure his mine, he may be sued civilly for such act.

3. PLEADING—COMPLAINT.

Where a complaint alleges several causes of action not separately stated, the proper practice is to move to strike the pleading, or to make it more definite and certain by separating and distinctly stating the different causes, and not by a demurrer.

4. SAME—DAMAGES.

The fact that the complaint prays for several forms of damages does not render it open to demurrer.

Suit against Justice of the Peace for Damages. Demurrer overruled.

Jackson, Pittman & Fink, for plaintiff.

Stevens & Du Bose, for Galen.

Ira D. Norton, for Backus.

Keller & Fuller, for Kjeagstad and Keller, defendants.

WICKERSHAM, District Judge. Admitting, as the demurrer does, that Galen, in his capacity as justice of the peace, acted in collusion with the defendants, that he knew the warrant issued was for the arrest of Mitchell for extracting and appropriating gold from his own claim, and that, having full knowledge of these facts, he joined in the enterprise for the purpose of gaining possession of the claim for himself and codefendants, is he liable in a civil suit for damages for such collusive action on his part?

If a judge were to be held liable for every mistake or error where another suffered any real or supposed injury; if the threat of suits for damage lurked behind every question presented to him for adjudication or determination; if every litigious and disappointed suitor could go into another tribunal and maintain an action against him upon any form of allegation whatever for having performed a judicial duty, however erroneously—the office of judge could be filled with safety only by a bankrupt knave. On the other hand, it would shock the moral sense of mankind to admit that there is one man who is so far above the law, by reason only of being its expounder, that he is absolved from obeying it. Upon this interesting branch of the law the courts have not failed to announce just principles for the protection of both litigant and judge. They will be found collected with annotations, following the leading English case of *Crepps v. Durden*, in Smith's Leading Cases (9th Am. Ed.) vol. 2, pp. 978-1044.

In *Randall v. Brigham*, 7 Wall. 523, 19 L. Ed. 285, the rule which must govern this court is laid down in the following language:

"Now, it is a general principle, applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction. In reference to judges of limited and inferior authority, it has been held that they are protected only when

they act within their jurisdiction. If this be the case with respect to them, no such limitation exists with respect to judges of superior or general authority. They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless perhaps where the acts in excess of jurisdiction are done maliciously or corruptly."

In a later case the Supreme Court had occasion to consider the qualifying language in the last above quoted sentence, and then said of the words used:

"In the present case we have looked into the authorities, and are clear from them, as well as from the principle on which any exemption is maintained, that the qualifying words used were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible." Bradley v. Fisher, 13 Wall. 335, 351, 20 L. Ed. 646.

From these authorities three principles may be extracted: (1) In reference to judges of limited and inferior authority, it has been held that they are protected only when they act within their jurisdiction. (2) Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. (3) Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. In short, an inferior judge must keep within his jurisdiction at his peril; a superior judge is not liable for

an excess of jurisdiction, even if accompanied by malice or corruption; while either will be held civilly liable for damages resulting from an admitted usurpation of authority.

A justice of the peace is an inferior judicial officer, and for any judicial act performed by him outside of his jurisdiction he may be sued in a civil action. The question, then, is whether the allegations of the complaint disclose that Galen acted without jurisdiction in the matter alleged. The allegations are that, acting in collusion with the other defendants, he issued a warrant against Mitchell for a felony, to wit, for stealing gold from his own claim. Section 75 of the Criminal Code of Alaska (Act March 3, 1899, c. 429, 30 Stat. 1263) provides "that any person who shall attempt to break or rob, any flume, rocker, quartz vein, lode, bed-rock, sluice, sluice-box, or mining claim not his own" shall be punished as for a felony. Carter's Code of Alaska, p. 15. While the justice would have jurisdiction to issue the warrant for the arrest of a person, and hold him to bail before the next grand jury in such case, yet he would clearly have no such jurisdiction if the mining claim belonged to the person arrested; and that is the allegation in the complaint. Whether he would have jurisdiction in case the person arrested was in actual possession, claiming title as a locator, although another claimed to be a prior locator, need not now be decided. Upon the allegations of the complaint in this respect, and in some others, it appears that the justice was without jurisdiction to issue the warrant, and under the rule his judicial character cannot be invoked as a cloak to his alleged wrongdoing. The demurrer is overruled as to Galen upon this ground, which was the only one raised by him.

The demurrer of Backus is upon both grounds: First, that the complaint does not state facts sufficient to constitute a cause of action; and, second, that several causes of action are improperly united. It must be overruled upon

both grounds. An inspection of the complaint does show that separate rights of the plaintiff were invaded, viz.: First, that he was illegally arrested and imprisoned; and, second, that he suffered damage to his property; and, third, to his character. These constitute separate causes of action, and they are certainly intermixed in one pretended cause of action, and are not separately stated. Pomeroy, however, says that the correct practice in such case is "not by a demurrer, but by a motion to make the pleading more definite and certain by separating and distinctly stating the different causes of action." Pomeroy's Code Pleading (3d Ed.) § 447. Section 96 of our Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 347) contains this provision: "When any pleading contains more than one cause of action or defense, if the same be not pleaded separately, such pleadings may, on motion of the adverse party, be stricken out of the case." An amended pleading may, of course, be filed, and the better practice, therefore, is to move against the improper joinder and require a separate statement. The fact that the plaintiff in this action asks for several forms of damage does not render the pleading open to demurrer, for these allegations of special damages are no part of any cause of action. They ought more properly to be embraced in the prayer for relief. Both demurrs are overruled.

WOODS v. BEATON.

(Second Division. Nome. December, 1901.)

No. 50.

1. BILL OF EXCEPTIONS—NEW JUDGE.

Where the judge who heard the case and to whom the bill of exceptions was presented for settlement temporarily left the district without signing the bill, but intended to return before the expiration of the year for appeal had expired, another judge, sitting in his absence, refused either to sign the bill or to grant a new trial. See section 953, Rev. St., as amended by Act June 5, 1900, 31 Stat. 270, c. 717, 2 Supp. Rev. St. 1892-1901, p. 1190 [U. S. Comp. St. 1901, p. 696].

Application to the judge to sign bill of exceptions.

C. S. Hannum, for plaintiff.

J. K. Wood and J. L. McGinn, for defendant.

WICKERSHAM, District Judge. The record in this case shows that the verdict of the jury was rendered on the 13th day of April, 1901, and that final judgment was entered on the verdict on the 15th day of May, 1901. A motion for a new trial was filed by the plaintiff on April 13, 1901, and a bill of exceptions and other proceedings in the way of an appeal were presented to Judges Noyes, but the hearing thereof seems to have been postponed from time to time, until, when Judge Noyes left the district in September to go to San Francisco, the matter was yet undisposed of. Counsel now urges this court to grant a motion for a new trial, under the rule laid down by the Supreme Court of the United States in the case of *Malony v. Adsit*, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163, and the case of *Henrichsen v. Smith (Or.)* 44 Pac. 496. The first of these cases went up from the District of Alaska. The trial was had before Judge Delaney, while the bill of exceptions was signed by his successor in office. The

Supreme Court of the United States held that the successor to Judge Delaney had no authority to sign the bill of exceptions, and ought to have granted a new trial. In the case of Henrichsen v. Smith (decided by the Supreme Court of Oregon) the trial judge in the court below died before the bill of exceptions was signed. The Supreme Court of that state held that the successor did right in refusing to sign the bill of exceptions and in granting a new trial. But neither of these cases govern the case at bar. Judge Noyes is neither dead nor removed from office. He left the district in September to attend the Circuit Court of Appeals in San Francisco on October 14th and thereafter, and was, of course, unable to return to this district; owing to the climatic conditions existing in this region, of which the court will take judicial notice. He may, however, return via Skagway and Dawson, down the Yukon river, as many other people do during the winter.

Section 506 of the Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 415) provides that:

"No appeal or writ of error, by which any final order or judgment may be reviewed under the provisions of this Code, shall be taken or sued out except within one year after the entry of the order or judgment sought to be reviewed."

Judgment in this case was rendered on the 15th day of May, 1901, and, if Judge Noyes returns to this district at any time before the year has expired, he may sign the bill of exceptions, and thus avoid the granting of a new trial upon the grounds suggested. In case he does not return before that time, or whenever it becomes necessary or apparent that the plaintiff will be denied his right to appeal by reason of his nonappearance to sign the bill of exceptions, this court will then again hear this application. In the meantime it will remain without determination.

FOSS v. DAM.

(Second Division. Nome. December 7, 1901.)

No. 318.

1. PUBLIC LANDS—QUIETING TITLE.

One who is in possession of a lot on the public lands in Alaska, and using the same for purposes of trade or residence, may maintain a suit to quiet his title thereto.

Demurrer to Complaint.. Overruled.

S. A. Keller and S. C. Blackett, for plaintiff.
Jackson, Pittman & Fink, for defendant.

WICKERSHAM, District Judge. Demurrer to complaint that it does not state facts sufficient to constitute a cause of action. The complaint shows the plaintiff's possession of a lot on the public lands, with store, residence, and other property for trade and residence, and the usual allegation that defendant claims an interest. Plaintiff seeks to quiet his title against the defendant. The only point made on the demurrer is that the plaintiff cannot maintain a suit to quiet title upon mere possession of public land, and counsel quotes Stark v. Starr, 73 U. S. 402, 18 L. Ed. 925, in support of his contention. The language depended upon is as follows:

"We do not, however, understand that the mere naked possession of the plaintiff is sufficient to authorize him to institute the suit, and require an exhibition of the estate of the adverse claimant, though the language of the statute is that 'any person in possession by himself or his tenant may maintain' the suit. His possession must be accompanied with a claim of right—that is, must be founded upon title, legal or equitable; and such claim or title must be exhibited by the proofs, and perhaps in the pleadings also, before the adverse claimant can be required to produce the evidence upon which he rests his claim of an adverse estate or interest."

The allegations in the complaint bring this case clearly within these words. They show the plaintiff to be in possession with store and dwelling house for purposes of trade and residence. The court will take notice of the act of March 3, 1891, entitled "An act to repeal timber culture law, and for other purposes" (26 Stat. 1095, c. 561, extending the town-site law to Alaska). Sections 11 and 12 [U. S. Comp. St. 1901, p. 1467] of this act provide for the sale of such land as that possessed by plaintiff for purposes of trade and residence, and a possession based upon such claim is founded upon sufficient title to maintain a possessory action under the Code, either by ejectment or suit to quiet title, as the fact of possession or want of it determines.

The fact that the real title is in the government has long been held in California not to prevent such actions by one claiming by right of possession only. Brandt v. Wheaton, 52 Cal. 430; Funk v. Sterrett, 59 Cal. 613; Orr v. Stewart, 67 Cal. 275, 7 Pac. 693. Such an action may be maintained in Alaska by one in possession claiming title under the United States land laws. Demurrer overruled.

KIMBALL v. MILLER et al.

(Second Division. Nome. December 7, 1901.)

No. 119.

1. PLEADINGS—EJECTMENT.

Where there is no separate statement of the allegations in support of recovery of possession in ejectment from those stating damages for withholding possession, and no demurrer or answer upon this objection is taken to the complaint, it is thereby waived, under section 62 of the Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 342).

2. EJECTMENT—COMPLAINT—CAUSE OF ACTION.

Under the provisions of section 301 of the Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 383) a complaint in ejectment may allege ownership, ouster, and damage for a wrongful withholding as one cause of action, and upon such cause of action may recover (1) possession and (2) damages for withholding.

3. SAME—MEASURE OF DAMAGES.

The measure of damages for withholding lands from which the plaintiff was wrongfully ejected is the reasonable rental value of the property during the time withheld.

This is a motion for a new trial. The case is an action of ejectment, and was tried before a jury, who found in favor of the plaintiff, and gave him a verdict for \$680 damages. The plaintiff, in his complaint, alleges, as the basis of his right to recover, "that he is the owner and entitled to the sole and exclusive possession" of the property in question, particularly describing it as a town lot in Nome; "that said plaintiff has been such owner and entitled to the sole and exclusive possession of said parcel of land since the 8th day of July, 1899, when he entered upon and took possession of the same under the laws of the United States, while the same was unoccupied and unappropriated public domain of the United States, and did thereupon occupy and improve the same"; "that the said defendants wrongfully withheld said parcel of land from said plaintiff, and have wrongfully withheld the same from him since the 18th day of May, 1900, to the plaintiff's damage in the sum of \$680." Then plaintiff prays for judgment against the defendants for the possession of the land, and "for the sum of \$680 for damages for withholding the same from him." The defendants deny the allegations of the complaint, and allege their own possessory title thereto through purchase from a prior locator.

C. S. Johnson and A. J. Daly, for plaintiff.

James E. Fenton and H. E. Shields, for defendants.

WICKERSHAM, District Judge. The principal argument upon the motion for a new trial is based upon the fourth ground that the court erred in permitting the plaintiff to offer or introduce any evidence of the rental value of the premises in controversy, for the reason that the damages claimed in plaintiff's complaint is not separately stated as a distinct cause of action.

It is admitted by counsel for the motion that the complaint states a cause of action, and no objection is raised to the jurisdiction of the court. But the whole argument is based upon the fact that, while the complaint is sufficient to support the verdict for the recovery of possession, it is not sufficient to support the verdict for damages. There is no separate statement of these two alleged causes of action. They are both intermixed in one cause. It is the opinion of the court that the allegations thus intermixed are sufficient, if repeated and separately stated in the same words, to constitute two separate causes—one for the recovery of possession, and the other for the recovery of the damages for withholding the property.

To the complaint, however, the defendants interposed neither demurrer nor answer upon these points. All objections, then, to the complaint, are waived under section 62 of the Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 342), and objection to the introduction of evidence for want of a proper segregation and separate statement of the facts cannot now avail the defendants. See sections 57-62, 96, Code Civ. Proc.

As the question, however, is important for the reason that most of our actions are to recover real property, with damages for withholding, it may as well be said that in the judgment of the court this complaint is in proper form. Our statutory action to recover real property is very different from the old common-law action of ejectment. Probably no

more correct or logical statement of its character can be made than that found in Pomeroy's Code Remedies in these words:

"Again, let the plaintiff's primary right be the ownership and right of possession of a certain tract of land, and let the facts from which it arises be properly alleged. Let the delict consist in the defendant's wrongful taking and retaining possession and use of such land for a specified period of time, and let the facts showing this wrong be properly averred in the same pleading. Evidently the plaintiff will have stated one single and very simple cause of action. The remedial rights arising therefrom and the remedies themselves corresponding thereto will be threefold, and all of them legal, namely: (1) The right to be restored to possession, with the actual relief of restored possession; (2) the right to obtain compensation in damages for the wrongful withholding of the land, and the actual relief of pecuniary damages; and (3) the right to recover the rents and profits received by the defendant during the period of his possession, with the relief of an actual pecuniary sum in satisfaction thereof. Here, also, the single nature of the one cause of action plainly appears, and its evident distinction from the various remedial rights and actual remedies which do or may arise from it." Pomeroy's Code Remedies (3d Ed.) § 454, p. 514.

The author adds this footnote:

"The fact that the codes generally seem to treat these different claims for relief as distinct causes of action does not affect the correctness of my analysis. They are plainly no more than separate reliefs or remedies based upon the same facts which constitute a single cause of action. See Larned v. Hudson, 57 N. Y. 151 which is based entirely upon the language of the statute."

Section 301 of our Code (Act June 6, 1900, c. 786, 31 Stat. 383) provides that "any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action." This last clause means "in the same action." It will be noticed that this section only provides for two remedies to flow from this cause of action: (1)

the recovery of the possession of the property, and (2) the recovery of damages for withholding the same. It makes no provision for the recovery of rents and profits received by the defendant while the plaintiff is out of possession, and it may be that, if it is sought to recover these in the same action, it must be in a separate cause.

What are damages for withholding possession, and upon what measure are they to be fixed by the jury? In the first place, it seems a limitation upon the recovery in the same action with the possession, and in the second they will embrace only such as necessarily flow from withholding possession. Special damages to the property by cutting trees or removing crops, or collecting rents or other profits, do not seem to be included, but clearly excluded. And upon what better, more reasonable, or proper basis could such damages be measured than the actual worth of the property to the plaintiff during the term of his ouster; in short, its rental value? No other mode of measuring such damages had been suggested by counsel, and the court is inclined to adhere to its original view on that question.

It must be admitted, of course, that plaintiff might state a good cause of action for the recovery of such damage for withholding, even though he was no longer entitled to recover the possession. Suppose the plaintiff were ousted, and brought no suit until his right to possession expired, and then brought suit for the damages only. In such case his action would not be based upon the provisions of section 301, Act June 6, 1900, c. 786 (31 Stat. 383) for the recovery of the possession of real property, but upon altogether a different cause.

Counsel also maintains that section 84 (31 Stat. 345) supports his contention. It provides that:

"The plaintiff may unite several causes of action in the same complaint when they all arise out of * * * Fifth: Claims to

recover real property, with or without damages for the withholding thereof. * * * But the causes of action so united must all belong to one only of these classes, and must affect all the parties to the action and not require different places of trial, and must be separately stated."

Counsel makes the point that the last clause, that they "must be separately stated," refers to the claims to recover real property, and the recovery of the damages for withholding thereof. But this is clearly not the true construction of the subdivision. The true construction is that different causes of action for the recovery of real estate may be joined, although some may seek to recover damages for withholding, while others do not, and requires only that these different causes be separately stated.

Under the provisions of section 301 it seems logical to allege ownership, ouster, and damage as one cause of action, and upon such a cause to recover possession and damages for withholding the same by the defendant; otherwise you drive the plaintiff to state his ownership and ouster for the purpose of recovering possession, then to a restatement of his ownership, ouster, and damages for the purpose of recovering his damage. Such a duplication of allegations seems illogical, and without a basis in reason, and is certainly opposed to the clear analytical statement of the elements of the action made in Pomeroy. The authorities are widely variant, and possibly based upon different statutes. No decision by the Supreme Court of Oregon is pointed out as laying down any different rule, and this court has a decided opinion that the complaint in this action states but one cause of action, and that, under that one cause, the court did not commit error in permitting a recovery of both possession and damages for withholding possession. No argument is made in support of any other ground, and the motion for a new trial is denied.

THE ARTHUR B.

(Second Division. Nome. December 14, 1901.)

No. 50a.

1. ADMIRALTY—LIEN—SERVICES.

Persons who are employed by the charterer in the home port of the vessel to dig ice, snow, and sand from about the vessel so that she could be launched over the ice from her bed on the beach, do not perform maritime services, and do not acquire a maritime lien on the vessel.

By charter party contract entered into at Nome, Alaska, between the general manager of the Alaska & Chicago Commercial Company and Minor Bruce, the latter chartered the schooner Arthur B. under date of May 14, 1901, for the summer season. The contract was made between the parties at Nome, and it is recited in the charter that the schooner was then lying on the beach near Nome, Alaska. From the record in this case it appears that the owners as well as the charterer and the libelants were all residents of Nome, and that the schooner was then lying on the beach in front of Nome, where she had rested during the winter. The charterer agreed to take possession of the schooner, and launch her upon the ice of Bering Sea, and equip her for sailing. This could only be done at that season and over the ice, for wide tide flats made it impossible in any other condition of the sea. In pursuance to the charter, Bruce hired the libelants in this action to assist him in digging the ice, snow, and sand from around the vessel, and in pushing her out on the ice. They performed no labor or services as seamen or sailors, nor did they aid in making any repairs on the vessel herself. Their whole service consisted in ordinary labor upon the land, digging the ice, snow, and sand from around the vessel and pushing her out upon ocean ice, from which she would sink into the water herself as that ice broke up.

To the libels filed by each of these libelants a demurrer was interposed by the claimant upon the ground that the facts stated in the libel were not sufficient in admiralty to constitute a claim or lien against the schooner. The demurrer being overruled, the claimant then filed an answer alleging payment, and further alleging that none of the services sued for were maritime in character, but were wholly personal, and did not constitute a lien upon the vessel. The case was sent to a referee to take the testimony and report findings to the court. A stipulation was entered into, whereby the taking of testimony was waived, and the allegations contained in the libel and intervening libel, respectively, were taken as true, with the understanding that the matter was to be heard and determined by the court upon the questions of law involved. The referee thereupon filed his report, in which he found that three of the libelants had been paid in full by the charterer, and found for the libelants Reidy and Patton in the sums of \$93.80 and \$99.40, respectively, and, as a conclusion of law, that a judgment should be entered for them in said sums, and that the same should be a lien upon the schooner. The report having been filed, a motion to confirm the same was made, and the matter came on for hearing upon the question of law involved. The attorney for claimant now urges the same objection which he interposed by demurrer and upon the allegations in his answer. The question for determination is whether or not the services admittedly performed by the libelants were maritime in character, and whether or not they have a lien upon the schooner for the same.

R. P. Lewis, for libelants.

Frank A. Steele, for claimants.

WICKERSHAM, District Judge. There is no statutory provision in the Code of Alaska upon the subject of maritime

liens. There is no finding that the owner and charterer are residents of Nome, but that fact appears from the record, and it seems for that reason that this is the home port of the schooner, and that she rested upon the beach within the city limits at the time the service was performed. The court is not cited to any authority which holds that the services admittedly performed by these libelants would constitute a maritime or any lien against the vessel. Counsel cites the case of *Frame v. The Ella* (D. C.) 48 Fed. 569, and upon an examination of the citations made by counsel for libelants that case comes the nearest of any to supporting their contention. That is a case where the schooner *Ella* was carried 1,200 or 1,300 feet beyond the ordinary water's edge, and beached high and dry upon the shore of the Elizabeth river. The owner employed a house mover with his outfit to move her back to the natural element from which she had been driven. The opinion discloses that he moved her about twice her length in that direction, and then changed the plan of procedure to digging a canal. For this purpose the dredge of one Culpepper was employed, and in stating the facts the court says:

"On the 5th of December the dredge was again hired, Frame and Condon, the master of the *Ella*, uniting with Culpepper in a written contract, by which they pledged the lien of the vessel for the \$351 already earned and for the wages to be earned."

Their efforts failed, and another party was employed, who successfully completed the canal to the vessel and launched her. Upon a proceeding in admiralty by *Frame* against the vessel to recover on the maritime lien, the court held that he was entitled to compensation for moving the vessel from the spot where he found her to that point to which the canal was dredged; and allowed him, beyond what Condon was paid, the sum of \$300. It would seem as if this opinion goes as far as the court would be justified to go. How much

force the contract of lien entered into by the captain of the vessel with Frame and Condon may have had in inducing the court to uphold Frame's lien is not shown.

The libelants in this case have asked the court to go further. They ask that the rule there laid down be upheld in a case where the employment was made by the owner and charterer, at the home of the owner and charterer, and at the home port of the vessel. The labor performed by these libelants was not in the nature of a salvage service, for the vessel was not in any danger. She was lying where she had rested the whole winter in safety. She was lying where all such small vessels lie in the winter time at this port. They were only ordinary laborers, employed by the charterer, presumably upon his own credit, for the performance of labor upon land in digging ice, snow, and sand from around the vessel. They were not employed to perform any dangerous service, nor did their labor in any wise tend specially to preserve the vessel. Their services were not in any way connected with the navigation of the ship nor in the performance of any voyage, nor in any preparation of the vessel for a voyage. There is nothing in the evidence or findings to show that they performed their services depending upon any lien upon the vessel, or that they had any contract of that kind. The C. Vanderbilt (D. C.) 86 Fed. 785.

In the case of The Mary Morgan (D. C.) 28 Fed. 196, the court said, in speaking of liens of this kind:

"Liens are implied for necessary repairs and supplies, where the debt is contracted by the master in a foreign port. The implication is founded on the ship's situation and presumed necessities. The master representing the owner, with authority to pledge the ship whenever his necessities require it, the law implies a pledge where repairs are made or supplies furnished abroad, on his order."

And, after citing the authorities, concludes that, where the owner is present, he may authorize an expressed lien, and

that an implied lien will not be presumed. Where the services are performed upon the credit of the owner or charterer, who are present, at their home and at the home port of the vessel, an implied lien in admiralty will not be presumed. Unless a contract lien is shown, and unless a lien is specially given by the legal owner for such services as that rendered in his case, none will be presumed. *The Mary Morgan* (D. C.) 28 Fed. 196; *The Now Then*, 5 C. C. A. 206, 55 Fed. 523; *The Ella* (D. C.) 84 Fed. 471.

The objections to the libels will be sustained.

DALY v. GARDNER.

(Second Division. Nome. December 14, 1901.)

No. 147.

1. DEFAULT—ATTORNEY.

Generally a default judgment will be opened when entered after service through neglect of the attorney. The inattention and neglect of the attorney is the inattention and neglect of the client.

2. SAME—JUDGMENT.

A default will not be set aside when the defendant was personally served with summons and an injunction, which he violated, after a year of absence from the jurisdiction, during which time judgment was entered, execution issued, and the property sold to third parties.

This is an application by the defendant to vacate and set aside a judgment obtained by the plaintiff against the defendant by default, and to permit the defendant to answer upon the merits. Motions of this kind are favorably considered by the court in all proper cases, but there are cases where the court, acting in its sound discretion, will not permit judgments to be vacated to allow the defendant to come in and defend.

The record in this case shows that the complaint was filed September 12, 1900, and that personal service was had upon the defendant, Gardner, on October 6, 1900, in Nome. At the time the summons was served upon him, an injunction was also served upon him to restrain him, among other things, from "selling, disposing, or getting rid in any manner of any gold, gold dust, or money derived in any manner from the working and mining of said claims, either by themselves or others, and to desist and refrain from shipping or sending the same out of the jurisdiction of this court, or in any manner concealing or putting the same out of your hands." No appearance was thereafter made in the action by the defendant. The default was regularly entered, and the matter was sent to a referee, who took all the testimony in the case, and reported the same to the court on January 8, 1901, upon which report the court entered judgment on that date.

The litigation arises between the plaintiff and defendant over their partnership interests in placer mining claims Nos. 2 and 3 on Elkhorn creek, in the Eldorado mining district, near Golovnin Bay, and the plaintiff was seeking to secure an accounting and settlement of his mining partnership with the defendant in relation to the said mines. After the entry of the judgment in January, an execution was issued on March 12th, upon which the interest of the defendant in the mining claims mentioned was sold on the 23d day of April to one Robert Dunn for the sum of \$1,100, which sale was thereafter regularly confirmed by this court. The proceedings in the case were full and complete, and appear in every respect to be regular, and in accordance with the law. On October 5th—just one year after personal service had been made upon him—the defendant, Gardner, filed in this court an application to set aside the judgment so entered on January 8, 1901, and to be permitted to file his answer and con-

test the plaintiff's suit. In his affidavit he alleges that at the time personal service was made upon him on October 6, 1900, he was on the steamer Charles D. Lane, then bound for Seattle; and that before leaving Nome he employed two attorneys, W. E. Crews and J. B. Zimdars, and paid them \$250, to look after his interests in said case. He states that his attorneys assured him that they would procure a continuance of his case, and that he might leave the country until the opening of navigation in the next year. He also says that at that time his health was bad, and that it was necessary for him to go outside. He also presents the affidavit of one Dr. J. H. Koons, of Franklin county, Pa., who testifies that in September, 1900, Gardner was suffering from a growth on the right leg, and also from rheumatism and some disease of the kidneys, and that it was necessary for him to go outside for medical treatment. It also appears by the affidavit of Gardner that he returned to Nome on the 20th day of June, 1901, and then learned that neither Crews nor Zimdars had remained in Nome during the winter of 1900-1901, and that neither of them had appeared in this action, and that a default judgment had been entered against him. He presents his answer with his affidavit, generally denying the amount due the plaintiff, but admitting the copartnership, and expressing a willingness to tender the deed which had theretofore not been made to the plaintiff for his half interest in the property.

C. S. Johnson, for plaintiff.

WICKERSHAM, District Judge. It has been decided in a large number of cases that the inattention and neglect of the attorney is the inattention and neglect of the client; that a default will not be opened where the attorney has simply neglected his duty, and allowed a default to be entered against his client, unless some other feature calling more loudly for

the interposition of the equity power of the court presents itself. There are some features of this application that strike the court as peculiar. One of them is the affidavit of Dr. Koons. It seems to have been made in Franklin county, Pa., on the 4th day of May, 1901, prior to the time when Gardner left that state to return to Nome. In his affidavit he makes the statement that he returned to Nome on the 20th day of June, "and to affiant's surprise learned that neither the said Crews nor the said Zimdars had remained in Nome during the winter of 1900-1901, and that the said Crews and the said Zimdars had made no appearance for affiant in the above-entitled suit, but that a default had been taken and entered against affiant in the above-entitled suit, and a judgment issued thereon, and affiant's property sold under execution." The query in the mind of the court is, if he knew nothing of this default judgment, and was surprised to learn of it when he returned in June, for what purpose did he have the affidavit of Dr. Koons made on May 4th, who therein states so many reasons why the default should be set aside. The defendant stands in a very poor attitude to come into this court and ask the equitable interposition of the court to set aside a judgment made almost a year ago, under which third parties have acquired title to real estate; when it appears that he had personal service of the summons, and that he personally violated the injunction of the court in this suit in connection therewith. He treats the process of the court with disrespect on the one hand, and asks for its equitable assistance on the other.

It is admitted by the defendant that he and the plaintiff were partners in the mines in question, and that their respective interests are correctly stated in the complaint. The only contention between the partners is the amount of gold extracted from the claim for which the defendant failed and refused to make any accounting. He now complains of the

finding of the court upon that question. Upon his own showing, one Coulter kept certain books showing the cleanups from these mines, and it appears in the record that these very books were used for the purpose of determining this question. Instead of giving his aid and assistance to the court in determining the contention, instead of respecting the injunction of the court that was personally served upon him, instead of entering his appearance in this action and defending it, the defendant, having personally notice of the plaintiff's claim, left the country carrying with him whatever gold dust came from this claim, in violation of the injunction, and he cannot now be heard to say that the court did wrong.

Upon a careful examination of this record, I am confident that there is no reason, either in equity or law, why the defendant Gardner should have the judgment vacated and be allowed to defend. He was given personal notice, but contemptuously, and in violation of the injunction of this court, left the country, and declined to come into this court and claim his rights. The court now declines to afford him any relief, and the application to open the default is denied.

BRACE v. SOLNER, Treasurer of Nome.

(Second Division. Nome. December 17, 1901.)

No. 599.

1. SCHOOLS—TOWNS—SCHOOL FUND.

The school board in incorporated towns in Alaska has the sole power to expend and pay out that part of the school fund paid into the treasury by the clerk of the District Court and derived from licenses paid within the town. The council has no power of expending any part thereof except that part segregated and set apart for municipal purposes by the District Court. Chambers v. Solner, *supra*, followed.

2. STATUTES IN PARI MATERIA—CONSTRUCTION.

A statute must be construed with reference to the whole system of which it forms a part. Such parts are to be read in pari materia, and taken together and construed as one system. They are to be construed in view of the evident purpose which the legislative body had in enacting them. They should, if possible, be so construed that no sentence or word should be superfluous, void, or insignificant.

3. PROVISO—USE—DEFINITION.

The word "provided" in the first clause of section 203 of the Civil Code of Alaska (Act June 6, 1900, c. 786, 31 Stat. 521), as amended by the act of March 3, 1901, has the meaning and significance of the conjunctions "but" or "and" only.

This is an application for a writ of mandamus to compel the defendant, as ex officio treasurer of the school board for the incorporated town of Nome, to pay a warrant drawn by the school board in payment of petitioner's services as janitor in the public schools. The warrant was presented, and payment refused, although the treasurer is shown to have then had sufficient funds properly applicable to its payment if the contention of the plaintiff is sustained. An alternative writ was issued, the treasurer appeared, and now demurs to the petition upon two grounds: (1) That the court has no jurisdiction of the subject-matter of the action; and (2) that the petition does not state facts sufficient to constitute a cause of action. The defendant contends:

(1) That the school board of the city of Nome has no power or authority to spend or direct the expenditure of the moneys which may be received for school purposes by the treasurer of the city of Nome under section 203 of the act providing for the incorporation of towns, page 393, Code of Alaska, nor in the amendatory act of March 3, 1901, which provides for any surplus found by the court not needed for school purposes to be used for any municipal purpose.

(2) That, even if the school board has authority or power

to provide in any way for the expenditure of any of the monies received, then such expenditure is subject to the consent and approval of the common council of the city of Nome, and such expenditure must be under their direction.

(3) That, even if the school board has the direction of expenditures, and the council has no control or discretion over the fund mentioned, then in that case the board cannot require the treasurer to pay any warrant until the council has directed such payment to be made by the treasurer. That, in any event, if the board has absolute control over the school fund, then the act of the council directing the treasurer to pay would be ministerial, and, before an action could be maintained against the treasurer, application would have to be made to the council for the direction to the treasurer to pay.

Alonzo Rawson, for petitioner.

P. C. Sullivan and V. T. Hoggatt, for defendant.

WICKERSHAM, District Judge. In a former action this court had occasion to pass upon the power of the council to expend this fund in payment of salaries to the town clerk and treasurer, and in denying such power in that body the court went somewhat beyond the matters in issue, and held that only the school board had authority to expend the school fund. Counsel for defendant now insists that, as the question was not involved in that case, that decision ought not to bar a full consideration of the issues in this case, and in that contention the court concurs.

The simple question at issue in this case is whether the school board of Nome or the town council has the power and duty of auditing accounts for school purposes and ordering payment thereof by the treasurer out of the school fund. The law which must be considered and construed is found

at page 393 of Carter's Code of Alaska, and the amendatory act of March 3, 1901, in 31 Stat. 1438.

The law is contained in a very short and comprehensive chapter for the incorporation of towns in Alaska and the incorporation of school boards therein. Act June 6, 1900, c. 786, 31 Stat. 520. Sections 198-200 provide for the original incorporation of the town, and, beyond fixing the general qualifications of electors in section 199, neither of these sections contain any provision applicable to the future government of the school board. There are but three other sections in the chapter. Section 201 confers certain enumerated powers upon the town council; section 202 provides for the election of and confers power upon the school board; while section 203 in the original act, and as amended by the act of Congress on March 3, 1901, defines the duty of the treasurer of the corporation, who is to be ex officio treasurer of the school board, provides for his oath and bond, and for the distribution and expenditure of the moneys derived from mercantile, liquor, and other licenses received from the clerk of the District Court. It will be seen from this summary how brief is the act in relation to towns and school boards and their respective powers.

Section 201 fixes the powers of the town council, and the fourth subdivision empowers the council "by ordinance to provide for necessary * * * maintenance of public schools. * * *"

Section 202 provides that:

"In addition to the officers heretofore provided by this act there shall be elected a school board of three directors, who shall have the exclusive supervision, management, and control of the public schools and school property within said corporation, and shall be elected in the same manner and for the same term as the council."

Section 203 was amended by Congress by the act of March 3, 1901, and the amended section reads as follows:

"The treasurer of the corporation shall be ex officio treasurer of the school board, and shall, before entering upon the duties of his office, take the oath prescribed by law and execute bonds to the corporation in an amount to be determined by the judge of the District Court, which bond shall be approved by the council and the judge of the District Court and filed in the office of the recorder of the corporation, and he shall give such additional bond as the council or judge of the District Court may from time to time direct, but in no event shall such bonds be less than twice the amount of money in the hands of the treasurer at any one time, to be determined by the tax rolls, and license books of the corporation, of the corporation clerk, and the clerk of the District Court: provided, that fifty per centum of all license moneys provided for by act of Congress approved March 3, 1899, entitled 'An act to define and punish crime in the District of Alaska and to provide a code of criminal procedure for said district,' and any amendments made thereto, required to be paid by any resident, person, or corporation for business carried on within said corporation, shall be paid over by the clerk of the United States District Court receiving the same to the treasurer of said corporation, upon taking his receipt therefor in duplicate, one of which duplicate receipts shall be forwarded to the Secretary of the Treasury of the United States by the clerk as a voucher in lieu of cash, and the other receipt shall be retained by the clerk. The money received by the treasurer of the corporation from the clerk of the court for licenses shall be used, under the direction of the council for school purposes; provided, that where it is made to appear to the satisfaction of the District Court that the whole amount heretofore or hereafter received by the treasurer of the corporation from the clerk of the court is not required for school purposes, the court may from time to time, by orders duly made and entered with a statement of the facts upon which they are based, authorize the expenditure of the accumulated surplus, or any part thereof, for any of the municipal purposes enumerated in this chapter. Fifty per centum of all license moneys provided for by said act of Congress approved March 3, 1899, and any amendments made thereto, that may hereafter be paid for business carried on outside incorporated towns in the District of Alaska, and covered into the treasury of the United States, shall be set aside to be expended, as far as may be deemed necessary, by the Secretary of the Interior

within his discretion and under his direction, for school purposes outside incorporated towns in said District of Alaska."

Under these statutory provisions both the town council and the school board claim to be authorized to control and expend the school fund derived from licenses for school purposes—the town council because section 203, original and amended, provides that "it shall be used, under the direction of the council, for school purposes"; and the school board because section 202 gives them "the exclusive supervision, management, and control of the public schools and school property within said corporation." It becomes necessary for the court to determine the question from a comparison and construction of the statutes above quoted.

In the examination of questions of this kind the court ought first to consider the purpose or object of the act. What was the intention of Congress in passing it? If the evident purpose was to establish a form of local self-government, that purpose must be kept steadily in view. That such a purpose was evident is apparent from an examination of these three sections under consideration. It is clear that Congress intended to provide a local town government as well as a local school government. It is also clear that the two are, in some respects, so intimately related that neither could perform all of its statutory powers and duties without the active co-operation of the other. It is the duty of the town council "by ordinance to provide for necessary maintenance of public schools," and it is quite clear that the school board could not perform that duty. The council is the only body having legislative power, and the only body having authority to levy taxes for the maintenance of public schools. Having in mind the idea of establishing a system of public schools controlled by the people residing within the town district, it must have occurred to Congress that the power of levying taxes and providing funds for the maintenance of

such schools must be lodged in some local body, and the town council was chosen. That there might not be any doubt, however, about the scope of the board's legislative powers, Congress provided that "the exclusive supervision, management, and control of the public schools and school property" shall be vested in the school board. The word "exclusive" shows clearly that it was the intention of Congress to shut out any other person or body from any pretended or real authority in the power then vested in the board. The use of the word excludes any possible construction or implication which will give the council any "supervision, management, or control of the public school or school property." The words "supervision, management, and control" are broad in their meaning. "Supervision" means having general oversight of, especially as an officer vested with authority; oversight; inspection; the act of supervising; superintendence; and this authority of oversight, superintendence, and inspection, is conferred exclusively upon the school board. "Management" is the act of managing, carrying on, directing, conducting, administering, superintending. "To control" is to exercise a directing, restraining, or governing influence over; to direct; to regulate; to guide. If, then, it be admitted that every other person or body is specially excluded from any power of supervision, oversight, inspection, superintendence, management, carrying on, directing, conducting, administering, controlling, restraining, governing, regulating, or guiding the public schools or school property, we may, in view of the general plan, inquire, what is left for the council to do in relation to the public schools?

The answer is: First, the council has the duty of the "maintenance of public schools" imposed upon it by the section conferring its powers. "Maintenance" is the act of maintaining. To maintain is to hold or preserve in any particular state or condition; to keep from falling, declining,

or ceasing; to supply with means of support; to provide for, to sustain, to keep up. It is the duty of the council by ordinance to provide necessary maintenance of public schools; to keep them from falling, declining, or ceasing; to supply the means of support; and this shall be done, when necessary, by taxation, under the fifth subdivision of section 201. No fitter words could have been chosen to impose upon the council the legislative power and duty of providing the means to support the public schools, and upon the board the executive power and duty of superintending, directing, and governing them.

The contention between the council and the school board arises over their different construction of a phrase contained in the sentence following the first proviso in both the original and amended section 203. This section, as amended, declares that the treasurer of the corporation shall be ex officio treasurer of the school board, and also provides that 50 per centum of all license moneys received by the clerk of this court within the corporation shall be paid over by him to the treasurer of the corporation. "The money received by the treasurer of the corporation from the clerk of the court for licenses shall be used, under the direction of the council, for school purposes."

Counsel for defendant insist that this clause forms an exception; that out of the well-defined system for the government of the city by the council, and of the schools by the school board, this clause creates an exception in favor of the council; that, while the school board might expend any other moneys, this particular fund, called a "gift" from the government, can only be paid out by direct action or supervision of the council; at least, that the board cannot expend it without the approval of the council.

Defendant's counsel urges that the matter would be clear if it were not for the fact that section 203 is joined in the

same act with other sections; that, if it stood alone—was a separate act of Congress—there would be no doubt that the council would have control of the fund. That fact, however, would not make the slightest difference. A statute must be construed with reference to the whole system of which it forms a part.

"Where enactments separately made are read in pari materia, they are treated as having formed in the minds of the enacting body parts of a connected whole, though considered by such body at different dates, and under distinct and varied aspects of the common subject. Such a principle is in harmony with the actual practice of legislative bodies, and is essential to give unity to the laws, and connect them in a symmetrical system. Such statutes are taken together and construed as one system, and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. Where a statute is made in addition to another statute on the same subject, without repealing any part of it, the provisions of both must be construed together." Sutherland on Stat. Const. § 288.

Under well-recognized rules, all acts of Congress, whether passed at the same or different sessions, relating to the same subject-matter, are to be considered together. Sections 201, 202, and 203 are to be construed with reference to section 203 as amended, and as if all were parts of the same law. They are to be construed, too, in view of the evident purpose that Congress had in enacting them, and also in respect to the evident intention of Congress to establish a system of local municipal and school government, dependent, yet separate.

Some stress is laid upon the fact that the expression "under the direction of the council," in section 203, as amended by the act of March 3, 1901, is found in a proviso, the use of which, as is well known, "is to except the clause covered

by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them to precede their proposed amendments with the term ‘provided,’ so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction ‘but’ or ‘and’ in the same place, and simply serving to separate or distinguish the different paragraphs or sentences.” Georgia Banking Co. v. Smith, 128 U. S. 181, 9 Sup. Ct. 49, 32 L. Ed. 377. An examination of the word “provided” at the beginning of the first proviso in section 203 both in the original and amended act clearly shows that it is used there with the ordinary meaning of “but” or “and.” The word “provided” separates two clauses which have no relation to each other. The following clause neither excepts anything from the preceding clause, nor qualifies nor explains it in any way. This is made clearly apparent by comparing the first and second provisos. The second is clearly a proviso, and the clause following the word “provided” therein does except something from the operation of the sentence which immediately precedes the word “provided.” The word “provided” in the first proviso has only the meaning of the conjunction “and” or “but,” while the second has the full significance of a proviso. Any argument based upon the word “provided” in the first alleged proviso, or upon the fact that the phrase, “under the direction of the city council,” is contained in a proviso, is, therefore, without foundation.

But for the second sentence contained in section 203 as amended, there would be no contention between the council and school board over this matter. The whole argument of the defendant is based upon that sentence. Let us examine

it for a moment, keeping in view the evident intention of Congress to establish a municipal government on the one hand, to be controlled by the city council and other city officials, and a school government on the other hand, controlled by the school board and school employés. Section 203 provides that the treasurer of the corporation "shall be ex officio treasurer of the school board," and then provides for his oath and bond. Then follows the first proviso that 50 per centum of all license moneys received by the clerk of this court within the town limits shall be paid over to the treasurer of said corporation by the clerk. Then comes the important sentence as follows: "The money received by the treasurer of the corporation from the clerk for licenses shall be used, under the direction of the council, for school purposes." The gist of the whole matter lies in the meaning of the words "under the direction of the council." What does this phrase mean, and what power or duty does it confer upon the city council? Does it except anything from the exclusive supervision, management, and control of the public schools and school property given to the board by section 202? Fortunately, this phrase has been more than once analyzed and carefully construed by courts of the highest resort, and their construction of the phrase must determine this action. In a case decided by the Supreme Court of Vermont the phrase was examined and construed. The question there arose upon the right of the clerk to issue certain process which could only be issued under "the direction of the judges." The court says in its opinion:

"Section 819, Rev. Laws, prescribes the duties of the clerk, and in paragraph 3 it says: 'Record any other proceeding that the court may direct, and make and sign all process regularly issuing from either of the courts aforesaid, under the direction of the judges.' It is claimed on behalf of the relator, under this paragraph, that the clerk can issue no process except as expressly directed by the judges. This is against the practical construction which this statute has re-

ceived. Neither courts nor judges have been in the habit of expressly ordering clerks to make, sign, and deliver to prosecuting officers or sheriffs warrants for the apprehension of persons indicted, but they have been issued by the clerks as an authorized duty irregular course, without express direction. * * * The clause 'under the direction of the judges' confers upon them the right to make orders, the right of supervision, but does not require an express order to invest the clerk with authority to issue a warrant for arrest in due course. * * * Without undertaking to define what, if any, may be the inherent authority of clerks under our system, we hold further, under said statute, construed in the light of other statutes appertaining to powers and duties of clerks, that, when a proceeding is in progress which at a certain stage requires, in regular furtherance, that a warrant should be issued, it is the official province of the clerk to issue the same without any order of the court to that end; that, in short, the word 'direction' in the clause 'under the direction of the judges' is to be taken in the sense of authority to direct as circumstances may require, and not as requiring direction in order to confer authority upon the clerk to act." *In re Durant*, 60 Vt. 181, 12 Atl. 652.

This Vermont case is quite full and clear and shows that "under the direction of the judges" still left the clerk free to act without the express approval of the judges, by reason of other provisions of law which gave him general power to act. The same construction applies to the case at bar. The town council is empowered, and it is its duty, to provide by ordinance for the "maintenance"—that is, for the support; that is, to raise means to support—the public schools. And under the principle announced in this Vermont case the school board will not be required, by the phrase "under the direction of the council," to seek the council's approval for the expenditure of the school fund any more than the clerk was required to seek the approval of the judges for issuing the warrant, and for the same reason, viz., that by other statutory provisions each had power to perform the act in question, and such power so expressly given was not lim-

ited by the phrase "under the direction of the council" (judges).

The same phrase was construed by Judge Sawyer in the case of the Southern Pac. R. Co. v. Wiggs (C. C.) 43 Fed. 333 (338). That was a suit in equity by the railroad to remove a cloud from its title to a tract of land, being a portion of its land grant. The land was selected by the railroad company under its grant, and the selection was denied by the Secretary of the Interior, who issued a patent for the same to Wiggs, the defendant. Judge Sawyer, in his decision, says:

"Although the selection of the lieu lands [was] to be 'made under the direction of the Secretary of the Interior,' they were to be 'selected by said company,' not by him; nor was the selection required to be approved by him, as is required by some other acts; and when there was a deficiency, and the company selected lands open to selection, there was no authority vested in the secretary to arbitrarily refuse to recognize and allow such selection. This would deprive the company of the right of selection expressly given by the statute, and vest it in the secretary, whereas the statute says in express terms, 'other lands shall be selected by said company in lieu thereof.' "

This principle is applicable to the case at bar; for, while the selection of the lieu lands was to be made "under the direction of the Secretary of the Interior," yet the selection was to be made by the company, and not by the secretary. In the case at bar, while the money is to be used, "under the direction of the council," for school purposes, it cannot be used in "the exclusive supervision, management, and control of the public schools and school property," except by the school board; otherwise section 202 is meaningless, and void, and it is a general rule of statutory construction that a statute, "if possible, should be so construed that no sentence or word should be superfluous, void, or insignificant." Cooley's Constitutional Limitations, p. 72.

The same phrase has been examined very fully in a most important case involving the right of the Northern Pacific Railroad Company to certain parts of its land grant in North Dakota by the Supreme Court of that state. The company had prepared lists of certain lieu lands which it desired to select, and had filed its list with the register and receiver in the various land offices. Thereafter the Secretary of the Interior modified and changed the conditions to be performed by the company in completing its selection, and then claimed the right to require said lists to be modified before he would finally approve, allow, and adjust said selections. He then claimed that the railroad company had acquired no legal or equitable title to the lands in question. So that the case stood as the case at bar stands. The Secretary of the Interior denied the right of the company to its lands, because they had not been selected under his direction, and this question became an important one in the consideration of the case. The court said:

"The facts alleged in the complaint sufficiently show, first, a deficiency in the amount of lands within what we may call the 'place limit' of the grant to which plaintiff was entitled; second, the existence of the lands at the time of selection, properly subject thereto; third, a selection of the lands here involved by the company 'under and in accordance with the direction of the Secretary of the Interior.' This phrase appears to us to indicate that the selections were made in the manner required by the regulations promulgated by the secretary in conformity with pre-existing rules. We do not think it imports, as used, an approval of the selection by the secretary. * * * The act in terms provides that for the specified deficiencies 'other lands shall be selected by said company in lieu thereof, under the directions of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond' the 40-mile limit. It has been urged that the phrase 'under the direction of the Secretary of the Interior' is equivalent to, and is intended to convey the same meaning as, 'subject to the approval of the Secretary of the Interior.' Such is not the plain and

ordinary meaning of the term used." Northern Pac. R. Co. v. Barnes, 51 N. W. 386, 403.

The court then goes on to discuss the meaning of the word "direction," and to decide that the company had the statutory right itself to the selection of its lands within the defined limits, and then continues:

"To make these selections 'under the directions of the Secretary of the Interior' is to make them in accordance with the rules and regulations prescribed by him. The object of this provision is undoubtedly that the Interior Department and the public may be advised as to what lands are appropriated under the grant, and thereby withdrawn from settlement and entry as a part of the public domain, and that the government may be advised when the quantity grant is satisfied. To secure these purposes and uniformity in the manner of selection, the secretary was authorized to prescribe the procedure to which the company must conform in making these selections. But it is in terms prescribed that the 'land shall be selected by said company.' To 'select,' says Mr. Webster, is 'to choose and take from a number; to take by preference from among others; to pick out; to cull.' This power of choice is to be from among all the unappropriated odd-numbered sections of land 'not more than ten miles beyond' the 40-mile limit. It is to be exercised by said company. This phrase renders clear the interpretation to be given to the words 'under the direction of the Secretary of the Interior.' The clause must be so construed that both these phrases may stand together, and both be given their full force and meaning. A construction of the phrase 'under the direction of the Secretary of the Interior' which would vest him with the power to dispose of the indemnity lands after the right of selection had attached, or vest him with authority arbitrarily to refuse to recognize a selection made by the company in proper manner, upon a proper basis of lands subject to the right of selection, or, by neglect or refusal to approve the selection, prevent the title to the indemnity lands from vesting in the grantee, would deprive the company of the right of selection. It would make the words 'by said company' surplusage, and deprive them of any effect whatsoever."

The argument of the court in this case is upon the same principle of construction as that involved in the case at bar.

In that case the Secretary of the Interior may, by general rules and regulations, provide and define the method and manner of selecting the lands in question, but he could not by any rule or regulation take away from the company its statutory right to select its own lands. In the case at bar the city council had the power, and it is its duty, under section 201, to provide for the maintenance of the public schools, the exclusive supervision, management, and control of which is given to the school board; and the phrase "under the direction of the city council" must be construed with reference to the evident purpose of Congress to impose upon the council the duty of maintaining, and upon the school board the exclusive duty of supervising, managing, and controlling. The raising of the money for the support of the schools, on the one hand, is the duty of the council; the expenditure of the money, on the other hand, is clearly included within the purpose and meaning of the law giving to the board the exclusive supervision, management, and control thereof. The town council can no more expend that money by virtue of the phrase "under the direction of the council" than could the Secretary of the Interior prevent the selection by the railroad of the lieu lands. The purpose of Congress in both instances must be sought for upon examination of the whole law involved. It was the duty of the secretary to provide general rules and regulations for all cases like that in question. But he could not select. That right belonged to the company. The purpose of Congress in passing the laws under consideration was to provide both a town and school government, each having specified powers, independent, yet not conflicting. It is the duty of the council, as a legislative body, to provide for the maintenance of the schools, and to that extent they have a general direction over the school fund. Concede that the special license fund is to be used "under the direction of the council," but by whom?

The act does not say "by the council," nor even "with the approval of the council." Then it must follow that it can only be used by that body which has "the exclusive supervision, management, and control of the public schools and school property." No other body could apply it to that use—the very use for which it is provided by Congress. To deny the right of the school board to expend the fund is to deny its use in the "supervision, management, and control of the public schools." It is the same as to deny the right of the railroad to select its land. No one else there had the right to select; no one else here has the right to pay out the money. The council may direct, but it cannot pay. The expenditure of the fund is necessary to the supervision, management, and control of the public schools. It is not necessary to any power vested in the council. The school system established by the act would be destroyed without that power, for the council is specially and clearly excluded from any supervision, management, and control of the public schools by its exclusive lodgment in the board.

"Under the direction of the council" means that in performing its legislative duty of the maintenance of the public schools the council will consider that fund along with any other which can be used for such support. It will provide a sufficient fund for the support of the schools by general or special rules or ordinances, just as the secretary should provide for selections of lands, by general rules or regulations. Such fund, however, whether raised by taxation by the council or arising from licenses, will be placed in the hands of the treasurer as "ex officio treasurer of the school board," and expended by that board only, and without the consent or approval of the council for the purposes which Congress had clearly in its mind—"the supervision, management, and control of the public schools and school property."

To give this act any other construction would be to annul and render useless the very positive provisions of section 202, and this court ought not to do that if it can be avoided. In the Dakota Case the court concludes:

"This act does not require, and the court cannot import, among the conditions precedent to the acquisition of title to indemnity lands by selection, the further condition, 'subject to the approval of the Secretary of the Interior.' "

Neither does the act in question require, nor can the court import, the further condition imposed upon the use of the school money, that it shall be used "subject to the approval of the city council." To so hold would be to destroy the symmetry and order adopted by Congress in this system of local government of public schools. It would place in the hands of the town council the power which is clearly given to the school board by section 202; and under the three decisions cited such a result cannot follow.

Upon a re-examination of the opinion heretofore given in the case of Chambers v. Solner, ante, 271, I am inclined to approve every part of it that is important in this case, without repeating it. This will dispose of many of the minor suggestions made by counsel. In conclusion, it is the opinion of the court that the phrase "under the direction of the city council" must be construed in connection with the evident purpose and object in the mind of Congress to establish a town and school government, and to separate the duties and powers, respectively, between the two sets of officials; that the only direction which the town council has over the use of the school funds is that of considering them in determining the revenue and support which ought to be raised by taxation; that it is the duty of the council to so consider them, and to that limited extent they are under the direction of the council for the purpose of determining what additional fund shall be raised, and none other. Section 202,

giving to the board the "exclusive supervision, management, and control of the public schools and school property within said corporation," considered in connection with the purposes and objects to be attained by Congress, clearly gives to the school board the exclusive power to expend the school fund for the purposes of that act. No action whatever is necessary on the part of the town council when the fund is raised and placed in the hands of the treasurer of the corporation, as "ex officio treasurer of the school board," to enable the school board to appropriate it and expend it for school purposes.

The demurrer is overruled, and, unless the answer shall state facts sufficient to bring the matter at issue for trial, the peremptory writ of mandamus may issue.

UNITED STATES v. HOMER BIRD.

(Third Division. Juneau. December 17, 1901.)

No. 1,327.

1. CRIMINAL LAW—CONTINUANCE.

Where it appears, from the affidavit for a continuance, that the defendant procured, at the May term, 1901, an order of court that certain witnesses be subpoenaed at the expense of the government, but took no further step until August 26th thereafter, after which one was served, and the others shown to be out of the district; that neither of the witnesses was present at the time of the homicide, and they are shown by the application to have knowledge only of the existence of shot marks at the place of the homicide—the motion is denied.

Motion for a Continuance. Denied.

R. A. Friedrich, U. S. Dist. Atty.
Maloney & Cobb, for defendant.

BROWN, District Judge. It appears by the record in this case that the homicide alleged to have been committed

by the defendant occurred on the Yukon river, in Alaska, on September 27, 1898; that thereafter a trial was had before the United States District Court for the District of Alaska, the defendant convicted, an appeal taken to the Supreme Court of the United States (21 Sup. Ct. 403, 45 L. Ed. 570), the judgment of the lower court reversed, and a mandate of the Supreme Court of the United States directing this court to proceed to the trial of the case returned and filed in this court.

At the Skagway April, 1901, term thereafter, on the application of the United States attorney, the case was continued to the Juneau May, 1901, term, because of the absence of the witnesses for the prosecution. At the time of such continuance the defendant was brought into court, and appeared in person and by his attorneys, and counsel for the defendant then declared himself ready for trial, though none of the witnesses now asked for were in court, or within reach of the process of the court, so that their attendance could have been procured for that term. It is inferred that counsel for the defendant declared themselves ready for the trial without witness other than the defendant, because of their knowledge that none of the witnesses for the prosecution were then within reach, and that their evidence could not be procured for that term.

The case was again called at the Juneau May, 1901, term, and it appearing to the court that the witnesses for the prosecution, who were being brought by steamer from Seattle, were prevented from landing at Juneau, for the reason that smallpox had been discovered among some one or more of the passengers voyaging on the same ship, the case was again continued. During the said May, 1901, term, an application was made by the defendant for service of subpoena at the expense of the government on certain witnesses named therein—the same witnesses now described in the

affidavit for continuance—and who were said to be residing at certain points along the Yukon river in Alaska; the defendant alleging in such application that he was not possessed of means to obtain the service of said subpoenas and the attendance of such witnesses. Notwithstanding the knowledge of the court that this case had been once tried, was vigorously defended by competent counsel, thereafter an appeal taken to the Supreme Court, and the case heard there at great expense to the defendant, and that competent counsel were again appearing in the case, from which facts the court might reasonably infer at least that the defendant was not in such sore need of means for the procurement of witnesses as he claimed, still the court, giving the utmost credence to the defendant's claim, ordered the subpoenas issued and served at the expense of the United States. This order was made during the Juneau May, 1901, term. It appears that the defendant's attorney never called upon the clerk of the court for the issuance and delivery of these subpoenas until about the 20th or 21st of August thereafter; that in the meantime, and on or about the 18th day of August, the clerk had issued the subpoenas, and the same had been delivered to the United States marshal of this division, and forwarded to the United States marshal at St. Michael; that service was there had upon Jensen; that the other witnesses were not served, because, as the marshal asserts in his letter accompanying the return, they were not only not found, but, upon reliable information and belief, they were not within the district. Among the other facts of which the court must take knowledge is the fact that the defendant has been confined in jail during the interim of court and ever since his first trial; that defendant's knowledge or information as to the whereabouts of the desired witnesses must necessarily be indefinite and uncertain, and not of the most trustworthy character. The affidavit

of ex-United States Marshal Vawter, who was deputy marshal of the district at the time of the alleged homicide, has also been presented, tending to show that said witnesses are not at this time, and have not been for a considerable period, within the District of Alaska.

Under these conditions, then, the court is required to pass upon the application of the defendant for a continuance at this time. An examination of the affidavit discloses that the facts which the defendant undertakes to establish by the absent witnesses are as follows:

"That he was sitting on the bed of the said Patterson, on the port or left-hand side thereof, facing the defendant, who was sitting on the right-hand side of said scow, on his bed; that they were casting up their accounts, to see how much each had paid out for the outfit then in their possession, preparatory to a division thereof; that a quarrel sprang up over some differences, and Patterson struck the defendant, who struck him back; that at that instant the woman called out to the defendant to look out, they were getting their guns; that defendant thereupon sprang to the stern of the scow and seized his shotgun; as he did so, he saw Hurlin in the act of raising up with his Winchester rifle in his hands, which he had taken from his blankets at a point near the bow of the scow on the right-hand side thereof; that said scow was covered with a tarpaulin; that defendant thereupon shot deceased with the shotgun, which was charged with goose shot, the charge taking effect in the side of his head, killing him instantly; that some of said shot took effect in the tarpaulin immediately beside the said Hurlin's head; that said Patterson, at the instant defendant fired at said Hurlin, was making for and attempting to get a Winchester rifle in the extreme bow of said scow, and was in a half-stooping position near the front end of said tarpaulin covering; that defendant thereupon fired at and wounded the said Patterson in the left shoulder, some of said shot taking effect in the tarpaulin immediately over him."

The homicide is said to have been committed on September 27, 1898. The witnesses who are said to be absent, and for whose absence a continuance is claimed, are M. C. Jensen, John Doe Wallace, and John Doe Thompson. The

affidavit set forth that, if said witnesses were present, they would testify that they were at the scene of the homicide on the 28th or 29th day of September, 1898, and were in said scow, helping to take therefrom certain provisions stored therein; that they saw and recognized shot marks on the tarpaulin at the extreme front end thereof and at or near the middle or center of said front end; that they also saw blood on the scow, immediately under the place where the first shot was said to have taken effect; that there was no indication of any shot marks whatever on or about or anywhere near the stern of said scow; that one John Doe Hendricks was at said scow several times during the winter of 1898 and 1899, and saw shot marks on the tarpaulin at the same places as stated above. It is further claimed that Jensen, in addition to the foregoing, would testify that "the witnesses for the government stated to him at that time, and at other subsequent times, had the homicide occurred in the manner above set forth"; that witness John Doe Chapman would testify "that in the month of March, 1899, he saw and talked with the witnesses for the government herein, and that they then and there detailed to him the circumstances of the homicide as substantially set forth herein.

It appears that none of these witnesses were present at the time of the shooting; that their testimony is quite indefinite and uncertain in character, it being said by them that a day or two after the shooting described by the defendant in his affidavit they were on the scow in question, engaged in discharging some freight therefrom; that they observed certain shot marks in a piece of canvass at or near the bow of the scow, and certain shot marks near the center of the bow of the scow in the end thereof, and shot marks at the side, and also certain blood stains on the boat. Nothing is said by the witnesses as to what examination was made by them as to the appearance of the shot marks,

whether the indications were that they had been made recently or were of great age, or as to any time they could or might have been made. The statement is a bald one, unsupported by details or facts showing careful observation, or whether any observation or examination was made. It is believed that this sort of testimony is too indefinite in character, and altogether too uncertain, to warrant the court in granting a continuance at this late day, after so much time has expired since the homicide occurred. It further appears to the court by the record of the case made at the former trial that no application was at that time made for the attendance of the witnesses now desired, nor was it in any manner indicated that they knew facts such as are set forth in the affidavit at this time.

I am of the opinion that, while it was the duty of the clerk of this court to have immediately issued the subpoenas for witnesses under the order of the court, it was equally the duty of counsel for the defendant to have followed up the order that had been made at their instance, and to have promptly called the attention of the clerk to the fact of the order and their desire for the immediate issue of the subpoenas.

A part of the testimony desired, as appears by the affidavit for continuance, is for the impeachment of certain government witnesses not named in the affidavit as to conversations claimed to have been had with "such government witnesses" by some of the witnesses whose presence is alleged to be desired for the purposes of this trial. It is believed that the law governing continuances does not require the court to consider the merits of an application based on this sort of testimony. Even in states where the statutes give defendants the right to continuance when an affidavit is made setting forth the facts to which certain absent witnesses will testify if present in court, and wherein no other affidavit

or other evidence of any character may be considered by the court in passing upon such application save the affidavit so made, it has been frequently held that testimony of the character here sought to be secured will not be considered as basis for the granting of a continuance. It would seem that, to entitle it to consideration, the affidavit should state facts relative to the homicide, or to some phase of the matter in issue, and not impeaching testimony.

Applications of this character are addressed to the sound discretion of the court, and not under any statute making it the imperative duty of the court to grant a continuance upon a showing made. Considering all the facts and circumstances surrounding this case, and exercising the fairest discretion of which this court is possessed, the court is constrained to deny the application.

Continuance of the case is therefore refused.

OSGOOD v. DONNELLY et al.

(Second Division. Nome. December 21, 1901.)

No. 437.

1. ABATEMENT—PLEADING.

Matters in abatement are not favored, and must be specially pleaded, or they are waived.

2. TOWN SITE—SETTLEMENT—OCCUPANCY.

That a claimant for a tract of land within a town site camped on the ground two nights while passing on a journey, and also two nights on his return, at which time he set stakes at its corners, without any other mark of settlement or occupancy; that later next spring he occupied a tent on the tract for a short time with dozens of other persons, but made no other settlement or occupancy, are not such acts of occupancy and use as enabled him to acquire a preference right by possession against one who first built a dwelling house on the lot, and continuously and in good faith occupied the ground thereafter.

3. PUBLIC LAND—TRADE AND MANUFACTURES.

A mere occupancy for a brief time by camping on the ground in a tent is not a sufficient evidence of the occupation of public land for the purpose of trade and manufacture upon which to base title under the land laws.

This is an action to quiet title to a town lot in Nome. Plaintiff shows in his complaint that he first entered upon the lot on the morning of July 1, 1899, having come ashore from a vessel the same morning; that he set stakes at its four corners; that the lot was 50x100 feet square; and that he immediately entered into the actual use and occupation of the lot, and has at all times since remained in possession. The complaint further shows that the defendants were, at the time of bringing the action, seeking to acquire possession through a writ of restitution issuing out of this court in the case of Donnelly & Pratt v. Hendrikes, and that plaintiff, Osgood, was not a party to that suit; that defendants Donnelly and Pratt claim some interest in the property; and plaintiff then prays for an injunction, that defendants state their title, and that plaintiff's title be quieted.

Defendants answer, and deny all the allegations of the plaintiff's complaint in relation to title, and then, by way of an affirmative defense, allege generally that they are the owners in fee and entitled to the possession of the property claimed by the plaintiff, particularly describing it, but the answer does not contain any allegations of fact, except the description. It further alleges that the plaintiff claims some interest in the property, and concludes with a prayer to quiet title. The reply denies the defendants' ownership.

Cochran & Grimm, for plaintiff.

W. T. Love and B. F. Knott, for defendants.

WICKERSHAM, District Judge. From the evidence it appears that Osborn, in November, 1898, on his way from

Golovin Bay to Penny river, camped one night at the mouth of Snake river, and upon the ground in question; that on his return from Penny river he remained two nights encamped at the same place; he removed his tent and all equipage each visit, and left nothing in the nature of improvements on the ground either time. He testifies that upon his visit to the spot on November 30, 1898, he placed stakes at the corners of a tract 100x300 feet square, and a notice upon one stake as follows:

"Notice of Location Town Site at Steamboat Landing.

"Notice is hereby given that the undersigned claims the within described property, commencing at this the initial stake, thence running easterly one hundred feet to corner stake No. 1, thence north-easterly three hundred feet to stake No. 2, thence westerly one hundred feet to corner stake No. 3, thence southerly three hundred feet to the initial stake.

Frank Osborn.

"Dated November 30, 1898.

"Witness: M. Dowd, F. Koltchoff."

He then returned to Golovin Bay, where he remained for the winter, and where, he testifies, he was sick. In the spring of 1898, about May, one Lane delivered upon the tract 16 small logs for Osborn. While at Golovin Bay, Osborn made an arrangement with the defendants in this case to come to Nome and take possession of the ground for him, promising them one-quarter interest for their services. Pratt testifies he came in May, 1899, and established his tent on the tract staked by Osborn, and resided in that tent until August, 1899, when he went outside. Donnelly went outside also about September or October. Osborn first returned to the tract about June 28, 1899, and erected a tent near that of defendants, and resided in the same until some time in the fall, when he also left the property.

The evidence discloses that Osborn made no improvements on the large tract at any time, except to put up a

tent, and reside there a short time—he says during July and August, 1899—when he left the property. He has made no improvements of any kind upon the large tract, so far as the evidence in this case bears upon that question.

The evidence discloses that the plaintiff landed at Nome on the night of June 30, 1899, and at an early hour next morning, in company with other persons seeking to locate lots, he went back of all tents, buildings, stakes, and other signs of occupancy, except some large stakes several hundred feet back on the tundra, and which were by them taken for mining stakes, and there located the lot in question 50 by 100 feet square, erected his tent, staked and took exclusive possession of it. The lot so staked and located by the plaintiff was within the larger area theretofore located by Osborn. Plaintiff successfully kept off others who sought to enter upon his lot. The mining excitement was then at its height. Ships were continually arriving in the roadstead of Nome, and every foot of space on the Osborn tract farther in toward the beach and Front street was crowded with tents, including those of the defendants and Osborn, none of which, however, were on plaintiff's lot.

On July 13, 1899, Osborn made a deed of the west 25 feet of his tract to the defendants, being a tract 25 feet wide and 300 feet long. This deed embraced the west 25 feet of plaintiff's lot, then in his possession. His occupation was then known to the defendants.

One Hendrikes claimed to have staked a lot lapping over on the plaintiff's lot. His entry was subsequent to the plaintiff's. He erected some kind of a structure thereon, and a suit was begun by the defendants herein against both Hendrikes and this plaintiff before the United States Commissioner Shepherd to recover their rights. This was prior to the date of the arrival of the judge of this court at Nome on July 23, 1900. An agreement was entered into by plaintiff as

one of the defendants in that action with Donnelly and Pratt, by which certain matters were recited, whereby plaintiff agreed that "he has not and will not interfere with plaintiffs' [defendants in this case] use and enjoyment of said lands in the complaint described, until by some proper action in a court of competent jurisdiction his right to the possession thereof shall have been determined," etc. It also contains a provision that the agreement "shall not be used as evidence against or in favor of either party in any future litigation in regard to the title or right to the possession of said lands," the lot in controversy in this suit. Defendants introduced this agreement in evidence, and urge very earnestly that it constitutes a bar to the plaintiff's recovery. Plaintiff claims that he complied with it in good faith, and that his right to possession to the lot had been determined by this court in actions coming to final decree between Osborn and other persons claiming adverse interests in the larger tract before he is claimed to have violated any of its provisions. However, defendants' answer contains only denials and a mere bold assertion of ownership. The matter can avail them nothing. This agreement neither sustains the denials nor proves the ownership in defendants. Its only purpose is to abate the plaintiff's suit, and it is not pleaded. Matters in abatement must be specially pleaded in the answer. Such pleas are not favored. If not specially pleaded, they are waived. *Chamberlain v. Hibbard*, 26 Or. 428, 38 Pac. 437; *Fiore v. Ladd*, 29 Or. 528, 46 Pac. 144.

Defendants claim title through their deed from Osborn. Osborn, however, had no title to the property in dispute. The act of March 3, 1891 (26 Stat. 1095, c. 561), entitled "An act to repeal timber culture laws, and for other purposes," extended the town-site laws to Alaska. It also provided, in sections 12, 13, and 14 [U. S. Comp. St. 1901, pp. 1467, 1468], that any citizen of the United States "now or

hereafter in possession of and occupying public lands in Alaska for the purpose of trade and manufactures, may purchase not to exceed" 160 acres. It was not shown by the evidence, and it is not clear from defendants' briefs, under which of these, or what other, laws he claims to be entitled to hold the ground so claimed by him.

His notice, however, shows that it was for town-site purposes, and, that being admitted, his rights are to be determined under the provisions of section 11 of the act of March 3, 1891 [U. S. Comp. St. 1901, p. 1467], and section 2387, Rev. St. [U. S. Comp. St. 1901, p. 1457]. This section provides that, "whenever any portion of the public lands has been or may be settled upon and occupied as a townsite," the corporate authorities may enter "the land so settled and occupied in trust for the several use and benefit of the occupants thereof," etc. The person claiming under this law must both settle upon and occupy the lot, and Osborn did neither. His camping over night on the ground while on a journey was neither an act of settlement nor occupancy. The presence of the defendants upon the ground from May to September, dwelling in a tent, together with a failure to show any other act of occupation or possession, is not sufficient to initiate a use, occupation, or possession for Osborn. His own presence on the land from June 28th to September, taken together with the fact that he only occupied a tent, like dozens of other persons, on the same tract, and that he left and abandoned the land in September, and made no permanent improvements thereon, and, so far as the evidence shows, never has either occupied or used it since, is not sufficient to show a settlement or occupation such as will justify the court in sustaining his title over that of plaintiff.

There is some evidence on the part of the defendants to show that Osborn laid claim to this property under section 12 of the act of March 3, 1891 [U. S. Comp. St. 1901, p.

1467], providing for the sale of such lands for the purpose of trade and manufactures. This section declares that any citizen of the United States "now or hereafter in possession of and occupying public lands in Alaska for the purpose of trade or manufactures may purchase not exceeding 160 acres." Osborn cannot acquire title under this provision upon the facts shown in evidence. The evidence does not disclose that he ever was in possession of or occupying the tract in question for the purpose of trade or manufactures. It only shows his mere occupancy for a brief space of time, and then his utter abandonment of the tract, without disclosing that he ever attempted in any way to use the same for any purpose whatever. The proviso in section 12 is clearly in favor of the plaintiff in any question of conflicting interests between Osborn and the plaintiff. Plaintiff has shown good faith in his settlement and occupation of his lot. He has built permanent improvements thereon, and has used and occupied it continuously from July 1, 1899, and is entitled to continue to do so.

This court will sign findings of fact, conclusions of law, and a decree for the plaintiff.

CROSSLY et al. v. CAMPION MIN. CO.

(Second Division. Nome. December 21, 1901.)

No. 420.

1. VENDOR AND PURCHASER—FRAUDULENT CONVEYANCES.

One who purchases real estate for a mere nominal consideration, with knowledge of a prior sale and of a prior unrecorded deed, made in good faith, and for a valuable consideration, is not a bona fide purchaser for value. Nor was he a "subsequent innocent purchaser in good faith, and for a valuable consideration," such as is protected by section 98 of the Civil Code of Alaska (Act June 6, 1900, c. 786, 31 Stat. 505).

Suit to Quiet Title to Real Estate.

T. M. Reed, for plaintiffs.

Hastie & Thuland, for defendant.

WICKERSHAM, District Judge. Daniel J. Hart located the property in question on April 21, 1899. The same property was located by J. E. McDermott on August 1, 1899. Upon all the evidence in the case I am satisfied that Hart's location was strictly in compliance with the statute, and for that reason the McDermott location was and is void, and need not be further considered in this case.

Hart's location was made in pursuance to a grub-stake contract with the Yukon Gold Dredging Company, made in March, 1899, and was recorded on June 29, 1900. In pursuance to this contract, and on August 19, 1899, Hart made a deed to the Yukon Company for the property in question, which deed was also filed for record on June 29, 1900.

On June 17, 1900—almost a year after his deed to the Yukon Company—Hart made another deed to D. D. McLennan. This is a deed of quitclaim, in effect conveying only "all his right, title, and interest." The consideration mentioned in this deed is \$1. The deed was not acknowledged until the 20th day of September, 1900. It was first recorded on June 22d, and, after acknowledgment, on September 20, 1900. Upon all the evidence I am satisfied that McLennan took this deed with full knowledge of the prior deed made by Hart to the Yukon Company. Hart testifies that he informed Harrison and McLennan distinctly about this matter when the deed to McLennan was made, and that McLennan acknowledged to him that he understood the situation fully.

Under section 75 of the Civil Code (Act June 6, 1900, c. 786, 31 Stat. 503) "a deed of quitclaim or release, of the form in common use, shall be sufficient to pass all the real

estate which the grantee could lawfully convey by deed of bargain and sale." The deed in question, then, may be considered as one of bargain and sale, but only of "all the right, title, and interest" which Hart then had. The expressed consideration being nominal, and never having been paid, and the grantee accepting the deed with full knowledge of the prior unrecorded deed under which the plaintiffs claim title, he is not a bona fide purchaser for value. Nor was he a "subsequent innocent purchaser in good faith, and for a valuable consideration," such as is described in section 98; the outstanding deed would not be void as to such a purchaser. I am inclined to hold that the deed from Hart to McLennan is void under sections 119 and 120 of the Civil Code. *American Mortgage Co. v. Hutchenson*, 19 Or. 334, 348, 24 Pac. 515; *Baker v. Woodward*, 12 Or. 3, 6 Pac. 173.

There is a wide discrepancy between Hart and McLennan as to the payment of the consideration. Hart testifies positively that no consideration was paid, while McLennan swears equally as positively that it was paid. The deed itself discloses that the consideration was \$1. This much may be conceded as established.

The evidence satisfies me that the plaintiffs' grantor, Hart, located this mine in good faith, and plaintiffs and their grantors have maintained that possession which justifies the court in upholding their title at the time of the bringing of this action.

Findings of fact and conclusions of law may be prepared for the plaintiffs, who will have judgment upon the merits of the case.

THE SKOOKUM.

(Second Division. Nome. December 26, 1901.)

No. 25a.

1. ADMIRALTY—FREIGHT—MARITIME CONTRACT.

A suit to recover unearned freight charges advanced, as well as for freight used by the vessel, is founded upon a maritime contract.

Libel to recover advanced freight charges not earned and for freight retained by the vessel.

P. C. Sullivan, for claimant.

WICKERSHAM, District Judge. On the 28th day of April, 1900, the owners of the barge Skookum entered into a written agreement with the libelant to ship certain oxen, feed, and merchandise upon the barge to Nome, for prices therein fixed. Some disagreement arose about the over-loading of the barge, the insurance, and other matters, whereupon the libelant unloaded the live stock and most of the hay and grain. It is agreed in a stipulation that the libelant testifies that there was one ton of hay and one and a half tons of rolled oats and feed left on board the barge, it being covered with other feed. At the time the contract was made, the libelant paid 25 per cent. upon the freight, being the sum of \$172.50. There is a disagreement and dispute as to the repayment of this money, it being alleged on the part of the barge owners that the money was to be retained by them by reason of their consent to the rescission of the contract. The burden of proof seems to the court to be otherwise. It is disclosed by the written agreement that the libelant was to pay \$50 per ton for hay and \$35 per ton for oats and other feed for the use of the stock. Upon an examination of the entire case the court resorts to those

facts which are beyond dispute for a determination of the controversy between the parties, to wit: The barge owners received \$172.50, which they have retained, and which belongs to the libelant. The libelant shipped one ton of hay and one and one-half tons of rolled oats, at the agreed price of \$102.50, which the barge owners also retained. It is admitted that this was worth at Nome \$187.50. The account then would stand: Due the libelant, advance on freight, \$172.50; value of hay and feed \$187.50; total due libelant, \$360. Due the barge owners, freight on one ton hay at \$50, \$50; freight on one and one-half tons feed at \$35, \$52.50; total due barge owners, \$102.50. \$360, the amount due libelant, less \$102.50, leaves \$257.50, the amount which the court finds for libelant.

I am satisfied that the contract in this case is a maritime one, arising out of the original contract for freightage, which has not yet been settled between the parties according to the evidence. The findings of fact heretofore filed by the referee will be approved, with the modification hereinabove mentioned, and the libelant will have a decree against the barge for that amount.

TOWN OF NOME v. REED, Com'r.

(Second Division. Nome. December 28, 1901.)

No. 597.

1. UNITED STATES COMMISSIONERS—Costs—Courts.

Where a commissioner assumes to act as a police magistrate under the authority of town ordinances, and to impose fines, and forfeitures, and costs, in enforcement of such ordinances, for crimes not recognized by the laws of Alaska, he has no right to retain the "costs" after having paid over the "fines and forfeitures." There is no law or rule to justify his paying the "costs" to the United States.

2. ESTOPPEL—MANDAMUS.

Where the commissioner receives costs by virtue of his assumed jurisdiction to enforce town ordinances, he is estopped to deny the authority of the town and retain the "costs." He must pay them over to the town, and may be compelled to do so by mandamus.

Application for mandamus against the commissioner to pay over to the town of Nome "costs" collected by him in the enforcement of town ordinances. Granted.

V. T. Hoggatt, for plaintiff.

John H. McGinn, for defendant.

WICKERSHAM, District Judge. This is a mandamus proceeding, brought by the town of Nome to compel the defendant, as commissioner and ex officio justice of the peace for Nome precinct, to turn over to the town treasurer the sum of \$258.55 collected by him as costs in criminal proceedings instituted under town ordinances, and paid into his hands along with fines and forfeitures imposed under the same ordinances. The defendant admits receiving the money, and it appears from the admitted facts in the case that all the fines and forfeitures received with the costs have been duly paid over by the defendant to the town treasurer. A distinction is made by the defendant between "fines and forfeitures" and "costs," and this distinction is based upon section 3 of the ordinance imposing the duty on the justice of the peace of hearing the cases. The section reads as follows:

"Sec. 3. That said commissioner shall keep a record of all the fines and forfeitures received by him from persons fined for violations of city ordinances, and he shall pay over the same weekly to the treasurer of the city of Nome."

The defense is made that all "fines and forfeitures" have been paid over to the treasurer, but that costs are not in-

cluded in this section, and are not required to be paid over in consequence. The defendant also maintains that the costs belong to the United States, and not to the town; that the costs are compensation earned by him in his official capacity as justice of the peace, and should, therefore, be included in his account with the government.

The further defense is made to the application by way of a challenge to the jurisdiction of the town to pass and enforce criminal ordinances. The persuasive argument is made that no power is given to the town by subdivision 4 of section 201 (Act June 6, 1900, c. 786, 31 Stat. 521) to pass and enforce such ordinances; that the only power given is that of "police protection," which includes only the right to appoint and raise funds to pay policemen for the purpose of maintaining order and enforcing the criminal laws passed by Congress.

The court ought not to hear either of these defenses in this action. It is admitted that the defendant received the costs in question, along with the fines and forfeitures already paid over, under and by virtue of the town ordinances in question. The "costs" were received by the defendant under his assumed jurisdiction to enforce such ordinances. They were received with the consent of the town, and were paid to him by many persons for the use of the town. There is no law or rule under which he could be permitted to pay them to the United States. Whether or not the town has the right to pass, and in this way to enforce, criminal ordinances, ought not to be heard as a defense against the payment of this money. The defendant certainly has no right to retain it, nor has the United States any right to receive it. It was received by the defendant as the property of the town, and he ought not to be allowed to retain it after having so received it, and deny the right of the town in a collateral way. Let the peremptory writ issue.

In re SHARICK, Bankrupt.

(First Division. Juneau. December 30, 1901.)

No. 65a.

1. BANKRUPTCY—APPEAL AND ERROR—REVIEW.

A review of an order of a referee in bankruptcy by the District Court is to be obtained by a petition, and not by notice of appeal. No time is fixed by rule or otherwise within which such petition shall be filed, but it must be within a reasonable time. Ten days is a reasonable time, and a petition filed six months after the date of the order complained of dismissed.

It appears that on June 4, 1901, C. D. Rogers, as referee, allowed the claim of George W. Garside and William Winn in the amount of \$880, as a preferred claim against the estate of the said Sharick, including a further sum for costs; a part of the order being as follows: "And it is further ordered, adjudged, and decreed said claim is secured by a mortgage upon all the bankrupt's estate in custody of the trustee herein, and situated in the store known as the Alaska Jewelry Company's store, in the city of Juneau, Alaska; that said claim be first paid out of any assets of said store, or out of the proceeds of the same after sale by the trustee, subject to the priorities provided for by section 64 of the bankrupt act [U. S. Comp. St. 1901, p. 3447]." Thereafter, and on the 3d day of August, 1901, a notice was filed in said referee's court by Referee Rogers, which said notice bears the signature of Maloney & Cobb and John B. Denny as attorneys for appellants, and purports to be a notice of appeal from the decision of the said C. D. Rogers, referee in bankruptcy, allowing the claim of the said Garside and Winn against the bankrupt's estate aforesaid in the sum of \$800, and the costs before referred to. The notice further alleges that the appeal is taken on questions of both law and fact, is styled "Notice of Appeal in Bankruptcy," and is ad-

dressed to C. D. Rogers as referee in bankruptcy, and to Winn & Shackleford, attorneys for claimants and respondents Garside and Winn. The notice itself is without date.

Thereafter, on the 17th day of December, 1901, the same attorneys whose names are attached to the said notice of appeal present their petition for a review of the decision and order of the said referee in bankruptcy approving and allowing the claim of the said Garside and Winn as a preferred claim, which seems to be the same order and judgment of the referee attempted to be appealed from under the notice of appeal. The referee, upon said petition being filed with him on the said 17th day of December, 1901, on the same day certified the whole matter to this court, and the certificate and petition for review are dated the 17th day of December, 1901.

On December 19, 1901, the files in this case show that a motion was filed by Winn & Shackleford to dismiss the petition for review for various reasons assigned and stated in said motion; among others being the following, which are the fourth and fifth grounds of said motion:

"Fourth. For the reason that said petition and certificate have been sued out since the time limited by law has expired for suing out said review. Fifth. For the reason that it appears on the face of the record herein that said petition and certificate have been sued out after an unreasonable time therefor had expired since the entry of the order complained of, and for the further reason that it appears on the face of the proceedings herein that the petitioners herein have been guilty of laches in suing out their petition."

This motion is signed "Winn & Shackleford, Attorneys for Claimants."

On the 14th day of December, 1901, the same attorneys, Winn & Shackleford, acting on behalf of the claimants, Garside and Winn, moved the court to dismiss the appeal, which said motion is in the following words:

"Come now, George W. Garside and William Winn, by their attorneys Winn & Shackleford, and move this court for an order dismissing the appeal herein of I. J. Sharick and others from a certain order allowing to George W. Garside and William Winn a preferred claim. That this motion is based upon the records and files of the case."

Winn & Shackleford, for creditors.

Maloney & Cobb, for bankrupt.

BROWN, District Judge. It will be observed, as appears from the files, that three days after this motion was filed the petition for review was filed with the referee in bankruptcy, and also in the District Court, thereby abandoning the so-called appeal.

Rule No. 27 of the Supreme Court (18 Sup. Ct. viii) touching the subject of bankruptcy, reads as follows:

"When a bankrupt creditor or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

The notice of appeal that was filed August 3, 1901, refers to a proceeding not authorized by the law or any order or rule of the Supreme Court, and will, therefore, without further consideration, be dismissed on motion of the claimants heretofore referred to, which was filed in this court on the 14th day of December, 1901, and it is so ordered.

The rule of the Supreme Court above quoted fixes no time within which the petition for review shall be presented or filed with the referee, but the language of the rule as to the duty of the referee when such petition is filed with him is very imperative, and requires that the referee "shall forthwith certify to the judge," etc., the question presented. The word "forthwith" ordinarily means "immediately," "without de-

lay," "directly." Generally, in law, the term is understood to mean "as soon as the thing required may be done by reasonable exertion confined to that object," which is another way of saying that it must be done within a reasonable time. Accepting this definition, we conclude that the work should be done speedily, pursued with reasonable industry, and concluded within such time as might be ordinarily deemed reasonable for the performance of the work in hand.

The rule of the Supreme Court, however, fixes no time within which proceedings for review shall be taken. We are left, therefore, without any specific guide as to the question of time, and must determine the same by the general character of the act of Congress and the rules of proceeding by the Supreme Court. Where no rule is definitely fixed requiring an act to be done within a given time, it is deemed that it shall be done within a reasonable time. What is to be deemed a reasonable time depends largely, in a case of this kind, upon the general trend of the bankrupt act. The act itself is intended as a speedy remedy, one that shall be rapidly and promptly enforced, and shall not be unreasonably delayed. "A reasonable time," says Mr. Rapalje, "must be determined by the circumstances of each particular case." What might be a reasonable time under one condition of circumstances would not be reasonable under other circumstances. But certainly, in following the general tenor of the act, we might reasonably conclude that a review of the decision or order of the referee should be pursued as promptly as remedies by appeal from this court to higher courts.

Looking, then, to the bankrupt law for some guidance in this behalf, we find that:

"The Supreme Court of the United States, the Circuit Courts of Appeals of the United States, and the Supreme Courts of the states

and territories, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankrupt proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other causes."

Appeals, as in equity cases, may be taken in bankruptcy proceedings from the court of bankruptcy of the Circuit Court of Appeals of the United States and of the Supreme Court of the territories in the following cases, to wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; (3) from a judgment allowing or rejecting a debt or claim of \$500 or over. Such appeals shall be taken within 10 days after the judgment appealed from has been rendered, and may be had and determined by the appellate court in term or vacation, as the case may be.

Where the act provides that appeals from these courts to the Circuit Court of Appeals of the United States shall be taken within 10 days on claims amounting to \$500 or over, it would seem that certainly no longer time should be allowed for filing a petition for review of a like question determined by a referee and bringing the same before the District Court. To file such a petition six months or more after the determination by the referee seems wholly out of harmony with the general intent and purpose of the bankrupt act, which intent and purpose unquestionably is that all such matters should be speedily determined. It seems to me, therefore, that the motion of the claimants on the last ground stated, if not on the others, should be sustained, and it is so ordered.

THE SCHOONER ARTHUR B.

(Second Division. Nome. December 31, 1901.)

No. 70a.

1 ADMIRALTY—FAILURE OF VOYAGE.

Where a vessel took freight and passengers for Kotzebue Sound, but wholly failed to make the voyage, and discharged both at Nome, the sailing point, and they were not afterward forwarded, *held*, that upon the total failure of the voyage the passengers are entitled to have the return of their passage and freight money.

2 LIBEL—SERVICES ON LAND—WAGES.

One who assists in digging ice, snow, and sand from around a vessel lying on the beach at her home port, performed under contract with the charterer, is not entitled to a lien upon the vessel therefor.

Libel to recover passenger and freight money upon total failure of voyage.

C. S. Blackett, for libelants.

A. Rawson, for claimant.

I. S. Thompson, for intervener.

Bruner & McBride, for charterer.

WICKERSHAM, District Judge. The libelants in this case seek to recover the various sums paid by them for transportation and freight charges on the schooner Arthur B. on an unsuccessful voyage from Nome to Keewalich, near the new gold strike on Candle creek. Some time in October the schooner Arthur B. was announced to sail upon a voyage from Nome to Keewalich to carry freight and passengers. The date of her sailing was fixed upon the 14th, and the libelants in this case purchased transportation and procured their freight to be sent aboard the vessel for that voyage. Without any fault on the part of the libelants, the vessel

was detained in the roadstead of Nome, and did not sail until the 22d.

The voyage was unsuccessful, the vessel having reached a point no farther north than Cape Prince of Wales, from which she returned to Nome, and discharged her passengers and freight. The passengers now seek to recover the amounts paid by them for transportation and freight, while the claimant defends against their recovery upon the ground that on account of the climatic conditions it was impossible to complete the voyage, and contends that the libelants cannot recover for that reason. The intervenor, Craig, seeks to recover for services performed on a prior voyage of the same vessel from this port to Indian Point, Siberia, and return, upon which voyage he served as supercargo, or rather as a representative of the owner.

The court heard as much of the testimony as was offered in open court, has carefully read all of the testimony taken before the referee, and has examined the entire case with some care. The libelants were not to blame for the delay in leaving the roadstead of Nome in the first instance. The vessel remained there seven days after the date fixed for her sailing time, and this delay was wholly due to the vessel or her owners. On the 22d of October she left, but returned to the roadstead and anchored within 24 hours. Upon the 23d she made the second attempt, and this time reached a point near Cape Prince of Wales, from which she returned to Port Clarence or Teller Harbor for the alleged reason that she met head winds at the cape. At Teller she took on water and supplies, and again left on her voyage. Again she reached the neighborhood of Cape Prince of Wales, but early in the morning of the 26th of October, without making any attempt whatever to continue her voyage, she turned about, and returned to Nome, and discharged her passengers and freight. The reason given by the captain for turning

about at the cape is that he saw slush ice in the distance, but all the passengers who were on deck at that hour deny the existence of any ice. It may be that the passengers were mistaken, and that the captain did see ice in the distance, but I am very much impressed by the evidence that it was a lack of experience and capacity as a navigator that induced the captain to return, and not the fear of ice floes. The evidence conclusively shows to the court that the voyage was badly managed by the owners and master from the beginning. It was late in the season, and well known to all of them that for the vessel to reach Kotzebue Sound she must go early, and yet the vessel remained in Nome from the 14th to the 23d without any fault on the part of the passengers. It is shown in the evidence by the claimant's witnesses that it is dangerous for vessels of that character to enter the waters of the Arctic Ocean and Kotzebue Sound after the 15th day of October. In spite, however, of this knowledge which they possessed, these passengers were induced to part with their money for passage and freight, which was received by the charterer for that service.

This action, however, may be determined without finding any evidence of bad faith on the part of either party. It is admitted that the contract was for the transportation of freight and passengers from Nome to Keewalich, a point from which all the passengers and freight were to reach the mines at Candle creek. No part of the freight nor any of the passengers reached that point, nor were they or any part of the freight afterwards within a reasonable time, or at all, delivered by the schooner or her owners under their contract. They were all returned to Nome, and put ashore upon the beach. They received no part of the consideration for which they paid their money, and the rule in such cases is clearly laid down by the Supreme Court of the United States in the case of *Ellis v. Atlantic Ins. Co.*, 108 U.

S. 342, 2 Sup. Ct. 746, 27 L. Ed. 747. The rule is that, if the libelants are forwarded to their destination with their freight according to the contract by the vessel upon which they took passage, or within a reasonable time by another vessel, then the transportation and freight charges will be earned, and may be recovered in full. On the other hand, if there be a refusal or a failure to forward them to their destination, or a total failure of the voyage, the passengers are entitled to have the return of their passage and freight money. In this case there was a total failure on the part of the vessel to carry both the passengers and freight. There was a total failure of consideration on the part of the vessel, and the money must be returned to the party who paid it. The court is impressed from the evidence that there was no real attempt in good faith on the part of the vessel to earn either the passage or freight money.

As to the intervenor, Craig, there seems to be but little controversy. He is not entitled to any lien upon the vessel for any services performed by him in digging the ice, snow, and sand from around the vessel while lying on the beach in front of the town of Nome, performed by him under contract with the charterer. But from the moment when he entered upon the vessel to perform a voyage he is entitled to be paid for all services performed by him as supercargo, and as such is entitled to a maritime lien.

A decree may be entered in favor of the libelants for the amounts stipulated which they paid for freight and passage money, respectively, and for the intervenor, for services performed by him from the port of Nome to Indian Point, Siberia, and back, not including the time employed in launching the vessel upon the ice.

GIBSON v. CANADIAN PACIFIC NAV. CO.

(First Division. Juneau. 1902.)

No. 1,070.

1. PLEADING—NEGLIGENCE.

A complaint for damages through negligence, which states that plaintiff was injured in unloading freight from a vessel to the wharf, and briefly describes the relative positions of the vessel and wharf, the defective appliances used, and points out the defects therein, and the acts constituting the negligence, is good against demurrer.

2. NEGLIGENCE—VICE PRINCIPAL.

A mate of a ship, intrusted with the work of discharging the cargo upon a wharf, and having control and supervision of the ship's appliances for that purpose, the entire manner of using which was left to his judgment and discretion, is a vice principal of the defendant vessel owner.

3. NEGLIGENCE IN UNLOADING VESSEL.

Though appliances for unloading the cargo of a vessel may be suitable and sufficient at one stage of the tide, if used when the tide is so low as to render their use in raising heavy loads dangerous, it becomes negligence for which the owner is liable.

4. CONTRIBUTORY NEGLIGENCE.

The plaintiff could not be charged with a degree of contributory negligence, such as would defeat recovery, simply because he knew the appliances were defective in the manner in which used, unless a reasonably intelligent or prudent man, under like circumstances, would have known or apprehended the risks and danger which the use of the defective appliances would indicate.

Motion for a New Trial. Denied.

Maloney & Cobb, for plaintiff.

J. W. Jennings, for defendant.

BROWN, District Judge. Briefly stated, the complaint in this case alleges that on or about the 8th day of March, 1899, plaintiff, Gibson, was employed by the defendant at the

town of Skagway as a longshoreman to assist in the unloading of the steamer Tees, a vessel owned by the defendant, the unloading of which was being conducted under the supervision of the agents and officers of said defendant; that while the plaintiff was engaged in the work of unloading said vessel, through the negligence, carelessness, and mismanagement of said work by the defendant he was seriously and permanently injured by the breaking of his right leg. This allegation is followed by a statement of the circumstances and conditions under which the injury occurred; the term of plaintiff's sickness and incapacity by reason of sickness, loss of time, expense of treatment and care in his efforts toward recovery. The particular specifications of the complaint are that at the time the injury was received it was the hour of extreme low tide at the port of Skagway; that the ship Tees was very much lower than the platform of the wharf; that the appliances for unloading said vessel were defectively rigged, so as to make her unloading dangerous to the employés engaged in said work, and especially dangerous at the stage of the tide aforesaid.

The alleged defective appliances are described as follows: Said unloading was being done by means of rope and tackle fastened to the end of a beam, the other end of which was fastened to the mast, one end of said rope passing around a winch. The load, fastened to the other end, was drawn out of the hold, and swung onto the wharf. The end of said beam fastened to the mast was fastened at a point so low down upon said mast that, in order to lift the load sufficiently to pass over the platform of the wharf, said beam was placed in a nearly upright position, so that it was impossible to swing the load over the wharf by means of the boom itself, making it necessary to draw said load over the wharf by hand; that while unloading the vessel in the dangerous manner aforesaid, by reason of the defective appli-

ances, the defendant negligently loaded too heavy a load upon said rope and tackle, to wit, 18 bales of compressed hay, and when the same was hoisted up to the end of the beam in the manner aforesaid libelant was instructed by defendant to draw the same by hand over onto the platform, when and where the said load was lowered upon the platform of the dock. This, the plaintiff charges, was a negligent and dangerous manner of unloading said vessel, and said load was precipitated upon the plaintiff, and crushed and broke his right leg.

The answer of the defendant is practically a denial of these allegations, putting the plaintiff to proof.

The evidence in this case tends to show that the work of unloading the vessel Tees had progressed but a short time when the accident occurred by which the plaintiff was injured. The freight that was being taken from the steamer consisted of baled hay. Several bales were held together by a rope, and hoisted up to or above the level of the wharf, but, by reason of the shortness of the boom or the improper arrangement of the tackle, at the then stage of the tide, the load could not be swung over and landed upon the wharf. It did permit the swinging of the load to a point about even with the edge of the wharf, where the longshoremen engaged upon the work would seize the load at each end thereof, and swing it over the wharf platform far enough or to a point where it might be lowered upon the same. Several loads of hay, consisting of perhaps six bales, had been hoisted from the vessel and swung upon the wharf successfully, and without apparent danger to those engaged in the work. Later, nine bales were included in a single load and hoisted up through the vessel's appliances as before. The two men, one of whom was the plaintiff, engaged in swinging these loads inward, so that they might fall upon the wharf when lowered, undertook to land the load of nine bales upon the

wharf as they had landed the other load. They made three trials to land this load, but failed, whereupon a stranger standing by came to their aid, one of the employés taking hold of the load at one end, the stranger at the other, and the plaintiff immediately in front. As it was swung inward, over the wharf by the united strength of the three, and the men were straining to hold the load over the wharf, the plaintiff leaning backward pulling with his utmost strength, his feet apparently somewhat under the load, the same was quickly lowered by the winchman, and fell upon and broke the right leg of the plaintiff. These are practically the facts, and all the facts, as described by witnesses engaged in the work, that resulted in the injury to the plaintiff.

The attorney for the defendant complains of the plaintiff's complaint, and challenges its sufficiency in the law. While, perhaps, the manner of stating the facts may be open to some criticism, it is believed that the allegations, as a whole, state a cause of action. The complaint being held sufficient, there remain two questions to be disposed of by the court on the motion now under consideration: Was the injury received by the plaintiff the result of carelessness on the part of the defendant in the imperfect construction of the appliances of the ship Tees for unloading and discharging its cargo, or of the careless use of appliances sufficient in themselves, or was the injury the direct result of the contributory negligence of the plaintiff?

Referring to the statement of facts, it is proper for the court to add that it was admitted on trial, or the court and the counsel for the plaintiff were given to understand, that the unloading of the ship Tees was being done under the direct supervision of the mate of said ship, and for the purposes of this motion the court accepts this statement as true.

It is self-evident that, while the appliances of the ship were ample and sufficient for the discharge of its cargo at

ordinary stages of the tide, when the boom attached to the mast could be so lowered as easily to swing the loads being hoisted from the hold over the wharf so that the same could be lowered thereon, without the load being swung upon the wharf by men working thereon, yet, at extreme low tide, such appliances were wholly insufficient for the work. The fault, if fault there was, was not in the original construction of the appliances, but in the use of them at a stage of the tide which made them unequal to the work for which they were originally made.

As the court understands the evidence, the only negligence or wrong on the part of the defendant was in using these appliances when insufficient for the proper performance of the work for which designed.

The mate of the ship was intrusted with the work of discharging the cargo, and the ship's appliances for that purpose were under his control and supervision. The manner of using these was left to his judgment and discretion, a discretionary power and authority which, in the judgment of the court, constituted him, for the time being at least, "vice principal" of the defendant company. If there was negligence, fault, or wrong in the use of these insufficient appliances at the time the accident occurred, it was, therefore, the fault, negligence, and wrong of the defendant company. Was there fault in using these appliances? There can be but one answer to this question. There is always fault and always wrong in using appliances unsuitable and insufficient for the service required.

However strong and adequate these appliances at a higher stage of the tide, at the stage when being used they were beyond question insufficient and inadequate. That they could have been used with very slight danger in raising light loads there is no doubt; but it is equally evident that, when raising heavy loads, danger from their use was increased.

But it is urged with great earnestness and candor that, if there was negligence on the part of the defendant in the use of insufficient appliances, this was evident to the plaintiff, and that he continued to work knowing and realizing all the conditions which brought him misfortune. This, in a measure, must be conceded, but whether the plaintiff knew, or should have known, the danger to which he was exposing himself in the use of insufficient appliances, is not, perhaps, quite so clear.

The testimony of the plaintiff is not altogether satisfactory; indeed, the plaintiff, when testifying, seemed to be unable to explain the conditions around him at the time the injury was received. Whether this inability arose from the natural diffidence and modesty of the man, or from mental inability, the court was not able at the trial to determine. That the plaintiff knew that the appliances being used were insufficient and inadequate, there can be no doubt. That he realized the danger in using them in the manner in which they were employed at the time of the injury does not appear.

The plaintiff could not be charged with a degree of contributory negligence such as would defeat recovery simply because he knew the appliances were defective in the manner in which used, unless a reasonably intelligent or prudent man, under like circumstances, would have known or apprehended the risks and danger which the use of the defective appliances would indicate. *Union Pacific Railway Co. v. Jarvi*, 3 C. C. A. 437, 53 Fed. 69. Judge Sanborn, speaking for the Circuit Court of Appeals upon this question, makes the following statement:

"The degree of care required of the master and servant also differ, because defects in a piece of machinery, or in the roof of a mine, that, to the eye of a competent inspector, such as the master employs, portend unnecessary and unreasonable risks and great dan-

ger, may have no such significance to a laborer or miner who has had no experience in watching or caring for machinery or roofs of slopes in a mine; and the latter is not chargeable with contributory negligence simply because he sees or knows the defects, unless a reasonably intelligent and prudent man would, under like circumstances, have known or apprehended the risks which those defects indicate. The dangers, and not the defects merely, must have been so obvious and threatening that a reasonably prudent man would have avoided them, in order to charge the servant with contributory negligence."

The question of contributory negligence is not only one ordinarily for the jury, but, unless the facts are undisputable, and such that reasonable men can fairly draw but one conclusion from them, the court will not take the case from the jury.

The plaintiff in this case evidently did not realize the danger of the work on which he was engaged. Indeed, men of ordinary intelligence and good judgment would not always agree upon the theory that the danger was so evident that plaintiff must have apprehended it. It would seem reasonable that the plaintiff might have placed himself in the position he did in swinging the load upon the wharf many times without injury to himself, and doing the work in the same manner it was done at the time of the injury. Technically, undoubtedly, when the plaintiff found upon trial that, with the aid of his fellow workman, it was impossible for the load to be swung upon the wharf because of its great weight, he should have refused to attempt it; the load should have been lowered again to the hold of the ship, and a portion of it removed, so that a lighter load, as before, could have been swung upon the wharf without danger. But, if there was technical negligence on the part of the plaintiff, it must be remembered that this work of unloading was being done under the personal supervision of the company, or its trusted agent, and if it was the technical duty of the

plaintiff to have refused the work of swinging the unusually heavy load upon the wharf, and if danger was thereby increased, this should have been far more apparent, and was more apparent, to the mate of the ship, supervising the work, than to the inexperienced longshoreman actively engaged in its performance.

At the close of the testimony in this case the defendant moved the court to instruct the jury to bring in a verdict for the defendant on the ground that there was no evidence upon which the jury could find for the plaintiff, and on the further ground that the evidence tended to show, and did show, that the injury to the plaintiff was the result of his own contributory negligence.

At the close of the evidence in every case the court must first find whether there is any substantial evidence upon which the jury may find for the plaintiff, and, if there is no such evidence, it is clearly the duty of the court to direct the jury to return the verdict for the defendant. Commissioners v. Clark, 94 U. S. 278, 24 L. Ed. 59; Railroad Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; Gowen v. Harley, 6 C. C. A. 190, 56 Fed. 973, 12 U. S. App. 574; Chicago G. W. Ry. Co. v. Price, 38 C. C. A. 239, 97 Fed. 423. In the case last above cited the court says:

"But it is equally well settled that it is only when the evidence leaves the material facts admitted or undisputed, and only when these facts are such that reasonable men, in the exercise of an honest and impartial judgment, can fairly draw but one conclusion from them, that the court may properly withdraw the case from the jury. If the evidence relative to the material facts is contradictory, or if, from the admitted or established facts, the unprejudiced minds of reasonable men may well draw different conclusions, it is the duty of the court to submit the issues to the jury." R. R. Co. v. Jarvi, 3 C. C. A. 433, 53 Fed. 65, 10 U. S. App. 439; Fuel Co. v. Danielson, 6 C. C. A. 636, 57 Fed. 915; R. R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; R. R. Co. v. Pollard, 22 Wall. 341, 22 L. Ed. 877.

It is quite clear from the evidence that the proximate cause of the injury sustained by said Gibson was the use of improper appliances in unloading the vessel at the time the accident occurred. This being true, the only question raised by the motion to instruct the jury, was the contributory negligence of the plaintiff.

In reference to some of the facts the plaintiff testified on cross-examination, as follows:

"Q. When you unloaded the first two loads you saw how the apparatus was rigged, did you not?

"A. No. I did not.

"Q. You did not see it?

"A. No, sir; I did not see it as I see it now.

"Q. Not as you see it now? But I ask you whether you saw that the 'boom stick' was too short?

"A. No, sir; I did not.

"Q. There was nothing in the way to prevent you seeing it?

"A. I was not an experienced longshoreman. I was doing it, but I did not pay attention to that."

The rule is that the danger from defects in machinery and appliances furnished an employé must have been so obvious and threatening that a reasonably prudent man in the plaintiff's situation would have avoided them, in order to charge the injured servant with contributory negligence in the performance of his duty in such a way as to have assumed the risk.

The case of the N. Y. T. S. S. Co. v. C. C. A. 529, 50 Fed. 462, was somewhat like the case at bar. The plaintiff was stationed on the upper deck to receive the cargo as it reached him, loaded in slings, from the hold. He conducted the slings to the side of the vessel, and started the load down the skids to the dock. Other men, some from the crew and some from the shore, were at work in the hold filling the slings with cargo; and one Bronson, a man from the shore, had charge of the steam winch by which the cargo

was hoisted and lowered. Bronson's winch was between the decks, and it was his duty to operate it according to the signals to be given to him by the plaintiff by blowing a steam whistle. The signal to raise the load was one blast, the signal to stop was one blast, and the signal to lower was two blasts. According to the testimony of the plaintiff, after the work had proceeded for an hour or more, and when the sling of cargo had been hoisted from the hold and conducted by him to the side of the vessel, he blew one blast to stop, which was not heeded, whereupon he repeated the signal almost immediately, but that Bronson, instead of stopping, lowered the sling load, and it struck the plaintiff, and led to his injuries. Everything testified to by the plaintiff, it is said, was contradicted by the witnesses for the defendant. The ground of recovery was the incompetency of the winchman, the winchman being deaf, and otherwise incompetent; and these facts, if they were facts, were known to the plaintiff before the injury occurred. It seems in this case that two of the instructions requested by the defendant and refused embodied the proposition that, if the plaintiff had information that the winchman was incompetent, and continued to work without objection, he was not entitled to recover for an injury caused by the winchman's incompetency. The verdict was for the plaintiff. A motion for new trial was filed, and the motion was denied.

In passing upon this case the Circuit Court of Appeals, Second Circuit, says:

"We do not think the defendant was entitled to the specific instructions asked for, following the charge to the jury, in the unqualified terms of the requests. The plaintiff, as a sailor, was amenable to rigid discipline for disobedience of orders. He was injured while discharging a duty to which he had been assigned by his superior officer, and which he was performing under the eye of the master of the ship. Notwithstanding what he had heard and observed about the deafness and inexperience of the winchman for an

hour at least, and, according to some of the witnesses, for a period of several hours, the winchman had heard and obeyed the signals, and performed his duty properly. In view of these facts, it would have been erroneous to instruct the jury that, if the plaintiff had any information that the winchman was incompetent, or had all the information which he had been shown to have, he could not recover. Irrespective of the consideration that any complaint on his part would probably have been treated as an act of insubordination, the facts presented a fair question for the jury whether, notwithstanding what he had heard and seen, he was not justified, until the accident took place, in believing that the winchman was sufficiently competent to manage the winch safely."

In passing upon the question as to whether the evidence was sufficient to warrant the submission of the case to a jury, the court said:

"We are constrained to decide that there was, although the case for the plaintiff was very weak, and was overwhelmingly disapproved by the evidence introduced by the defendant." 1 C. C. A. 532, 50 Fed. 464.

In the case of the Mex. Cen. Ry. Co., Limited, v. Murray, 42 C. C. A. 334, 102 Fed. 265 (error to the Circuit Court of Appeals, Fifth Circuit), in the statement of the facts the court says:

"The main issue in the case was, conceding the negligence of the railway company in furnishing a defective loop, did the plaintiff assume the risk of injuries from that source, and was the plaintiff guilty of such contributory negligence as would prevent a recovery? This was one of the defenses of the defendant in its answer."

The plaintiff's case was the furnishing by the defendant of unsound material with which to accomplish their work, viz., the raising of an iron bridge. The plaintiff testified:

"I saw what kind of materials [the loops] were made of when they brought them there. I remember distinctly of two of these same kind of irons breaking before the one broke that injured me. I had been working there, and I had seen two or three of these [loops] broken before. I knew that they would break if too much weight

were put upon them. At that time I was turning the ratchet, or turning the jack. That was just before the one broke that injured me."

At the close of the evidence the defendant requested the court to instruct the jury to return a verdict for the defendant. In refusing the general charge in favor of the defendant, the trial judge expressed his doubt as to whether the charge should be given, but resolved that doubt in favor of the submission of the case to the jury. This was proper, and any doubts we have on the subject are resolved on the same side. It is clear that, as to the manner and method of the work in hand at the time Murray was injured, the danger and risks were as well known to him as to any other servant of the company there employed, either as superintendent, foreman, or ordinary laborer, and we are of the opinion that, as to the apparent dangers and risks in carrying on the work, Murray assumed them with his employment. But the case shown requires us to go farther. While Murray assumed the risks attendant upon the operation, and knew that there was danger, the question is presented whether, in assuming the known and apparent risks, he also assumed the risks resulting from unknown defects in the tools and appliances furnished by the railroad company. The loop that broke—the breaking of which was the proximate cause of Murray's injury—was defective, and the negligence of the company in furnishing it is conceded. The defect, while it was more or less apparent, and was discoverable upon slight inspection, was not known to Murray, nor probably to any other employé of the railway company.

"Conceding that Murray assumed the known risks and dangers attending upon his work, did he also assume the additional risks and dangers resulting from defects in appliances which were unknown to him, but were known, or ought to have been known, to the railroad company? If he did not assume these unknown risks, the general charge was properly refused. If it was a matter for determination

from the evidence, and the evidence on the point was conflicting and uncertain, then there was no error in refusing the general charge. It is well settled that, where there is uncertainty as to the existence of either negligence or of contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them.”

The verdict of the jury was sustained, and the judgment of the lower court affirmed. Richmond & Danville Ry. Co. v. Powers, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642.

In the case of the Grand Trunk Ry. Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266, Mr. Chief Justice Waite, delivering the opinion of the court, said:

“In the instruction which was given we find no error. It was, in effect, that, if the negligence of the company contributed to—that is to say, had a share in producing—the injury, the company was liable, even though negligence of a fellow servant of Cummings was contributory also. If the negligence of the company contributed to it, it must necessarily have been an immediate cause of the accident, and it is no defense that another was likewise guilty of wrong.”

It is urged in support of the motion for a new trial before this court that, if the winchman was careless and negligent in permitting the sling load of hay to drop upon the plaintiff too suddenly, whereby the plaintiff was injured, this injury was the result of the negligence of a fellow servant. Counsel seems to overlook the more important principle that, where several “tort feasors” contribute to an injury, any one of them may be mulcted in damages for the injuries received. In the above-cited case it was evident that there was wrong on the part of the railroad company, as well as of the fellow servant of Cummings; but without the negligence of the railroad company the injury would not have been sustained. It is also urged by the counsel that, even if the injury resulted from the carelessness of the winchman, such

carelessness is not alleged in the complaint. This is true, but under our statute the complaint, either before or after judgment, may be amended, and made to conform to the facts proved. The failure of allegation, therefore, is not material at this time.

In the case at bar the proximate cause of the injury was the use of improper appliances in the unloading of the ship at that stage of the tide. While it is undoubtedly true that the winchman let the load fall upon Gibson in a reckless and unskillful manner, and was guilty therein of negligence contributory to the accident, nevertheless such negligence of the winchman can be no defense to the greater wrong of the company.

Considering the admitted facts in this case, is it not a reasonable conclusion to say that the plaintiff might have placed himself in the position described in the testimony, and have drawn the same load of hay over toward himself upon the wharf in the manner described, many times, with perfect safety to himself? Unless the winchman had carelessly and negligently lowered away too suddenly, and the load been caused to strike with greater rapidity and suddenness than the plaintiff could have possibly anticipated, there could have been little or no danger of injury resulting from the act.

Gibson was an inexperienced longshoreman, doing his first work in that line. He seems to have been ambitious in performing the work assigned him. This work, it must be remembered, was being performed under the direct supervision of the mate of the ship. Can it be said, under the circumstances of this case, that fair-minded men, desirous of doing right, might not reasonably reach different conclusions, upon the facts presented, as to whether the plaintiff's negligence contributed to the injury? It is believed by the court that reasonable men might well reach different

conclusions upon the facts of the case; some holding that there was, and others holding that there was not, contributory negligence on the part of the plaintiff.

On the motion of the defendant to take the case from the jury the court was in doubt as to the propriety of allowing the jury to pass upon the questions presented by the testimony, but upon reflection, while it appeared that there was some degree of negligence on the part of the plaintiff, which perhaps contributed to the injury, the court was of the opinion that the danger was not so apparent that a man of ordinary intelligence and prudence would have foreseen it, and avoided doing what was done by the plaintiff. And then again it seemed to the court that fair-minded men might reasonably reach different conclusions upon the question of contributory negligence of the plaintiff. Upon this theory the court determined to resolve whatever doubts were urged in favor of the injured plaintiff, and to permit the case to go to the jury under instructions submitting the question of contributory negligence to the jury so fully and fairly that counsel for the defendant took no exceptions thereto.

Considering the same question upon the motion for a new trial, the court is still of the opinion, strengthened by examination of the authorities, that no error was made in submitting the case to the jury.

It is urged in the motion for a new trial that the damages—viz., \$1,500—assessed by the jury were excessive. It is apparent to the court that the jury, in assessing the damages, exercised great wisdom and fairness. The plaintiff was severely injured; so badly, indeed, that it is doubtful whether he ever fully recovers. The damages returned by the jury are a moderate equivalent for the injuries sustained.

The motion for a new trial is overruled, and judgment ordered on the verdict.

EVERTON v. SMITH.

(Second Division. Nome. January Term, 1902.)

No. 615.

1. JUSTICE OF THE PEACE—APPEAL—DEFAULT—JUDGMENT.

The defendant filed a formal answer in the justice's court, but did not appear or offer any evidence on the day of trial. Upon the testimony of plaintiff, and in the absence of the defendant, the justice rendered judgment for plaintiff. Defendant appealed, and upon a motion to dismiss the appeal in the District Court it was held that defendant's unexplained failure to appear at the trial was an abandonment of his answer, and that judgment was properly rendered against him, and that he had no absolute right of appeal to and trial in the District Court. Appeal dismissed.

Motion to dismiss appeal from justice's court.

Francis McNulty, for plaintiff, respondent.

Bruner & McBride, for defendant, appellant.

WICKERSHAM, District Judge. This is an appeal from the justice's court in Nome precinct. The plaintiff there began a suit and had personal service upon the defendant on November 29, 1901. The summons commanded the defendant to appear before the justice of the peace at his office in Nome on the 4th day of December, 1901, at the hour of 2 o'clock in the afternoon of said day, and answer the complaint of the plaintiff. The summons further commanded him: "And unless you appear thereto and defend as herein you are required, judgment will be rendered accordingly." In pursuance to this notice the defendant appeared in the justice's court on the 3d day of December, and filed an answer and counterclaim in writing. On the 4th day of December, however, the defendant failed to appear at the trial. At the hour of 2 o'clock the plaintiff was present, and waited

until the hour of 3 o'clock, giving the defendant the hour fixed in section 1012 (Act June 6, 1900, c. 786, 31 Stat. 489) within which to make his appearance. After the expiration of the time the justice heard the plaintiff's testimony, and gave judgment accordingly. On the following day the defendant appeared by his attorney, and moved the justice to reopen the judgment granted the day before. Upon the hearing of this motion it was, on the 13th day of December, denied, whereupon, and on the 19th day of December, the defendant appealed from the judgment entered by the justice on the 5th day of December. The notice of appeal is defective in this: that it appeals from a judgment rendered on the 5th day of December, while the record shows that the first judgment was entered on the 4th day of December, and the judgment denying the motion to reopen, while made and argued on the 5th, was not decided until the 13th. It is not clear to the court whether the appeal is from the judgment entered for the plaintiff on the 4th or the proceedings begun to reopen it on the 5th. Both matters are argued in the brief.

Section 995 (Act June 6, 1900, c. 786, 31 Stat. 487) provides:

"Either party may appeal from a judgment given in the justice's court, in a civil action, when the sum in controversy is not less than \$50, or for the recovery of personal property of the value of not less than \$50, inclusive of the costs in either case, except when the same is given by confession or for want of an answer, as prescribed in this chapter, and not otherwise."

The respondent now urges, upon a motion to dismiss the appeal, that by reason of the defendant's failure to appear within the hour, and give evidence upon the merits of the case, his answer, although on file, was virtually abandoned, and that judgment went by default against him for want of an answer. It seems to be well settled that an appeal will

not lie from a default judgment against the defendant granted in the justice's court. The defendant, however, urges that the mere presence of his answer was sufficient to save him from default, and that the rule does not apply. In the case of *Long v. Sharp*, 5 Or. 439, however, a very similar question was decided by that court. An answer was filed in that case, but was stricken out by the justice, and, the defendant declining to further answer or appear, judgment was rendered against him as for want of an answer, and the court held that such judgment, upon the question of the defendant's right to appeal, will be considered as a "judgment for want of an answer," and not appealable. The court held that the remedy in that case was by writ of review. In the case of *State v. Superior Court (Wash.)* 41 Pac. 395, a somewhat similar question was decided by the Supreme Court of Washington. The case of *Clendenning v. Crawford*, from Nebraska, is quoted in the Washington case as follows:

"It seems clearly to be the legislative intent that actions in justices' courts must be tried upon the merits of both the claim of the one party and the defense of the other before an appeal shall be taken to the district court, and this rule seems to be reasonable and just, for, where the law establishes the court in which a party shall bring his action, the adverse party should not be allowed to disregard the process of such court, and then select the forum of his choice in which the case shall be first tried upon the merits of the case. If such a practice were permitted, it would defeat the main object for which the justices' courts were established, namely, the trial and disposal of causes or controversies with the least possible expense to the parties, where the amount involved does not exceed one hundred dollars." *Clendenning v. Crawford*, 7 Neb. 474. *State v. Superior Court (Wash.)* 41 Pac. 895.

Our Code has established justices' courts for the trial of all civil actions for the recovery of money or personal property involving less than \$1,000. Section 702, Carter's Code (Act June 6, 1900, c. 786, 31 Stat. 443). Formal pleas are

not required in that court, and it is only required of the defendant that he shall, "before the trial is commenced, file the instrument, account, or statement of his set-off or counterclaim relied upon." Section 962, Carter's Code (Act June 6, 1900, c. 786, 31 Stat. 483).

This section does not require the defendant to file a formal answer; it expressly excuses him from so doing; but it does require that he file his proofs, and that he did not do in this case. His answer will not be permitted to take the place of the proofs imperatively required by statute. To give the answer of the defendant the force and effect that he now desires would be to degrade, if not destroy, the jurisdiction of the justices' courts. The failure of the defendant to appear at the time fixed in the summons, or within the hour given by section 1012 of the Code, was such a default upon his part as would justify the justice in hearing the evidence of the plaintiff upon his claim, and rendering judgment as he did. The defendant was in default for want of appearance and evidence, and, by his refusal and neglect to attend at the time fixed by law, must be deemed to have abandoned his formal pleading, which would leave him without an answer. It will not do to say that, by the mere filing of the paper in the justice's court no judgment could be taken against him upon his nonappearance within the time limited by law. This court will not permit a defendant to file an answer in the justice's court, and then refuse to try his case in that court, and bring it to this court to try it for the first time upon the merits. It must be tried in the court provided by law for that purpose.

The court is unable to determine from the notice of appeal just which of the orders of the justice's court is appealed from, whether the judgment of the plaintiff of December 4th or the judgment rendered on the motion to reopen, which motion was filed on December 5th and not decided

until the 13th. The court has, however, determined the case as if the appeal was from the final judgment made on the 4th. If counsel seeks to procure a review of the error complained of upon the motion to reopen, it must be done under chapter 55 upon a writ of review, and not upon an appeal. The appellant has made no showing to justify this court in opening the default or judgment. There is no affidavit of merits. There is nothing to show the court that defendant has any excuse for his failure or refusal to be present at the hearing fixed in the summons, and the court has no means of knowing whether, if the case was now heard upon the merits, the defendant would not again refuse to attend and give evidence. The court is justified in assuming, under such conditions, that the appellant has no excuse to offer for his failure to be present before the justice, but stands upon his bare right to have his case heard on the merits for the first time in this court. He has no such right under the law. He does not bring himself within the rule laid down in the case of *Schwabe v. Lissner* (Mont.) 33 Pac. 1012, even if that case can be considered applicable. The party in default there made a showing by filing affidavits as required by the statute to set aside the default, but no such showing was made here. The defendant stands upon his absolute right to a new trial. He does not concede that the lower court had any discretion in the matter. He has no such absolute right under the rule laid down in the Montana case.

The appeal will be denied. Judgment may be entered in conformity with the statute, and at the cost of the appellant. Respondent will prepare the judgment.

EUBANKS v. PETREE et al.

(Second Division. Nome. January 4, 1902.)

No. 42.

1. MINES AND MINERALS—CONTRACT—GRUB-STAKE CONTRACT.

A grub-stake contract was made between Hollister and two other parties at Santa Barbara, Cal., but, after arriving in Alaska, one of these parties for himself and as the agent of the other verbally released Hollister from the grub stake. Hollister afterward located the mine in question. *Held*, that neither the grub-stake parties nor an assignee had any interest in the location.

Suit to enforce grub-stake contract.

J. Frawley and P. C. Sullivan, for plaintiff.

Ira D. Orton, for Adams and Pierce.

Hastie & Thuland, for Geraghty and Lyon, interveners.

WICKERSHAM, District Judge. The evidence in this case has been heard in part only by the court. It was agreed that the court should hear the evidence relative to the title first, and that upon the decision by the court upon that question further evidence would be taken upon the accounting between the parties thereto. As to the interveners Adams and Pierce, the court is able, however, to determine their title from the evidence before it. The evidence shows that at Santa Barbara, Cal., on the 9th day of April, 1898, one Hollister entered into a grub-stake contract with Hayne and Pierce, by which, as their agent, he came to Kotzebue Sound in the summer of 1898, to prospect along with a large number of other persons known as the "Hayne Party." There seem to have been two contracts signed by Hollister, one of which was for the government of the prospectors in the Kotzebue Sound country, while the other was a private

agreement between Hollister, Hayne, and Pierce. Some time after having reached the Kotzebue Sound country, Hollister became dissatisfied with the prospects, and desired to be released from his agreement with Hayne and Pierce. While the evidence of some of the witnesses shows that their knowledge of this release applied only to the governing contract signed by all of the Kotzebue party, yet it convinces the court beyond a doubt that, before leaving the Kotzebue Sound country, Hollister was released by Hayne, acting for himself and Pierce, from his contract made with Hayne and Pierce at Santa Barbara on the 9th day of April, 1898. Without going into any examination of the facts or the law, I am satisfied that that release was effectual, and that thereafter, when Hollister located the mining ground in question on Dexter creek, neither Pierce, nor Adams as the assignee of Hayne's interest, had any right or interest in the property.

Eubanks, the plaintiff, has sold all of his interest to the defendants, so that the only question undetermined by the court is as to the respective rights of the defendants as the owners of the claim and Geraghty and Lyon as the lessees under Eubanks. The evidence has not been transcribed, and the court cannot at this time, in fairness to either party, determine that matter. Nor have the attorneys for the lessees filed any brief or argument in their behalf. If the parties desire the court to examine the testimony, it must be transcribed. They may continue to take the testimony upon the question of accounting, and submit the whole matter to the court after it has been finished.

In re PACIFIC COLD STORAGE COMPANY.

(Second Division. Nome. January 14, 1902.)

1. LICENSES—MEAT MARKET—MERCANTILE ESTABLISHMENT.

Within the meaning of the license laws of Alaska, a corporation engaged in the wholesale cold storage and sale of all kinds of meats for the public generally, as well as for its own meat markets, is a mercantile establishment, and not a meat market, and must pay license accordingly.

P. C. Sullivan, for Pacific Cold Storage Co.

J. L. McGinn, Asst. U. S. Dist. Atty., contra.

WICKERSHAM, District Judge. The Pacific Cold Storage Company, a corporation maintaining a cold storage plant in the town of Nome, as well as in St. Michael, for the purpose of selling meat generally to the public, made application to the court, and received a license for three or more meat markets in the town of Nome, and paid therefor the sum of \$15 each, as required by the statute. Upon the objection of the prosecuting attorney, the matter came before the court to determine the character of the license to be paid by the company. Section 460 of Act March 3, 1899, c. 429 (30 Stat. 1336), as amended by section 29 of Act June 6, 1900, c. 786 (31 Stat. 330), provides that meat markets shall pay \$15 per annum license. It also provides that licenses shall be paid by mercantile establishments, and fixes the amount to be paid by them upon the basis of the business done. The evidence upon this application is undisputed that, besides furnishing meat to its own markets, the Pacific Cold Storage Company does a general mercantile business in the sale to other meat markets and the public generally of all kinds of fresh meats preserved by cold storage, as well as in the sale of coal. The company made application for, and received

from the clerk of this court, a license to do business as a mercantile establishment in the sale of coal, and limits its showing of business done to the sale of coal alone. This condition would enable the company to furnish from its cold storage plant all meats required in its own markets, and permit it to sell uncut meats to the public generally and to their meat markets without paying any license therefor. I am of the opinion that the term "meat market" here refers only to what is commonly known as a "butcher shop," or a place where meats are cut into small quantities, and sold to individual customers. It seems clear to the court that the term "meat market" does not include a cold storage plant, such as that possessed by the company in question, nor would it cover its general sales of meat in bulk to other meat markets, even though the meats were sold through one of the meat markets for which it had license. The license for a meat market under the section in question was not intended to embrace so wide a range as to allow a general mercantile business in frozen meats to be conducted under it. Under the statute in question, if the Pacific Cold Storage Company desires to run a "meat market," it should pay a license for so doing; if, beyond the business conducted in the ordinary meat market, it sells meats preserved by the cold storage process to the general public or to other meat markets, even though it does so through one of its own meat markets, it is a mercantile establishment, and should pay a license accordingly. The company in question must obtain a license as a mercantile establishment if it intends to sell its meats except in cuts to the ordinary customer who goes to the meat market to buy.

VAN SCHUYVER v. HARTMAN.

(First Division. Juneau. February 15, 1902.)

No. 1,166.

1. STATUTE OF LIMITATIONS.

Where a cause of action accrued in the state of Oregon, of which state the defendant was a resident, more than six years prior to the time at which action is brought, and the defendant removed to the District of Alaska admittedly less than six years prior to the time the action was brought, *held*, that the statute begins to run, not from the date the cause of action accrued in Oregon, but from the date of the removal of defendant to Alaska.

2. SAME.

Statutes of limitations, so called, affect the remedy, but not the right of action. Necessarily, therefore, the *lex fori* must control in all matters of procedure.

3. SAME.

The statute of limitations of this jurisdiction cannot begin to run until there is found some one within the jurisdiction of the forum capable of being sued.

J. G. Price, for plaintiff.

R. W. Jennings, for defendant.

BROWN, District Judge. In this case the defendant, by his amended answer, pleads the statute of limitations. Plaintiff demurs to the amended answer, alleging that the defendant first came to Alaska on the 1st day of January, 1898, and had been absent from the district prior to that time. It is admitted that a right of action accrued on the claim sued on in the state of Oregon, more than six years prior to the time at which this action was brought in Alaska, but the time that the defendant has lived in Alaska prior to the bringing of the action is admittedly less than six years. The question, then, is this: Is the plaintiff's right of action barred by reason of lapse of time?

It is believed the law upon this question has been settled since the case of *Dupleix v. De Roven*, 2 Vern. 540, or at least since the passage of the statute of Anne, which has been adopted into all, or nearly all, of the statutes of limitations in this country. Statutes of limitations, so called, affect the remedy, but not the right of action. Necessarily, therefore, the law of the forum must control in all matters affecting procedure. A proviso in the statute of Anne, which has practically been adopted by the act of Congress governing limitations in Alaska, saves the operation of the statute if the party should be out of the district at the time the cause of action arises against him, and the statute does not begin to run until after the return of the defendant. This statute has received its true and proper construction first, perhaps, in the case of *Strithorst v. Graeme*, 3 Wils. 145, 2 Black. 723.

Necessarily, the statute of limitations of this jurisdiction cannot begin to run until there is found some one within the jurisdiction of the forum capable of being sued. Chief Justice Kent passed upon this question in *Ruggles v. Keeler*, 3 Johns. 263, 3 Am. Dec. 482. He says:

"A foreign statute of limitations can no more be pleaded to a suit instituted here than it can be replied to a plea under our statute. Statutes of limitations are municipal regulations founded on local policy, which have no coercive power abroad, and with which foreign or independent governments have no concern. The *lex loci* applies only to the validity or interpretation of contracts, and not to the time, mode, or extent of the remedy. Suppose Ruggles had sued Lewis upon the account attempted to be set off in the court below. The defendant could not have interposed the statute of limitations of Connecticut by way of plea."

The learned judge concludes in that case by saying:

"The party to be charged by the set-off not having been six years within this state since the cause of action arose, our statute of limitations could not, therefore, be replied to the plea."

In *Bulger v. Roche*, 22 Am. Dec. 359, 11 Pick. 36, the action was assumpsit on a promissory note payable on demand given by defendant to plaintiff at Halifax, N. S., and dated February 5, 1821. The defendant pleaded non assumpsit and the statute of limitations. The plaintiff replied that he was beyond the sea, at Halifax, when the cause of action accrued, and that he commenced this suit within six years of his coming to the United States, in 1829. The defendant rejoined that both he and the plaintiff were residents of Halifax at the time the cause of action accrued, and were aliens; that by the laws of Nova Scotia then and now in force said cause of action was barred, no suit having been commenced within six years from the time the same accrued. There was a demurrer to the rejoinder on the ground that the plea was founded upon a foreign statute of limitations, and was, therefore, no defense in this state. Chief Justice Shaw, in deciding the case, states the question before the court as follows:

"The general question is whether a plaintiff, a subject of a foreign state, can maintain an action against a defendant, who is a subject of the same foreign state, upon a cause of action barred by a statute of limitations of the state of which they were respectively subjects when the cause of action accrued."

After disposing of some preliminary questions as to the pleadings in the case, the court states the facts:

"The cause of action accrued in 1821—more than six years before the commencement of this action; that the plaintiff and defendant were both domiciled at Halifax, in Nova Scotia, and were subjects of the king of Great Britain; and that by the law of that country an action in assumpsit is barred in six years. It is stated in the replication, and admitted in the rejoinder, that the plaintiff came into this commonwealth for the first time in 1829, and that the action was commenced within six years from that time."

It will be perceived that the facts as stated by the court are, for all practical purposes, the same as the facts presented

in this case, save in that the statute of limitations of Nova Scotia had fully run, and the claim had become barred under the statutes of that country, before the parties came to Massachusetts. In passing upon the question presented in that case the distinguished jurist proceeded as follows:

"That the law of limitations of a foreign country cannot of itself be pleaded as a bar to an action in this commonwealth seems conceded, and is, indeed, too well settled to be drawn in question. *Byrne v. Crowninshield*, 17 Mass. 55. The authorities, both from the civil and common law, concur in fixing the rule that the nature, validity, and construction of contracts is to be determined by the law of the place where the contract is made, and that all remedies for enforcing such contracts are regulated by the law of the place at which such remedies are pursued. Whether a law of prescription or statute of limitations would take away every legal mode of recovering a debt shall be considered as affecting the contract like payment, release, or judgment which, in effect, extinguish the contract, or whether they are to be considered as affecting the remedy only by determining the time within which a particular mode of enforcing it shall be pursued, were it an open question, might be one of some difficulty. It is ably discussed upon general principles in a late case (*Le Roy v. Crowninshield*, 2 Mason, 151 [Fed. Cas. No. 8,269]), before the Circuit Court, in which, however, it is fully considered by the learned judge, upon a full consideration and review of the authorities, that it is now to be considered a settled question. A doubt was intimated in that case whether, if the parties had remained subjects of the foreign country, until the term of limitation had expired, so that the plaintiff's remedy would have been extinguished, such a state of facts would not have presented a stronger case in the present instance; but we think it sufficient to avert to a well-settled rule in the construction of the statute of limitations to show that these circumstances can make no difference."

After discussing the different cases, the court concludes:

"This reason, whether well-founded or not, applies equally to cases where the term of limitation has elapsed when the parties leave the foreign state and to those where it has only begun to run before they have left the state and elapses afterwards. * * * On the

whole, the court are of the opinion that the plaintiff is within the terms and spirit of the exception of the statute of limitations, and that his action, therefore, is not barred by it. The rejoinder is adjudged bad and insufficient, and judgment must be rendered on the verdict."

Where the statute has fully run in a foreign jurisdiction before either of the parties came into the jurisdiction of the forum, the holding has been different in some other courts than in the case above referred to; but the court is not advised of any well-considered case, where the statute had begun to run after an action had accrued in another state and the defendant had left that jurisdiction before the term had fully expired, in which it has been held that any portion of the term of years mentioned by the statute of limitations in the jurisdiction of the forum could include any portion of the terms of years that had expired after a right of action had accrued in the foreign jurisdiction, and before the defendant became a resident of the jurisdiction of the forum. These several questions will be found fully discussed in the note to the case of *Bulger v. Roche*, 22 Am. Dec. 362 et seq.

The question at bar is also quite learnedly discussed by Judge Denio in *Olcott v. Tioga R. R. Co.*, 20 N. Y. 210, 75 Am. Dec. 393. Here the question of the application of the statute of limitations to foreign corporations was the question at issue; but the whole law of the question at bar was fully discussed, with the same conclusion as that reached by Chief Justice Kent in the case heretofore referred to. The same question was also before the court of Maryland in the case of *Mason v. Union Mills Paper Mfg. Co. and B. & O. R. R. Co.*, 32 Atl. 311, 29 L. R. A. 273, 48 Am. St. Rep. 524, and a brief of the authorities on this question may there be found.

The court is therefore of the opinion that, both as a matter of principle and as determined by the great weight of authority, the statute of limitations of Alaska did not begin to

run in the present case until after the defendant came into this jurisdiction. As the six-years limitation fixed by the statute has not run since the defendant came into Alaska, the statute cannot be invoked to relieve him of his obligation, and the demurrer to the amended answer must be sustained. Thereupon the defendant declines to further plead or answer, but elects to stand upon his amended answer. Judgment is awarded to the plaintiff on the pleadings.

In re HILL'S BOTTLING LICENSE.

In re STADIE BROS.' LICENSE.

(Second Division. Nome. February 17, 1902.)

1. LICENSES—PAYMENT.

The court will not order a refund of license money paid under section 460 as amended in section 29 of the Political Code of Alaska of June 6, 1900 (31 Stat. 330, c. 786), a year or more after its payment, and after it has been carried into the public accounts and expended for the necessary expenses of the court, or covered into the treasury. Petitioner's remedy, if he has any, is by an application to Congress for relief.

2. PAYMENT—LICENSES.

Where a person engaged in business in Alaska voluntarily and without duress pays his license fees for the business in which he is actually engaged, he cannot recover the same, or any part thereof, because of an alleged mistake on his part, either of law or fact.

Petition for Refund of Excessive License Fee. Denied.

Du Bose & Stevens, for petitioner.

John L. McGinn, Asst. Dist. Atty., contra.

WICKERSHAM, District Judge. The petition shows that on the 26th day of January, 1901, the petitioner paid to the clerk of this court the sum of \$200 for a license for carrying

on the business of bottling temperance and other drinks at Nome from November, 1900, to October 31, 1901. It is further alleged that at that time the petitioner was engaged in the manufacture of temperance drinks, and was visited by a collector of licenses, who threatened to arrest him unless he paid the sum of \$200 for such annual license, whereupon he did so. He then prays for the return of \$190, and offers to pay only the sum of \$10, as a manufacturer doing a business of less than \$4,000 per annum. The district attorney objects that the petition does not state facts to entitle the petitioner to the return of his money; that the court has no jurisdiction to make the order refunding it; and that petitioner's only remedy, if he is entitled to any relief, is by application to Congress for an appropriation.

Conceding that an error in construing the law was made by the payment by the petitioner of \$200 for a bottling works license, instead of the sum due for a license as a manufacturer, had this court authority to refund the difference at this time out of the moneys in the hands of the clerk? The power of the court over the fund in the clerk's hands is derived from the act of Congress of June 6, 1900 (31 Stat. 321, c. 786). Section 4 of that act confers certain authority and duties upon the judge of this court, in this language:

"And each shall have authority to employ interpreters and to make allowances for the necessary expenses of his court, and to employ an official stenographer under the same terms and conditions as are, or may be, provided for district courts of the United States."

The fourth paragraph of section 10 provides for the collection of the fund in question by the clerk, and then provides that:

"All public moneys received by him and his deputies for fees or any other account shall be paid out by the clerk on the order of the court, duly made and signed by the judge, and any balance remaining in his hands after all payments ordered by the court shall have

been made shall be by him covered into the treasury of the United States, at such time, and under such rules and regulations as the secretary of the treasury may prescribe."

These are all the statutory provisions authorizing the judge to order or approve the expenditure of any part of this fund. It is clearly apparent that no other authority is conferred upon the court to expend any part of the money except "for the necessary expenses of his court." The clause in section 10, instead of being an open door through which the court may dispose of the fund at its pleasure, is a statutory direction fixing the method of its expenditure. I am not inclined to lay down any hard and fast rule as to what is or is not a part of "the necessary expenses" of the court, but rather to let each case stand alone.

The application here is to order the refunding of the sum of \$200 out of the clerk's fund, more than a year after its receipt. It has long since been carried into his accounts, and either expended under the orders of the judge or transmitted to the Secretary of the Treasury. It is not the case of a mere mistake, where his money, being present, may be handed back to him by the clerk. He now has a claim against the United States, and, if no fund has been provided by Congress in some general appropriation act to pay it, he must seek its recovery by a special act. I am also of the opinion that the rule that a recovery cannot be had on a voluntary payment, so clearly stated by Judge Field in *Brumagim v. Tillinghast*, 18 Cal. 271, 79 Am. Dec. 176, bars a recovery in this case. The petitioner was not under any duress, either of person or property, at the time he paid the license sought to be recovered. It may be true that the collector employed by the clerk threatened to have him arrested for a violation of the law if the license was not paid, but that is not sufficient. The record shows that subsequent to the threat of the person who represented the clerk as collector to cause the arrest of

the petitioner he voluntarily, on the 21st day of January, 1901, presented a petition to this court asking for the issuance of the license upon the payment of the sum of \$200. He could have presented the matter now in litigation to the court in that proceeding. He did not do so, and the prior threat was thereby waived. His application and payment to the court were voluntary, and he cannot recover. This court has no jurisdiction to repay the money merely because the petitioner made a mistake of law or fact in his petition. He represented to the court in his petition that he desired a license for a bottling works, paid the necessary fee for that branch of business, and it was issued to him.

For all the reasons mentioned, the prayer of petitioner is denied. The same order will be entered in the petition of Stadie Bros.

THE TYEE CONSOL. MIN. CO. v. LANGSTEDT et al.

(First Division. Juneau. February 17, 1902.)

Nos. 29a-39a.

1. LIMITATION OF ACTIONS—MINES AND MINERALS.

The 10-year statute of limitations begins to run in favor of one in adverse possession of a part of a mining claim from the time of the location, and not from the date of the patent. The proviso at the end of section 4 of the Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 334) held to have no meaning or effect in Alaska.

2. MINES AND MINERALS—EJECTMENT—QUIETING TITLE.

A mining locator acquires a present vested estate in his claim, good against the world, which he may defend by ejectment or a suit in equity to quiet title.

Suit in Ejectment for Portion of a Mining Claim.

R. F. Lewis and John G. Heid, for plaintiff.

Crews & Hellenthal, for defendants.

BROWN, District Judge. In this case, and other cases involving practically the same question, there are about 110 defendants. The plaintiff is a foreign corporation that has complied with all the laws of Alaska necessary to entitle it to do business in this jurisdiction.

The complaint alleges that the plaintiff and its grantors have been the owners of certain mining claims situate on Douglas Island, Alaska, known as the "Bonanza King Lode Mining Claim"—which claim is described by metes and bounds in the complaint—at all times since December 26, 1890, on which date plaintiff's grantor, one M. W. Murray, became possessed of a fee-simple title to said lode claim by virtue of a United States mineral patent numbered 16,989, issued on the last above mentioned date by the President of the United States to the said Murray; that plaintiff, by divers mesne conveyances, has succeeded to and now holds each and every right which the said Murray had by virtue of the above-mentioned patent. The plaintiff further alleges that it and its grantors have been at all times since said December 26, 1890, and are now, entitled to the possession of the above-mentioned premises; that the defendants, on or about the 7th day of June, 1900, entered upon the said claims, or some part thereof, and ousted plaintiff from the premises, and that the defendants wrongfully withhold, and ever since said 7th day of June, 1900, have continued to withhold, said premises from the plaintiff, to plaintiff's damage.

The defendants plead that the plaintiff, by its grantors, located the said mining claims on the 29th day of January, 1884, and at that time entered into the possession of the same, and thereafter remained in said possession up to the time patent was issued therefor, and thence hitherto, except in this: that the defendants have occupied as a residence a certain portion of the lands covered by said mining claim since the _____ day of _____, 188____, and are now occupying

the said premises; that a right of action accrued to the plaintiff upon the location of said claims; and that more than 10 years have expired since said right of action accrued and prior to the bringing of this action by the plaintiff, which said action was brought on the 24th day of December, 1900.

The rights of the parties as to a judgment in this case are submitted to the court on a stipulation, which is in the words and figures following:

"In the United States District Court for Alaska, Division No. 1, at Juneau.

"Tyee Consolidated Mining Co., Plaintiff, v. E. Langstedt, Defendant.
No. 29a. Stipulation.

"It is hereby stipulated, by and between the parties to this action and by and between their respective attorneys, that the issue involved in this case is the question of the 'statute of limitations'; that is to say, if the court finds that plaintiff has commenced its action against the defendant within the time limited by law, then the plaintiff shall have judgment against the defendant; if the court shall find that the plaintiff did not commence its action against the defendant within the time limited by law, then the defendant shall have judgment.

"It is further stipulated and agreed that the Bonanza King lode claim, described in the complaint herein, was located on January 29, 1884, by one Walter Pierce; that said Pierce conveyed by deed said Bonanza King lode claim to M. W. Murray on May 13, 1884; that receiver's receipt issued to said Murray on May 20, 1890, and that U. S. patent for said Bonanza King lode claim issued to said Murray from the government of the United States on December 26, 1890; that thereafter said Murray conveyed by deed said Bonanza King lode claim to one Frank W. Griffin, and that said Griffin, on May 28, 1895, conveyed by deed said Bonanza lode claim to the Tyee Consolidated Mining Company, the plaintiff therein.

"It is further agreed that this stipulation shall affect and extend to eight cases numbered 29a, 30a, 32a, 33a, 35a, 37a, 38a, 39a, inclusive, as the same now appear upon the calendar of this court at this term.

"John G. Heid, Attorney for Plaintiff.

"Crews & Hellenthal, Attorneys for Defendants."

The question before the court, therefore, is this: If a right of action accrued to the plaintiff, as a legal proposition, at any time after the original location of said mining claim and before the issue of patent, it is conceded that the statute of limitations has fully run and may be invoked as a bar to the plaintiff's right to recover; and, further, if it is held that a right of action did not accrue to the plaintiff until after patent was issued, then the statute has not run, and the plea of the defendants must be held for naught, and judgment be awarded in favor of the plaintiff. It will be observed, therefore, that the question presented is purely of a legal character, and is most novel and interesting. The court is not aware that the precise question presented here has ever been passed upon by a court of last resort. If there are any such cases, they have escaped my observation.

The defendants in this action contend that a right of action for the possession of the mining claim and all the surface ground thereof accrued to the plaintiff (1) as soon as the location of the claim was properly made, and the boundaries thereof duly designated; or (2) that, from and after the time final proof and payment were made in proceedings for patent, the equitable title thereupon vested in the plaintiff; the government thereafter held the bare legal title for the benefit of the equitable owner; and that, if they may not plead the statute of limitations from the inception of the claim, then their right extends back at least to the date of final proof and the issuance of the final certificate from the land office. The plaintiff contends that no right of action accrued to the plaintiff against the defendants until patent to the claim in question was issued, and that 10 years had not expired between said date (December 26, 1890) and the date of bringing this action (December 24, 1900). The plaintiff further contends that, under the statute passed on June 6, 1900, it would have one year in which to bring its action after June 6, 1900.

It is clear, from the statement of facts contained in the stipulation, that 10 years have not elapsed since the patent was issued to Murray by the government of the United States, as this suit was brought on December 24, 1900. The question, then, is this: Did a right of action for the possession of the property in question by ejectment or other possessory action under the Code accrue to the plaintiff before patent issued?

In support of his contention, counsel for plaintiff cites Redfield v. Parks, 132 U. S. 239, 10 Sup. Ct. 83, 33 L. Ed. 327, and Gibson v. Chouteau, 13 Wall. 92, 20 L. Ed. 534. The opinion in the case of Redfield v. Parks was delivered by Mr. Justice Miller. He says:

"The principal issue in the case before [the lower] court was on the defense under the statute of limitations. The plaintiff relied upon, and introduced in evidence, a patent from the United States dated April 15, 1875, conveying the property to the Mississippi, Ouachita & Red River R. R. Co., reciting the purchase by that company of the land in controversy and the payment of \$594.48 for it. The plaintiff, Redfield, purchased this land at a judicial sale, on a judgment against that company, for the sum of \$500, and received a deed under that purchase. It further appears from the findings of the court that the railroad company made payment in full for the land September 10, 1856, and received at that time the certificate of the register of the land office. The approval of this entry for the issue of a patent was made at the General Land Office in Washington, June 1, 1874. The circumstances under which the delay in the issue of a patent was had are not stated. The defendants relied upon a deed made by the county clerk of Lafayette county, Ark., to W. F. Parks and James M. Montgomery, on the 11th day of August, 1871, upon a sale for taxes for the year 1868, and upon adverse possession under the statute of Arkansas of two years in regard to claims under tax sales, and the general statute of limitation of seven years.

"This action was commenced by the plaintiff on the 11th day of April, 1882. The court entered the following conclusions of law:
(1) That said tax deed to Parks and Montgomery for said land is

void, because the land was sold for the taxes of 1868 on a day not authorized by law. (2) That under the laws of this state, notwithstanding said tax deed is void upon its face for the reason stated, it constitutes a claim and color of title sufficient to put in motion the statute of limitations in favor of any person in possession under it. (3) That the possession taken by Parks and Montgomery of said land under said tax deed in the manner set out in the finding of facts constitutes in law actual, peaceable, open, notorious, and adverse possession of the whole of said land; and, said possession of said land having been taken by Parks and Montgomery as early as the month of February, 1874, and maintained continuously by them and their grantees down to the trial of this cause, the plaintiff's right of action to recover said land is barred by the two-years statute of limitation contained in section 4475 of Mansfield's Digest, and also by the seven-years statute of limitation contained in section 4471 of the same digest."

The court in that case concludes the decision upon this question in the following language:

"The plaintiff could not sue or recover in the courts of the United States upon the equitable title evinced by his certificate of purchase made by the Register of the Land Office. His title, therefore, being derived from the United States, the right of action at law to oust the defendants did not commence until the making of that patent."

In the case of *Bagnell v. Broderick*, 13 Pet. 436, 10 L. Ed. 235, an action similar to the one above referred to was brought and decided in the same way on appeal. The court in that case held that the patent, that was issued long after the right accrued to the other party, was the strictly legal title on which the plaintiff was bound to recover. In deciding the case, among other things, the court says:

"We are bound to presume, for the purpose of this action, that all previous steps had been taken by John Robertson, Jr., to entitle himself to the patent, and that he had the superior right to obtain it, notwithstanding the claim set up by Byrne; and, having obtained the patent, Robertson had the best title (to wit, the fee) known to a court of law. Congress has the sole power to declare the dignity

and effect of titles emanating from the United States, and the whole legislation of the federal government in reference to the public lands declares the patent the superior and conclusive evidence of legal title. Until its issuance, the fee is in the government, which, by the patent, passes to the grantee, and he is entitled to recover the possession in ejectment."

In Gibson v. Chouteau, 13 Wall. 99, 20 L. Ed. 534, the opinion was delivered by Mr. Justice Field. On the trial of the case in the lower court the defendants endeavored to show that they acquired through certain legal proceedings the equitable title to the land, upon which they could defend against the patent under the practice which prevailed in Missouri. The case was tried several times in the courts of Missouri, and at the last trial the Supreme Court of Missouri recognized the fact that the legal title remained in the United States until the patent issued, and that the location title gave an equitable right that had been conveyed, upon which an action was sustainable in the state courts by virtue of the state statutes. That court said:

"But there is another principle upon which we think the statute may be made to operate here as a bar to plaintiff's action, and that is the fiction of relation whereby the legal title is to be considered as passing out of the United States through the patent at its date, but as instantly dropping back in time to the date of the location as the first act or inception of the conveyance to vest the title in the owner of the equity as to that date, and make it pass from him to the patentee named through all the intermediate conveyances, so that the two rights of entry and the two causes of action are thus merged in one, and the statute may be held to have operated upon both at once. The legal title, in making this circuit, necessarily runs round the period of the statute bar, and the action founded on this new right is met by the statute on its way, and cut off with that which existed before."

Speaking of the doctrine of relation referred to by the Supreme Court of Missouri, Mr. Justice Field says:

"The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title. The defendants in this case were strangers to that party and to his equitable claim, or equitable title, as it is termed, not connecting themselves with it by any valid transfer from the original or any subsequent holder. The statute of limitations of Missouri did not operate to convey that claim or equitable title to them. It only extinguished the right to maintain the action of ejectment founded thereon under the practice of the state. It left the right of entry upon the legal title subsequently acquired by the patent wholly unaffected."

The foregoing clear and concise statement by Mr. Justice Field seems to settle the doctrine of relation contended for in the case at bar. The learned judge, further commenting on the case, uses the following language:

"In the federal courts, where the distinction between legal and equitable proceedings is strictly maintained, and remedies afforded by law and equity are separately pursued, the action of ejectment can only be sustained upon the possession by the plaintiff of the legal title. For the enforcement of equitable rights, however clear, distinct equitable proceedings must be instituted. The patent is the instrument which, under the laws of Congress, passes the title of the United States. It is the government conveyance. If other parties possess equities superior to those of the patentee, upon which the patent issued, a court of equity will, upon proper proceedings, enforce such equities by compelling a transfer of the legal title, or enjoining its enforcement, or canceling the patent. But in the action of ejectment in the federal courts the legal title must prevail, and the patent, when regular on its face, is conclusive evidence of that title. * * * In several of the states—and such is the case in Missouri—equities of the character mentioned, instead of being presented in a separate suit, may be set up as a defense to the action of ejectment. The answer or plea in such case is in the nature of a bill in equity, and should contain all its essential averments."

Notwithstanding the practice act of Missouri abolishing all distinction between legal and equitable actions, a party could not, by his pleadings, set forth a merely legal title, and be led into proof of facts which show that, having an equity, he is entitled to a conveyance of the legal title. The Supreme Court, however, through Mr. Justice Field, declares that,

"Neither in a separate suit in a federal court nor in an answer to an action of ejectment in a state court can the mere occupation of the demanded premises by plaintiffs or defendants for the period prescribed by the statute of limitations of the state be held to constitute a sufficient equity in their favor to control the legal title subsequently conveyed to others by the patent of the United States, without trenching upon the power of Congress in the disposition of the public lands."

The case of Rector v. Ashley, 6 Wall. 142, 18 L. Ed. 733, and U. S. v. Thompson, 98 U. S. 486, 25 L. Ed. 194, announce the new principle as stated in the cases of Redfield v. Parks and Gibson v. Chouteau. These cases would seem to settle the contention upon the question of the statute of limitations raised in this case, if the same rule should be followed in the disposition of mineral lands. If these cases are to be followed, then the 10-years period prescribed by the statutes of Alaska had not expired after the issue of the patent and before this action was brought.

It is contended on the part of the defendants, however, and an examination of these cases shows the contention to be well founded, that the cases examined discuss questions affecting the disposition of agricultural lands by the government of the United States. It is contended also that the laws of the United States in reference to mineral lands, and the rules and regulations of the government as to the disposition of the same, are essentially different from the laws, rules, and regulations governing the disposition of public agricultural lands, and that the cases heretofore considered, holding that the

statute of limitations can only be successfully invoked from the time the government parts with its title by the issue of the patent, cannot be regarded as a controlling authority in this case. It therefore becomes necessary to examine the statutes of the United States as to the disposition of the public mineral lands, and to determine how far, if at all, the mere location of a mining claim upon the public domain differs from a pre-emption or homestead.

In exercising the right of pre-emption, the settler, in filing upon the land in the local land office, acquires no exclusive right of possession of the land upon which the filing is made. The pre-emptor simply makes his settlement, and bases his filing upon that, and holds so much of his claim as is under his actual control; and if he cultivates the land, and makes improvements sufficient in law, he can acquire title upon making final proof of these facts, pay for the land, receive what is called his "final receipt" from the local land office, and in due time his patent from the government of the United States. The pre-emptor acquires no legal title until the patent issues; and his equity, even after payment, has been held not to be of so important a character as to prevent the Department of the Interior from setting it aside on its own motion, and thereby absolutely destroying all of such claimed equities as were supposed to have vested in the pre-emptor. The citizen taking a homestead on the public domain acquires no legal title to his land until he has made final proof of five years' residence, improvements, etc. No part of the land covered by the homestead claim could be entered by another, either by pre-emption or homestead, or otherwise, until the first entry or homestead claim had been contested and set aside by action of the department; but the entryman acquires no legal right until the issuance of the patent upon final proof.

The Congress of the United States has enacted such laws for the disposition of the public mineral lands that, when a

person makes a discovery of mineral, and thereupon so designates the boundaries of the tract or parcel claimed by him that the same may be readily traced upon the ground, he acquires a legal title to the land that is good against all persons except the United States. His is not a mere inchoate right that may ripen into a title, but it is a present title, a present legal interest in the land, that he cannot be deprived of even by the United States without compensation. The miner's claim, when properly located under the acts of Congress, becomes a grant of a present legal interest, and as a title differs in every essential element from the equities that may be acquired by persons locating upon the public agricultural lands either under pre-emption or homestead laws, and afterwards obtaining patent for the same. The farmer acquires in the public agricultural lands, even when he has paid his money for them, at most an equity; while the miner, under the acts of Congress for the disposition of the mineral lands as before stated, acquires a present legal interest and legal title from the inception of his claim. When he makes his discovery and location, so much of the public mineral lands as is properly covered by his claim is thereby severed from the great body of mineral lands of the United States, and is then no longer subject to location by any other person.

In *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735, in delivering the decision of the court, Mr. Chief Justice Waite uses the following language:

"A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent. *Forbes v. Gracey*, 94 U. S. 767 [24 L. Ed. 313]. There is nothing in the act of Congress which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location than it is for any other grant from the United States. The language of the act is that the locators 'shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations,' which

is to continue until there shall be a failure to do the requisite amount of work within the prescribed time. Congress has seen fit to make the possession of that part of the public lands which is valuable for minerals separable from the fee, and to provide for the existence of an exclusive right to the possession, while the paramount title to the land remains in the United States."

Not only has it been frequently decided by the courts of our country that actions in ejectment will lie as between rival claimants of mineral lands, but the Congress of the United States has expressly enacted "that no possessory action between individuals in courts of the United States for the recovery of mining titles shall be affected by the fact that the paramount title to the land is in the United States; but such case shall be adjudged by the law of possession."

In the case of Silver Bow Mining & Milling Co. v. Clark, 5 Mont. 378, 5 Pac. 570, it is held that the location of a mining claim had the effect of a grant from the government to the locator of a right to the exclusive possession and enjoyment of all the surface ground included within the lines of his location, and that a patent is the perfection and consummation of the title conveyed by the location. In Talbott et al. v. King et al., 9 Pac. 434 (a decision by the Montana court on January 7, 1886), the court said:

"The only reason why a patent may be issued for a quartz lode mining claim is that the ground has been previously located according to law. Such location gives the person making the same the right to the exclusive possession and enjoyment of all the surface ground included within the lines of his location. This is a provision of the statute, and the rights thereby conferred cannot be encroached upon while the statute remains in force."

In the same case the court says further:

"A valid location is equivalent to a contract of purchase. The right to occupy and possess means the right to acquire a full title. The mineral lands are declared open to occupation and purchase. The location, together with the necessary work, is the purchase, and

the patent is the evidence of the title so acquired. The location, therefore, has the effect of a grant from the government to the locator, and this grant cannot be defeated or abridged by an unauthorized exception contained in the patent, for the patent must always be in accordance with the consummation of the grant evidenced by valid location."

That the action of ejectment will lie between rival claimants of mineral lands is no longer a question. And such action may be brought to determine the right of possession of the rival claimants, even before any attempt is made by either party to procure a patent for the mining claim. Such an action may be maintained even by an alien against a citizen of the United States, or one who has declared his intention to become such. *McKinley Creek Mining Co. et al. v. The Alaska United Mining Co. et al.* (decided in January of this year) 183 U. S. 563, 22 Sup. Ct. 84, 46 L. Ed. 331. While it is true that the action of ejectment may be maintained between rival claimants, does it necessarily follow that the locator of a mining claim can maintain such action, or other possessory action, under the Code, against persons who simply intrude upon the ground covered by his location?

The Revised Statutes of the United States, § 2322 [U. S. Comp. St. 1901, p. 1425], provide as follows:

"The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations."

Surely, if his interest in the mining ground is in the nature of a grant, and is such a legal title as will support a suit in ejectment, and he is entitled under the law to the exclusive

right of possession and enjoyment of all the surface within the exterior boundaries of his claim, the locator must be legally authorized to maintain that possession by proper action. The maxim of the common law that there is no wrong without a remedy is sufficient authority for the conclusion that, where the right given by statute is the exclusive possession and enjoyment of the surface ground of the miner's claim, an entry thereon by any other person, whereby such right of possession is infringed by the intruder, is such a wrong as will invoke an adequate legal remedy.

Section 301 of the Code of Civil Procedure for Alaska (Act Cong. June 6, 1900, c. 786, 31 Stat. 383), among other forms of action for the recovery of the possession of real property, makes the following provision:

"Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action. Such action shall be commenced against the person in the actual possession of the property at the time, or, if the property be not in the actual possession of any one, then against the person acting as the owner thereof."

Section 303 of the same Code provides what shall be alleged in the plaintiff's complaint, and reads as follows:

"The plaintiff in his complaint shall set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years, and for whose life, or the duration of such term, and that he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him to his damage in such sum as may be therein claimed."

Section 304 of the same Code designates what may be given in evidence by the defendant, as follows:

"The defendant shall not be allowed to give in evidence any estate in himself, or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer. If so pleaded, the nature and duration of such estate, or license, or

right to the possession, shall be set forth with the certainty and particularity required in a complaint."

In addition to the right of action provided by the foregoing sections, Congress also provided for the action of forcible entry and detainer, which is the usual form of action provided by codes in such cases. These sections of the act of Congress of June 6, 1900, and the rights of action therein described, have been in force in Alaska since May 17, 1884, when the first act of Congress establishing a Civil Code for Alaska was passed (23 Stat. 24, c. 53). In addition to these particular forms of action, there was, under the Oregon Code, an action for the recovery of real property, or for quieting the title thereto, that was of an equitable nature.

It would certainly seem that the locator of a mining claim, who was entitled under the laws of the United States to the exclusive right of possession and enjoyment of all the land within the limits of his claim, could have, at any time since the passage of the act of May 17, 1884, brought and maintained either the real action of the Code as provided for, or the action of forcible entry and detainer, where parties were simply intruding upon his property, and by force settling thereon and holding portions thereof adversely to him, or who peaceably entered, but insisted upon holding possession from him by force. These forms of action were open to the plaintiff in this case, and he could have pursued any of them or either of them that he chose at any time since the location of the Bonanza lode claim and the passage of the act of May 17, 1884. It would seem to follow that, if the plaintiff could have brought these actions, or either of them, at any time since the location of his claim and the passage of the act of May 17, 1884, the defendants herein may properly plead the statute of limitations, and that the statute has run since the location of said claim on January 29, 1884, and the passage of the act of May, 1884.

But it is contended on the part of the plaintiff that the title of the defendants, which is mere posession, is not sufficient to entitle them to plead the statute of limitations; that there must have been at least an open, notorious, adverse, and uninterrupted possession under color and claim of title, before they can invoke the aid of the statute of limitations. Whether this is true depends entirely on the statutes themselves.

Section 4 of the Alaska Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 334) provides as follows:

"Within ten years, actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it shall appear that the plaintiff, his ancestor, predecessor, or grantor was seised or possessed of the premises in question within ten years before the commencement of the action: provided, in all cases where a cause of action has already accrued, and the period prescribed in this section within which an action may be brought has expired, or will expire within one year from the approval of this act, an action may be brought on such cause of action within one year from the date of the approval of this act."

It may be well, perhaps, first to consider what character of title a plaintiff must have to bring an action at any time within 10 years under this statute.

The language of the statute, "seised or possessed," perhaps needs some interpretation. Seisin is feudal possession; in other words, it is the relation in which a person stands to land or other hereditaments when he has in them an estate of freehold or possession. Such a person is said to be seised in the land. Seisin is opposed to possession, which, in its technical sense, is only applied to leaseholds and other personal property, and to occupation, which signifies actual possession. "Possession" is sometimes used in the old books in the technical sense of seisin or feudal possession of land. It is to be known that there is a *jus proprietatis*, a right of ownership;

jus possessionis, a right of seisin or possession; and jus proprietatis et jus possessionis, a right both of property and possession. Possession is also sometimes opposed to seisin. "The difference between possession and seisin is, lessee for years is possessed, and yet the lessor is still seised; and therefore the terms of law are that of chattels a man is possessed, whereas in feoffments, gifts in tail, and leases for life, he is described as seised." Rapalje's Law Dict.

Owing to the peculiar conditions existing in Alaska, the possessory title to land has been given a stronger meaning than is ascribed to it in other sections of our country. In the case of Carroll v. Price (D. C.) 81 Fed. 137, it was early decided in this jurisdiction that possessory rights in and to government lands may be conveyed from one person to another, and that instruments in writing making such conveyances are admissible in evidence, and may be considered as tending to establish possession. It was also said by the court in that case:

"While the paramount title to all lands in Alaska is in the United States, Congress and the general government have recognized for a great many years the right of the American citizen to go onto public lands, occupy, possess, use, and improve the same, with the view of ultimately obtaining title thereto from the general government whenever the same shall be opened to purchase; and in this district this right is specially recognized by Congress in the first proviso of section 8 of the act of May 17, 1884, providing a civil government for Alaska."

The case then before the court was in the form of an action in ejectment, and the sole title of the plaintiff rested upon the fact of his having taken possession of certain public lands of the United States and held the undisturbed possession thereof for a period of years. The contention was that the action of ejectment would not lie, inasmuch as the plaintiff in such an action must have a legal title or interest

in the land to entitle him to recover. An instruction was requested and given in the case as follows:

"This is an action in what is known as ejectment. The plaintiff, to recover in this action, must do so upon the strength of his own title, and not upon the weakness of the defendant's title."

In the case of *Malony v. Adsit*, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163 (on appeal to the Supreme Court of the United States), Mr. Justice Shiras, speaking for the court, in discussing the question involved in the last case referred to, says:

"In the condition of things in Alaska under the act of 1884, providing for a civil government for Alaska, and under the twelfth section of the act of March 3, 1891, 26 Stat. 1100 [U. S. Comp. St. 1901, p. 1467], the only titles that could be held were those arising by reason of possession which might ultimately ripen into a fee-simple title under letters patent issued to such prior claimant, when Congress might so provide by extending the general land laws or otherwise."

Again, it is said in *Bennett v. Harkrader*, 158 U. S. 441, 15 Sup. Ct. 863, 39 L. Ed. 1046:

"Where the complaint alleges that the plaintiff is entitled to the possession of certain described property, which is unlawfully detained by the defendant, and the possession of which the plaintiff prays to recover, a general verdict for the plaintiff is a finding that he is entitled to the possession of all the property described in the complaint. Again, in this action, brought under a special statute of the United States in support of an adverse claim, but one estate is involved in the controversy. No title in fee is or can be established. That remains in the United States, and the only question presented is priority of right to purchase the fee."

In passing upon this question, Justice Shiras says:

"This principle applies more strongly to the present case, in which the real nature of the plaintiff's estate in the property is only alleged as ownership by right of prior occupancy and prior possession, and was so found to be by the trial court."

The same view of the nature of the title to a lot in a town site in Alaska is expressed by the District Court of the United States for the District of Alaska in 81 Fed. 137, in the case of *Carroll v. Price*. As the only kind of estate that could be held was that of possession, it is sufficient for the plaintiff to allege that his was of that nature.

It would seem, then, that in Alaska, at least, possession of the public lands, though the land laws were not in force in the district, was sufficient interest therein to enable the party in possession, or whose possession had been interfered with, to bring an action in ejectment under the Code, the provisions of which have been before quoted. If possession were sufficient title to enable the party to maintain the action of ejectment where it is said one must have a legal interest or title, surely the words "seised or possessed" must be construed to have at least as broad a meaning when used in this statute of limitations, and a party in possession of real property, whose possession had been intruded upon by others, could, at any time within 10 years, bring his action to dispossess them. Can we say that parties who have gone into possession of land and have maintained the possession thereof for a number of years must have a higher or better title, in order to plead the statute of limitations, than a plaintiff who seeks to recover on the strength of his own title, possession having been declared sufficient for that purpose not only by our own court, but approved by the Supreme Court of the United States? If there could be any further question as to the quality of title that would enable these defendants to plead the statute of limitations, it would seem to be put entirely at rest by section 1042 of our Code (Act June 6, 1900, c. 786, 31 Stat. 493), which provides for a shorter period of time where the quality of title is higher than mere possession. The section reads as follows:

"The uninterrupted, adverse, notorious possession of real property under color and claim of title for seven years or more shall be conclusively presumed to give title thereto, except as against the United States."

Under this statute possession alone would not be sufficient to enable a party to maintain an action, but, in order to do so, he must not only be in possession, or have a right of possession, but the same must be accompanied by claim and color of title. As the Congress of the United States has included these two sections in the same act of June 6, 1900, we cannot but conclude that it has understandingly fixed a longer period within which an action may be brought, where the title is based upon possession only, than where such possession is accomplished by color or claim of title.

Considering, then, that the plaintiff's right in this case had its origin in the location of the Bonanza King lode claim on January 29, 1884, which thereafter ripened into a title by patent from the United States, it seems to me that, considering all the circumstances and conditions as they have existed in Alaska, a right of action has existed in the plaintiff in this case since the passage of the act of Congress establishing a civil government for Alaska on May 17, 1884; and, if a right of action has existed in favor of the plaintiff during that period, then these defendants would seem to have a right to plead the statute of limitations running over the same period of time, unless the interests of the United States in the public mineral lands are such as to preclude this right.

One other question, perhaps, arises under this statute, and is urged by counsel for the plaintiff, and that is that he has 11 years in which to bring his action, even if the statute of limitations applies before the issue of patent. The proviso to the 10-years statute I have before quoted at length. Of course, this claim is made under the proviso to section 4 as quoted. It is a little difficult to determine what meaning, if

any, this proviso has; and, in order to ascertain it, it becomes necessary to inquire into the history of the legislation in Oregon that has been followed by the Congress of the United States in legislating for Alaska. The statute of Oregon at one time provided a limitation for bringing actions for the recovery of real estate at 20 years. In 1876 a statute was passed by the same Legislature, of which the present statute of limitations for Alaska is an exact copy, and contains the same proviso found in section 4 of our Civil Code. The object and purpose of the Oregon Legislature is clear so far as the proviso was concerned at the time of its adoption. Some rights might be cut off by the new statute of 10 years, and therefore the provision that "in all cases where a cause of action has already accrued and the period prescribed in this section within which an action may be brought has expired, or will expire within one year from the approval of this act, an action may be brought on such cause of action within one year of the date of the approval of this act." But this identical statute has been in force and effect in Alaska since the 17th day of May, 1884, and is the only limitation ever fixed by law within this jurisdiction for the recovery of real property. It would seem, therefore, that the proviso attached to section 4 of the act of June 6, 1900, was a mere reiteration and adoption of the old Oregon statute, and it can have no possible meaning or effect as applied to conditions in Alaska at the time of the passage of the act of June 6, 1900. Therefore the 10 years fixed by the statute can only be invoked by the plaintiff as the term within which his action may be brought, in order to divest the defendants of their possession or right of possession.

We are now brought back to this proposition: Can the statute of limitation avail the defendants in this action so as to reach back of the date on which patent was issued to the plaintiff or the plaintiff's grantors? If it cannot reach back to

the date of the location of the claim, it surely cannot reach back to the date of payment and issue of the final certificate.

The title to a mining claim, no matter what its quality or force, is wholly legal. It is acquired by the miner under a statute of the United States and by his own acts in locating and appropriating a portion of the mineral lands of the United States. Every act is in accordance with the statute giving the right, and, as before stated, whatever the right and whatever the quality of his right, though payment for the land creates an equity in his favor. But, whatever these equities may be, they grow out of the original location of the mining claim. Section 2322 of the Revised Statutes of the United States provides, among other things,

"The locator of all mining claims heretofore, or which shall hereafter be made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth," etc.

In Belk v. Meagher, in speaking of the nature of the title, the Supreme Court of the United States said:

"When perfected, it has the effect of a grant by the United States of the right of present and exclusive possession."

In the case of Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113, it is stated:

"The government of the United States, * * * as a reward to the successful explorer, grants him the right to extract and possess the minerals within certain prescribed limits."

Notwithstanding the courts have frequently said, speaking of a mining claim, "it is property in the miner of great value," these claims "are subject to bargain and sale, and constitute very largely the wealth of the Pacific states"; and again, that "a claim may be sold, transferred, mortgaged, and inherited"—one can get no very clear idea as to the nature of the estate

in a mining location. We may conclude, therefore, that a mining claim is a possessory title, and probably something more; that it is legal in its character; that it is property in the highest sense; that it may be sold and inherited; that the miner may enjoy his possession; that he may claim all lodes whose apices lie within the surface lines of his location; that he may mine and extract, and appropriate to his own use, all minerals therein to whatever depth; and that his estate, whatever it may be, comes as a grant from the United States, the owner of the soil, under the acts of Congress. The right to dig and appropriate the ores in a mining claim is an exclusive right which passes to one's heirs and assigns. It has been said that when a man receives a grant of all the beneficial interest in an estate he receives the estate. However this may be as applied to mining claims, it is difficult to perceive the difference between a grant which carries with it all that is of value, or all the "beneficial interests" in an estate, from that estate which the miner obtains in his claim when he makes a valid location.

As we have found, actions for the recovery of the possession of real estate apply to this estate; also actions to quiet title, and for trespass upon the same. It has always been treated as real property in the distribution of estates of deceased persons throughout the mining states of the West. Is it possible that a man, by himself or through his grantors, may hold a legal estate of this character in a mining claim for a term of perhaps 50 years without ever applying for a patent, and that people, who may have dealt with him as to portions of the surface ground and the right to occupy the same for building purposes and whose deeds have been lost, no records having been made (and it is well understood that records in mining districts are sometimes almost impossible), and who are, therefore, unable to show even color of title, or any title save and except their possession, may bring their

action to dispossess the person so in the open and notorious possession of the property for perhaps the most of 50 years, and that the court may say to the person so in possession, when he invokes the statute of limitations, "You cannot do so, because the ultimate title to the mining property is vested in the United States"?

I am not unmindful of the frequent declarations of the courts that, when a man makes application for patent, and patent is issued to him in the regular course as provided by the laws of Congress, all questions as to discovery, location, and the regularity of the proceedings leading up to patent are presumed to be settled by the fact of the patent alone, and that no question can thereafter be raised as to any of these matters; and, further, that, if there were any adverse rights existing at the time the application for patent was made, the parties in whose favor such rights exist had their opportunity to have them adjudicated in the proceedings for patent; and, inasmuch as they failed to do that, all such rights were waived. While these declarations are undoubtedly accurate in many respects, are they in all? A man who had been permitted by the locator, prior to patent, to occupy some portion of the surface land, even for a consideration, could not appear before the register and receiver and file an adverse to the claim made by the party proceeding to obtain patent. The right to adverse is saved to those having an adverse title or claim to the mineral lands or the mining claim as a mining claim, and not to mere occupiers of the surface soil, or some small portion of it. If the court is right upon this proposition, then the person occupying such surface ground could have no opportunity of meeting the claims of the owners of the mine, either at the time of the proceedings for patent, or any time prior thereto or thereafter, until the owner of the mining claim sought to dispossess him by proper proceedings.

If the case at bar were not clearly distinguishable from Redfield v. Parks and Gibson v. Chouteau and other cases of that character decided by the Supreme Court of the United States, I should follow those decisions with the utmost pleasure and willingness. But the locator of a pre-emption upon the agricultural lands of the United States acquires no legal interest or title therein until patent issues. It is true that when payment is made for the land he has an equitable interest therein, and it is said that the United States holds the naked legal title solely for the benefit of the pre-emptor. The same is true with homesteads. The patent furnishes the first evidence of a legal title. The legal title of the miner is created when his location is perfected. In the discussion of Redfield v. Parks, it is said:

"In the federal courts, where the distinction between legal and equitable proceedings is strictly maintained, and remedies afforded by law and equity are separately pursued, the action of ejectment can only be sustained upon the possession by the plaintiff of the legal title. For the enforcement of equitable rights, however clear, distinct equitable proceedings must be instituted."

It would seem from this language that the ruling of the court in that case was based upon the form of the action, which was one at law, rather than upon the question of right absolutely involved in the case. But for the following language, this conclusion would seem to be inevitable:

"But neither in a separate suit in a federal court, nor in an answer to an action of ejectment in a state court, can the mere occupation of the demanded premises by plaintiffs or defendants, for the period prescribed by the statute of limitations of the state be held to constitute a sufficient equity in their favor to control the legal title subsequently conveyed to others by the patent of the United States, without trenching upon the power of Congress in the disposition of the public lands. That power cannot be defeated or obstructed by any occupation of the premises before the issue of patent, under state legislation, in whatever form or tribunal such occu-

pation be asserted"—citing *Gibson v. Chouteau*, 13 Wall. 101-104, 20 L. Ed. 584.

But must we not understand this declaration of the court to apply to the disposition of the public agricultural lands which were then in controversy, and not to the disposition of the mineral lands of the United States? If the Congress of the United States has created by legislation an estate in a mining claim when the same is once located, which is sufficient to invoke the statute of limitations under proper conditions, can the language of the Supreme Court be so construed as to destroy such estate and the right to plead the statute of limitations? I am constrained to believe that none of these matters as to the rights of persons locating mineral lands in the United States were in the mind of the court at the time the decision referred to was made.

To put another supposititious case: A miner enters upon the public mineral lands of the United States, and by his explorations discovers a lode thereon, stakes and properly marks his mining location upon the ground, occupies the same for 20 or 30 years without moving for patent. Shortly after his location, for some consideration furnished by another, he permits that other person to occupy a portion of his surface ground, put valuable buildings and improvements thereon, and thereafter convey to others, but has no conveyance himself. After a lapse of 10 years, the original locator conveys his mining claim to others, without reservation, and the new owner proceeds against such surface occupant to dispossess him. Surface occupant pleads the statute of limitations, and retains his possession. Thereafter the miner abandons his claim, and it is taken by a second and different locator, who, later, makes application for patent, and proceeds to obtain it in the regular way. Can it be said, from any view taken of the law, that the person who occupied a portion of the surface ground for residence purposes for a term of years could, in

any manner, resist the application for patent, or, to prevent patent issuing from the United States, could exhibit his former judgment against the miner, who at another time held a legal estate in practically the same premises? It seems to me almost self-evident that no such proceedings could be entertained either in the United States land office or in a court of justice.

Let us consider briefly the effect of the plea of the statute of limitations, and a judgment thereon in favor of the party pleading it in cases of mining claims before patent. Admit, if you please, that the successful party pleading the statute obtains, by his judgment, title to the ground or premises in dispute: who is affected by it? Judgments bind the parties and their privies. The United States is not a party. Is it in privity, as a holder of the ultimate legal title, with the owner of the mining claim? It can hardly be said that under the act of Congress (whereby a citizen is permitted to go upon the public mineral lands, take possession of a portion thereof as a mining claim, and extract therefrom all that has value, thereby being permitted to acquire a certain legal interest or estate in such claim) the locator is in such privity with the United States that a judgment against him on the plea of the statute of limitations would either preclude Congress from exercising, or in any manner affect, its power in the disposition of the public mineral lands. It seems to me unnecessary, in this connection, to discuss the relation of privies bound by judgments. Even if it were possible that the United States could be held to sustain such relation of privity, the government could not be so bound. It has been decided by the Supreme Court of the United States that a suit or action can be brought against the United States only by authority of an act of Congress, and that no one can appear in a suit on behalf of the United States concerning title to land not thereto expressly authorized by act of Congress, so as to

bind the United States when it is not a party. See Carr v. U. S., 98 U. S. 433, 25 L. Ed. 209, and authorities there cited.

If no one can appear so as to bind the government in a proceeding against persons representing it not thereto authorized by Congress, how can it be said that the mine owner, in a proceeding against him, can be in such privity that the United States will be bound by a judgment against the mine owner?

Again, the highest title that could vest in the party pleading limitations by a judgment against the mine owner would be such title and estate as was vested in him. The judgment could carry no higher title by estoppel than the mine owner possessed, and no higher title than he could himself convey by deed. Should he abandon or forfeit his mining claim, his estate, claim, title, or interest, whatever it may be called, would terminate, and any title he had made to others depending upon continuing his own title would fall with his title.

Can it be said, then, that in pleading the statute of limitations as it is attempted to be pleaded in this case, would be "trenching upon the powers of Congress in the disposition of the public lands"? And if it should be so said, and it should be held to be true, should we not answer that Congress has created the estate and condition whereby trenching upon the powers of Congress in the disposition of public land is made possible?

There was a time when the plea of the statute of limitations was regarded by the courts with disfavor. It is believed, however, that, at the present time that sentiment has passed away, and the statute is now looked upon with more favor as a statute of repose. I am of the opinion, that the statute of limitations, when properly presented, and in a proper case, is one of great value and benefit. I believe that the owner of a mining claim holds a legal estate therein; that it is property in the highest sense; that it is a present grant of a legal interest and estate in the land by the government of the

United States to the locator; that it permits the owner of such estate to take therefrom and apply to his own use all the ore therein throughout its entire depth; that it gives the locator the exclusive right of possession; that by location and occupation of a mining claim as provided by the acts of Congress the miner receives a grant of all the beneficial interest in such claim or estate, as well as possession; that all such actions as may be brought for the possession of real estate or trespass thereon, may be brought against the holder of such mining claim at any time from and after its location; that a person who retains the possession of any portion of the surface ground of such mining claim, and occupies the same continuously for a period of 10 years or more after the location of such mining claim, and before patent issued therefor, may successfully plead the statute of limitations in resisting the mining claimant's action in ejectment or for possession, and may plead limitation in an action even after patent issued, though the 10 years required to be pleaded by the statute of limitations have not expired since patent issued, but had in part run before patent and after location. In other words, I hold that in pleading the statute of limitations it may reach back to the date of location, or as soon thereafter as the defendant acquires an interest, and begins to run from that date.

It is believed that the pleadings and agreed facts in this case are sufficient to sustain the conclusion arrived at on the ground of estoppel, and I think it needs no discussion to show that the principle of estoppel may be invoked in support of the decision here made.

I reach this conclusion with a great deal of deference, after such hurried examination as I have been able to make of the question while being pressed by the continuous duties of a trial court. I know that the mining company against which this decision goes is amply able to take an appeal, and present this question to a higher court. This fact makes me less

guarded, and I reach the conclusion, as above stated, with less hesitation because of such right of appeal, and because I know the question will be examined by men of greater learning and broader experience than mine, and no doubt with a clearer insight than I possess. Should the appellate court take a different view of the law upon this question, no one will hail its decision with greater delight than myself, and no one be more ready to enforce the conclusion it reaches.

Judgment for the defendants under the pleadings and the stipulation on file.

CHAMBERS v. HANNUM et al.

(Second Division. Nome. February 20, 1902.)

No. 344.

1. REAL ACTIONS—BUILDING—LIEN.

The owner of a building who permits another to place it upon his lot and build it into other permanent buildings does not thereby acquire an interest in the real estate, nor does he acquire a lien in equity for the value thereof. He must bring his action at law to recover its value.

Thompson, Murane & Thompson, for plaintiff.
T. M. Reed and P. C. Sullivan, for defendants.

WICKERSHAM, District Judge. This is a suit for an accounting, the plaintiff alleging that in the fall of 1899 he entered upon a certain lot with the consent of the owner, Bruce Milroy, and erected thereon a small house, upon the parol agreement of Milroy to convey to him a half interest in the lot. There was a general denial to the complaint, and the matter was referred to a referee, who has preserved all the testimony in the record, and has made and filed his findings of fact and conclusions of law. Both parties have filed objec-

tions to the referee's report upon various grounds, and the matter is now before the court for determination upon the report and the evidence filed therein.

The referee finds against the plaintiff upon the question of title to either tract of land in controversy by the eleventh finding of fact. An exception is taken to this finding by the plaintiff, but, upon a very careful examination of all the testimony, I am inclined to agree with the referee, and the exception will be overruled as to that finding. Other exceptions are taken by the plaintiff to other findings of fact, but I think the findings are fairly drawn from the evidence in the case.

The referee finds, as a conclusion of law, that judgment should be entered conveying to the plaintiff an interest in the Steadman avenue property to the extent of \$1,000, that being the proportion which his house bears to the cost or value of the said structure as it now stands, and for costs and disbursements. I am unable to agree with the referee in that conclusion of law from the facts found by him, and the testimony in the case, which I have carefully examined at length. I agree with the conclusion of the referee that the plaintiff does not show by a fair preponderance of the evidence, or at all to the satisfaction of the court, that he is entitled to have a trust fastened upon either tract of land in question. He testifies that he made an arrangement with the Milroys by which he erected the first building upon their 50-foot lot, on the consideration that they would give him an interest therein. His evidence stands alone upon this question, for no other witness testifies fully in his support. The evidence is not sufficient to justify the court in enforcing a trust against real estate. The possession by the plaintiff does not aid him, because that is explained in an entirely different manner by the defendants, and in a way which does not justify the court in sustaining a trust in part performance or possession. I am constrained to accept the findings made

by the referee, and the theory of the defendants as to the facts.

Upon the facts, then, found by the referee and testified to by the plaintiff, it cannot follow, as a matter of law, that the plaintiff is entitled to any decree of this court adjudging him to be the owner of, or entitled to any interest in, the Steadman avenue structure. It clearly appears from all the testimony, although the defendants endeavor to represent it otherwise, that the structure is one solid, complete building. It appears that the roof was taken off Chambers' house after it was moved upon the Steadman avenue property, and an additional story and a half built thereon and other additions made thereto, which would necessitate its entire destruction to move it. It thereby became a part and parcel of the real estate, and belongs to the owners of the real estate.

It cannot follow that because the defendants took the house of the plaintiff, and moved it upon their own property, and made additions thereto, with his consent, that he acquired any lien upon the real estate for payment. He stood by and saw his building made a part of a permanent structure upon this ground, and the court knows of no rule by which he is now entitled to a decree that he has an interest in either. He may have a cause of action to recover against the defendants for the house which they took and utilized in the structure, but he has no lien.

So far as the findings of fact in the referee's report are concerned, they are approved, with the exception of the fifteenth finding, which is expressly disapproved and set aside. From the facts found by the referee in this action, so far as they are approved, and from the testimony in the case, there must be a new conclusion of law drawn in favor of the defendants. Counsel for defendants will prepare it in accordance with the suggestions herein.

THE CITY OF SEATTLE.

THE WASHINGTON AND ALASKA STEAMSHIP CO., Claimant.

(First Division. Juneau. February 24, 1902.)

No. 1,096. Admiralty.

1. ADMIRALTY—SALVAGE.

The Cottage City, a vessel of 1,800 tons and carrying 300 tons freight and 86 passengers, while lying in the harbor of Douglas, Alaska, was urgently requested, by the pilot of the passenger steamer City of Seattle, to go out in a heavy storm and attempt the rescue of the latter vessel and her crew and passengers from her perilous position near Point Bridget, where she had drifted and anchored, after dropping her propeller in the gale in Lynn canal. A heavy northwest snowstorm was increasing, and threatened to drive both boats on the rocks, but, in the teeth of the storm, the Cottage City got lines aboard the City of Seattle, drew her out of danger, and towed her into Juneau. *Held* salvage services of a high order.

2. SALVAGE—EVIDENCE.

Evidence of the continued increasing severity of the danger, and the probable certainty of the loss of the vessel had she not been rescued at the time, may be shown for the purpose of fixing the value of the salvage services actually rendered. The character and value of the vessels may also be shown, and will be considered in determining the amount of the award.

3. ADMIRALTY—SALVAGE—PERILS OF THE SEA.

Salvage compensation may be expanded to comprehend reward for peril of life and property. The amount rests in the sound discretion of the court, and is dependent upon the labor, perils, risk, and damages incurred, and also upon the character and value of the vessels engaged.

4. ADMIRALTY—PRINCIPAL AND SURETY—JUDGMENT.

Where the claimants secure the release of the vessel libeled by bond, the judgment may go against both principals and sureties on the bond.

This cause, having been orally argued by the proctors and counsel for the respective parties, was thereupon submitted to the court upon the testimony and depositions of the several witnesses and the briefs of counsel.

An examination of the whole evidence discloses what seems to the court to be a somewhat unusual character of testimony. All the officers and crew of the Cottage City testify to a state of facts in direct contradiction, on all material points, to the evidence of the libelants. That the testimony should be absolutely contradictory on all points is somewhat extraordinary in a case of this kind. The evidence of the masters of the two steamships sheds as much light upon the true state of facts existing at the time of the occurrence in question as that of the dozens of witnesses who composed the crews of the two vessels. The statements of the several passengers, who were practically disinterested, while not so clear and complete as might be desired, aid very largely in determining the real state of facts. From all the evidence in the cause, including the various exhibits for what they are worth, it would seem that the steamship City of Seattle, after leaving Skagway, Alaska, on her south-bound voyage to Seattle, on January 13, 1900, at about 2:10 a. m., on arriving at a point about 40 miles from Skagway, in Lynn canal, encountered a blinding snowstorm and heavy wind, lost her propeller, and was thereby left to the mercy of the wind and waves, to drift whither she might; that, while drifting in this helpless condition, the City of Seattle reached a place off Point Bridget, and her master, Capt. Connell, to save the ship from going upon the rocks and rocky shore of Lynn canal, dropped his anchors and brought his ship to, barely in time to avoid being dashed upon the rocks, which were but a few feet from her stern when the anchors held her; that while in this position a life-boat was manned, with Pilot Johnson in charge, and, at the hazard of his own life and the lives of his crew, Pilot Johnson

undertook to go to the town of Juneau, to secure aid for the ship City of Seattle, and to extricate her passengers and crew from the perilous situation in which they were placed; that Pilot Johnson succeeded in reaching Juneau, and thence Douglas Island, where he found Capt. Jansen in charge of the steamship Cottage City, whose aid and assistance he implored to save the passengers and crew of the City of Seattle, and, if possible, the ship itself; and that Capt. Jansen prepared his ship as best he could for the proposed service, immediately departed from the Treadwell docks, went to the scene of the misfortune of the City of Seattle, and there attempted the rescue of said ship, her passengers, and crew.

Up to this point there is but little divergence of testimony as to the facts substantially as above stated. It is claimed that a northwest gale was blowing at a velocity of 40 or 50 miles per hour, and that a heavy and blinding snow was falling most of the time. Under such conditions, the Cottage City, with all passengers and cargo aboard, and a full complement of officers and crew, approached the City of Seattle and attempted her rescue. After several unsuccessful attempts, a seven-inch hawser from the Cottage City was made fast to the City of Seattle, and the City of Seattle was hauled out a short distance from the shore. After the Cottage City had proceeded with her a short distance, the cable attached to the anchor that was holding the City of Seattle, on being shortened and strain put upon it by the lifting of the waves and the tow of the Cottage City, broke, and shortly afterwards the hawser from the Cottage City to the City of Seattle also parted. The Cottage City soon afterwards got another line aboard the City of Seattle, and towed her to Juneau.

S. H. Piles, Donworth & Howe, and Winn & Shackleford, for libelants.

J. M. Ashton and John G. Heid, for claimant.

BROWN, District Judge (after stating the facts as above). A question is raised as to whether the service that was actually performed was one that entitled the Cottage City and her officers and crew to salvage, or to merely a fair and reasonable compensation for towage. It has been frequently held by the courts of our country that, where a vessel has encountered any danger or misfortune which may possibly result in her destruction, if services are rendered they are salvage services, though the danger is not immediate or absolute. See *The Sarragossa*, Fed. Cas. No. 12,334; *The Mount Washington*, Fed. Cas. No. 9,887. The fact that the assistance rendered might not have been actually necessary does not prevent salvage, if rendered while the vessel was in such a perilous position as to excite apprehension for her safety. *The Courier*, Fed. Cas. No. 3,283. The fact of peril is to be ascertained from the circumstances surrounding the boat at the time when the salvage service commenced. *McGinnis v. The Pontiac*, Fed. Cas. No. 8,801. It is not claimed, on the part of the respondent and claimant, that the service rendered to the Cottage City was not a salvage service, if it is true that the Cottage City was instrumental in moving the City of Seattle from her point of danger and towing her to Juneau. The theory of the respondent and claimant is that the Cottage City was so unskillfully managed by her captain and crew that she rendered no service in moving the City of Seattle from the point where she lay under anchor near the rocks; that the Cottage City was negligently and unskillfully run across the bow of the City of Seattle in such a way as to cut or break her anchor cables in her effort to get a hawser aboard the City of Seattle, and that, when the Cottage City thereafter was backing away from the City of Seattle, the first strain on the hawser of the Cottage City parted it because of its rottenness, and that the Cottage City thereupon left the City of Seattle in even greater peril than she had been be-

fore the approach of the Cottage City; that the City of Seattle thereupon resorted to her sails, and by means of these took her course out of immediate danger, and got well out in Lynn canal before the Cottage City again came alongside, got her hawser again on board the City of Seattle, and towed her to Juneau; that the only service really rendered by the Cottage City was the towing of the City of Seattle into Juneau after the hawser was fast to the latter the second time. This theory of the case, notwithstanding the testimony of the officers and crew of the City of Seattle and some one or two of her passengers, is, in my opinion, absolutely untenable. When the City of Seattle came to under anchor, her stern swung around until within 35 or 40 feet of the rocks, as one of the passengers testifies; the captain and crew of the City of Seattle putting the distance much greater, but all practically admitting that the rocks were immediately astern of her as she lay at anchor. If the Cottage City had run across the bow of the City of Seattle as she lay head to wind, straining on her anchors in the manner indicated in one of the exhibits of claimant and respondent (see sketch by Quintell, Claimant's Exhibit No. 12), cutting off or breaking the cable that held the City of Seattle at anchor, inevitable disaster must have come to the City of Seattle, and even the Cottage City would have been placed in extreme peril. There is no evidence of the change of the direction of the wind, that its velocity became less, or that the storm and danger were less threatening at the time claimant and respondent alleges this unskillful maneuver was executed, than they were when the Seattle came to anchor. Indeed, the evidence indicates that the storm was increasing, the cold becoming more bitter, and the resultant danger more imminent. The claim of the respondent and claimant that, at this juncture, the City of Seattle spread her canvas, consisting of an ordinary ship's mainsail, foresail, and staysail, and sailed into safety, is incon-

sistent. Any attempt to have set sail while in this condition would have thrown the City of Seattle upon the rocks before her bow by any possibility could have swung out to a position where the sails could have so taken the wind as to move her out from shore. Indeed, lying head to the wind, the bow was as apt to swing inshore as off, and a little more apt to swing in, because the wind was so tending. If her sails had been sufficient to move her at that time into the stream, they certainly would have moved her in the same direction as that in which she was moving at the time she came to anchor at this dangerous point.

Considering the very urgent request of Pilot Johnson, and the representations made by him at the time to Capt. Jansen that he should go and save the passengers if possible, as there was little hope of saving the ship, and the further fact that Pilot Johnson was sent out by the master of the City of Seattle as a forlorn hope, and under grave doubt as to whether he could ever reach a place of safety and communicate with others who might relieve the City of Seattle from its threatened destruction, the claim that the City of Seattle itself sailed out of danger looks very much like a flimsy pretense based upon an afterthought having no foundation in fact, and like an effort on the part of interested parties to avoid a just claim for salvage. One cannot be heard to deny the character of the service rendered, after representing himself as being in distress and requesting the service. The Huntsville, Fed. Cas. No. 6,916. That the efforts of the Cottage City to rescue the City of Seattle from her dangerous position were salvage services of a high order, I have no doubt.

It is claimed, however, by the officers of the City of Seattle, that her anchors were holding, and would have continued to hold her, possibly for days to come. The condition of the weather in Lynn canal on the day the service was rendered, and for several days thereafter, as shown by the testimony in

the case, made the canal exceedingly perilous for navigation, even with ships in the best possible condition. The wind is said to have increased, blowing from the northwest, until it reached a velocity of 70 miles an hour, and continued to blow, with snow falling a large portion of the time, for the next two days after the services in question were rendered. The testimony on this point was objected to by proctor for respondent and claimant, on the ground that all such evidence was incompetent and immaterial; that conditions as they existed at the time the services were rendered was the only fact to be considered as bearing upon the case in that regard. It has been held, and perhaps properly so, that "the fact of peril is to be ascertained from the circumstances surrounding the boat at the time the salvage service was commenced." But, admitting this to be the law, how does it affect the evidence in this case? Take a case of fire on a wharf. Unquestionably, where ships are without power to move and avoid the danger threatened, should the fire extend so as to reach them, their loss would be inevitable. But it is always possible that a fire may be extinguished before reaching a ship so situated, when the fire is some distance away; and before any one may conclude that the destruction of the ship in such danger would have been inevitable, but for the ship being moved by other power than her own, it might be necessary to prove that the fire continued to burn until it would have reached the ship, had she not been moved. This would be the showing of a future fact, but it would be merely illustrative of the present danger of loss of the ship if it had not been moved from the wharf. So, where a ship is on a lee shore, situated as the City of Seattle was, in a great storm, which was constantly increasing, whether she would have been destroyed by the increasing fierceness of the storm can only be shown by evidence of such increase of the storm after the service was rendered, which evidence would be merely cor-

roborative of the present apprehension of danger and peril of destruction. The testimony in this case shows that the storm increased in fury for two days following the day of the rescue of the City of Seattle, and, from the evidence of Capt. O'Brien, it is evident that no ship situated as the City of Seattle was could have withstood the gale, but must have gone to certain destruction. This evidence, as I understand it, is not offered to prove future conditions, with a view of determining the value of the service performed under different circumstances, but for the purpose of determining the value of the service that was then being rendered, and to show what must have inevitably followed had not the service for which salvage is claimed been rendered at the time it was. There was no other help in the vicinity, either from passing steamers or local boats, that could by any possibility have come to the aid of the City of Seattle. This is clearly shown by the evidence objected to, and in my opinion such evidence was admissible and pertinent to the issues to show existing peril to the City of Seattle at the time the salvage service in issue was rendered. We are not left without authority to support this conclusion. The Boyne (D. C.) 98 Fed. 446; The City of Puebla (D. C.) 79 Fed. 983; The Elm Branch (D. C.) 106 Fed. 952; The Monticello (D. C.) 81 Fed. 211. It would seem that the same principle is recognized in many other cases, where continuing and future conditions have been permitted to be proven to illustrate with greater certainty the danger present and existing at the time the salvage service was rendered. The evidence in this case, therefore, tending to establish the fury of the storm which existed at the time, and its continuance for two days thereafter with increased power, together with the showing of the absence of any shipping in the vicinity that might have come to the relief of the City of Seattle, is admitted in evidence over the objection of proctor

and counsel for claimant and respondent, and is considered by the court in reaching its conclusion in this case.

The respondent and claimant correctly states the principles or grounds upon which all salvage service rests. The statement is as follows: (1) The degree of danger from which lives and property are rescued; (2) the risk or danger, if any, incurred by the salvors; (3) the skill and courage shown in rendering the services; (4) time and labor employed in performing the services; (5) the value of the property salved; (6) the value of the property employed by the salvors in rendering the service, and the risk to the same. The court would add one further ground, viz., the peculiar character of the ship or property engaged in the salvage service. For example, if the salvor were a large steam vessel, and were compelled to go into a narrow channel to render the service, whereby it was itself endangered, the service is more meritorious than if it were rendered by a powerful tug built for the special purpose; or, if the only vessel available were a small tug or ferryboat, and the property salved were very valuable and difficult to manage by the inadequate power, the services of such small tug or ferryboat are more worthy than if it had been a larger boat with greater power. The court is of the opinion that the services rendered by the Cottage City in the rescue of the City of Seattle were salvage services of a high order; that in rendering these services the Cottage City was subjected to great danger, considering the velocity of the wind, the blinding snow, and the high seas, whereby she could not approach the City of Seattle, lying as she was in close proximity to the reefs and rocky shore, without great danger to the salving ship and the lives of her crew and passengers. The work of rescuing the City of Seattle under the circumstances required bravery, heroism, and skill. The Cottage City is quite a large ship, registering some 1,800 or 1,900 tons, carrying 300 tons of freight, 86 pas-

sengers, and a crew of 68, including the officers. Such a ship cannot be handled in a heavy wind and sea with the ease and certainty of movement of a smaller vessel. The danger, therefore, because of her size, was proportionately greater than the danger would have been to a smaller craft under similar circumstances.

The next question to be considered by the court is the value of the property salved. And here we meet with the same contradictory evidence that is found upon other important questions involved in the case. By the pleadings on the part of the claimant and respondent, it is admitted that the value of the City of Seattle, at the time of the rescue, was \$130,000. According to the testimony of Mr. Bryant, who seems to be a man of great experience and candor and having great confidence in his own judgment, her value was \$125,000 at the time. According to the testimony of Mr. Moran, a man of large experience in the construction of ships of various kinds, and now, and for many years past, actually engaged in the business of shipbuilding, the value is fixed at something over \$200,000. Mr. Lent, a man of experience and apparently fair judgment, puts her value at about \$200,000; Mr. George Roberts at about the same figure. Both of the latter are engaged in the steamboat business between Seattle and Alaska, and perhaps may place a higher value on shipping engaged in that business than otherwise. Mr. Moran, being engaged in the construction, building, and sale of ships, would perhaps be inclined toward high prices. Among other things, Mr. Lent testifies that the original contract price of the City of Seattle was \$168,000, and that alterations and changes were made that ran the cost of the ship up to about \$200,000. Mr. Bryant seems to consider that the 10-year service, or thereabouts, of the city of Seattle, since her construction, would lessen her value very largely, but does not fix a definite ratio of annual deterioration. From such

testimony as is before the court, the court is inclined to the opinion that the deterioration by use of the City of Seattle certainly does not exceed the sum of \$30,000, or about \$3,000 per annum, it being shown that the ship has been kept in good repair and condition; and, arriving at as fair a conclusion as is possible from all the evidence, it would seem that \$170,000 as the value of the City of Seattle is a reasonable conclusion from the facts stated. The value of her cargo and passenger money is said to have been \$660. The value of the Cottage City is, by the testimony, made to range from \$85,000 up to perhaps \$150,000. The court can only take a reasonable view of the testimony on this point, and add to or deduct from the estimated value of the different witnesses, as their judgment from their manner of testifying seems to have been affected favorably or unfavorably upon the question of value. Reaching my conclusion in this way, I fix the value of the Cottage City at \$125,000. The evidence places the value of her cargo at about \$30,000, passenger money \$1,720, and freight charges \$2,100, making the value of the property that entered into the risk of rescuing the City of Seattle, in all, \$158,820.

We now approach the most important question presented in this case, viz., the amount that may be awarded for salvage services. Salvage compensation is not confined to quantum meruit as to the salvor, but is expended to comprehend a reward for the risk of life and property, labor, and damage, as well as a premium operating as an inducement to similar exertions. *Warder v. La Belle Creole*, Fed. Cas. No. 17,165; *Scott v. The Clara E. Bergen*, Fed. Cas. No. 12,526a. Other things being equal, the total award of salvage should vary with the degree of peril from which the property was saved. *The Mt. Washington*, Fed. Cas. No. 9,887; *The Kristrel*, Fed. Cas. No. 7,935. It is also said that the ratio of salvage award to the value of the property salved should be less when

such value is large than when it is small. The Philah, Fed. Cas. No. 11,091a. Where the services are very meritorious and the value of the property salved is very small, the usual proportion will be exceeded in making the reward. Smith v. The Joseph Stewart, Fed. Cas. No. 13,070. The amount of salvage is discretionary with the court, and is dependent on the labor, perils, and damages incurred by the salvors, and the good faith they exercised toward the owners of the property salved, the circumstances of each case, previous decisions, and commercial policy. Western Transportation Co. v. The Great Western, Fed. Cas. No. 17,443; The John and Albert, Fed. Cas. No. 7,333. The fact that salvage services were rendered by a steam vessel to a steam vessel is ground for greater compensation than if both had been sailing vessels. The Huntsville, Fed. Cas. No. 6,916; Adams v. The Island City, Fed. Cas. No. 55; The Puritan, Fed. Cas. No. 11,474; Anonymous, Fed. Cas. No. 430; The Lexington, Fed. Cas. No. 8,336. In cases of extraordinary merit or of extraordinary peril, the rescuing ship should be allowed a moiety as salvage. The Cumberland, Fed. Cas. No. 3,470. As to the amount of the award that should be allowed under conditions approaching those of the case at bar, we cite The City of Puebla, 79 Fed. 982; The Strathnevis (D. C.) 76 Fed. 855; The North Erin (D. C.) 71 Fed. 430; The Kimberley (D. C.) 40 Fed. 289; The California (D. C.) 36 Fed. 563. These and many other cases have been determined where some of the elements existent in this case were also present.

It is evident to the court that, without timely assistance on the part of the Cottage City, the City of Seattle would have met with inevitable disaster, involving the loss of the ship and the lives of many of her passengers and crew, and that the danger to the Cottage City in approaching this rocky shore under the conditions existing at the time was very great. The unfavorable and dangerous conditions attending

the navigation of Lynn canal in heavy storms; that storms come on with almost unequaled severity and with slight indication of their coming; that the shores abound in rocky points extending into the canal; that there is no protection through lighthouses or signals; and that mariners are frequently exposed to the most unusual perils in the navigation of this canal—all these facts are matters of common knowledge among navigators and all the people of the vicinity; and while the court is not unmindful that "allowance for salvage service, while liberal, should not be so large and so out of proportion to the services actually rendered as to cause vessels, in situations in which it is expedient that they should quickly accept assistance of the character rendered, to hesitate or decline to receive it because of its ruinous cost," still it is of the opinion that the conditions that exist in Alaska, and the dangers attending navigation along these various canals and straits on the Alaskan coast, require a more than ordinarily liberal reward in order that reasonably prompt exertions may be made to save lives and property from inevitable loss and disaster where salvage services are required. Conditions here are unusual, and the dangers attending navigation much greater than those ordinarily existing in the open waters of the ocean or upon the coasts in other sections of our country. It is believed, therefore, that the reward should be proportionately greater to subserve the interests of commerce and navigation.

Notwithstanding the earnest contention of proctor for the respondent and claimant, and the large number of cases cited where small awards have been made, I cannot find in the cases cited those elements of danger, and the heroism demanded in the performance of the salvage services, that were necessarily required in the case at bar. I am therefore constrained to make a reasonably liberal allowance, considering all the circumstances of the case, and fix the award in this

case at 18 per cent. of the value of the property salved, to wit, \$170,660, or the gross sum of \$30,718, with interest thereon from January 16, 1900, to which should be added the value of the boat crushed while the Cottage City was rescuing the City of Seattle, \$135, and the value of the hawser lost during the performance of the service, \$170.

The division of the award for salvage services as between the owners of the ship and the captain and crew of the Cottage City deserves some consideration. In this connection, I cannot refrain from commenting on the conduct of Capt. Jansen in leaving a safe place in port for the performance of a service known by him to be exceedingly dangerous, and retaining on board his ship 86 passengers, thereby exposing their lives to peril, in his effort to save the property and lives on the City of Seattle. His conduct shows recklessness and lack of consideration for the lives of the passengers intrusted to him, and because of his taking his passengers out in this way when he should have left them in the hotels of the town where the ship lay, where they could have received the comforts of life while he was performing a gallant service for the City of Seattle, its passengers, and crew, he is subject, in my opinion, to severe criticism. It raises some question in my mind whether he should not be required to go without reward as a punishment for what seems to me a reckless exposure of the lives of many people. Considering all the circumstances, however, the apparent necessity for haste, and the fact that he was starting out in the night, the court is disposed to overlook somewhat this seeming reckless conduct, and permit him to share in the award for the gallant service performed. In this case the court considers the danger to the Cottage City and its cargo and passengers very great, and therefore the proportion that should be awarded to its owners for the salvage service more than is ordinarily given in such cases. I shall therefore allow the Cottage City

and its owners \$305 damages for boat and hawser lost, and two-thirds of the award for the salvage service rendered; one-third thereof to go to the captain, officers, and crew of the Cottage City, to be divided as follows: To the captain, officers, seamen, and engineers' department, in the ratio of the wages of each; to the stewards' department, in the ratio of one-half the wages of each. This smaller proportion to the stewards' department is given from the fact that it participated in the danger, but not in the actual service rendered. The distribution of the award is restated as follows:

Total salvage award.....	\$30,718 80
Interest to Feb. 24, 1902, at 8 per cent.....	5,170 94
Damages for loss of boat and hawser, with interest.....	355 83

Total award..... \$36,245 57

Distributed as follows:

Two-thirds salvage and interest to Pacific Coast Co.....	\$23,926 53
Captain, officers, seamen, and engineers.....	9,842 80
Stewards' department	2,120 41
Damages and interest, as above.....	355 83

Total \$36,245 57

The respondent and claimant having given bond to release the City of Seattle, the judgment and decree in this case will go against the sureties on said bond as well as the owners of the City of Seattle. It is further the opinion of the court that the costs of this proceeding should be paid by the Washington & Alaska Steamship Company, the owner of the City of Seattle and the claimant in this suit. A decree in accordance with this opinion may be submitted by proctors for libelants for the consideration of the court.

RUSSELL et al. v. DUFRESNE.

(Second Division. Nome. March 1, 1902.)

No. 280.

1. MINES AND MINERALS—DISCOVERY.

When the employés and agents of a future locator entered upon a placer claim which had previously been located, but was then not in the actual possession of the locator or any one else, and peaceably and without objection explored the same for gold, and discovered a valuable pay streak thereon, and thereafter and on January 1st, after the prior location had lapsed on December 31st for failure to work the claim, the said employés and their employer went upon the ground, and the employer, having knowledge of all the facts, then located the claim, set the stakes and otherwise complied with the law in time, *held*, that the prior discoveries of gold by his employés were a sufficient discovery on which to base his location.

2. SAME—ESTOPPEL.

One Russell made a valid location of a placer mine for himself and Niebling. Dufresne made a subsequent location of the same claim upon the suggestion of Niebling. *Held* that, whatever force estoppel may have in another case, it cannot make a second location of a placer claim good as to Niebling's part and bad as to Russell's. The first valid location excludes any subsequent location during its continued validity.

This action was originally brought by plaintiff, Russell, to quiet his title to a mining claim described in the complaint as No. 1 above discovery on Kasson creek in the Cape Nome mining district. After the cause had been sent to the referee to take testimony, it appeared that Niebling was an interested party, and he was joined, with his consent, as a plaintiff, and the cause proceeded. The plaintiffs claim title through a location made by Russell on January 1, 1901, and defendant upon a subsequent location made on January 7, 1901.

The referee has reported all the testimony in writing, and has made and filed his findings of fact and conclusions of law. He finds as a fact that Russell made a good and valid location on January 1, 1901, for himself and Niebling, but based upon a discovery of gold made in the previous September, 1900, at which time the ground was embraced in a valid claim located by one Hilligos, which became vacant and abandoned on December 31, 1900. The referee also finds that about the 5th day of January, 1901, Niebling represented to Dufresne that he had sent Russell to locate the claim in controversy for him, but that, in violation of his instructions, Russell had located it in his own name; that Russell had not made any discovery of gold before the location; and he advised and urged Dufresne to go upon the claim, and make a discovery and a new location over Russell's, and that he (Niebling) would assist Dufresne in contesting Russell's title. He further finds that subsequent to his location Russell conveyed a quarter interest in the mine to Niebling, and a half interest to one Wilson, who thereupon conveyed it to Niebling, who is now the owner of such deeds of a three-fourths interest in the premises. He finds that, in pursuance to the suggestions of Niebling, the defendant did go upon and did make a discovery and a junior location over Russell, and finds as a conclusion of law that Niebling is estopped by such fact to deny Dufresne's title, and that Dufresne is thereby the owner of a three-fourths interest in the claim, while Russell is the owner of the remaining fourth by virtue of his senior location, which is sustained.

The referee's report being filed, and the objections of both plaintiffs and defendant thereto being considered by the court on August 12, 1901, the court made new findings of fact favorable to the defendant, and entered a decree, in which the referee's finding and conclusion in favor of Russell was reversed, and the entire property awarded to Dufresne.

Thereupon, and on August 15, 1901, the plaintiffs filed a motion for a new trial, which is now before this court for determination.

Thompson, Murane & Thompson, for plaintiffs.
W. T. Love and B. F. Knott, for defendant.

WICKERSHAM, District Judge (after stating the facts as above). Two errors are especially urged on the motion for a new trial. The first is that the court erred in holding that Russell's location made on January 1, 1901, was void for want of any discovery to support it. The finding upon this point made by the court, and upon which the decree was based, is that Russell and Niebling were partners in the venture; that Niebling, acting for himself and Russell, sent two men in September, 1900, to explore the ground; that these men made a discovery of placer gold thereon, and immediately thereafter reported the same to the plaintiff Niebling; and that both of these men were trespassers in making entry upon the ground to make such discovery. In this finding the court committed error both as to fact and law. While it is practically admitted that a prior location of this claim had been made by Hilligos, which did not expire until December 31, 1900, yet there is no evidence which shows any trespass by the two men sent by plaintiffs to prospect the same. Nothing whatever appears in the evidence about that matter. They may have been invited by Hilligos to inspect the claim; they may have entered without such consent. The evidence does not show either fact, and the court ought not to presume that a citizen acts in violation of the law. Certainly, no such presumption ought to be indulged in when the result is to forfeit a mining location valid in all other respects. The evidence on this point is that Koncal and Alexander were sent by Niebling and Russell in September to prospect the claim, and did so; also, that it was prospected during that summer by Wil-

son for himself, but who informed Russell at the time of his location that it contained gold.

It clearly appears from Wilson's testimony that he had made discoveries on the claim in 1900, independent of those made by Koncal and Alexander for Niebling; that he was with Russell on January 1, 1901, when Russell located, and informed Russell as early as November, 1900, of his discoveries. He also states conclusively that no one was in the actual occupancy of the ground when he and the explorers sent by Niebling were there. Nor is there any evidence to show that his presence there was unauthorized; it may have been with the consent of Hilligos. Certainly, it is not now shown by any testimony whatever that Wilson was sent by the plaintiffs to trespass upon this claim prior to January 1, 1901, whatever may be asserted of Koncal and Alexander's visit. I reach this conclusion from the evidence: That Koncal and Alexander examined this claim in September, 1900, in a peaceable and quiet manner, as the agents of plaintiffs, when it was not in the actual occupancy of any other person, and informed plaintiffs of the discovery of gold for them thereon. They also received the same information from Wilson, who was not there at their procurement, but whose discovery they adopted and utilized in their location of January 1, 1901. The claim ought not to be declared void because of the alleged trespass. The government invites exploration upon its mineral lands, when made peaceably and in good faith.

The court, in its finding of fact, found that on January 1, 1901, the plaintiff Russell made a valid location of this claim by posting his location notice and marking the boundaries according to law and the rules and customs of the district; that on the 8th day of January, 1901, he filed in the recorder's office a certificate of location for record, and on the 15th day of January an amended notice, but that he made no other

discovery than that made by Koncal and Alexander. The court entirely ignored the discovery of Wilson, and gave it no weight. The court also found that Dufresne's location was not made until the 8th, and his certificate was filed within 90 days thereafter, not giving the exact date, though the notice itself bears the file mark of January 17th, two days after Russell's amended notice was filed.

From all these conceded facts it appears to me that this court erred in holding the claim to be void on the ground of want of discovery. A discovery is certainly necessary to enable the claimant to make a valid location of a mining claim, but it has never been held necessary for the locator to do the actual manual labor of exposing the gold. He may, and usually does, employ others to do the work for him. It may be done in his absence—even without his knowledge; and so far does common sense carry this rule that Judge Sawyer correctly said, in charging the jury in Jupiter Min. Co. v. Bodie (C. C.) 11 Fed. 666, 4 Morr. Min. R. 423, 7 Sawy. 96:

"It is not necessary that the locator should be the first discoverer of the vein, but it must be known to him, and claimed by him, in order to give validity to the location."

Wermer v. McNulty (Mont.) 14 Pac. 646; 1 Lindley on Mines, §§ 403-408. When Russell made his location of this claim on the morning of January 1, 1901, the presence of gold on the claim was known to him; and acting upon that information, obtained not only from his employés Koncal and Alexander, but from Wilson, a present employé on the ground with him at the time of the location, he may fairly be said to have known of the discovery, and to have claimed it as his act, and these acts and information give life and validity to his location. It follows that, in my opinion, the location of Russell was valid, and that at the time of Dufresne's location Russell had "the exclusive right to the possession and

enjoyment of the property in dispute." There can be no such thing as Russell's location being good as to his quarter and Dufresne's as to three-quarters; the latter was void and of no effect. Whatever force an estoppel may have in another case, it cannot make a second location of the same mining claim valid. Dufresne's title in this proceeding depends upon his location, which must fail, and his title must fail with it. However reprehensible the conduct of Niebling may be, it cannot give life to a mining location in violation of the laws of Congress. It cannot be claimed either that Russell said or did anything which created an estoppel as to his rights, nor which could in any wise render his location void.

This being true, no estoppel can give validity to Dufresne's location, which is the only basis of his claim to right or possession or ownership. Whatever title he acquires must come through the Russell location. I am of the opinion that Russell's location made on January 1st was good, and that his pleading alleging a discovery on that day is sufficient, and that proof of discovery by Wilson and the two employés of Niebling and Russell is sufficient to sustain his cause of action. The court therefore erred in its findings of fact, conclusions of law, and decree, and they must be modified, and a new trial awarded.

MACINTOSH v. TOWN OF NOME.

(Second Division. Nome. March 15, 1902.)

No. 587.

1. TOWN SITE—STREETS—TRESPASSERS.

Streets and public ways set apart for the public use by town-site settlers will be protected by the courts from trespassing claimants, though dedicated prior to a formal application for entry under the town-site act.

2. STREETS—VACATION—ABANDONMENT.

Such public ways cannot be abandoned or otherwise disposed of so as to cut off the public easement, even by the town council, and such an attempt would be ultra vires and void. It does not affirmatively appear that the town council of Nome is given any power by the act of June 6, 1900, c. 786 (31 Stat. 321), or any other law, to vacate or abandon the public easement upon a entry under the town site act.

3. VACATION—ESTOPPEL.

A resolution of the town council of Nome to vacate a public way dedicated by the town-site settlers *held* ultra vires, and does not serve as an estoppel to the plea.

Ejectment by town to recover possession of alley from trespassing claimant. Demurrer overruled.

Cochran & Grimm, for plaintiff.

V. T. Hoggatt, for defendant.

WICKERSHAM, District Judge. This is an action of ejectment to recover from the town of Nome the possession of a tract of land 25 feet wide by 176 feet long, extending from Front to Second street, and described as beginning at the southwest corner of a certain well-known building. The complaint alleges that the plaintiff, his grantors and predecessors, entered upon the tract on the 5th day of September, 1899, while it was a part of the public lands of the United

States, and located and thereafter possessed it and occupied it as a place of residence, and then alleges an ouster by the chief of police on behalf of the defendant on the 18th day of September, 1901. He prays for restitution and damages.

The defendant, answering, denies the facts alleged by the plaintiff, and for an affirmative defense alleges that in June, 1899, this tract was settled upon and occupied by Malone and Gascoigne, who thereafter, in the fore part of 1900, dedicated the strip in dispute to the public as a street or alley, and that upon the incorporation of the town of Nome on or about the 8th day of April, 1901, the same was so accepted and dedicated by said town as a public street, and named "Metler Way." It is alleged that at all times since the time when plaintiff first claimed the strip it was dedicated to the use of the public as a public way in the town of Nome.

The plaintiff replied, denying the allegations of the answer, and then specially pleading that, if the town of Nome did acquire any interest in the tract as a public street, it abandoned the same prior to the bringing of this action; and, secondly, pleads a special abandonment by virtue of the following resolution passed by the common council of Nome on September 9, 1901: "On motion of Councilman Geiger, seconded by Councilman McPhee, the city withdrew all claim to Metler Way, and allowed Mr. Schwarz \$75 for the destruction of his cabin;" and then alleges that on the next day the town delivered possession of the tract to Schwarz, paid him for his cabin, and that thereafter Schwarz conveyed to plaintiff, who now urges that the town is estopped by such action from denying his title. The demurrer is made to this defense by estoppel. The question to be determined is whether the town council had power to abandon a public way by such or any proceeding, and whether the action of the council, if it had the power, had that effect.

By the eleventh section of "An act to repeal timber culture-

laws, and for other purposes" (26 Stat. 1099),¹ Congress extended the town-site laws to Alaska. The citizens of Nome, however, have not yet sought to obtain the benefit of that act and secure permanency and peace to their titles. Their rights yet depend upon mere occupancy and possession, although the town of Nome has been incorporated under the provisions of chapter 21 of the Civil Code in the act of June 6, 1900, c. 786 (31 Stat. 520). It is, therefore, a community having 300 or more permanent inhabitants. The court will take notice that it is more than that—that it is an incorporated town having 2,000 or 3,000 permanent inhabitants, and the usual adjuncts of an American community of that size. It has never been doubted, in the settlement of the great public domain belonging to the United States, that a settler who once gains the prior peaceable occupancy and possession of a limited part of that land may lay it off into lots, blocks, streets, and alleys, and by inducing others to settle thereon assist in founding a town or city. Acts of this character almost invariably precede the application of the town-site laws, and it has never been doubted that the policy of our land system was to encourage and protect settlers in such preliminary appropriations of the government land. If the prior possession of the settler was one recognized by the laws of the United States, his dedication of a reasonable and necessary part of the tract for streets and alleys would certainly be sustained by the courts and protected from trespass by subsequent claimants.

The case of *Ashby v. Hall*, 119 U. S. 526, 7 Sup. Ct. 308, 30 L. Ed. 469, determines the demurrer in this case. It was a suit to abate an obstruction of an alley in the city of Helena, Mont. The plaintiffs were the owners of lots lying alongside of the alley, which was recognized as existing at the time property was purchased by them. Subsequently an application was made to enter the town under the town-site

¹ U. S. Comp. St. 1901, p. 1467.

act, and a new map or plat was made by the probate judge and approved by the county commissioner, which did not recognize the existence of the alley. The probate judge thereupon sold the property to the defendant, and issued him a deed under the town-site law. Plaintiff brought suit to open the alley as a public way, and Judge Field, in delivering the opinion of the court, said:

"As thus seen, the act required the entry of land settled upon and occupied to be in trust 'for the several use and benefit of the occupants thereof according to their respective interests.' The very notion of land settled upon and occupied as a town site implies the existence of streets, alleys, lots, and blocks; and for the possession of the lots, and their convenient use and enjoyment, there must of necessity be appurtenant to them a right of way over adjacent streets and alleys. The entry of the land carried with it such a right of way. The streets and alleys were not afterwards at the disposal of the government, except as subject to such easement. * * * The power vested in the Legislature of the territory in the execution of the trust, upon which the entry was made, was confined to regulations for the disposal of the lots and the proceeds of the sales. These regulations might extend to provisions for the ascertainment of the nature and extent of the occupancy of different claimants of lots, and the execution and delivery, to those found to be occupants in good faith, of some official recognition of title, in the nature of a conveyance. But they could not authorize any diminution of the rights of the occupants, when the extent of their occupancy was established. The entry was in trust for them, and nothing more was necessary than an official recognition of the extent of their occupancy. Under the authority conferred by the town-site act, the Legislature could not change or close the streets, alleys, and blocks of the town by a new survey. Whatever power it may have had over them did not come from that act, but, if it existed at all, from the general grant of legislative power under the organic act of the territory. The plaintiffs taking the lots they occupied, with the right of way appurtenant thereto—that is, over the alley on which the lots were situated, which they had previously enjoyed—the action of the probate judge in conveying the alley to the defendant was illegal and void. The intrusion of the defendant there-

on was, therefore, a trespass, and the fence erected by him to bar the passage through it was a nuisance to be abated."

It seems to follow conclusively from this opinion: (1) That streets and alleys set apart and recognized by town-site settlers as necessary for the public use will be protected from trespassing settlers by the courts, though dedicated prior to the former application for entry under the town-site act. (2) Such public ways cannot be disposed of so as to cut off the public easement, even by the town council, and such an attempt would be illegal and void. It does not affirmatively appear that the common council of Nome is given any power by the act of June 6, 1900, c. 786 (31 Stat. 321), or any other law, to vacate or abandon the public easement upon a street or alley, and such an attempt must be held less effective than a solemn act of a territorial legislature, and therefore ultra vires, illegal, and void. The motion or resolution passed by the town council on September 9, 1901, was ineffectual to abandon or vacate the property if it was then a public way, and such act created no estoppel against the town. The suit having been brought against the town, it may make the same defense in protecting the public easement as a property owner could if a party. The case therefore falls within the rule in *Ashby v. Hall*, *supra*. For these reasons the demurrer to the special affirmative matter in the reply is sustained.

SPAULDING et al. v. ALASKA COM. CO.

(Second Division. Nome. March 15, 1902.)

No. 26a.

1. ADMIRALTY—SALVAGE—SUIT IN PERSONAM.

Under the general admiralty law (which is not limited in this respect by admiralty rule 19), a salvor of property, which has been taken from his possession by the owner, may maintain a suit in personam against the owner for salvage compensation.

2. SALVAGE SERVICE—WANT OF MERIT.

Where libelants knew that barges had been driven on shore by a heavy on-shore wind at a point designed by the master of the tow, reached them ahead of the owner's employés, went aboard dry-shod, put out an anchor on shore, and attached a line thereto, but did no meritorious act or thing toward saving them or the property aboard, or rendering either more secure, *held*, that they were trespassers, and not entitled to salvage compensation.

Libel in personam to recover salvage for services performed in saving two barges and contents on St. Michael Island, Alaska.

Albert Fink, Ira D. Orton, and James M. Bell, for libelants.

C. S. Johnson, Geo. D. Schofield, A. J. Daly, and P. C. Sullivan, for respondent.

WICKERSHAM, District Judge. The libelants brought this action in personam against the Alaska Commercial Company to recover for salvage services voluntarily performed in saving two barges and their contents and other stranded goods, on the north shore of St. Michael Island, on or about July 31, 1899. An answer was filed by respondent denying the performance of the services. The evidence has been heard by the court, and the case is now submitted for final determination.

Respondent contends that, even if the testimony of the libelants should be taken as absolutely true, the libelants

could not recover in this action, first, because a suit in admiralty for voluntary salvage services cannot be maintained in personam; second, that, if such action could be maintained, the alleged service performed by libelants was not a salvage service; and, third, that the libelants, at the time they claim to have performed the service, ought to have known from the circumstances surrounding the condition of the barges, and their knowledge of the circumstances under which they came ashore, that the barges had not been abandoned by the owner, the Alaska Commercial Company.

The nineteenth admiralty rule provides that, in all suits for salvage, the suit may be "in rem" against the property saved or the proceeds thereof, or "in personam" against the party at whose request and for whose benefit the salvage service has been performed. This action is based upon the latter clause in the rule, for the suit is not in rem against the property saved or the proceeds thereof. The inquiry then arises whether, upon the pleadings and proofs in support thereof, the libelants can maintain a suit in personam under the last clause in the rule.

Upon the right of libelants to maintain the suit in personam, they cite to the court and depend upon the construction given to rule 19 in the case of *Hudson v. Whitmire* (D. C.) 77 Fed. 846, while respondent cites and depends upon the construction given in the case of *The Sabine*, 101 U. S. 384, 25 L. Ed. 982. In the case of *The Sabine* the court says:

"There is a broad distinction, said Dr. Lushington, between salvors who volunteer to go out and salvors who are employed by a ship in distress. Salvors who volunteer go out at their own risk for the chance of earning reward, and, if not successful, they are entitled to nothing; the rule being that it is success that gives them a title to salvage remuneration. But if men are engaged to go out to the assistance of a ship in distress, they are to be paid according to their efforts, even though the labor and service may not prove beneficial to the vessel or cargo. *The Undaunted*, 1 Lush. 90. No one

can doubt that for such service the proper remedy is an action in personam, as provided in the last clause of the admiralty rule prescribing the mode of procedure to recover salvage compensation. Unless the property saved is destroyed after having been restored, or is clandestinely removed from the jurisdiction, the salvors require no more convenient or effectual remedy than the action in rem against the property, as their compensation cannot exceed its value; and, if destroyed without their fault or removed from the jurisdiction to defeat their remedy, no doubt is entertained that they may proceed in personam against the owners of the salved property, though the case is not specifically provided for in the nineteenth rule, to which reference has been made. The Emblem, 2 Ware, 61 [Fed. Cas. No. 4,435]; The Schooner Boston [1 Sumn. 328, Fed. Cas. No. 1,673]; Dunlap, Prac. 511; The Trelawney, 3 C. Rob. 216, note."

I gather from the rules announced in this opinion: (1) If a salvor's services were voluntary, he can generally recover only by a suit in rem against the property salved. The exception to this general rule is stated to be that, if the property is "destroyed without their fault or removed from the jurisdiction to defeat their remedy, no doubt is entertained that they may proceed in personam against the owners of the salved property, though the case is not specifically provided for in the nineteenth rule, to which reference has been made." (2) If the salvor's services were furnished upon request of the master or owner, then the salvor may recover either in rem or in personam, as upon a contract, express or implied.

In the case at bar the service sued for was voluntarily rendered, and it is not sought, as is usual, to enforce a lien therefor, which exists independent of possession, by a suit in rem, but the suit is in personam. If the facts do not bring it within the exception to the general rule, the action must fail. The salvor cannot generally waive his lien for voluntary services, and sue in personam as upon a contract, express or implied.

Upon the matter of exceptions to the rule, the court is cited to the case of Hudson v. Whitmire (D. C.) 77 Fed. 846,

which recognizes the same exception as that pointed out in the Sabine Case.

The court in that case holds that under the general admiralty law, which is not limited in this respect by admiralty rule 19, a salvor of property which has been taken from his possession by replevin in a state court may maintain a suit in personam against the owner to recover salvage compensation, and quotes another distinguished admiralty jurist, who held that, "if the owner wishes to receive the property before the proceedings at law are instituted and the salvor delivers it to him, a personal libel may be maintained for the salvage." And he adds, "This is solely on the ground of his possession of the property." The Emblem, Fed. Cas. No. 4,434.

In the case at bar the libelants were present at the wreck of the property alleged to have been saved, and claiming possession thereof. Either by their voluntary surrender or by overpowering force, the respondent came into possession of the property, and removed it and sold part of it at auction immediately thereafter, and retained possession of the balance. The facts seem to me to bring the case within the exception to the general rule stated in *The Sabine* and in *Hudson v. Whitmire*, and the objection of respondent upon this point is overruled.

The next objection made by respondent is a challenge in the nature of a demurrer to the evidence. Conceding all the evidence offered by the libelants to be true, respondent insists that it conclusively appears that the services performed were not necessary or beneficial, and not sufficient to support the claim for salvage award. This challenge goes to the merits of the case, and, if sustained, will end the litigation.

The Supreme Court of the United States has laid down some rules which must govern all inferior courts in admiralty cases, and some of which apply particularly to the facts that

determine this case. In the case of The Blackwell, the court says:

"Salvage is the compensation allowed to persons by whose assistance a ship or her cargo has been saved, in whole or in part, from impending peril on the sea, or in recovering such property from actual loss, as in cases of shipwreck, derelict, or recapture. Success is essential to the claim; as, if the property is not saved, or if it perish, or, in case of capture, if it is not retaken, no compensation can be allowed." 77 U. S. (10 Wall.) 1, 19 L. Ed. 870.

In speaking of the character of the service necessary to support such a claim, the court in this case fairly determines that it must be a successful, meritorious, and important service, resulting in a saving of the property. In the case of The Sabine, the court quotes the definition of salvage given in the case of The Blackwell, and then adds:

"Three elements are necessary to a valid salvage claim: (1) A marine peril. (2) Service voluntarily rendered when not required as an existing duty or from a special contract. (3) Success in whole or in part, or that the service rendered contributed to such success. Proof of success, to some extent, is as essential as proof of service, for if the property is not saved, or if it perish, or, in case of capture, if it is not retaken, no compensation will be allowed. * * * Volunteer assistance rendered to such property when in peril, and which is successful in saving the property or some portion of it, constitutes the proper foundation to support an action for salvage in rem against the ship and cargo or the proceeds thereof. * * * Salvors who volunteer go out at their own risk for the chance of earning reward, and, if not successful, they are entitled to nothing; the rule being that it is success that gives them a title to salvage remuneration." The Sabine, 101 U. S. 384, 25 L. Ed. 982.

The facts in the case of The Avoca (D. C.) 39 Fed. 567, show that the vessel caught fire while lying at the wharf loaded with refined petroleum. The pilot of the Alice E. Crew, a steam tug, saw her danger, and came to her rescue voluntarily, extricated her from the burning shipping and wharves, and anchored her in safety in the river, where the

Avoca's crew were successfully assisted by the tug and her crew in extinguishing the fire.

"While the bark was at anchor, and the crew of the bark engaged with the crew of the Alice E. Crew in extinguishing the fire upon the bark, the steam tug Arrow and also the steam tug Excelsior came alongside the bark, and now claim to have rendered services in extinguishing the fire on the bark, for which they also demand salvage compensation. * * * In regard to the services rendered by the Arrow and the Excelsior, in my opinion, neither of those vessels is entitled to salvage compensation. Their services were not needed. The Alice E. Crew was alongside the bark, and her crew and the crew of the bark were engaged in putting out the fire, and it would have been extinguished without any aid from the Arrow or the Excelsior. The little aid that they did render was not required, and I am unable to award to them any compensation therefor."

The rule so clearly recognized in this case is founded upon principles of good faith and equity. It is that the service performed must be beneficial, to some extent, in saving the property; that, if the property had then been rescued from the peril, no gratuitous, officious, and unnecessary service thrust upon it by one seeking to connect himself with a salvage claim would justify the court in granting the decree. See, also, *The Pohatcong* (D. C.) 77 Fed. 996; *The J. W. Husted* (D. C.) 36 Fed. 604; *The Chouteau* (D. C.) 5 Fed. 463. In the case of *Spreckels v. The State of California*, Judge Hoffman, in commenting upon the case of *The Chouteau*, says:

"I should hesitate to accept the view of the master's right and duties as broadly as it is here laid down. But when the owners of a vessel in peril have taken all measures in their judgment necessary to insure her safety, and those measures are adequate, and all that prudence requires, other parties have no right to obtrude their services, and anticipate the employment of the means adopted by the owners, and then, if successful, claim a salvage recompense. Such an enterprise savors more of a predatory expedition than a salvage service to be encouraged and rewarded on grounds of public policy. * * * The owner of a vessel disabled or in distress does not thereby lose the control of his property. He has the right to refuse

or accept any offers of assistance that may be made, or to adopt his own measures for the preservation of his vessel. When he has provided means for her rescue, in his judgment adequate and effectual, he is not at the mercy of any stranger who, with full knowledge of this fact, may sally out to 'take his chances' of winning in a race 'to see which shall first seize the ship as a salvage prize.' *The Bolivar v. The Chalmette* [1 Woods, 397, Fed. Cas. No. 1,611]."*Spreckels v. The State of California* (D. C.) 45 Fed. 647.

In October, 1879, the bark Cleone was driven ashore in St. Lawrence Bay, just south of Bering Strait, and sank in shallow water. Her crew and part of her cargo were shifted to another vessel, and her master left her for the winter, giving a native on shore orders to protect her as best he could. In the spring, another vessel reached that bay, ahead of the one commanded by the master of the sunken bark, who came back to rescue her and her cargo from peril. Capt. Ravens, of the Timandra, well knowing the facts, but reaching the bay a short time prior to Capt. Nye, the recent master of the Cleone, put a man aboard of the stranded vessel, and set up a claim for salvage services.

"His design was to take possession of the vessel, and to secure some sort of a lien or right to take her cargo, to the exclusion of her owner, at a future time, and whenever circumstances and his own convenience might permit."

Under the facts in the case, Judge Hoffman held that she was neither a derelict nor abandoned.

"By quitting the vessel the master and owner does not lose his *jus disponendi* or right of property. If a vessel be found, though with no one on board, under such circumstances that the persons assuming to be salvors knew, or ought to have known, that their services were not desired, and they take possession with intent to supplant the master and owners in giving her relief, they have no claim for compensation. *The Upnor*, 2 Hag. Adm. 3; *The Barefoot* [1 Eng. Law & Eq. 661]; *The India*, 1 W. Rob. 406; *The Amethyst*, Davies R. 23 [Fed. Cas. No. 330]. See argument of counsel (the late Mr. J. Curtis) in *The Island City*, 1. Black, 126 [17 L. Ed. 70]; *The Cham-*

pion, Br. & Lush. Adm. R. 69. These authorities establish beyond controversy the principle so agreeable to justice and reason—that unless the vessel has been utterly abandoned, and is, in contemplation of law, a derelict, even bona fide salvors have no right to the exclusive possession, and are bound to give up charge to the master on his appearing and claiming charge. See *The Champion*, *ubi supra*. It is not to be tolerated that a stranded vessel with a valuable cargo may be taken possession of by a stranger, who knows that she has been left, but not abandoned; that she has been put in charge of an agent of the master, and that the latter intends to return to her, and is actually on his way to her for that purpose; nor that the mere fact of placing a man on board, with the object of anticipating and supplanting the master, shall entitle him to a share of the property which is subsequently recovered by the unaided efforts of its owner." *The Cleone* [D. C.] 6 Fed. 517.

In the case at bar the testimony shows that the *Louise* was a Yukon river steamer, and that she left the harbor of St. Michael at midnight of July 30, 1899, pushing three loaded barges, one at her bow and one at each side. Her destination was the mouth of the Yukon, to reach which she had to coast along the north shore of St. Michael Island. Soon after leaving the harbor a strong gale from the north struck the vessel, and on account of the strong winds, and the great surface exposure of the houses on the barges, she became unmanageable, and drifted upon the north shore. The storm increased, and the danger became so great that, upon a consultation between the master and his two pilots and Capt. Hansen, the superintendent of the line, it was found necessary to drop the barges. The course of the vessel was changed, she was backed to relieve her from the strain, and a good place was sought to beach the barges. Just opposite a sandy cove on the north shore, with the wind on shore at the rate of 30 miles an hour, they anchored the front barge and cut the side barges loose, with the design of saving them and their cargoes by beaching them in the cove. Their design failed in one feature only—the front barge swamped at her

moorings about 300 or 400 feet off shore. The other two safely beached, as expected, in the sandy cove. The Louise, though in great peril, turned back and reached St. Michael Harbor, but in such an unmanageable condition that she went ashore there. Her crew and passengers were rescued with danger. The evidence shows that the Louise left St. Michael at midnight, and returned to the harbor and was beached about 4 o'clock in the morning. The barges were cut loose about 2:30 a. m., about a mile or a mile and a half off shore. The wind was blowing at the rate of 30 miles an hour on shore.

The libelants were at the St. Michael wharf when the Louise left there at midnight (McKinney testifies to hearing her signals of distress), and was at her place of stranding in St. Michael harbor at 4 o'clock, and remained there an hour or more. In company with one McSherry, he interviewed one Lascelles, a fireman who came ashore from the Louise, and testifies that Lascelles told them the barges had been cut loose some nine miles north of the coast. Well knowing that the barges would come ashore before such a wind, he testifies that "finally we made up our minds that it would be a pretty good thing for us to strike out on our own hook on a little salvage expedition." So accurate was the information obtained by them from Lascelles that they went speedily and directly to the spot where the barges had been beached by the master. It was eight miles distant along the beach, and upon the journey Spaulding and McKinney met, and thereafter continued and acted together. They testify that they saw the barges when yet distant from their final landing place a mile, and that they were all three coming rapidly ashore before the wind. This, they say, was about 7 o'clock in the morning. They also testify that two of the barges reached a point only 150 feet from shore by the time they arrived there, and that the third suddenly swamped about 300 or 400

feet from shore. They testify that they boarded the two stranded barges, got an anchor ashore, and a line fast to the anchor, and then, hauling in on the slack of the line, they drew the barges further upon the land, and thus preserved them. It is admitted that the wind continued to blow heavily on shore for two days, and the evidence is clear that there was no contrary and dangerous current and no danger of rocks.

A short distance away from where the barges beached stood an Eskimo village, and some of these people, being introduced on behalf of the respondent, testified that the barges came ashore just at sunrise, which would be very early at that season. This evidence agrees with that of the officers of the Louise. The Eskimo witnesses say that they saw the steamer and saw the barges cut loose, and that it was not long before the barges struck the beach solidly; that it was much later when the white men (the libelants) came, and that, when the white men arrived, the tide was falling, the strong wind having, as usual, carried the water out of Norton Sound and St. Michael Bay; before the white men (libelants) reached the barges, an Eskimo had gone on the barges to unfasten a dog, and had succeeded. They testified that they gathered from the surf much of the cargo coming ashore from the sunken barge, but deny that libelants did. They further testify that libelants did not reach the barges until 9 or 10 o'clock in the morning, and got out no anchor until the tide went out, leaving the barges flat on the beach, and making it easy to roll the anchor ashore.

It appears from the testimony that the goods rescued from the surf by the natives, or the libelants, or both, were of little value, and only sold for some \$28; that, as soon as the Louise landed, the respondent's officers sent out men to find and take charge of the barges and cargo, though the libelants beat them in the race by a few hours, but were promptly

ejected when respondent's employés did arrive. Libelants now claim salvage for the services rendered in putting out lines and rescuing goods from the surf.

There seems to be no ground for the foundation of such a claim. The libelants had nothing to do with beaching the barges in this sandy cove. That was designed and carried out by the officers of the respondent on board the Louise, and was the primary, if not the only, means of saving them. The on-shore gale blew the barges upon the sands and held them there. No evidence is offered to show that they could or would have moved a foot up or down the beach. The court is satisfied that no act done by libelants assisted in any way in holding the barges on shore; it was impossible to move them off in opposition to the on-shore wind. The anchors put out by the libelants, whether put out in the morning or evening, gave no aid in rescuing the property from peril, for the winds never abated their strength on shore, nor was it shown that, even if the course of the wind had changed, and come from the opposite direction, the barges could have lifted after once reaching their place on the crest of the high on-shore waves. Success in saving these barges and their loads was due entirely to the design of the officers on board the Louise beaching them at a safe place. True it is that the libelants, in pursuance of the information given them by the fireman of the Louise in St. Michael, were enabled to race across the tundra and reach these barges ahead of the employés of the respondent; but they rendered no meritorious services in saving either the barges or cargo. They knew that the officers of the Louise had cut them loose, and that they would find them on shore, as they did. Their action in racing there and boldly taking possession of them was, as McKinney well said, a "little salvage expedition"—a predatory excursion without a single just or equitable feature of salvage service to excuse it. Their service brought no suc-

cess in saving the property. It was not a meritorious service nor beneficial in any respect. It resembles, more than anything else, the action of the master of the Timandra in placing a man on board the bark Cleone for the purpose of dividing another man's property because he rescued it first in the race.

"Useful services of any kind rendered to a vessel or her cargo, exposed to any impending danger and imminent peril of loss or damage, may entitle those who render such services to salvage reward. * * * Compensation as salvage is not viewed by the admiralty courts merely as pay, on the principle of a quantum meruit, or as a remuneration pro opere et labore, but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertaking to save life and property." The Blackwell, 77 U. S. (10 Wall.) 1, 19 L. Ed. 870.

Public policy suggests that courts ought to be fair, and even liberal, in compensating salvors who have thus saved derelict property, but no such liberality can be shown unless it affirmatively appears that their services were an aid to the enterprise. Beach-combing, predatory excursions to fasten upon another man's property before he can reach it, mere possession, without aid in saving it from peril—these are not services for which admiralty courts will award salvage compensation. Whatever may be said of the labor performed by the libelants in going to the place of wreck, their efforts to get anchors and lines ashore, and their alleged salvage of wreckage from the sunken barge, it is my judgment that it falls far short of invoking the equitable principle of admiralty law which can justify this court in decreeing them an award as a compensation for such services. The efforts of the officers on board the Louise, and the prevailing winds of which they took advantage, are entitled to all the credit for saving what was saved from their tow, and nothing can be awarded to the libelants for their intrusion when their services were not needed. Let a decree be entered against the libelants.

BINSWANGER et al. v. HENNINGER et al.

(Second Division. Nome. March 15, 1902.)

No. 409.

1. MINES AND MINERALS—TENANCY IN COMMON.

A mining claim is real property. By section 62 of the Civil Code of Alaska (Act June 6, 1900, c. 786, 31 Stat. 501) joint tenancy is abolished, and all persons having undivided interests in real property, including mines, are tenants in common.

2. DESCENT AND DISTRIBUTION—ESTATES.

Real property descends directly to the heir upon the death of the ancestor, "subject to his debts." The only jurisdiction of the probate court lies to enforce the lien of the ancestor's debts against the real property. If there are no debts, the heir becomes vested at once with the title of the ancestor.

3. MINES AND MINERALS—INJUNCTION—TENANCY IN COMMON.

One tenant in common may maintain an action for the recovery of a mining claim without joining his co-tenants as parties. One co-tenant may enjoin another from waste or from appropriating the entire proceeds of the mine.

4. CONTRACTS—PARTNERSHIP.

Where several parties sign a mutual contract to locate and work mines in Alaska between two specified dates, one of the parties who locates a mine in his own name and interest between the dates mentioned has the burden of proof to show that the contract had been mutually rescinded prior to his location.

On the 26th day of April, 1898, at Seattle, King county, Wash., Albert Speer, Adolph Binswanger, A. J. Lawrence, Samuel Henninger, Charles Coburn, and O. T. Collins made, signed, and acknowledged an agreement of copartnership, as they called it, whereby they agreed to jointly locate and work mines in Alaska until October 1, 1899, and that all mines located by either party during that period in Alaska should become the property of the copartnership. On or about July 7,

1899, one of these parties, Samuel Henninger, located the Anny placer mine, near Nome, in his own name, and in violation of the alleged rights of his copartners, and on July 5, 1901, he sold it to the defendants Carter, Boland, Mason, and Pearse, and placed the deed in escrow with the Alaska Banking & Safe Deposit Company as trustee.

It further appears that about September 25, 1899, A. J. Lawrence and Albert Speer, two of the partners, died; that prior to his death Speer sold a one undivided half interest in all of his Alaska mining interests to plaintiff Cassie S. Marcy. This suit is now brought by Binswanger and Coburn, two of the original partners, with W. N. Lawrence, Alden M. Lawrence, Elizabeth R. Stansberry, née Lawrence, Bede M. Lawrence, and M. S. Lawrence, as the heirs at law of A. J. Lawrence, deceased, and one of the copartners, and Cassie S. Marcy, representing a one-half interest in Albert Speer's share, against Samuel Henninger, a partner, and his grantees, to determine and declare the title of the plaintiffs in the Anny mine, and to enjoin the delivery of the deed from Henninger to his grantees. All of the original parties to the agreement of April 26, 1898, are made parties, or are represented, except Olaf T. Collins and an undivided one-half interest held by Albert Speer.

To the amended complaint alleging these facts a demurrer is filed upon the grounds: (1) That the heirs of A. J. Lawrence, merely as such, and without proper probate proceedings, cannot maintain the suit as plaintiffs; (2) that it can only be maintained, so far as the Lawrence interest is concerned, by his personal representatives, an administrator or executor; (3) that there is a defect of parties plaintiff, owing to the absence of the personal representatives of Albert Speer; and (4) that the complaint does not state facts sufficient to constitute a cause of action against the defendants. No objection is urged in the demurrer to the fact that Col-

lins is neither a plaintiff nor a defendant, nor his interest put in litigation.

P. J. Coston, for plaintiffs.

James E. Fenton and C. S. Hannum, for defendants.

WICKERSHAM, District Judge. A mining claim is real property. By the provisions of section 62, Civ. Code, p. 367, Carter (a re-enactment of the Oregon Code in force at the time of the agreement in question), joint tenancy is abolished, and all persons having an undivided interest in real property are to be deemed and considered tenants in common. The parties to the agreement of April 26, 1898, if at all interested in the Anny claim, were co-tenants, and not mining partners. Sections 788 and 796, *2 Lindley on Mines*. Real property descends directly to the heir upon the death of the ancestor "subject to his debts." Section 168, Civ. Code, p. 384, Carter. The heir obtains title by descent, and not through the process of the probate court. His title vests immediately upon the death of the ancestor, and the only jurisdiction through probate lies to enforce the lien of the ancestor's debts against the real property. If there are no debts, the heir becomes vested at once with a complete title. *Lohmann v. Helmer* (C. C.) 104 Fed. 178. If the ancestor was a co-tenant, the heir stands in his place. Speer's sale of an undivided half interest was valid, and Marcy became a co-tenant in the mine. A tenant in common may maintain an action for the recovery of a mining claim without joining his co-tenant. *Morenhaut v. Wilson*, 52 Cal. 263; *Weise v. Barker* (Colo. Sup.) *2 Pac.* 919. As to the right of the plaintiffs, as co-tenants, to enjoin the defendants from extracting and converting the gold to their exclusive use, Lindley says:

"It may be generally conceded, particularly in the precious metal bearing states where the reformed procedure has been adopted, that where a co-tenant in possession, who either works in so unskillful a

manner as to amount to destructive waste, or, being in possession under an unequivocal hostile assertion of exclusive title, seeks to appropriate the entire product to his own use, an injunction will lie at the instigation of the injured co-tenant. The remedy at law by an action of trespass or trover for rents and profits, or one sounding in damages only, might be wholly inadequate." 2 Lindley, § 790.

The demurrer will be overruled.

On the Merits.

This is an action by the plaintiffs, as partners with Samuel Henninger, one of the defendants, to recover their alleged partnership interests in a mining claim located by the defendant, and described in the complaint. It appears that the defendant Henninger, together with Binswanger and others of the plaintiffs, entered into a written agreement of partnership on the 26th day of April, 1898, for the purpose of prospecting for mines, both placer and quartz, in Alaska, from that date until the 1st day of October, 1899. The complaint sets out the contract, and alleges that it was recorded on the 4th day of October, 1900, in the commissioner's office in Nome; that, in pursuance of the contract, the parties all came to Alaska, and engaged in the business described in their articles of copartnership; that on July 7, 1899, the defendant Henninger located the mine in question in his own name; that he remained in possession of it until about July 5, 1901, when he sold the same to the other defendants in this action, except the Alaska Banking & Safe Deposit Company, in whose hands the deed from Henninger to the other defendants was placed in escrow. The plaintiffs allege their interest in the property under their articles of copartnership, and the insolvency of the defendants, and then ask for a judgment that they be decreed to be the owners of the interests to which they would be entitled in their articles of copartnership.

The defendants, answering, admit the making of the arti-

cles of copartnership set out in the complaint, and as a defense thereto allege that, prior to the time when Henninger located the mine in controversy, he and his other partners had a full and complete settlement of all their partnership affairs, and had divided their partnership property; that they had dissolved their partnership agreement, and that said agreement had no further binding force or effect upon either of the parties thereto. The reply is a denial of all the material allegations of the answer.

An application was made by the defendants for a continuance, and the affidavit filed in support thereof alleged that Henninger and Collins, two of the partners, were without the District of Alaska, and sets out that, if they were present, they would testify to the facts alleged in the answer, to wit, to the dissolution and settlement of all partnership affairs prior to the location by Henninger on July 7, 1899. Rather than permit a continuance in the case, the plaintiffs admitted that those two partners would so testify if present, and the court denied the continuance, upon the agreement that the affidavit should stand as their evidence in the case. Upon the trial, Binswanger and Coburn, two of the partners, testified and denied positively that there was any such settlement or dissolution of the partnership property in question. The testimony of Collins and Henninger, taken in the matter of the estate of Albert Speer and A. J. Lawrence, two of the partners, who were drowned off the Alaskan coast, was introduced in evidence by consent. The articles of copartnership in this case are particularly against the defendants. The first clause, after naming the parties, continues: "Agree to and do hereby become partners in the business of prospecting for mines, both placer and quartz, in Alaska, from this date until the first day of October, 1899." The next clause in relation to this particular branch of inquiry reads as follows:

"No member of this co-partnership can withdraw prior to the 1st day of October, 1899, and in the event either of the partners hereto should desire to sell his interest in said co-partnership, he shall give to the remaining partners, or whichever of the partners shall desire, the preference right to purchase his interest in said copartnership for the period of thirty days after notice has been given by him of his intention to withdraw and of his desire to sell his interest therein."

The agreement provides in detail for the death of members, and the manner of conducting the business in case of the death or retiring of any member, as provided in the section last quoted, and then the next clause reads:

"The copartnership hereby formed shall terminate on the 1st day of October, 1899, unless the copartnership is by the consent of all the parties hereto, then surviving, continued beyond the last-named date."

It then goes on to provide a method for continuing the partnership from year to year after the said 1st day of October, 1899. A method is provided for settling all their difficulties and limiting the right of any partner to sign obligations without the consent of a majority. The agreement provides that:

"All mining claims, whether placer or quartz, and all properties or property acquired in Alaska by either of the parties hereto, during the continuance of this contract, shall be and become the property of said copartnership; and all claims or other property located or acquired by either of the parties hereto, during the life of this contract, or any period of time which the same may be extended, shall be located and acquired in the name of all the members of the said copartnership," etc.; "and in the event either of the parties hereto should acquire in his own name any such mining claims, the same are nevertheless to be and become the property of said copartnership; and such member shall, upon request so to do, duly transfer and convey the legal title thereto to said copartnership. Each member of this copartnership has an equal interest therein, and in the profits and property thereof, and shall bear equally all the expenses thereof."

This contract is set up by Henninger's partners as the basis of their right to share with him in the location of the mining claim made prior to October 1, 1899. It seems to the court to put the burden of proof upon Henninger. He must convince the court, by a preponderance of the evidence, that the copartnership is dissolved, as alleged by him, for he admits the making and signing of the articles of copartnership. I am satisfied, from all the evidence in the case, that he has failed to do that. The plaintiffs made a *prima facie* case by alleging and proving the articles of copartnership and the location of the mine within the life of the agreement. Two of the partners, as witnesses, testified that the agreement was dissolved; two other partners, as witnesses, deny the dissolution. I am satisfied, from all the evidence and from Henninger's management of their boat and other property, and the fact that he sold the schooner and kept the proceeds, and that they held certain meetings at which he was present, that there was no agreed dissolution of this copartnership prior to the location of the claim by Henninger. It is probably true that there were dissensions among the partners, and I am inclined to believe that these difficulties arose very largely from Henninger's management, which evidently was not satisfactory to his copartners, for they afterwards removed him before the end of the copartnership.

My conclusion from the evidence in the case is that the copartnership was not dissolved at the time Henninger made his location; that his location was made for the benefit of all; and that they are entitled to their share, as shown by the contract.

It is alleged that the other defendants who purchased their rights from Henninger are in possession, and threatening to extract the substance of the estate, in violation of the rights of the plaintiff partners, and an injunction is asked restraining them from so doing, on the ground of their insolvency.

A decree may be entered in favor of the plaintiffs, and an injunction will be issued against the defendants working the claim, except in accordance with the opinion of the court, as co-tenants with the plaintiffs and as successors to the Henninger interests.

McMORRY v. RYAN.

(Second Division. Nome. March 22, 1902.)

No. 278.

1. NEW TRIAL—EVIDENCE—VERDICT.

When there is a conflict of testimony, the court ought not to set the verdict of a jury aside and grant a new trial, even though the judge would have reached a different verdict upon the same evidence. When, however, the jury renders a verdict upon evidence insufficient to justify it, or in violation of the law, it is the duty of the judge to set it aside and grant a new trial.

Motion to set aside the verdict of a jury and for a new trial.
Granted.

Thompson, Murane & Thompson, for plaintiff.
V. T. Hoggatt, for defendant.

WICKERSHAM, District Judge. This cause comes before the court upon defendant's motion for a new trial, it having been decided by the jury in favor of the plaintiff.

Where there is a conflict of testimony, the court ought not to set the verdict of a jury aside and grant a new trial, even though the judge would have reached a different verdict upon the same evidence. Where, however, the jury render a verdict upon evidence insufficient to justify it, or in violation of the law, it is the duty of the judge to set it aside and grant a new trial. The motion in this action is based upon the in-

sufficiency of the evidence to justify the verdict, and that it is against the law.

It was not disputed by any evidence that Linden located the lot in question and entered into its occupancy and possession in 1899, erected some kind of a house, a fence, and a sidewalk, and then sold it to Ryan for \$1,000. Neither is it denied that Ryan left it in charge of an agent and went outside in the late fall of 1899 to make arrangements, which he testifies he perfected, to build a large and substantial building thereon. The only conflict of testimony is over the character and kind of structure on the premises during the fall, winter, and spring of 1899-1900. This conflict is immaterial, for the court instructed the jury, in effect, that Ryan could maintain the former occupancy and possession gained by Linden, by his agent, during the winter, if he went out intending to return with material and build on the lot, and the testimony to that effect was undisputed.

The court will not approve verdicts which will place every land title within its jurisdiction in jeopardy, and at the mercy of the swaying and uncertain will of a jury. The law intends that such titles shall be fixed and secure. The jury, it is true, is empowered to hear, and, from the evidence, and the law as given to them by the court, to award the right of possession; but there must be some adherence to the rules of law and evidence, and, if not, the verdict must be set aside.

The jury in this case clearly disregarded both the law and the evidence in rendering its verdict, not in immaterial or disputed matters of evidence only, but in respect to those which were admitted and most material to the issue. For these reasons, the verdict will be set aside and a new trial awarded.

BEHRENDS v. GOLDSTEEN.

(First Division. Juneau. March 29, 1902.)

No. 931.

1. PUBLIC LANDS—MINES AND MINING—TOWN SITE—ADVERSE SUIT.

The owner of a town lot in Alaska, unpatented, lying within the exterior boundaries of a mining claim, may not adverse an application for a patent for said mining claim, under sections 2325, 2326, Rev. St. [U. S Comp. St. 1901, pp. 1429, 1430], and cannot maintain an action in a court of competent jurisdiction in support of such adverse. *Contra, Young v. Goldsteen (D. C.) 97 Fed. 303.*

2. MINES AND MINING—PUBLIC LANDS—DEPARTMENT OF INTERIOR—JURISDICTION.

Under its power to dispose of the public domain, the Department of the Interior has sole jurisdiction and power to determine the mineral or nonmineral character of lands so held for disposition. The court has no such jurisdiction.

3. SAME—TOWN SITE—PROTEST.

The owner of a town lot in Alaska, unpatented, lying within the exterior boundaries of a mining claim, may contest the mining location and determine the character of the ground by a protest filed in the land office.

4. PUBLIC LANDS—EXECUTIVE ORDER—RESERVATION

The acts of the Secretary of the Navy in reserving parts of the public domain are, in legal effect, the acts of the President. A portion of the public lands in Alaska set apart by order of the Secretary of the Navy, and used by that department for public purposes connected with the navy, constitutes a valid reservation by the executive.

5. MINES AND MINERALS—DISCOVERY—RESERVATION.

A discovery of mineral within a tract of land reserved by proper authority, and used for naval purposes, is without effect and void, and will not sustain a location of a mining claim. The discovery of such mineral within the boundaries of such reservation will not sustain a mineral location which lies partly within and partly without such reservation. The whole mining claim is void.

Suit in adverse proceeding by a town-lot claimant against the applicant for a mining patent under sections 2325, 2326; Rev. St. [U. S. Comp. St. 1901, pp. 1429, 1430].

Arthur K. Delaney and Oscar Foote, for plaintiff.

J. H. Cobb, for defendant.

BROWN, District Judge. This case comes on for hearing on the amended bill of complaint and answer, and the evidence as reported by the referee.

The first question presented to the court for consideration arises out of the peculiar circumstances of the case. The defendant proceeded, through the United States land office, to secure a patent to a certain lode mining claim, or alleged lode mining claim. The plaintiff, the owner and occupier of a town lot in Juneau, filed an adverse in the land office, and brought suit, in accordance with the mining laws, in support thereof. At the threshold of this case we are confronted with the question, can the holder, owner, and occupier of the surface ground on mineral land "adverse," under the mining laws, the application for a patent of a lode mining claimant, where the town lot claimed is within the exterior boundaries of the lode mining claim? Section 2325, Rev. St. U. S., describes the procedure that must be taken to procure a patent to mineral land, and also states the presumption that shall follow if no adverse is filed in the land office within the 60-days publication required by statute. Section 2326, Id., provides what the adverse shall contain, the procedure thereon in a court of competent jurisdiction, and the results that shall follow the judgment of the court at the trial. The party obtaining judgment in the court must file a copy of the judgment roll with the register of the land office, together with a certificate of the surveyor general that the requisite amount of work has been done or improvements made thereon, the description as required in other cases, the payment of \$5 per

acre for his claim, etc., whereupon patent may issue. This section, by giving the party adverse to the right to a patent upon paying \$5 per acre required for mineral lands, and otherwise complying with the statute, clearly implies, it would seem, that the adverse claim would be for mineral land. The entry and patent thereon that follows the adjudication of the court is the method provided only for the entry of mineral lands.

The reading of the two sections referred to, viz., sections 2325 and 2326, impresses the mind so forcibly with the idea that they deal wholly with mineral lands, and no other, that the conclusion seems inevitable that a town-lot occupier, claiming no interest in the lands as mineral lands, cannot adverse under said sections. Indeed, the Supreme Court of the United States, in construing these sections, says:

"The purpose of the statute seems to be that where there are two claimants to the same mine, neither of whom has yet acquired title from the government, they shall bring their respective claims to the same property, in the manner prescribed by statute, before some judicial tribunal located in the neighborhood where the property is, * * * and the result of the judicial investigation shall govern * * * the Land Department." Iron Smelting Co. v. Campbell, 135 U. S. 286, 10 Sup. Ct. 765, 34 L. Ed. 155.

The court in the above case did not pass upon the question as to whether or not the town-lot claimant could adverse the mineral claimant. That matter was not in issue, but the court was construing the statute generally, and defining its object and purpose. This question is also discussed by Lindley in his work on Mines, at section 717; and I think the view of the question which he presents is a true one, namely, that, if an "adverse" could be entertained in such cases, it would result in the court being compelled to determine the mineral or nonmineral character of the land, instead of determining the rights of rival mineral claimants.

The Department of the Interior of our government, under

the acts of Congress, seems to be vested with the sole power of disposing of the public lands, both mineral and nonmineral. The character of the land determines the price to be paid. Mineral lands have always been reserved from pre-emption, homestead, and desert locations, and from public grants of railroads. The necessity that this department of the government shall determine the character of the lands held for disposition under the various acts of Congress is often urgent and pressing. To divest it of that power would be equivalent to taking from it all power to act in the disposition of the public domain, until power to determine the character of the public lands should, by act of Congress, be vested in some other department or tribunal. It is sufficient to say at the present time that the only tribunal vested by act of Congress with this power is the Department of the Interior. That department having jurisdiction over all public lands, and alone being vested with the authority to determine the character of the lands under its disposal, it is illogical to hold that this power is transferred to the courts in "adverse" proceedings under the mining laws, and that in such proceedings the court can be called upon to pass on the question of the mineral or nonmineral character of lands, in order to determine the rights between town-lot claimants and mineral claimants. To hold that adverse proceedings could be instituted by a town-lot claimant against a mineral claimant would be to hold that the jurisdiction of the Land Department to pass upon the question of the character of land under its control can be taken from the department and vested in the judicial branch of the government, without any express act of Congress upon the subject, simply by the filing of an adverse on the part of the town-lot claimant. Notwithstanding there may have been some such dicta expressed by the courts, and at one time by the department, I cannot give my assent to the doctrine. I therefore hold that, so far as the maintenance of

this suit depends upon adverse proceedings in the land office, it is without support.

A protest filed in the land office by the town-lot claimants would raise the question of the mineral or nonmineral character of the land, and the Interior Department would thereupon determine that question, acting within its undoubted jurisdiction. A paper prepared as an adverse, when not properly in the land office as such, is often received and accepted as a protest, and is permitted to serve that purpose.

From the decision of the Secretary of the Interior offered in evidence in this case, it would seem that the proceedings in the land office involved this question of the mineral or non-mineral character of the land claimed by the defendant in this action as a lode mining claim, and that the department determined the same. Of course, we all understand the offices of an "adverse" and a "protest" in procedure to obtain patent to mineral land. The former denies the right of the first claimant to the land in question, and sets up his own title thereto. These are therefore adjudicated in the courts. The protest challenges the proceedings of the first locator, and thereby may raise the question of the character of the land for the action of the department. It is in the nature of a demurrer to the plaintiff's complaint. As before stated, whatever the character of the paper filed in the land office in this case, it is not sufficient, in my opinion, to vest this court with jurisdiction as an "adverse" proceeding.

But there are matters presented in the complaint on file that require the court to determine the rights of the parties as to the possession of the lands or lots in controversy in this case, outside of the proceedings in the Land Department. The plaintiff alleges that the so-called lode claim location was made, not for the purpose of extracting the precious metals therefrom, but thereby fraudulently to procure title to the surface land embraced within the exterior boundaries of said

location, whereby the defendant might extort from the plaintiff, and any others in like situation, large sums of money for the lots upon which valuable improvements have been erected, and whereon the plaintiff and such others have lived and transacted business for many years, going back to the time long before said mineral location; that there are no precious metals in said pretended lode claim; that the pretended discovery was upon a naval reservation where no mineral location could be made, etc. The court is of the opinion that if the land in question was known to be nonmineral when located; if the claimed discovery was a mere pretense, and was upon a known military reservation; if the boundaries of the mineral location were, after the original staking, so extended as to take in a greater area of surface land; if the land so embraced had expensive structures thereon—these are all facts that may be considered as bearing upon the question of defendant's fraud in making the location, and the ultimate fact of the right of possession.

I shall first examine the question of the reservation. Did the action of the naval officers, including that of the Secretary of the Navy approving the action of the naval officers in surveying, taking possession of, and occupying what has been called "Block C," constitute the same a reservation? Considering the correspondence between the several naval officers; the original survey of the town site of Juneau, whereby it appears that block C was set apart by the naval officers and occupied as a naval reservation by them (they having erected buildings thereon for such purpose), the report of Lieutenant Commander Henry E. Nichols to Secretary William E. Chandler as to the claimed naval reservation; the disposition thereof, in turning it over to the civil authorities until it might be needed for naval or military purposes; and the letter of Secretary Chandler in answer thereto, which is in the words and figures following:

"Referring to your letter of Sept. 29th, concerning three houses and a small land reservation at Juneau, Alaska, which you have reason to believe belong to the Navy Department, but which are now occupied by the civil authorities, to whom you have given notice that such occupation is subject to the right of this department to take possession thereof when needed for naval (military) purposes, you are informed that your action is approved.

"Very respectfully,

Wm. E. Chandler,

"Secretary of the Navy."

--Together with the continuous possession and occupation up to the present time--do all these matters present such acts and evidence as, under the authorities, constitute a reservation? The acts of the heads of the several departments in matters appertaining to their respective duties, it is said, are, in legal effect, the acts of the executive. Wilcox v. Jackson, 13 Pet. 498-513, 10 L. Ed. 264. See, also, Wolsey v. Chapman, 101 U. S. 755, 25 L. Ed. 915; United States v. Stone, 2 Wall. 525, 10 L. Ed. 572; Hegler v. Faulkner, 153 U. S. 109, 14 Sup. Ct. 779, 38 L. Ed. 653. See, also, the opinion of the Secretary of the Interior in this case. This opinion was, no doubt, prepared under the direct supervision of the assistant attorney general for the Department of the Interior, Judge Willis Van Deventhal, a lawyer of a high order of ability and unusual legal acumen, and in whose judgment this court places great reliance. From all the facts presented by the record, under the authorities above referred to, the court is of the opinion that block C was at the time said lode claim was located, ever since has been, and is now, a naval reserve, duly and lawfully established.

The evidence contained in the record shows that the discovery of mineral, if any such was ever made within the exterior boundaries of said lode claim location, was at a point within the limits of said naval reserve. It has been so frequently decided that no mineral location can be lawfully made upon lands reserved from sale by the government, that it is deemed

inadvisable and unnecessary to discuss that question. It seems to follow inevitably that, as no mineral location can be lawfully made upon a reservation, the discovery or claimed discovery of mineral on block C in the town of Juneau could not be made the basis of a lawful location. The discovery in this case of mineral of value does not seem to be conclusively proven. Discovery is a condition precedent to a lawful location. *Murley v. Ennis*, 12 *Morr. Min. R.* 360; *Erhardt v. Boaro*, 4 *Morr. Min. R.* 432, 8 *Fed. 692*; *Id.*, 113 U. S. 527, 5 *Sup. Ct.* 560, 28 *L. Ed.* 1113. The discovery shaft must be on the public domain, and on lands subject to location. *Upton v. Larkin* (Mont.) 6 *Pac.* 66; *Little Pittsburg Min. Co. v. Amie Min. Co. (C. C.)* 17 *Fed. 57*; *Armstrong v. Lower*, 6 *Colo.* 393; *Golden T. Co. v. Mahler*, 4 *Morr. Min. R.* 390; *Moyle v. Bullene* (Colo. App.) 44 *Pac.* 69. It has also been decided that, where a party allows a claim held by other parties to go to patent over his discovery shaft, the loss of the discovery is the loss of the location. *Gwillim v. Donnellan*, 115 U. S. 45, 5 *Sup. Ct.* 1110, 29 *L. Ed.* 348; *Miller v. Girard*, 3 *Colo. App.* 278, 33 *Pac.* 69. It is said that where a senior claimant allows a location to be made over his discovery shaft, and to go to patent, his claim becomes a void location, not only as to such patent, but as to all persons and claims. *Morrison's Mining Rights*, p. 34. It seems also to have been held that a location of a claim, based upon a discovery outside the exterior boundaries thereof, though the strike of the lode would extend into the claim staked off, is a claim without a discovery, and is void. *Michael v. Mills* (Colo. Sup.) 45 *Pac.* 429.

The discovery of the lode claim in controversy, being admittedly within the lines of block C, a naval reservation, and therefore not on land open to exploration or location, must, upon authority as well as in reason, be void for all purposes, and held as no lawful location of a mineral claim. But it may

be urged that there has been a discovery of mineral within the boundaries of said mining claim and outside the naval reserve. A discovery, to be of value, must be of rock in place, carrying mineral. The evidence in this case on the part of the defendant discloses some work done outside the reservation, in a certain cut; but the evidence of several witnesses for plaintiff is to the effect that they went into this cut, to the back end thereof, and no quartz or mineral-bearing rock could be discovered therein. The weight of the evidence clearly shows that no mineral-bearing rock in place was shown in said cut or tunnel. It cannot be said, then, that any discovery has been made, beyond the limits of said block C, of a character that would support a lode location. It is hardly worth the while, however, to consider this branch of the case. The discovery shaft, and the place where all the improvements of any value have been made, within the exterior boundaries of said lode claim as located, were within the exterior boundaries of said block C. The discovery upon which the location of the lode claim was based, and the only discovery to support such location, was within said block C. That being true, the location was and is void, and gives the defendant no right to the possession of any of the surface ground within the limits of said location as made. The plaintiff has actual possession of his lots, has erected valuable improvements thereon, and has a possessory title of value—a title that can be sustained in the courts of Alaska. *Carroll v. Price* (D. C.) 81 Fed. 137; *Bennett v. Harkrader*, 158 U. S. 441, 15 Sup. Ct. 863, 39 L. Ed. 1046; *Malony v. Adsit*, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163.

If the defendant had a legal mining location, she had a right to all the land within the surface boundaries of her claim. Her claim would be an interest in the land—one that could be mortgaged, conveyed, and inherited. Her possession need not be continuous. So long as she performed the

requisite annual labor to represent said claim, her right of possession would continue, and she would be under no greater obligation to remain upon the ground, or to fence the same or perform other acts of possession, than if she were the owner in fee. But not having a valid location, and being without possession, except as to the work and labor expended on block C, she is without right, title, or interest in the land in controversy. I might rest the decision of this case upon the propositions before considered, but, as much has been said about the value of the mineral found in the discovery shaft and tunnel on block C, I will refer to that matter briefly.

Men who are reputed to be men of high integrity, and some of them without any interest in the lots or claim in dispute, have examined these workings. They, as well as men more or less interested, show by their testimony that there is no mineral-bearing rock to be found in either shaft or tunnel; that there are found small stringers of quartz or quartzite which is not mineral-bearing; and that there is no vein or lode. The general consensus of opinion among the miners seems to be to the effect that there is no more mineral to be found in the rock at the point of discovery than is found at almost any other point extending across the mineral-bearing zone passing across this country, several miles in width. I am not unmindful that there is evidence of an interested party for defendant, who testifies that specimens of rock were taken from the tunnel on block C and handed Davis for assay; and that Davis testifies to assays showing large values. I also recall that a miner of experience, who is familiar with the various properties of this section, says that he found at the shaft, at point of discovery, quartz which, from its looks and appearance, he knew came from a lode claim in the "basin," and never from the claim in dispute. I do not find this statement denied. If the statement is true—and there was said to be a large amount of this rock at the shaft—

it must have been carried there for a purpose. If carried there in quantity, the purpose to be subserved must have been deception; and the court is constrained to suggest that, if any one would carry rock to that shaft to deceive, they would also hand it for a like purpose to Davis for assay.

Evidence is offered to show that rock of value was taken at a point on what was supposed to be the same lode, at a distance from the end of the Bonanza lode claim of some 200 feet or more, to prove that the Bonanza lode claim contains value. This evidence is rejected, as not tending to show values in the Bonanza. The common experience of miners is that ore of value at one place on a lode, even where it is demonstrated to be the identical vein, is no evidence that such values will be found even 20 feet distant—much less, 200 feet away; at least, where it is not demonstrated that the ore of value is from the strike of the same vein. I am of the opinion that the so-called Bonanza lode claim is not shown to be a lode, nor to contain any values such as would warrant a practical miner in developing the same, or expending money thereon for that purpose; on the contrary, that this so-called Bonanza lode was never located with the expectation of obtaining valuable minerals therefrom, and such improvements by work and labor as have been expended thereon have not been expended with such expectation or purpose, but to secure title to the surface by the subterfuge of a mining claim, for the purpose of extorting money from lot owners occupying the surface of said land. I am of the opinion that the Bonanza location was made and attempted to be kept up as a fraudulent scheme, and without any merit whatsoever, and that as a mining claim it is without value. It follows from these views that the judgment in the several cases must go to the plaintiffs, and it is so ordered.

LEWIS et al. v. JOHNSON.

(First Division. Juneau. March 29, 1902.)

No. 444.

1. LIMITATION OF ACTIONS—PRESCRIPTION—PUBLIC LANDS.

It has long been the settled doctrine that a statute of limitations does not run against the government, and that no prescriptive right or title can be acquired to public lands.

2. PUBLIC LANDS—TIDE LANDS—TRESPASS.

A trespasser cannot acquire a prescriptive right or title to tide lands by mere occupancy. The upland owner has a right to build a wharf upon tide lands in front of his property, notwithstanding a trespasser's presence on the tide lands.

3. SAME—TOWN SITE—TRUSTEE.

A town-site trustee is charged with the duty of determining who of several claimants to a lot or lots was in rightful possession, and to make title to the rightful possessor. The Department of the Interior has sole jurisdiction over such matters, and its action thereon is final.

This suit was begun May 4, 1895. The plaintiffs allege possession of the property in dispute by themselves and their grantors from the year 1881 down to the present time. It seems that application and survey for patent of the town site of Juneau was made in 1893; that in July, 1898, after the patent for the town site was obtained, a deed was made by T. R. Lyons, town-site trustee, to the plaintiff Lewis, and another deed in 1900 to the defendant. The plaintiffs pray that they may be decreed to be in the free use and occupation of the tide lands in dispute, and entitled to exercise all riparian and littoral rights over the same; that an injunction restraining defendant from building a wharf over said land, or permitting the piles already driven and buildings erected on said lands to remain thereon may be granted, and to forever restrain defendant from driving piles or constructing any obstruction.

on said lands, or in any manner interfering with the plaintiff or his co-owner in the free use and occupation thereof.

The defendant, by answer, denies possession or right of possession in plaintiffs; claims to have settled on and erected improvements on said lands as early as 1887, and that the same had been occupied thence hitherto by him and his grantors; and, further, that he has acquired such possessory rights in the premises as entitle him to retain the same against the owner of the upland.

The testimony of Garside is to the effect that the upland lots 7 and 8 ran to the shore line; that the Hanus survey, that had been made long before the town site was entered, ran to the shore line; and that the survey made by said Garside was made to conform to the Hanus survey. Witness Thomas R. Lyons testifies to having made the deeds offered in evidence, and that the southern boundary of said lots 7 and 8 in block F is Gastineau Channel.

This case seems to have had a somewhat remarkable history. When the complaint was first filed, a demurrer was interposed by the defendant challenging the sufficiency of the complaint. The case was begun before Judge Truitt. The demurrer was argued before Judge Delaney, his successor, whose very clear, concise, and vigorous statement of the law on the subject in his opinion in passing upon the demurrer will be found reported in *Lewis v. Johnson* (D. C.) 76 Fed. 477. Thereafter it would seem that Judge Charles S. Johnson came to the bench, and, having been interested in the case as brought, could not sit in the trial thereof. The case was then certified to the Circuit Court for this jurisdiction, and that court refused to exercise jurisdiction. *Lewis v. Johnson*, 90 Fed. 673. The papers were again returned to this court, and were thereafter all lost. On an application made in 1900, it was ordered that copies of said papers be supplied and filed in place of the originals, and the case proceeded with.

Thereafter the case was set down for trial, the evidence taken before a referee and reported back to the court during the vacation thereof last year, and for the first time comes up for trial at this term.

R. F. Lewis and John G. Heid, for plaintiffs.
Maloney & Cobb, for defendant.

BROWN, District Judge. It is very earnestly contended on behalf of the defendant that he has acquired title in said land by prescription. It has long been the settled doctrine of the law that a statute of limitations does not run against the king or state, and that no prescriptive right or title can be acquired as against either. But it is claimed that, inasmuch as the defendant was in possession of a certain portion of the tide lands before and at the time the plaintiff acquired his title to the upland, there was a severance by reason of such occupation by defendant; and that, when plaintiff received his deed, he acquired no interest in the tide flats as a littoral or riparian owner. The question is presented with great ingenuity on the part of counsel for defendant; so ingeniously, indeed, that it leaves one in some uncertainty as to the true doctrine in the case.

My view, however, upon the law of this question, is that no person can occupy any portion of the lands below high tide and by such occupancy acquire title thereto. They go upon such lands as trespassers, and remain trespassers until they are ejected by proper authority. It is my opinion that they can acquire no prescriptive rights whatever. But the question is whether they acquire such possessory rights in the land which they actually occupy as would preclude any one save the United States from dispossessing them. If the government, when it parted with its title to the land under the trustee's deeds, conveyed all interest to the shore line of Gastineau Channel, and persons holding such uplands, by reason

of title thereto, have a right of way, unobstructed by others, from their uplands to deep water, and the right to wharf out to deep water on their approach to the same, then it would seem that a party who has acquired no interest in the land below tide water, and is there as a mere trespasser, could have acquired no such rights as would prevent the owner of the upland from occupying the tide flats as a littoral or riparian owner.

Under the rules of the Department of the Interior, the town-site trustee was charged with the duty of determining who of several claimants to a lot or lots was in rightful possession of such lot, and to make title to the rightful possessor. The plaintiffs and defendant were, as shown by the evidence in this case, each in possession of portions of the lots in dispute at the time the patent issued for the town site and when the deed was made by the town-site trustee. The Department of the Interior had sole jurisdiction over this matter, and, when title was finally made to the plaintiffs to the two lots 7 and 8, all rival claims of possession and right of possession were thereby determined. This defendant was, therefore, precluded from asserting any further right, unless he pursued such remedy as might then have been open to him. As he acquiesced in the judgment then rendered against him, the plaintiffs took the property as a whole, free from any claim whatsoever that the defendant might assert thereto.

It is believed that, if the plaintiffs had received a patent to the land in dispute before it was occupied by defendant, and defendant had retained the open and notorious possession for the requisite term of years, he would have thereby acquired title by prescription, and a deed thereafter made by plaintiffs would not have carried title as against the defendant; the doctrine of severance in that case clearly applying.

I am free to say that I am not altogether clear as to the justice of this proposition, but I am inclined to believe that it

is the law as applicable to cases of this kind, and the court will therefore grant the relief prayed for in the bill of complaint.

Judgment ordered for the plaintiffs.

JUNEAU FERRY CO. v. ALASKA STEAMSHIP CO.

(First Division. Juneau. March 29, 1902.)

No. 802.

1. PUBLIC LANDS—TIDE LANDS—POSSESSION.

Tide lands in Alaska are not held for sale. No one can occupy them except as a trespasser. They can only be held by such character of possession as constitutes actual occupancy. A pile or two, or temporary and uncertain structures, not sufficient to acquire a right of possession or occupancy.

2. SAME—WHARVES.

The owners of uplands and shore line have a right to pass out over tide lands to deep water, subject to the rights of navigation and commerce.

This action is brought by the plaintiff to restrain defendant from building a wharf from the shore line of Gastineau Channel out to deep water, and the plaintiff company complains that steamship company, by building a wharf across a direct line from the shore, crosses certain tide waters over which the Ferry & Navigation Company claims a possessory right, whereby the plaintiff company would be obstructed in the use of its possessory holdings, and it is without remedy in the premises. The defendant sets up title by possession of the same tide waters as are claimed by the plaintiff, and insists upon the right of defendant company to occupy the same. The plaintiff claims title by occupation of a certain portion of this tide water, having, as it says, kept a "cradle" anchored on a part of the same, by itself and its grantors, since 1899.

The evidence in this case on the part of the defendant

shows that one Bulger held the possession of certain of the uplands bordering on the tide water for a distance of 50 feet along the shore of Gastineau Channel for several years prior to the time when the plaintiff first entered upon and took possession of any portion of this tide water, if it ever did take possession at all. Bulger occupied the upland until the town of Juneau was located and surveyed into lots and blocks, and, after that was done, Bulger accepted a deed for his upland holdings, which, by the terms of said deed, run down to a narrow street or walk, said to be five feet in width, at the shore line of said Gastineau Channel. But it seems from the testimony in this case that Bulger not only finally obtained title to the upland, but that he erected a small house on piles over the tide waters, in which he and several others lived for a number of years, the others living therein as his lessees; and that finally Goldsteen and Behrends bought the house and the shore line holdings from the estate of the said Bulger, and have occupied this small building, placed near the shore, ever since, or perhaps another building erected upon the same foundation after the old one had been torn down.

McCully, a witness for the plaintiff, at pages 17 and 18 of the record, says that there were two or three piles there (speaking of this particular tract) belonging to Bulger when witness moved there in 1889, that witness lived on that property from 1889 to 1898, and that the ferry company came there after he was living there. There is considerable testimony in the record to show the varied efforts of the ferry company to hold this property, and of a suit before a commissioner for possession of that part of the tide lands that was occupied by its "cradle." The testimony also is to the effect that this "cradle" was sometimes moored within the limits of this particular property and sometimes moved out to other places, and it would seem from the evidence that it finally drifted away.

Maloney & Cobb, for plaintiff.
R. W. Jennings, for defendant.

BROWN, District Judge. It is a matter of grave doubt whether a person can put a pile or two upon the tide flats, or any such temporary and uncertain structure as the "cradle" described by the witnesses in this case, and thereby establish possession, or right of possession. It is to be remembered that these tide lands are not held for sale by the government; that no one can occupy them as of right, as they can uplands, with a view of obtaining title thereto from the government when the land shall come into the market. All that go upon these tide lands are trespassers. They are there without right or authority of law. If they have possession, it must be such character of possession as keeps all others out, and such as constitutes actual occupation by themselves. The owners of the uplands, and probably of the shore line, have a right to pass out over their land to deep water, and their ownership of the land down to the shore line gives them a right to wharf out, if they desire, to deep water, subject, of course, to the rights of navigation and commerce.

If either the plaintiff company or Goldsteen had any rights in the particular tract of land in controversy, it would seem that Goldsteen had the better right, because of ownership of the shore line and occupation thereof even below the tide line, prior to any pretense of occupation whatsoever by the ferry company of the tide waters at a distance farther out from the shore. But the defendant company has built its wharf running out to deep water over the line of the Behrends' approach to the same from the shore, and has then constructed an "L," at a point farther out than the ferry company ever occupied or ever controlled. If, therefore, the plaintiff company could obtain any rights in said waters by possession and occupation of a portion farther out than that occupied by

Goldsteen and his grantors, the defendant company would have the same right to occupy a point farther out toward deep water on the same line as that occupied by the ferry company. But I think Goldsteen had the better right, which extended out to deep water; and, having conveyed that right to the steamship company, that company has a right to occupy the same for the purposes of a wharf. Its title by possession is a higher and better title than that of the plaintiff company. The relief prayed for by the plaintiff company is therefore denied.

VALENTINE v. ROBERTS.

(First Division. Juneau. April, 1902.)

No. 128a.

1 SUNDAY—APPEARANCE—ARREST.

The issuance and service of an order of arrest in a civil action on Sunday is void, and cannot be aided or cured by appearance and giving bond for appearance.

2. COMMON LAW—ALASKA.

The common law adopted in Alaska by sections 367 (Act June 6, 1900, c. 786, 31 Stat. 552) of the Code of Civil Procedure and 218 of the Criminal Code (Act March 3, 1899, c. 429, 30 Stat. 1285) is that body of law described by the Supreme Court of the United States in the case of *Patterson v. Winn*, 5 Pet. 241, 8 L. Ed. 108, in the following language: "The term 'common law' means both the common law of England, as opposed to written or statute law, and the statutes passed before the immigration of the first settlers to America."

Motion to quash writ of arrest in a civil action issued and served on Sunday.

Maloney & Cobb, for plaintiff.

Louis P. Shackleford, for defendant.

BROWN, District Judge. This case came to this court on appeal from the United States Commissioner's Court at Juneau.

On the 23d day of August, 1901, as appears by the files in this case, Emery Valentine instituted proceedings in a civil action against the defendant, John R. Roberts, to recover the value of a ring said to have been unlawfully and improperly appropriated to his own use by the said Roberts after the same had been lent to him by the plaintiff on the promise of said Roberts to return the same. Upon an affidavit filed with the complaint, an order of arrest was issued, and placed in the hands of Deputy United States Marshal W. S. Staley for service. It seems that Roberts was passing through Juneau on Sunday, August 25, 1901, and was found by the deputy marshal at that time, and, under the order of arrest issued by the commissioner's court, seems to have been taken into custody by the deputy marshal on said 25th day of August; that thereafter, and on the same day, the defendant gave bond for his appearance, and delivered the same to the marshal, and the said deputy marshal thereupon made return of the said writ or order of arrest on the said 25th day of August, 1901, the same being Sunday. The defendant, by his counsel, appearing in said commissioner's court specially and for the purposes of the action only, moved for the dismissal of the action on the ground that the defendant had been improperly arrested on a Sunday; that the court had no jurisdiction for that reason; that the said summons had been served on the same day—which also appears from the records and files of the case. The court below overruled the motions and held the defendant to answer, whereupon the defendant answered, making a general denial of all the facts set up and alleged in plaintiff's complaint, pleading specially that he had been arrested on a Sunday over his protest, that the same was a nonjudicial day, and that he was not, therefore, subject

to arrest on civil process, and that the court was without jurisdiction; also that the summons had been served on a Sunday, and was therefore void. It is further alleged affirmatively in the answer that the jewel referred to in the plaintiff's complaint was presented to him by the plaintiff, and that there was no understanding or agreement that the defendant should ever return the same. On this issue, the defendant not being personally in court to testify, the plaintiff recovered judgment in the lower court, and the defendant appeals therefrom to this court.

The matter is presented to the court at this time on the motion of the appellant, John Roberts, which is as follows:

"Comes now the appellant above named, and moves the court for an order quashing and vacating the service of the writ of arrest in the above-entitled action, and for an order vacating and setting aside the judgment in said action, the issuance of a writ of execution, and all the proceedings subsequent to the writ of arrest and summons, and for an order discharging the bail bond herein. This motion is based for the reason that it appears on the face of the transcript herein that the court has never had jurisdiction of the person of the defendant, and is based upon the record and files in said action."

It is contended on behalf of the plaintiff, Valentine, that the service made on Sunday was a good service; that it was legal in every particular; and further that, if said service was irregular and illegal, the giving of the bail bond by the defendant was a waiver of the original wrong in making such arrest, if there was a wrong; that the giving of said bond was an appearance in the case; that the court had jurisdiction; and that the judgment is right. On the other hand, it is contended on behalf of the appellant that the action of the deputy marshal in making said arrest on Sunday was illegal and void; that the service of the summons was illegal and void; that the taking of the bond was an illegal proceeding; and that in

fact everything that was done by the deputy marshal in this behalf was, in law, void and of no force or effect.

An examination of the files and proceedings in this case in the court below discloses that the defendant, Roberts, resisted the action of the court from first to last, predicated his defense largely upon the proposition that the court had no jurisdiction, because of the illegal acts of the deputy marshal in making his service, or what is claimed to be a service, on Sunday. The motion raises the entire issue on the face of the case as made in the court below. The court therefore is compelled to examine the law as to what may or may not be done legally and properly on Sunday. And first, let us examine our statutes on the question. Section 141 of the Criminal Code of Alaska (Act March 3, 1899, c. 429, 30 Stat. 1274) reads as follows:

"That if any person shall keep open any store, shop, grocery, ball alley, billiard room, or tippling house, for purpose of labor or traffic, or any place of amusement, on the first day of the week, commonly called Sunday or the Lord's Day, such person, upon conviction thereof, shall be punished by a fine not less than five nor more than fifty dollars. Provided, that the above provision shall not apply to the keepers of drug stores, doctor shops, undertakers, livery-stable keepers, barbers, butchers, and bakers, and all circumstances of necessity and mercy may be pleaded in defense, which shall be treated as questions of fact for the jury to determine, when the offense is tried by jury."

Section 716 of the Civil Code (Act June 6, 1900, c. 786, 31 Stat. 445) defines what are nonjudicial days, and reads as follows:

"Courts of justice may be held, and judicial business transacted, on any day except as provided in this section. No court can be opened, nor can any judicial business be transacted, on a Sunday, on a legal holiday, or on a day appointed by the executive authority of the United States or of the district as a day of fasting or thanksgiving, except for the following purposes: First, to give instructions to a

jury when deliberating on their verdict; second, to receive the verdict of a jury; third, for the exercise of the powers of a magistrate in criminal actions, or in proceedings of a criminal nature: provided, that this section shall not be so construed as to prevent the issuance of any writ or order for which the judge granting the same may think an emergency exists."

Section 717 reads as follows:

"If any of the days mentioned in the last section happen to be a day appointed for holding a court, or to which it is adjourned, it is deemed appointed for or adjourned to the next judicial day."

It will be observed that the criminal statute referred to can hardly be construed as including the action of a marshal who serves process on a Sunday. The section of the Civil Code also leaves the matter in very grave doubt. This Code seems wholly to refer to the action of the court, unless the words, "nor can any judicial business be transacted on a Sunday or legal holiday," etc., should be deemed to include the action of a marshal in serving process or taking bail bond. It is contended, however, on the part of the defendant (the contention being earnestly and ably resisted by counsel for the plaintiff), that the common law which is in force in the District of Alaska makes the action of the deputy marshal in this instance unlawful and void, and that while it is perhaps doubtful whether the language of our statute is sufficient to include the return of the service of process in the words "judicial business," as used in our statute, yet the common law clearly and unequivocally helps out the statutory provisions, and covers the objection made on behalf of the defendant. Section 367 of our Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 552) reads as follows:

"So much of the common law as is applicable and not inconsistent with the Constitution of the United States or with any laws passed or to be passed by the Congress, is adopted and declared to be the law within the District of Alaska."

Section 218 of the crimes act of Alaska (Act March 3, 1899, c. 429, 30 Stat. 1285) reads as follows:

"The common law of England as adopted and understood in the United States, shall be in force in said district, except as modified by this act."

If we are to look to the common law as a guide in this case, therefore, the first question that must necessarily be determined is this: What is the common law as in force in the District of Alaska? "Common law" is sometimes defined as follows:

"It includes those principles, usages, and rules of action applicable to the government and security of person and property which do not rest for their authority upon any express positive declaration of the will of the Legislature." 1 Kent, Com. 533.

Again:

"A system of elementary principles and of general judicial truths which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade and commerce, and the mechanical arts and the exigencies and usages of the country." Pierce v. Proprietors of Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667.

Ordinarily we mean by the "common law" the unwritten law, or the English common law, as sometimes stated, comprising the immemorial custom declared by the courts and particular local customs, the law merchant, or that part not defined by statute, and the canon and ecclesiastical law. In Massachusetts it is held that whatever of the common law was brought over by the colonists, such statutes as have been passed since the immigration in aid of the common law and adopted in practice, and such usages as probably originated from laws of the Colonial Legislature, constitute the common law of Massachusetts, except as changed by statute. Commonwealth v. Knowlton, 2 Mass. 530. In Patterson v. Winn, 5 Pet. 241, 8 L. Ed. 108, it is said, "The term 'common law'

means both the common law of England, as opposed to written or statute law, and the statutes passed before the immigration of the first settlers to America." This latter definition, furnished by the court of last resort for Alaska, would seem to be the one that should control this court in its application of the common law to the case at bar. The common law, as before stated, is said to be an unwritten law. It is classed by Blackstone as the *lex non scripta*. Another definition is, "The common law of England meant all of those universal rules, not the enactment of Parliament, which govern the English people." In Andrews' American Law, § 200, the author says:

"'Common law' is a term which has with us a double significance. In the United States, when we speak of the common law, the mind of the lawyer naturally reverts to the system of English jurisprudence, an indefinite and undescribed portion of which was said to be the birthright of the colonies, and has been adopted in most of our states as a portion of our jurisprudence."

In many of the states of the Union the common law has been adopted by express legislation, and includes most of the statutes enacted by Parliament prior to the migration of the English-speaking people to this continent. In other states a particular date is fixed, and the common law includes all the statutes up to that particular date. In Virginia the common law and the statutes in aid thereof prior to the fourth year of King James I were adopted as the common law of Virginia. Some other states fix the date to include all of the common law and the statutes in aid thereof prior to the Declaration of Independence. It is also said that, if no other definite period is fixed, the Declaration of Independence necessarily limits the period when the common law of England was a part of the law of the colonies. See Andrews' American Law, p. 249, and authorities there cited. Perhaps the varying decisions which we find bearing upon the question at bar are due

in a measure to the dates fixed adopting the common law and the statutes of England. However that may be, upon the question now before the court the decisions of the courts are widely variant. Counsel for the plaintiff cites with great confidence the following statement of the law, found at page 1197, book 20, Enc. of P. & P.:

"While at common law, as has been seen, no judicial act could be done on Sunday, the authorities are practically unanimous that merely ministerial acts could be performed on that day, and this would seem to be the rule at present in the absence of any prohibitory statute."

Citing cases from Alabama, Arkansas, Indiana, Nevada, some English cases, the 8 Cowan, and some others. But in the same book, at page 1192, we find the following:

"At common law, and by statute in most, if not all, of the states, process cannot usually be served on Sunday. This rule is, however, relaxed in some states by statute, in cases where delay in making such service will result injuriously to the plaintiff."

Our statute provides that process may be served on Sunday where the court issuing the same may think an emergency exists, and orders the service made. But no such question as an order of the court to make the service is involved in this case. In support of the proposition that service of process is within the meaning of judicial proceedings, the author above quoted cites the article under the head "Service of Process and Papers," volume 19 of the same work (page 567). Also it is noted that service of notice of action on Sunday is irregular and void, and a large number of cases are cited in support of this proposition. Now, referring to volume 19, at page 567, as to "Service of Process and Papers," and more particularly to page 600, which refers to Sunday and legal holidays, we find the following statement of the law as to the service of process:

"At common law, and by statute in nearly every state, Sunday is dies non juridicus, and therefore process cannot usually be served

on that day." Citing *Swinney v. Johns*, 18 Ark. 534; *Seammon v. Chicago*, 40 Ill. 146; *Morris v. Shew*, 29 Kan. 661; *Moore v. Hagan*, 2 Duv. 436; *Foy v. Harper*, 3 La. Ann. 275; *Shaw v. Dodge*, 5 N. H. 462; *Vanderpoel v. Wright*, 1 Cow. 209; *Van Vechten v. Paddock*, 12 Johns. 178, 7 Am. Dec. 303; several other New York cases; *Devries v. Summit*, 86 N. C. 126; *Commonwealth v. De Puyter*, 16 Pa. Co. Ct. R. 589.

On the other side is cited *Hastings v. Columbus*, 42 Ohio St. 585. If we were to rest the proposition on these citations, found in the Encyclopedia of Pleading & Practice, it would seem that the weight of authority is in favor of the contention of the defendant in this case, viz., that process served on Sunday is void and equivalent to no service. The statute 29 Car. II provides, among other things:

"No person or persons upon the Lord's Day shall serve or execute, or cause to be served or executed, any writ, process, order, warrant, judgment, or decree, except in case of treason, felony, or breach of the peace; but the service of any such writ, process, warrant, order, judgment, or decree shall be void to all intents and purposes whatsoever."

If Mr. Andrews is right in his statement that where no particular time is mentioned, and the common law adopted in general terms includes not only the common law proper, but all statutes in aid thereof prior to the Declaration of Independence, then the statute of 29 Charles II is part and parcel of the common law to be administered by the courts of Alaska. In *Wheaton v. Peters*, 8 Pet. 658, 8 L. Ed. 1055, the court says:

"The common law, says an eminent jurist (2 Kent's Com. 471), includes those principles, usages, and rules of action applicable to the government and security of person and property which do not rest for their authority upon any express and positive declaration of the will of the Legislature. A great proportion of the rules and maxims which constitute the immense code of the common law grew into use by gradual adoption, and received from time to time the sanction of the courts of justice, without any legislative act or interference. It

was the application of the dictates of natural justice and of cultivated reason to particular cases."

In a case that arose in Nebraska (*Bryant v. State*, 21 N. W. 406) it was held:

"A writ of replevin conveys no authority to a sheriff or his deputy to seize property on the first day of the week, commonly called 'Sunday,' and the recapture on the same day of the property seized is not a resistance of an officer in the execution of his office."

In this case the sheriff took the property on Sunday at about 12 o'clock, the property being certain horses, and placed them in the barn of one James Boyd for safe-keeping. At about 7 o'clock the same evening the plaintiffs in error went into said barn and forcibly removed said horses. The court says:

"If the plaintiffs in error were guilty, their guilt depends upon the legality of the acts of the deputy sheriff in seizing and removing the horses, by virtue of the writ of replevin, on Sunday. It may be admitted there was no statute law which exactly covers the case. Section 38 of chapter 19 of the Compiled Statutes is in the following words: 'Sec. 38. No court can be open nor can any judicial business be transacted on Sunday or any legal holiday, excepting to give instructions to a jury when deliberating on their verdict,' etc. [our statute being practically a copy of the Nebraska statute referred to]."

The court further says:

"This provision is contained in a chapter devoted exclusively to the supreme and district courts, so that it can scarcely be said to strictly apply to county courts, and it is only by implication that it can be said to apply to the service of process. But there is common law, or, what amounts to the same thing, an English statute of ancient date (29 Car. II, c. 7, § 6), which provides that 'no person on the Lord's Day shall serve or execute, or cause to be served or executed, any writ, process, warrant, judgment,' etc. [repeating the entire statute as before recited in this opinion]."

The court then proceeded:

"Applying the law, as thus laid down, to the case at bar, how can we escape the conclusion that the formal service of the writ of re-

plevin by the *de facto* seizure of the horses on the Lord's Day impressed no right whatever on the part of the deputy sheriff on the horses? All acts of the deputy sheriff, so far as the writ of replevin was concerned, being absolutely void, the case stood precisely as though A. N. Barrett, without pretense of official authority or right, took the horses of plaintiffs in error and put them in James Boyd's stable. It cannot be contended that this act would give Mr. Barrett any right of possession, or give him any official power over the horses whatever. Hence the recapture of the horses by the plaintiffs in error, or the turning them out of Boyd's stable and taking them home, was no resistance of the authority of the deputy sheriff."

It is said in Am. & Eng. Enc. of Law, vol. I, p. 723, "At the common law, service of process might be had by night or day or on Sunday;" citing Keith v. Tuttle, 28 Me. 326. But on the same page, and in the next sentence, we find the following: "By statute 29 Car. II, c. 7, § 6, however, arrests on Sunday were prohibited, except for treason, felony, and breach of the peace. Proceedings on Sunday coming within this provision are void." It would seem that the first question referring to the common law meant, of course, the common law as it existed in England before the adoption of the statute next referred to; but as that definition of the common law does not cover the common law as it existed and has existed in the United States, or in most of the states of the Union, it cannot be of force or effect, it would seem, in this jurisdiction.

In Peck v. Cavell Jr., 16 Mich. 8, Justice Cooley, deciding the case (I read from the syllabus only), states:

"An execution may be lawfully returned by the officer on the sixth day from its date, that being the return day, unless such day should be Sunday, in which case the return would be void."

In Hauswirth, Administratrix, etc., v. Sullivan et al. (Mont.) 9 Pac. 798, it is said that, under the Revised Statutes of that jurisdiction, a summons cannot be legally served on Sunday.

"The want of jurisdiction is a matter that may always be set up against a judgment, where sought to be enforced or where any bene-

fit is claimed under it, and the want of jurisdiction may be shown in cases where the judgment by the record appears perfect; and where the sheriff serves a writ on Sunday, and falsifies the return by making it appear that such service was made on Saturday, the fact may be proven in a collateral action to show that the court never acquired jurisdiction."

Mr. Chief Justice Wade delivered the opinion of the court, and, in the course of his discussion, said: "By the common law, all judicial proceedings which take place on Sunday are void. It is so stated in all the books, as the following authorities will show"—citing a large number of cases, and then continuing:

"By a statute of this territory the common law, so far as the same is applicable and of a general nature, and not in conflict with the statutory enactments thereof, is made the law and rule of decision, and is in full force until repealed by legislative authority; and our statute further provides that no judicial business shall be transacted on Sunday, except in certain cases. The issuing of a summons, and the service and return thereof, are acts by the officers of the court and for the court in the action therein pending, and, in the construction of this statute, must be considered as judicial business or proceedings. The statute so construes itself, for it authorizes summons and process in certain cases to issue and be served on Sunday, and the specification of these particular and special cases is a prohibition of all others."

By an examination of our statute it will be found it is practically the Montana statute. However, I do not rest this case on our statute, and do not wish to be understood as holding that the service of process is the transaction of judicial business, although it may be very reasonably construed to be such. Sunday is made by our statute a nonjudicial day, and undoubtedly it was intended to prevent all business, including the service of writs, on said day. In *Gould v. Spencer*, 5 Paige, 541, in an action brought to restrain proceedings on a judgment, it is said:

"It is irregular to make any process returnable on Sunday, and where the complainant made his subpoena returnable on that day,

and afterwards took out an attachment thereon against the defendant for not appearing, the court set aside the attachment as illegal. The court of chancery has jurisdiction to restrain proceedings elsewhere for an abuse of its processes, and may compel the injured party to appeal to this court for redress."

In *Vanderpoel v. Wright*, heretofore cited, the defendant indorsed his appearance on the capias on Sunday, and the service was admitted to be void, within the case of *Taylor v. Phillips*, 3 East, 155, and *Field v. Park*, 20 Johns. 140. It was moved to set aside the return and subsequent proceedings. This motion was opposed because the defendant had retained an attorney, who had given a general notice of retainer in the case. It was insisted that this was an appearance, and therefore a waiver of all irregularities. Held, the notice of retainer is not an appearance.

It would seem from these authorities, and many others that might be referred to, that, under the conditions of the law as it exists in Alaska, service of process on Sunday is void, and the court so holds. But it is urged on the part of counsel for the plaintiff that the defendant below and appellant here waived the irregularity of the service by filing his bond on Sunday. Upon this question of waiver it is said:

"The right of waiver is subject to the control of public policy, which cannot be set aside or contravened by any arrangement or agreement of the parties, however expressed. Thus an agreement waiving the defense of usury is void, and so, also, is the ratification of a forgery. A party cannot waive the objections to acts done or contracts entered into in violation of the Sunday laws. The service of process on Sunday is absolutely void, and cannot be made good by the subsequent waiver of the defendant." *Taylor v. Phillips*, 3 East, 155.

In *Pierce v. Rehfuss*, 35 Mich. 53, it is held:

"The objection in a replevin suit that the return day of the writ was Sunday is held to be waived by the defendant appearing, pleading to the merits, and going to trial without objection."

This decision seems to have been predicated on several Michigan cases to the effect that by pleading the general issue one admits all jurisdictional and formal matters. But in the case at bar it will be perceived that the defendant first moved to set aside the proceedings, making a special appearance for that purpose. Being overruled in this, he then answered; among other things, again setting forth that the court had no jurisdiction because of the proceedings had on Sunday.

Counsel for the plaintiff cites Nemitz v. Conrad (a case from the Supreme Court of Oregon, decided March 29, 1892) 29 Pac. 548, in support of his contention that by filing the bond for discharge in this case the defendant waived irregularities of the service. A suit was brought of false imprisonment by reason of arrest under what was claimed as a void warrant. The court in this case says:

"A void process is no justification for an arrest, but an irregular and voidable one is a complete defense until set aside. Before an action for false imprisonment under process of court can be maintained, it is necessary that the writ should be set aside, unless it appears to be absolutely void, for, if the process is merely voidable, it is valid until quashed; hence the arrest, until then, must be legal."

In the case then under consideration by the Supreme Court of Oregon, no application was made in the case wherein the void or voidable process was issued to have the process set aside, but a defendant appeared and put in bail. Having done so, and by neglect to move to be discharged, he consented to the process, and waived all irregularity in the manner of its issue. The language of the court, it will be observed, is "that the plaintiff appeared and put in bail. Having done so, and by neglect to move to be discharged, he consented to the process," etc., and thereby waived irregularities; showing conclusively that if in that case the defendant, notwithstanding the fact he put in bail, had moved for

a discharge because of the irregularities in the manner of the issuance and service of the process, he would have been so discharged notwithstanding the bail. But let it be remembered, also, that in that case, where there was no motion to discharge, and the party put in bail, judgment went against him; and in a suit for damages for false arrest the court held that the condition of that case was such that no such action could be maintained, which is entirely in accord with the contention of defendant in this case, and in no wise tends to support the claim made by the plaintiff. Neither does the case of *Forster v. Orr* (Or.) 21 Pac. 440, cited by the plaintiff, seem to support his contention. In that case, action was brought against the defendant for the sum of \$1,000 due for rent, and the plaintiff caused an order of arrest to issue in said action. The respondent, after being arrested, and consulting with counsel in regard to the matter, paid the appellant's demand against him, on account of which he was arrested, and the disbursement in the proceedings against him accrued in said case and said arrest, and asked that he be released from custody, and that all further proceedings against him be discontinued. Whereupon, on order of the attorney for appellant, the respondent was released from custody, and all further proceedings against him were discontinued. A reply was filed to the allegations, and the issues tried. It was held in the case that the failure of the complainant to show that the writ of arrest had been vacated or set aside by the court in the action in which it was issued was a fatal defect, and that the complaint was insufficient to sustain a recovery had thereon. It was held, further, that an allegation in the answer to the effect that the plaintiff, after being arrested upon the writ of arrest, paid the defendant's demand on account of which he was arrested, and the disbursements of the proceedings against him, accrued in the case in which the writ was issued, and that said arrest did

not aid the complainant in respect of such defect, but, on the contrary, showed that the arrest was acquiesced in by the defendant, and that the plaintiff did not deny in his reply the said allegation in the answer—all this showed that under the pleadings he had no cause of action. I fail to see wherein the case sustains the claim of counsel for the plaintiff, and, while it refers indirectly to the proposition of waiver, it does not go to the extent of sustaining the contention of plaintiff.

On the other hand, as has been shown before, there can be no waiver in a case like the one at bar, and this is expressly decided in *Ex parte Tice*, 49 Pac. 1038. The Supreme Court of Oregon holds in that case that, under the Sunday statute, the court cannot discharge a jury in a criminal case on Sunday, and further holds that the privilege of Sunday statute is one that cannot be waived, in this connection stating:

"The contention that it must be presumed, in the absence of recital in the record to the contrary, that the plaintiff consented to the discharge of the jury, is without merit, for, if he could agree to their discharge on Sunday, he could with equal propriety consent to be tried in a criminal action on that day. But as the public has an interest in the observance of Sunday as a day of rest, and the right to see that it shall not be desecrated except in cases of urgent need, the plaintiff could not waive a public right, and hence the injunction invoked is not applicable to the facts involved."

I am clearly of the opinion that giving the bond to the deputy marshal was not only a waiver, but, in all probability (and there is ample authority to support the proposition), it was in itself a void act, and could in no wise furnish a ground for waiver. It will be remembered that the bond was taken on Sunday, and the return of the marshal with the bond was made on the same day. It is further urged by counsel for the plaintiff in the court below that, inasmuch as an appeal has been taken in this case, it is a waiver, under the statute, to all objections to process, and is made so by statute, and that, where appeals are taken, the rule is entirely different from

that prevailing where a case is taken up on error. I do not so find the law, and, in the few cases that I have examined, I find that appeals have been taken, and the sufficiency of process objected to, and objections to the jurisdiction have been sustained, exactly as if the same had been taken up on error.

But in the case at bar these questions are hardly worthy of consideration. The defense in this case set up by answer is that the court acquired no jurisdiction by reason of the service of process on Sunday. The question, therefore, would arise on the trial, and the court would necessarily have to pass upon it at some time during these proceedings. The whole matter may as well be finally determined at this time as at any other.

It is possible that the court erred in dismissing this case unadvisedly on account of the stream of other business at the time. I was at the time of the belief that the process and all other proceedings in the case were begun on Sunday. Under such conditions, the action of the court below would have been void ab initio; but it appears that the case was properly begun, so far as the filing of the complaint and the issuance of summons are concerned, and that the trouble grew out of the service alone. The order of the court dismissing the case will be set aside, and the case reinstated.

The motion of the defendant is therefore sustained, and the judgment of the court below set aside and held for naught. The service of the summons and the return thereof are hereby quashed, and all the proceedings in said case in the court below following the issue of the summons are set aside and held for naught, and the case is remanded, with instructions to set aside the judgment and proceedings as above stated, and to discharge the defendant and his bail.

UNITED STATES V. BINNS.

(Second Division. Nome. April 5, 1902.)

No 154.

1. TERRITORIES—CONSTITUTIONAL LAW—AUTHORITY OF CONGRESS.

Congress has full legislative power over the territories, unrestricted by the limitations of the Constitution. *Endleman v. U. S.*, 30 C. C. A. 186, 86 Fed. 456, followed.

2. LICENSE LAWS OF ALASKA—TERRITORIES—TRANSFER COMPANY.

The act of June 6, 1900 (31 Stat. 321, c. 786), imposing a license upon transfer companies and other trades and businesses carried on in Alaska, is valid, being within the plenary legislative power possessed by Congress over the territories.

The defendant was fined for carrying on the business of a transfer company. He appealed, admitting the facts, but urged that the law under which the penalty was imposed was unconstitutional and void. Demurrer to the evidence overruled.

John L. McGinn, Dep. Dist. Atty., for plaintiff.

Ira D. Orton and Albert Fink, for defendant.

WICKERSHAM, District Judge. The defendant was found guilty, and condemned to pay a fine and costs in the justice's court for violating section 29 of the act of Congress entitled "An act making further provisions for a civil government for Alaska and for other purposes," approved June 6, 1900 (31 Stat. 321, c. 786). The section mentioned provides that all persons or corporations prosecuting the lines of business therein mentioned shall apply to and obtain from this court a license so to do, and pay the license fee fixed therein. Defendant was arrested and fined for carrying on the business of a transfer company without applying for and obtaining the necessary license. Section 29, in specifying the classes of persons who shall pay license, and the amount, con-

tains this clause, "Transfer companies, fifty dollars per annum." It is admitted by counsel for defendant that he was operating as such transfer company, and had not paid the license. The matter comes before the court upon an objection in the nature of a demurrer to the complaint as well as to the evidence.

Counsel for the defendant urge that section 29 of the act of Congress of June 6, 1900, supra, is unconstitutional and void for the following reasons, viz.: (1) That Alaska is an organized territory; (2) that the Constitution and laws of the United States which are not locally inapplicable are extended to Alaska by section 1891, Rev. St. 1878; (3) that, having thus formally extended the Constitution to Alaska, Congress could not thereafter pass a law for Alaska in conflict with its provisions; (4) that the section in question is an excise law; and (5) therefore it is necessarily unconstitutional and void, as in conflict with the provisions of section 9 of article 1 of the Constitution, which requires all excise duties to be uniform throughout the United States.

This court will not undertake to answer in detail the many interesting and important questions propounded by counsel for the defendant. The case involves little more than an abstract question of law, for the fine imposed is only nominal, and the evident purpose of the cause is to secure a final construction of the law by the courts of the highest resort. It is only fair, however, to say that I disagree with the conclusions of counsel for defendant upon the main question involved. The Supreme Court of the United States has not passed upon the points raised in this case in relation to the territory of Alaska. I cannot find authority even in *Downs v. Bidwell* to support the arguments of counsel for defendant, but the opposite. The Circuit Court of Appeals for the Ninth Circuit, however, to which appeals lie directly from this court, has practically decided every point in controversy

in this case in its relation to Alaska, and that decision will be followed by this court until modified or overruled. In the case of Endleman v. United States, 30 C. C. A. 186, 86 Fed. 456, the unconstitutionality of the act of Congress forbidding the sale of liquor in Alaska was urged upon practically the same grounds urged in the act in question. In answer to these objections that court said:

"The answer to these and other like objections urged in the brief of counsel for defendant is found in the now well established doctrine that the territories of the United States are entirely subject to the legislative authority of Congress. They are not organized under the Constitution, nor subject to its complex distribution of the powers of government as the organic law, but are the creation, exclusively, of the legislative department, and subject to its supervision and control." Benner v. Porter, 9 How. 235, 242, 13 L. Ed. 119.

It follows, of course, that if the territory of Alaska is "not organized under the Constitution, nor subject to its complex distribution of powers of government as the organic law," the provisions of section 8 of article I of that Constitution can have no such application to it as to render void the law in controversy. Certainly, this court will not declare such a result, without more support from the courts of higher authority in direct relation to the territory of Alaska. The objections of defendant are overruled, and judgment rendered accordingly.

HAINES WHARF CO. v. DALTON et ux.

(First Division. Skagway. April 11, 1902.)

No. 86.

1. PUBLIC LANDS—ABANDONMENT—BOUNDARY.

One who abandons a portion of his possessory rights on the public domain of Alaska, including one entire boundary line, thus leaving the limits of his claim open, indefinite, and undetermined, is limited in his possessory claim in the direction of his abandoned boundaries to lands actually occupied and used.

This action is brought by the plaintiff company to restrain the defendants from building upon or occupying any portion of the space between the shore end of the plaintiff's wharf at Haines Mission and the building owned by the defendant Dalton, and situated, as appears from the evidence, 15 feet and 10 inches in a northerly direction from the most northerly stringer of said wharf. The evidence in the case, as returned by the referee, shows, briefly stated, the following facts: Neither party has title in fee to the land in controversy. The only right that either can assert to the premises is that which grows out of possession and occupation. Title to the land is in the government of the United States. The particular tract in dispute runs from the shore line of Lynn Canal, an arm of the sea, out toward the deep water of the canal. It seems that Dalton had been at Haines 10 years or more, and some time after his going there his wife purchased an acre of land adjoining the mission lands from a Mrs. Dickinson, whose only title to the same was possession and occupation. This acre of land originally included the ground in controversy in this case.

From the testimony of the witnesses in the case it would seem that Dalton was engaged in some commercial business, and that he and others needed an opening to the sea, where they could pass out to deep water, and bring and land goods from the sea—although this does not very clearly appear. It is said by Dalton that his wife made the purchase, and that one of the monuments designating the boundaries of the acre was a large stone just below high tide, which also marked the boundary of the Haines Mission lands; that, passing down the shore line a certain number of feet, another monument was placed, and that the land ran inland from this shore line; that he put some improvements on some part of the land, and afterwards conveyed to the town of Haines a road or street running across the acre tract from the sea

up the hill. This conveyance was not of record, nor made by deed, and was in fact no conveyance whatever; but there was a relinquishment of the possessory rights of Dalton and his wife over this roadway. It did not constitute the roadway an easement, because the Daltons held no title by which any easement could be created. It was a mere surrender and quitclaim of the right of possession that had theretofore been asserted by them or those from whom they purchased. Just what width of land was so released does not appear. Dalton fails to state the width of the tract that was donated for a street, and no other witness in the case described with any degree of certainty just what portion of the acre purchased by Mrs. Dalton was abandoned by the Daltons and used as a roadway.

Dalton testifies that he had at one time a building resting on a portion of the land in controversy, lying between the wharf of plaintiff and what is called in the testimony the "Dalton Structure." In that he is evidently mistaken. Pad-dock, a wholly disinterested witness, and one who must have been familiar with all the facts, testified that the small building referred to by Dalton was situated in part on the lot that is now occupied by the new Dalton building; that he was employed by Dalton to build the present Dalton building; and that he moved the small building referred to by Dalton from the site of the present Dalton building to a point farther north, where the same now remains, having moved it a sufficient distance to enable him to build the present Dalton building as it now stands. This witness has been familiar with these premises and the conditions there as many years as Dalton himself, and perhaps longer. The fact that he moved the small building referred to by Dalton, and that he constructed the new building, must fix in his memory, beyond possible question, the exact condition of things as they existed at the time. Dalton, then, made a mistake when he said that

he erected this small building on a portion of the premises now in dispute.

The testimony of Paddock is also interesting in connection with the controversy that existed between Dalton and Smith as to this particular ground. And here it may be proper to refer to another fact that appears from the evidence, viz., that the wharf people, under the direction of Smith, put a certain foundation and piling on the land in dispute, and reduced it to actual occupation and possession prior to the attempt of Dalton to put up his new building. Dalton, it would seem, directed Paddock to put the new building up close to the wharf, but some difficulty arose about this with the wharf people, and, after Dalton had got his lumber, it was piled up on the foundation that had been constructed by Smith and others, and Dalton thereupon directed Paddock to put the new Dalton building close to the line of the Smith foundation, and thus have no further trouble with the wharf people.

It will be observed from the testimony that Paddock and others, and even Dalton at times, speak of this property in dispute as abutting on the street, and they all refer to it as the wharf property; but the testimony of Dalton is that he bought the property in order that they might have a street. In fixing the place of the monuments between his land, or the acre purchased by his wife, and the mission property, Dalton states that it was right behind the building of the Bay Trading Company—a small structure perhaps 10 or 12 feet in width, which stands on the opposite side of the wharf from the ground in controversy. The wharf is said to be 15 or 16 feet in width, and the distance from the wharf to the Dalton building is 15 feet and 10 inches, making the entire width from the Dalton building to the farther side of the wharf 30 feet, and, without fixing any distance that the monument was located beyond the south side of the wharf, we may say it could not be farther than 10 feet behind the Bay Trading

Company building. From Dalton's description of it, it is probably a less distance than 10 feet; so we would have for the width of the street, from the Dalton building in a southerly direction to the farthest point of the land that Dalton describes as a street, only 40 feet. Considering that the land was of no special value, that the parties had no ownership of it, and that it is in a country where streets in all towns are ordinarily very much wider than 40 feet, it would seem highly improbable that Dalton ever intended to relinquish to the town a lesser distance than 40 feet for a street. But Dalton says he claimed "up to the corner." What constituted the "corner," and where it was located, he fails to explain, as do all the other witnesses. But he says he thinks it was 3 or 4 feet north of the wharf; so that, on his own showing, the land that he claimed a right to occupy, after having released his possessory right to the street, is 4 feet, we will say, less than he would claim if he went up to the wharf. But Paddock and the other witnesses all indicate by their testimony that this entire ground in front of the wharf, for the whole width between the Dalton building and the Bay Trading Company building, and up to the mission line south of the wharf, had all been left open for the purposes of a street. Indeed, the corner across the street from the Dalton building, running in a northerly and southerly direction along the water front, which runs up the hill toward the hotel, and which Paddock talks about as having a fence along the side next the street that was put there after the Daltons relinquished their possession of the land for a street, is about on a line with the corner of the Dalton building.

From the fact that Dalton testified that the little building, to which he refers in his testimony as the first he constructed there, was in part on the ground in controversy, and his being mistaken as to that—it having been on the site of what is called the present Dalton building—and that he claimed up

to a certain point covered by that small building, it would appear that he is entirely mistaken as to the point where the small building really was, and as to the ground he thinks he claimed. That the ground opened up as a street extended to the water along the line of the old posts and fence now on the ground, I have no doubt whatever, and I am fully convinced that the ground released by the Daltons for the purpose of a street covers all the ground now claimed by the wharf company. Without referring to the testimony of Smith and other witnesses, which in some respects is in conflict with Dalton's, I find that the preponderance of the evidence shows the possession and right of possession to the land in dispute in the plaintiff.

Winn & Shackleford, for plaintiff.
Maloney & Cobb, for defendant.

BROWN, District Judge. When the Daltons abandoned their right of possession to the land along the sea front, running south from the mission monument, for a street, without finding any boundaries whatsoever to the land so abandoned, then the occupation by the Daltons of other portions of the tract having no boundaries fixed therefor, would give them no right of possession whatsoever over lands wholly unoccupied. Legally speaking, as he had no boundaries to his southern line bordering on the street at the water line—and none have been testified to by Dalton—he had no possession or right of possession of any of the lands south of the ground actually occupied by him, viz., by the Dalton building. In any view of the case, under the facts or the law, it does not seem that Dalton has any claim whatsoever upon the land in question, and the temporary injunction heretofore granted by the court will be made perpetual by proper order, to be entered of record in the case; and it is so ordered.

BLACK V. TEETER et al.

(Second Division. Nome. April 15, 1902.)

No. 418.

1. TRIAL—EJECTIONMENT—EVIDENCE—PLEADINGS—NEW TRIAL.

In a suit in ejectment evidence was offered by both plaintiff and defendant, and was received without objection, of a second and later location of a mining claim by the plaintiff, which was not specially pleaded in the complaint, and the court submitted all the evidence to the jury, who found for the plaintiff upon the location not specially pleaded. Defendant excepted to the instruction submitting the last location as not within the issue, and made that alleged error a ground for a motion for a new trial. *Held*, that where the evidence offered is broader than the issues tendered by the pleadings, or otherwise varying therefrom, and is received without objection, it was the duty of the judge, and not error, to instruct the jury upon the whole thereof.

Motion for a new trial. Denied.

P. C. Sullivan and R. N. Stevens, for plaintiff.

A. J. Bruner, P. J. Kelley, and Thompson, Murane & Thompson, for defendants.

WICKERSHAM, District Judge. A verdict for the plaintiff was rendered by the jury in this case, and the matter now comes up on defendants' motion for a new trial. The motion contains seven distinct grounds, only one of which, however, is presented to the court by the briefs, and is for "error of the court in instructing the jury as set forth in that part of the charge and numbered nineteen, twenty, twenty-one, and twenty-two." This alleged error is based upon the action of the court in submitting to the jury the second location made by Black on January 1, 1900, with the instruction that, if he then made a valid location prior to that under which the defendants claim, it would be a sufficient title to sustain his suit in ejectment.

The sole question to be determined is whether the court erred in submitting the title under the plaintiff's location of January 1, 1900, to the jury as one of the issues in the case. This location was not specially pleaded in the complaint, the plaintiff having alleged only his prior attempt of July 22, 1899, to locate the mine. Upon the trial, however, the defendants offered the second location of the plaintiff, with the purpose, it is said in their brief, "to show that he (Black) did not have any faith in his location made in 1899." Plaintiff followed the defendants' evidence upon this second location by full evidence, showing that he was on the claim when defendants' grantor made his attempted staking, and that prior to the completion of Sweet's location on January 24th, Black, the plaintiff, had made a good and valid location of the same ground. No objection was made to the introduction of this second location by Black, and the whole evidence went to the jury without objection from defendants, or request for any instruction limiting, explaining, or otherwise mentioning it. In this condition of the testimony, the court instructed the jury that the location made by Black in July, 1899, was void for conflict with a prior valid location made by one Lynch in 1898, but submitted to the jury the question of the priority of the title acquired by Black through his second location, made in January, 1900, over Sweet's, under which defendants claim; upon which instructions the jury found for Black. Defendants excepted to the instruction submitting the second location of Black to the jury, because the same had not been pleaded in the complaint.

It is true that the complaint does not contain a particular statement of the January, 1900, location as it does of the July, 1899, location. It does show the citizenship of the plaintiff, his location of July, 1899, the discovery of gold on the claim, its marking, and the recording of the July loca-

tion. It contains a description of the property, and the third paragraph contains this allegation:

"That on the 1st day of October, 1900, this plaintiff was the owner of, in, and entitled to the possession of the hereinbefore described tract of land and placer mining claim. That thereafter, on the 2d day of October, 1900, while this plaintiff was so seised, the defendants, without right or title, entered into possession of the said land and premises, and ousted and ejected this plaintiff therefrom, and did wrongfully withhold the possession thereof from this plaintiff, to his damage in the sum of five thousand dollars (\$5,000)."

Now, the evidence offered without objection, and primarily by the defendants themselves, established that prior to October, 1900, to wit, in January, 1900, the second location was made by Black. The allegation upon which the case was tried was that thereafter, in October, 1900, he was the owner, in and entitled to the possession, and was ousted by the defendants.

Section 303 of our Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 383) provides that the plaintiff in an action of ejectment, as this was, in his complaint shall set forth the nature of his estate in the property, and that he is entitled to the possession thereof, and that the defendants wrongfully withhold the same from him, to his damage in such sum as may be therein claimed. The third paragraph of the complaint, as far as above quoted, contains a sufficient statement to comply with this section.

If paragraph 1 of the complaint, alleging the details of the location of July, 1899, were not in the complaint, and the evidence of the second Black location of January, 1900, had been offered and received without objection, there could be no serious question that it would be sufficient, under the allegations of the paragraph above quoted, to sustain the verdict. No rule has been suggested by which it should be given less effect because of the presence of paragraph 1. Plaintiff did

not abandon his location of July, 1899, but offered full proofs to establish it as alleged in his complaint. Both defendants and plaintiff offered proof to establish the second location, and both counsel argued the whole of the evidence to the jury. I am inclined to the view that under the allegations contained in paragraph 3 of the complaint, and the liberal intendment in support of verdicts, no error was committed by the court in thus submitting the evidence of the second Black location to the jury. Nicolai v. Krimbel, 29 Or. 76, 43 Pac. 865; Wasatch Min. Co. v. Crescent Min. Co., 148 U. S. 293, 300, 13 Sup. Ct. 600, 37 L. Ed. 454; London Ins. Co. v. Gunther, 116 U. S. 113, 127, 6 Sup. Ct. 306, 29 L. Ed. 575; Railroad Co. v. Lindsay, 4 Wall. 650, 18 L. Ed. 328; Hartley v. Preston, 2 Mont. 415; Hershfield v. Aiken, 3 Mont. 442; Bruce v. Foley (Wash.) 50 Pac. 935.

Section 87 of the Code of Civil Procedure provides that:

"No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just."

There can be no pretense that the defendants were in any respect misled by the variance between the allegations and proofs in this case, for they first introduced the evidence of the title which is now complained of. If they had not done so, but had objected to its introduction, and the court had admitted it over their objection, they might have been heard to say they were misled to their prejudice. Section 88 also provides that:

"When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs."

No objection having been made to the testimony, but both parties joining in offering it, the court was fairly justified in concluding that neither was misled to his prejudice, and only followed the statute in directing "the fact to be found according to the evidence" by the jury. Section 97 of the same chapter also provides that:

"The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party."

All the substantial rights of the parties were submitted to the jury without objection. The error complained of is only technical. I am satisfied that the verdict rendered is in accord with both the law and the facts, is just and right, and would be the result of another trial. No substantial right of the defendants is taken away or affected unjustly by the verdict, and the error or defect ought, therefore, to be disregarded by the court.

The only error complained of is in giving a series of instructions upon a matter not within the issues made by the pleadings. I am not willing to concede that the issue tendered by paragraph 3 is not sufficiently broad to embrace the second Black location of January, 1900, which is complained of. The rule, however, is broader than conceded by counsel for defendants. In section 2309 (2d Ed.) Thompson on Trials, the author cites the strict rule held by some courts that the instructions must be confined to the issues made by the pleadings. In the next section he cites the true and broader rule, saying:

"This view ignores a principle which obtains in almost every situation in a civil trial—that the court is to disregard at every stage of the trial those errors or irregularities which it is competent for the party to waive, and which the party against whom they are committed does not object to at the time. The object of pleadings being merely to notify the opposite party of the ground of action or defense if the party comes into court, it is not perceived why he may

not waive the notice, as in every other case, although the pleading may not advise him of the case or defense which is actually tendered in the evidence. Several of the best courts in the country proceed upon this enlightened view. * * * Suppose, then, that facts come out in the evidence broader than those alleged in the pleadings, or otherwise varying from them, is the judge to instruct the jury upon the whole evidence, or is he to limit his instructions to so much of the evidence as is within the scope of the pleadings? The proper answer is believed to be this: If neither of the parties has objected to the evidence on the ground of variance, the judge is to instruct the jury upon the whole evidence; the rule being that a variance between the pleadings and the evidence is no ground of error, unless the evidence was objected to on this ground at the time it was offered."

If this be the true rule, it was the duty of this court to submit the evidence in relation to the Black location of January, 1900, to the jury, for it was offered by both parties without objection. True, defendants' counsel now say that it was only offered to show that Black had no confidence in his prior location pleaded in paragraph 1 of his complaint; but no such limitation was mentioned when the evidence was offered, nor was objection offered to its wider significance. The court submitted it to the jury as offered, and, after a careful consideration of the authorities, is satisfied that no error was committed in so doing. Boyce v. California Stage Co., 25 Cal. 460; Roberts v. Graham, 6 Wall. 578, 18 L. Ed. 791; Bruce v. Foley (Wash.) 50 Pac. 935.

The motion for a new trial is denied.

NESTOR v. HOLT et al.

(Second Division. Nome. April 16, 1902.)

No. 114.

1. RECORDS—DEEDS—MORTGAGES.

Under section 98 of the Civil Code of Alaska (Act June 6, 1900, c. 786, 31 Stat. 505), mortgages must be recorded with the same effect as deeds and other conveyances. An unrecorded mortgage is void as against an innocent purchaser in good faith for value, and without notice of the existence of the mortgage.

James E. Fenton, for Nestor, plaintiff, and Holt, defendant. Jeffreys & Sullivan, for defendant Ross.

WICKERSHAM, District Judge. Upon an examination of the pleadings, evidence, and brief of the defendant Ross, I am satisfied:

1. That section 98 of the Civil Code of Alaska (Act June 6, 1900, c. 786, 31 Stat. 505) applies to the recording of mortgages, as well as to deeds and other conveyances. Watson v. Dundee Co., 12 Or. 474, 8 Pac. 548.
2. That the mortgage given by Holt to the plaintiff, Nestor, on June 30, 1900, and which was not recorded until August 2 and 6, 1900, and several days subsequent to the conveyance by Holt to Chapman and Ross, who took their deed in good faith, for value, and without any notice of the existence of the Nestor mortgage, is void as against the said subsequent conveyances.
3. That the option given by Ross to Holt did not create the relation of debtor and creditor between them, and Ross' deed from Chapman was not considered as a mortgage in favor of Holt, nor was it converted into a mortgage by the option given by Ross to Holt. These conclusions dispose of the matters in issue in favor of the defendant Ross, and findings of fact and conclusions of law in his favor may be prepared for signature by his attorney.

HACKLEMAN v. GEISE et al.

(Second Division. Nome. April 26, 1902.)

No. 654.

1. JUSTICE OF THE PEACE—CONTINUANCE—JURISDICTION.

A justice's record must show jurisdiction. Where he enters judgment after an unexplained continuance for more than a year, it was without jurisdiction and void.

Motion to dismiss for want of jurisdiction. Granted.

James Frawley, for plaintiff.

James E. Fenton, for defendants.

WICKERSHAM, District Judge. On September 19, 1900, the plaintiff began a suit in the Commissioner's Court in Nome precinct to recover from McPhee & Hamilton a balance of \$450 alleged to be due him for hay and grain sold the defendants. The summons in that case was made returnable on September 27th, and on that day the defendants filed their answer with the commissioner, denying every material allegation of the complaint. The record does not disclose any action of the justice on the return day—neither an appearance, nor trial, nor an adjournment to another time. The transcript of the justice's docket shows that the next step in the case occurred on November 2d, when the case was set for trial on November 5, 1900, at 10 a. m.; but again the record fails to show any appearance, trial, or postponement. Nothing further is shown by the docket until June 30, 1901, when some costs were paid. There is no other entry until October 8, 1901, when the docket shows a special appearance by the defendants, and their objection to the jurisdiction of the justice on the ground that the case had prior thereto been dismissed, which objection was overruled, and the testimony of the plaintiff was heard, and judgment given against the defendants for \$450 and costs.

Upon the hearing of the special objection to the jurisdiction, an affidavit was filed by defendants' attorney, alleging that upon written notice served by mail on November 2, 1900, the case was dismissed by the justice on November 5, 1900. The record is otherwise silent on this point. Plaintiff's attorney, however, filed an affidavit in support of jurisdiction, in which he alleges that the cause was continued once by consent of both parties, and that before he left Nome for the outside, in the fall, counsel for defendants consented, upon his request, to continue the case till the spring of 1901.

Upon the 19th day of September, 1900, when the suit was begun against McPhee & Hamilton, the plaintiff caused their personal property to be attached. On the 20th the defendants, to secure the release of their property, gave a redelivery bond, with the defendants in this action as sureties, and thereupon the attached property was released. After the entry of the judgment on October 8, 1901, this action was begun to recover upon the redelivery bond. The cause was heard before the justice, who held that the judgment against McPhee and Hamilton was void for want of jurisdiction, on account of the long postponement and lack of record entries. An appeal from the final judgment before the justice, dismissing the cause, was brought into this court.

In open court, counsel for plaintiff and defendants agreed that the allegations in the complaint and answer, and the entries contained in the justice's transcripts in both cases, are true, and correctly stated the facts, and thereupon the case was submitted to the court for decision.

Section 945 of the Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 480) provides that every justice of the peace shall keep a docket, and prescribes what he shall enter therein, including, "Fifth. Every postponement of a trial or proceeding, and upon whose application, and to what time." Section 965 fixes the time beyond which postponement shall

not extend, as follows: "When a cause is at issue upon a question of fact, the justice must, upon sufficient cause shown on the application of either party, postpone the trial for a period not exceeding sixty days." These matters are thus made jurisdictional, and a violation of the statute in either respect leaves the justice without power to proceed further in the case. *Nelson v. Campbell* (Wash.) 24 Pac. 539; *State v. Laurandeau* (Mont.) 53 Pac. 536. The judgment rendered by the justice on October 8, 1901, more than a year after the return day of the summons, and without any docket entry showing a continuance or an appearance of the plaintiff, was wholly invalid and void for want of jurisdiction, and will not support the action against the sureties on the redelivery bond. At the time it was rendered, the justice had no jurisdiction of either the person or subject-matter of the action. There is no judgment, and the question may be raised in this action by the defendants herein. 12 Am. & Eng. Ency. of Law, p. 311.

Judgment of dismissal, with costs to defendants, may be entered.

REEDY et al. v. WESSON et al.

(Second Division. Nome. May 3, 1902.)

No. 575.

1. MINES AND MINERALS—CO-TENANCY—SALES—VENDOR AND PURCHASER.

A purchaser of a mining claim, who buys from the locator of record, takes it subject to the rights of other co-tenants who are in actual, open, and notorious possession, and engaged in working the mine.

Suit in equity to quiet title to mining claim.

C. S. Johnson, A. J. Daly, P. C. Sullivan, and James E. Fenton, for plaintiffs.

W. V. Rinehart, Jr., C. S. Hannum, and T. M. Reed, for defendants.

WICKERSHAM, District Judge. This is a suit in equity, brought by the plaintiffs to quiet their title to placer mining claim No. 1 on Nugget Gulch in the Cape Nome mining district. It appears from the evidence that the mine was first located by one Hawkyard in 1899; that thereafter, and on July 20, 1900, it was again located by one Pitcher; that about June, 1900, the defendants Spencer, Reedy, Wachenheimer, and one J. S. Smith entered into an agreement by which Spencer and Reedy agreed to furnish a grub-stake to Wachenheimer and Smith, who, on their part, agreed to go into the mountains and seek for and locate mining claims. They ascertained that Pitcher was in possession of the mine in question, and that it was a valuable claim, and prevailed upon Spencer and Reedy to purchase an undivided one-fourth interest in it for the four partners. This was done, and at the same time the four partners took a lease upon the other three-fourths of Pitcher's claim, with the agreement to work and mine the claim. Some question seems to have arisen about the validity of the Pitcher location, and the four partners agreed that they would relocate it in their own right on January 1, 1901, by J. S. Smith, for the benefit of all the partners. Soon thereafter the four partners purchased the remaining three-fourths interest from Pitcher, and became the owners of the whole claim by purchase from Pitcher, and by the location in the name of Smith. They continued to work the claim during the year 1901 with a large force of men, and extracted more than \$6,000 in gold from the claim. They located a fraction lying beside No. 1, and upon this fraction Reedy built a house for himself and family, while Wachenheimer continued to live on No. 1 in a large bunk house, used by himself and Smith and their employés. On or

about October 17, 1901, Smith came to Nome, and approached Wesson, the defendant in this action, with a proposition to sell to him the claim for \$1,000. Wesson testified that at that time he was very busy as the local agent of the Pacific Coast Steam Whaling Company, and had very little time or attention to give to the facts surrounding the claim before purchasing it. He did not go to see the claim, and seems to have made no further examination into the question of title than to consult Smith and his attorney, Mr. W. V. Rinehart, Jr. He instructed his attorney to examine the record, and ascertain if the title was clear in Smith. The Hawkyard location was discovered on the record, and Hawkyard himself was produced by Smith, and made an affidavit that he had not done his assessment work for 1900, which forfeited his claim on the 31st day of December of that year. This left the Smith location on January 1, 1901, a valid location of the ground. Upon an examination of the record, Mr. Rinehart found the Hawkyard location, the Noble location, and Pitcher's location. He reached the conclusion that both the Noble and Pitcher locations were void because of the prior location of Hawkyard and the reservation of the claim after the years 1899 and 1900 by reason of that location. He also found upon the record the deed from Pitcher to Reedy of a one-fourth interest in the claim in 1900, and the subsequent deed to Reedy and Spencer of the other three-fourths in January, 1901, but made no further examination to ascertain whether or not these people had any valid claim to the property, because of his opinion that the title of Pitcher, through whom they obtained title, was invalid and void. The evidence discloses that neither Wesson nor Rinehart had any knowledge of the co-partnership between the plaintiffs, and had no knowledge of the possession of the partners at the time of the examination and sale in question. With this slight examination into the true condition of the title, Wesson purchased the claim on

October 18, 1901, and took a deed to the property from Smith, and paid him the full consideration of \$1,000. He was not acquainted with Smith, had never met him before, had no information as to his character or standing, and seems to have made no inquiries about either. Upon the date of the purchase by Wesson the claim was in the open and notorious possession of Reedy and Wachenheimer, acting for themselves and their other partners, and had been in their possession for almost a year. They were then living upon the claim, had their mining tools, sluice boxes, provisions, houses, and all of the property necessary to work the valuable mine located thereon. All this could readily have been seen by any one by visiting the claim, but no such inquiry was made by the purchaser or his attorney. On the 21st of October Wesson leased the mine to the defendant Meehan, who had been the foreman for the plaintiffs in the working of the same mine during the preceding summer. It seems that Meehan first told Wesson and Rinehart of the partnership between the plaintiffs and Smith, and of the rights of the plaintiffs in the premises. In spite of his knowledge of these facts, however, Meehan took a lease from Wesson for two years, and went upon the claim and took possession, accompanied by two men to assist him. He was warned by the co-tenants in possession not to intrude upon their rights, but did thrust himself into their buildings, their mines, and open cuts, and claims that he began to prepare for taking out a "dump" during the winter. The plaintiffs thereupon began this suit.

The objection is now made to the form of the action, but, as no such objection seems to have been heretofore raised, the court will not now consider it. The whole matter has been heard upon the pleadings as filed, the evidence has been taken before the court, and the defendants will not now be heard to question the technical form of the action.

Upon the facts, I am compelled to render judgment in

favor of the plaintiffs. At the time of the defendants' purchase from Smith the plaintiffs were in the open and notorious possession of the property. They had been in such possession for many months, and had buildings and all the necessary mining tools, boxes, and provisions thereon, and were residing thereon and working the claim. The defendants rely entirely upon the recorded title of Smith. It must not be forgotten, however, that this is a mining claim. The location by Smith on January 1, 1901, in pursuance to his agreement with his partners, inured to the benefit of himself and partners equally. They became tenants in common in the property. The possession of Smith was as the possession of each of the other co-tenants. Their possession was equally as good as his. That possession, under the circumstances in this case, was sufficient to give the defendants constructive notice of the title of the plaintiffs, which they will not now be permitted to deny. 2 Pomeroy's Equity Jurisprudence (2d Ed.) §§ 597, 603, 606-608, 615. The defendant Wesson might have ascertained, by a reasonable examination, what the condition of the title was. He had a sufficient notice from the deeds upon record and from the open and notorious possession held by the plaintiffs, as well as by the working of the mine and the location of their buildings and other property thereon, that they asserted an interest in the claim. His failure to follow up the examination and ascertain the true condition of the title places him at fault. Had he done so, he would have readily discovered the possession of the plaintiffs, their relations with Smith, and their ownership in the property. A locator of a mining claim, who locates in his own name, but for the benefit of himself and other partners, becomes a trustee for the benefit of all the other partners. *Hunt v. Patchin* (C. C.) 35 Fed. 816. Such was the relation of Smith to these plaintiffs and to the claim in question. He was not the owner. He was only a co-tenant in possession with his

other co-tenants. The mere fact that the location notice was in his name gave him no exclusive title to the property, and did not empower him to convey the claim to the exclusion of his other co-tenants. Findings of fact, conclusions of law, and judgment may be entered as well against Wesson as against the defendant Meehan.

RUSSELL et al. v. DUFRESNE.

(Second Division. Nome. May 8, 1902.)

No. 280.

1. APPEAL—ABANDONMENT—JURISDICTION.

Plaintiffs were allowed an appeal from an order of court dissolving an injunction against the defendants, but the order provided that, if an indemnifying bond of \$10,000 was not given by defendants within 10 days, the injunction should stand. The bond was not given, and the injunction was not dissolved, and the appeal was thereby abandoned; the cause proceeding as if no such order had been made, and without objection by either party. *Held*, upon objection of defendants after judgment on the merits, that no appeal had been allowed or taken, and that the court had jurisdiction to enter judgment.

2. NEW TRIAL—EVIDENCE—JUDGMENT.

Where a new trial is granted because wrong findings of fact and conclusions of law were drawn from the testimony, it is not necessary or proper to require or permit the evidence to be taken *de novo*, but the court should make correct findings and conclusions from the evidence already taken, and render judgment thereon.

Thompson, Murane & Thompson, for plaintiffs.

W. T. Love and B. F. Knott, for defendant.

WICKERSHAM, District Judge. A new trial has been granted in this case, but counsel do not agree upon the form of the order, and have presented the matter to the court.

The cause was originally sent to a referee upon a stipulation between counsel. The evidence was taken, and the referee reported the evidence and his findings and conclusions to the court. Thereafter Judge Noyes vacated some of the findings, and made new ones from the evidence, and entered judgment thereon. A new trial was thereafter granted upon the motion of the plaintiffs by the present presiding judge (*ante*, 486), but no judgment has yet been signed, for the reason that counsel have urged diverging views upon the court in relation to the correct practice and the scope and contents thereof.

The defendant urges that the case must be sent back to the referee to take new evidence, while plaintiffs insist that it is only necessary for the court to make and file new findings and conclusions, and enter a new judgment, in accordance with the decision granting the new trial, upon the evidence already before the court. Defendant also objects to the jurisdiction of the court to make any order, for the reason that the case is now pending on appeal. This point is based upon the contents of an order made and entered on August 12, 1901, as follows:

"It is hereby ordered in the above-entitled cause that all proceedings therein be stayed until the 1st day of November, A. D. 1901, or such time thereafter as said court shall first convene, and that said plaintiffs be allowed an appeal from the decree of this court in favor of said defendant and against said plaintiffs, and an appeal from the order dissolving the injunction in said case, and that the time within which the said plaintiffs are required to file their appeal bond and bill of exceptions shall be extended until the time aforesaid. And further ordered that in case said defendant shall not file his indemnifying bond of \$10,000 in said action as required by the order of the said court, this day made in open court, within ten days from the making of this order, that the said decree and order dissolving the injunction be set aside, and the cause be allowed to stand upon the hearing of the report of the referee.

"Dated August 12, 1901.

Arthur H. Noyes,

"Judge of Said Court."

An examination of the record discloses that no other step was ever taken in the matter of the appeal by any one. No petition or application for appeal was ever presented by the plaintiffs, no bond given, no other step taken, but the matter was abandoned. There is nothing in the record to show that the allowance of an appeal was made upon request of plaintiffs, but the record does disclose that the plaintiffs continued to prosecute their case in this court thereafter, without regard to the allowance, and without objection being raised by the defendant. A careful inspection of the whole order in which the allowance is made, however, discloses that a certain injunction had that day been dissolved, which, in effect, gave the possession of the property in dispute (a valuable gold mine) to the defendant, upon his giving an indemnifying bond in the sum of \$10,000, but providing that, if he failed to give the bond in ten days, the order dissolving the injunction be set aside, and the cause be allowed to stand upon the hearing of the report of the referee. The bond for \$10,000 was never filed. Consequently the order dissolving the injunction was set aside, and the ground for appeal did not happen. No appeal was therefore allowed. This objection is overruled.

Upon considering the testimony, this court drew findings not justified by the evidence, and its conclusions were equally faulty. The new trial was granted for that cause alone. It will not be necessary to take any further or other evidence, for that was not the point upon which the new trial was granted. *Duff v. Duff* (Cal.) 35 Pac. 437. New findings and conclusions, based upon the evidence now before the court, will be made, and a judgment in accordance therewith entered.

NOME-SINOOK CO. v. SIMPSON (LINDBLOOM et al., Intervenors).

(Second Division. Nome. May 10, 1902.)

No. 577.

1. MINES AND MINERALS—ADVERSE SUIT—JURISDICTION—PATENT.

An adverse suit brought by an applicant for a mining patent may be maintained in the District Court of Alaska, the practice and parties being regulated solely by the Codes.

2. SAME—INTERVENERS—MUNICIPAL CORPORATIONS—PARTIES.

A municipal corporation, though not an adverse claimant in the land office proceeding, may intervene in a suit against an adverse claimant by the applicant for a mining patent, and protect its public property lying within the limits of the mining location, by showing that neither has complied with the law.

Application of the town of Nome to intervene in a suit brought by the applicant for a mining patent under section 2325, Rev. St. [U. S. Comp. St. 1901, p. 1429], against an adverse claimant.

F. E. Fuller, for plaintiff.

T. M. Reed, Jr., and P. C. Sullivan, for defendant.

Ira D. Orton, for intervenor Lindbloom.

V. T. Hoggatt, for intervenor town of Nome.

WICKERSHAM, District Judge. This is an application by the town of Nome for leave to intervene in this action. Objection by plaintiff and defendant.

On August 6, 1901, the defendant applied, under the provisions of sections 2325 and 2326 of the Revised Statutes of the United States [U. S. Comp. St. 1901, pp. 1429, 1430], for a patent to the Simpson placer mine, located over a portion of the main town of Nome, and in the Cape Nome mining district. Within the time limited by law the plaintiff filed an adverse claim in the land office, and began this suit in ejectment to recover a portion of the ground, alleging it to be a part of

the Utah and Winchester placer mines, theretofore located by its grantors. Thereafter, and on March 7, 1902, Lindbloom filed a complaint in intervention, alleging his ownership of certain town lots within the disputed area; his waiver of his adverse claim in the land office in consideration of an agreement by Simpson to sell them to him when patent should be issued to him; and an allegation of connivance and fraud between plaintiff and defendant, whereby defendant, after the expiration of Lindbloom's time for filing an adverse claim had expired, agreed to abandon the land, and permit plaintiff to acquire title. He alleged the bona fides of the Simpson claim, and asked to appear and defend the location, at least so far as to protect his own interests. His intervention was allowed over the objection of both plaintiff and defendant.

The complaint in intervention tendered by the town of Nome alleges that the placer mines of both plaintiff and defendant are located within the area covered by the town of Nome, and that said tracts were, long prior to the location of either of said claims, and now are, in the actual use and occupation of the people of the town for purposes of trade and business, and embraced within the limits of the town, which was incorporated under chapter 21 of the Civil Code of Alaska (Act June 6, 1900, c. 786, 31 Stat. 520) on April 10, 1901, and that the main street of the town is located on said claims.

The published notice of Simpson's application for mineral land patent given by the land office to all parties claiming an interest in the land is also attacked for fraud and insufficiency, and the facts upon which both plaintiff and defendant rely are denied, and the bona fides of their locations put in issue. It is alleged that by reason of the insufficiency of the notice of application for a patent, neither the town of Nome nor any one else in interest had any notice, and that the notice was purposely made misleading to prevent the filing of adverse claims.

Both plaintiff and defendant object to the proposed intervention of the town of Nome upon several grounds, but principally because the town filed no adverse claim in the land office in support of its rights within the 60 days prescribed in section 2325 of the Revised Statutes. They urge that, as neither Lindbloom nor the town filed an adverse claim, it must be conclusively presumed "that no adverse claim exists" in their favor.

When, as in this case, an application for a mineral patent is made to the land office, notice given, and an adverse claim filed, "it shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim." Section 2326, Rev. St. 1878. The plaintiff filed an adverse claim in the land office and began this suit within 30 days thereafter to determine the question of the right of possession, and now objects to the intervention because the intervenor did not also file an adverse claim within the time limited.

The determination of the point in dispute involves an inquiry into the very character of the action now pending, and also the extent of the jurisdiction of this court in relation to it. Upon the one hand it is urged that the proceeding or suit which the adverse claimant must begin in a court of competent jurisdiction in support of his claim is only that ordinary action which he could bring under the local law without regard to the patent proceeding, to determine the question of the right of possession to the claim; that the suit is independent of the land office proceeding both as to parties and subject-matter, and is to be governed as to parties, pleadings, and practice only by the local law; that the land office proceedings are immaterial, and need not be referred to in the

pleadings; and that, whether it is a suit to quiet title or in ejectment, the pleadings need only contain those allegations required by the local law, and that proper and necessary parties plaintiff and defendant or in intervention, under the local law, are not barred by sections 2325 and 2326 and the amendatory act of 1881 (Act March 3, 1881, c. 140, 21 Stat. 505 [U. S. Comp. St. 1901, p. 1430]), though they have not filed an adverse claim in the land office.

On the other hand, it is urged that the suit is a part of the special proceeding provided for by acts of Congress, and is dependent upon those provisions for support. To put it in the exact words of counsel for the defendant, the "court becomes, under the special proceeding authorized by sections 2325 and 2326 of the Revised Statutes of the United States, an auxiliary of the executive department to try conflicts in mining claims, and to report the results for the guidance of the executive department in the disposal of its public lands." Very much of all this may be admitted, but the real point in question is this: Does the power of the "court of competent jurisdiction to determine the question of the right of possession," mentioned in section 2326, flow in any degree from that act? Does the act either confer any power or jurisdiction upon the court, or in any wise limit its power or jurisdiction, under the law of its creation, either as to parties or the subject-matter of the action? The answer to this inquiry is decisive of the matter before the court for this reason, viz., if this court is authorized to try the case solely under the provisions of the Alaska Code, the interveners may properly come in as parties; but, if the power or jurisdiction of the court is limited by the acts of Congress to a controversy between the applicant and adverse claimant in the land office proceeding, then the intervention cannot be allowed, for the town has not filed an adverse claim in the land office. It will be noticed that the statute only requires the suit to be brought in a court

of competent jurisdiction (and the Supreme Court of the United States has declared that this means either a local territorial or state court), or when, under the general rules, a federal question is involved, in a federal court. Neither does the statute contain a direct limitation as to parties, for it carefully states that the adverse claimant shall commence proceedings to determine the question of the right of possession, not his right of possession. The whole question of the right of possession is thus brought before the trial court, without limitation, and since the amendatory act of 1881 neither the applicant nor the adverse claimant can secure a patent unless one or the other establishes affirmatively his exclusive right to the possession and patent against the government and all persons interested. *Perego v. Dodge*, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 113.

In line with this instruction, the amendatory act of March 3, 1881, provides:

"That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case, costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title." 21 Stat. 505.

Clearly, there is nothing in the original statute or the amendment of 1881 which prevents the court from determining the right of possession, according to the evidence, under the law of the locality, or denying to either party a favorable judgment, unless one or the other establishes a valid and legal title under the mining laws of the United States and the local rules and customs of miners. These statutory provisions have been before the Supreme Court of the United States many times, and upon a careful examination of the cases I am persuaded that they do not sustain the objections

urged against the intervention of Lindbloom and the town of Nome. Smelting Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875; Chambers v. Harrington, 111 U. S. 350, 4 Sup. Ct. 428, 28 L. Ed. 452; Richmond v. Rose, 114 U. S. 576, 5 Sup. Ct. 1055, 29 L. Ed. 273; Gwillim v. Donnellan, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348; Wolverton v. Nichols, 119 U. S. 485, 7 Sup. Ct. 289, 30 L. Ed. 474; Noonan v. Caledonia Min. Co., 121 U. S. 393, 7 Sup. Ct. 911, 30 L. Ed. 1061; Iron Silver Min. Co. v. Campbell, 135 U. S. 286, 10 Sup. Ct. 765, 34 L. Ed. 155; Bennett v. Harkrader, 158 U. S. 441, 15 Sup. Ct. 863, 39 L. Ed. 1046; Perego v. Dodge, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 113; Blackburn v. Portland, 175 U. S. 571, 20 Sup. Ct. 222, 44 L. Ed. 276; Shoshone Min. Co. v. Rutter, 177 U. S. 505, 20 Sup. Ct. 726, 44 L. Ed. 864; De Lamar's Min. Co. v. Nesbitt, 177 U. S. 523, 20 Sup. Ct. 715, 44 L. Ed. 872.

In one of these latest decisions the Supreme Court of the United States says upon this point:

"The first observation to be made is that Congress did not intend to prescribe jurisdiction in any particular court, state or federal. * * * Without undertaking to say that no cases can arise under this legislation which turn upon a disputed construction, and therefore presenting a question essentially federal in its nature, we hold that clearly, where a patent is authorized to be issued to the party in possession, the statutes refer the contest to the ordinary tribunals, which are to determine the rights of the parties without any controversy as to the construction of those acts, but are to be guided by the laws, regulations, and customs of the mining district in which the lands are situated." Blackburn v. Portland, 175 U. S. 571, 20 Sup. Ct. 222, 44 L. Ed. 276.

And in Shoshone Min. Co. v. Rutter, 177 U. S. 505, 20 Sup. Ct. 726, 44 L. Ed. 864, the court said:

"While, on the other hand, as we have heretofore shown, in these adverse suits preliminary to a patent of mineral lands not merely questions of law arising under the statutes of the United States,

but questions of fact and questions arising under local rules and customs and state statutes are open for consideration. * * * And finally, it is said that congress cannot confer any jurisdiction on the state courts, that they may decline to entertain these adverse suits, and that congress cannot compel them to do so. But here again we are met with the fact that congress has left all controversies in respect to right of possession, not exceeding \$2,000 in value, to the state courts."

In the case of *Chambers v. Harrington*, 111 U. S. 350, 4 Sup. Ct. 428, 28 L. Ed. 452, the court said: "What is a competent court is not specifically stated, but it undoubtedly means a court of general jurisdiction, whether it be a state court or a federal court," and then asserts that "the very essence of the trial is to determine rights by a regular procedure in such court, after the usual methods"; and to the same effect is the decision in *Perego v. Dodge*, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 113.

Upon a careful consideration of these decisions of the Supreme Court of the United States, I am satisfied that the following conclusions are well founded: (1) That Congress did not intend by sections 2325 and 2326 and the amendatory act of 1881 to prescribe jurisdiction in any particular court, state or federal. (2) The local trial court may determine the action, without any controversy as to the acts of Congress in relation to patent proceedings, and therefore no federal question is necessarily involved. (3) The state or local court shall be guided and controlled as to jurisdiction, practice, and procedure only by the laws, regulations, and customs of the mining district and the state or territorial statutes—the law of the forum. (4) No power or jurisdiction is conferred upon the local courts by the provisions in relation to patent proceedings, nor are their general powers or jurisdiction limited in any respect thereby.

And these conclusions are further strengthened by the decisions of other federal and state courts. In *Shoshone Min.*

Co. v. Rutter, 31 C. C. A. 223, 87 Fed. 801, the Circuit Court of Appeals, Ninth Circuit, sustained each of the above conclusions, except the second, in this language:

"The proceedings required to be commenced, under the provisions of section 2326, in a court of competent jurisdiction, may be brought either in the state or national courts, at law or in equity, as the facts may warrant; but section 2326 does not confer any special jurisdiction on the state courts. When the suits are brought and tried in the state courts, they are subject to the provisions of the state statutes in relation to such cases, and the courts proceed in the manner prescribed by such statutes."

This case was reversed upon appeal to the Supreme Court of the United States upon the point that no federal question was involved, though sustained in respect to the quotation above made. Shoshone Min. Co. v. Rutter, 177 U. S. 505, 20 Sup. Ct. 726, 44 L. Ed. 864.

In the case of Rose v. Richmond Min. Co., 17 Nev. 25, 27 Pac. 1105 (cited with approval on this point by the Circuit Court of Appeals, Ninth Circuit, in Shoshone Min. Co. v. Rutter, 31 C. C. A. 223, 87 Fed. 801), the Supreme Court of Nevada reaffirmed its decision in the case of 420 Min. Co. v. Bullion Min. Co., 9 Nev. 248. Its language is:

"In 420 Min. Co. v. Bullion Min. Co., 9 Nev. 247, we said: 'Congress did not, by the passage of this act, * * * confer any additional jurisdiction upon the state courts. The object of the law, as we understand it, was to require parties protesting against the issuance of a patent to go into the state courts of competent jurisdiction, and institute such proceedings as they might, under the different forms of action therein allowed, elect, and there try "the right of possession" to such claim, and have the question determined. The acts of Congress do not attempt to confer any jurisdiction not already possessed by the state courts, nor to prescribe a different form of action. * * * We are of the opinion that when the action is brought, whatever may be its character, it must be tried by the same rules, governed by the same principles, and controlled by the same statutes that apply to such actions in our state courts, irrespective

of the acts of Congress.' Section 1674 [Comp. Laws Nev.] was evidently passed to supplement the act of Congress as stated in the Golden Fleece Case [12 Nev. 312], and it designates the jurisdictional facts that are necessary to be alleged in the complaint. The complaint in this action substantially conforms to the language of the statute, and we are of the opinion that, tested by the statute and the previous decisions of this court, it states facts sufficient to constitute a cause of action to determine the right to possession to the mining ground in controversy."

This case was affirmed, including the language from 9 Nev. 248, upon an appeal to the Supreme Court of the United States, in Richmond Min. Co. v. Rose, 114 U. S. 576, 5 Sup. Ct. 1055, 29 L. Ed. 273.

Counsel for applicant and adverse complainant in the land office proceedings rely with confidence upon the case of Mont Blanc Min. Co. v. Debour, 61 Cal. 364, where the identical point in question was decided in their favor. The case was an appeal by interveners from an order denying their right of intervention, and the syllabus states the gist of the opinion clearly:

"In an action brought under section 2326, Rev. St. U. S., to determine the right of possession to a mining claim, those only who have filed claims to the land in the United States Land Office can properly be made parties to the action, and such parties only are entitled to intervene."

This case, however, has been recently overruled in principle by the Supreme Court of California in two cases. The case of Altoona Q. M. Co. v. Integral Q. M. Co. (Cal.) 45 Pac. 1047, sustains the doctrine announced by the Nevada courts, which it quotes as authority, and says:

"The rights of the parties will be entirely determined by the laws of the United States granting the right to enter upon the mineral lands, to extract metal therefrom, and to acquire title thereto, and the suit must be tried in every respect as though no contest was pending in the land office of the United States in regard to the right to purchase the same."

In the case of *Quigley v. Gillett*, 101 Cal. 462, 35 Pac. 1041, the same court said of this action:

"The action was brought to 'determine the question of the right of possession' to certain mining land, and that was the only question involved. The court had nothing to do with the proceedings in the land office, and had no power to determine their regularity or irregularity, sufficiency or insufficiency."

The California courts cite with approval *420 Min. Co. v. Bullion Min. Co.*, 9 Nev. 248, which, by implication at least, has also been approved by the Supreme Court of the United States in *Richmond Min. Co. v. Rose*, *supra*.

Upon a careful examination of all the decisions which are binding authority upon this court, as well as those which are very presuasive, I am satisfied that section 2326 neither prescribes the jurisdiction nor limits it in any court having jurisdiction to try this action. It is true that this is a continuation of the land office proceedings, in that it is one of the steps required by the United States statutes to be taken by the parties who desire to contest the issuance of a mining patent. When the step is taken, however, in compliance with the statute, it must be according to the law of the forum, both as to parties and subject-matter.

In *Lindley on Mines*, the author seems unable to reach a conclusion satisfactory to himself from an examination of the authorities then available. The federal Circuit Courts as well as some of the state courts in the western mining states had then adopted the rule that a suit under section 2326 was one arising under the laws of the United States, and necessarily involved a federal question, and that the jurisdiction of the trial court was necessarily limited to the parties litigant in the land office proceedings. This doctrine was not indisputably overthrown until the case of *Blackburn v. Portland* was decided by the Supreme Court of the United States at the October term, 1899 (175 U. S. 571, 20 Sup. Ct. 222, 44 L. Ed. 276).

Following that, the cases of *Shoshone v. Rutter*, *supra*, and *De Lamar v. Nesbitt*, *supra*, were clearly explained, and defined the jurisdiction of the trial court, and its methods and rule of procedure. Even amid the uncertainties and doubts then prevailing, Lindley states that:

"It may be accepted as the established doctrine that the act of Congress under consideration does not confer any additional jurisdiction upon the state courts. The action to determine an adverse claim to unpatented mining claims is an action concerning real property. Such a mining claim is real estate, and the jurisdiction to try controversies arising out of conflicting claims to real estate is vested in the state courts by virtue of the state constitutions." *Lindley on Mines*, § 753.

There can be no question, it seems, about the general jurisdiction of the court, and yet it may be objected that the authorities cited have not sufficiently overruled the case of *Mont Blanc v. Debour*, 61 Cal. 364, denying the intervention of one who has not filed an adverse claim. The case of *Noonan v. Caledonia M. Co.*, 121 U. S. 393, 7 Sup. Ct. 911, 30 L. Ed. 1061, is sufficiently in point. That was a suit to determine the rights of the applicant and adverse claimant to a mining claim in the territory of Dakota and which was carried to the Supreme Court of the United States. During the trial below it appeared that one Mahan, not a party of record, asserted an interest in the claim, and was a necessary party to a complete determination of the matter in controversy. He had not filed an adverse claim in the land office. He was made a party defendant notwithstanding that fact, and the judgment was affirmed. The court determined that the Dakota provision in relation to the amendment of pleadings by adding to or striking out the name of any party, or by correcting a mistake in the name of any party, applied to the case, and sustained the decision of the court in permitting Mahan to be a party to the case. It follows that, if he could

be made a party by a motion without his consent, he might have become a party by intervention. It seems to me that this case settles the very point at issue, and permits an intervention by one who has not filed an adverse claim. I conclude, from an examination of the authorities, that this suit, while it is a step required by the act of Congress in aid of the land office proceeding, is supported by the jurisdiction which this court possesses by virtue of the Code of Alaska, both as to parties and subject-matter. It is a suit in ejectment, and the pleadings should contain only those jurisdictional allegations required by chapter 32 of the Code of Civil Procedure in relation to actions to recover the possession of real property. Section 303 of that chapter authoritatively states what such a complaint shall contain. It should contain nothing more, and need contain no reference to the land office proceedings. It may be true that neither of the interveners in this case can procure a patent by virtue of their appearance in this case, because they have not filed an adverse claim in the land office. But they clearly have the right to contest the claims of the applicant and adverse claimant to such patent, and, if the interveners are the real owners of this property, and the court shall so determine by its judgment, the result will be that neither the applicant nor adverse claimant will receive a patent, whereby the rights of the interveners will be fully protected.

If, however, I were to reach the opposite conclusion in this case, and deny the right of the interveners to appear and defend, because they had filed no adverse claim, yet I would, of my own motion (*Parker v. Winnipiseogee*, 2 Black, 545, 17 L. Ed. 333), be compelled to dismiss the action for want of jurisdiction on account of the fatal jurisdictional defect in the motion published by the land office. If this is a continuation of the land office proceeding, and dependent upon it for jurisdiction, such a result must necessarily follow. In Colo-

rado, where that theory is followed by the state courts, the Supreme Court in the case of *Seymour v. Fisher*, 27 Pac. 240, says:

"But if, by reason of the fraudulent conduct of the patentee, the would-be contestor is kept in ignorance of the pendency of patent proceedings, and is thus prevented from availing himself of the statutory remedy, a court of equity may, in our judgment, interfere. * * * And when the foundation is laid by proof showing clearly the fraud of the applicant, whereby the complaining party has been kept in ignorance of the existence of the patent proceedings, the court may consider the right of such party to the ground in controversy."

In my judgment, the notice of the application for patent in the land office proceeding in this case is fatally defective, and cannot be made to support a patent in opposition to the rights of other claimants, who had no other notice. However, I accept the view expressed by the Supreme Court of California in the case of *Quigley v. Gillett*, 101 Cal. 462, 35 Pac. 1041, that this court "has nothing to do with the proceedings in the land office, and no power to determine as to their regularity or irregularity, sufficiency or insufficiency." This court stands upon its own jurisdiction, and not that acquired by the notice in the initiation of the land office proceedings; otherwise the interventions would be denied, and the case dismissed, for want of jurisdiction.

The right of an intervener claiming ownership and possession against both the applicant and adverse claimant under the patent proceedings to appear in this action and contest their claims is further strengthened by the last clause of section 2325: "And thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." Third parties, then, may appear as protestants to show that the applicant has failed to comply with the terms of the law, and is not entitled to a patent. The

statute, however, does not limit the appearance of these third parties to the Land Department. They may appear at any stage of the proceedings to show the failure of the applicant to comply with the law. A protestant in the land office proceeding is an intervener who appears by virtue of the statute to show that the applicant has failed to comply with the law; and intervener in this action is a protestant, who appears by virtue of the same statute to show that the applicant has failed to comply with the law. Neither can acquire the status or right of an adverse claimant by such appearance, but either may defend his rights by showing the failure of the applicant or claimant to comply with the law. It is my opinion that the intervention of such third parties for such purposes is allowed and justified by the provisions of the language quoted from the statute.

Upon an examination of the complaints in intervention, I am satisfied that both Lindbloom and the town of Nome have an interest in the matter of litigation against both the applicant and adverse claimant in the land office, and are proper parties to intervene. The objections to the intervention of the town of Nome are overruled, and leave is given to file its complaint.

THE INDEPENDENCE.

(Second Division. Nome. May 17, 1902.)

No. 58a.

1. ADMIRALTY—EVIDENCE—SEAMEN.

A seaman's claim for a contract salary must be supported by a fair preponderance of proof, where it is attempted to secure an unconscionable sum for a minimum service.

A. J. Bruner and C. H. McBride, for libelant.
C. S. Johnson and A. J. Daly, for claimant.

WICKERSHAM, District Judge. The libelant sues to recover the sum of \$1,175, alleged to be due him for services as engineer on the small stern-wheel steamer Independence, for 85 days' work as engineer from April 28, 1901, to July 18, 1901, at \$15 per diem. He admits the payment of \$100 on account.

Upon stipulation the testimony taken before the justice of the peace upon the inquiry as to probable cause was taken as testimony upon the merits. Upon that and the testimony offered in court the cause is now determined. The evidence discloses that the libelant left Nome on April 28, 1901, with the charterer, one A. H. Logan, and one Falkenburg, who went as captain, to go to the winter quarters of the boat on the Neukluk river, near Council City. The boat remained fast in the ice until about July 1, when she was loosened, and run down to Chinik, occupying some five or six hours in the trip; thence to Teller, about fourteen hours; and one round trip from Teller to Mary's Igloo, about two days. This comprised all the services rendered by the libelant in running the boat, and less than five days' time.

Logan, the charterer, testified that the contract with libelant was made by him, and that libelant agreed to work for a percentage of the receipts of the business, except that he was to be paid \$100 for bringing the boat from the Neukluk river to Nome. In support of Logan's version of the contract the evidence shows that no articles or contract in writing was made or signed by libelant; that no pay roll was ever made or kept with his name on it, though it did contain the name of his immediate successor; and that on July 18, 1901, when Dumar quit, the purser made and Dumar signed the following receipt:

"Received of A. H. Logan \$100.00, payment in full for bringing str. Independence from Neukluk Riv. to Nome City.

"H. T. Dumar.

"Dated July 18, 1901."

Dumar's claim is not sustained by any preponderance of proof. It is shown that for 60 days or more, for which he seeks to fasten a lien upon this boat at \$15 per day, the boat was fixed in her winter quarters, frozen in the ice. The proof is insufficient to convince the court that he performed any meritorious or other services during that time. For the time actually employed in running the boat he was fully paid, even more than his alleged contract price. His claim of \$1,175, in view of the facts, seems unconscionable; nor is it established to the satisfaction of the court. Dumar testifies in its support. Logan testifies with equal earnestness against it, and is supported by equity, the receipt, and other facts and circumstances. The preponderance of proof is against the libelant, and so, it seems to the court, is the good faith of the transaction. His claim ought to be supported by a fair consideration before he is given so great a judgment for so small an amount of actual services.

I find that the libelant entered into an agreement with Logan to run the boat for a share of the receipts, and for the sum of \$100 for bringing her to Nome. He has been paid for his services as agreed, and his claim for further services will be denied. A decree may be prepared accordingly.

TOWN OF NOME V. LANG.

(Second Division. Nome. May 17, 1902.)

No. 641.

1. MUNICIPAL CORPORATIONS—ASSUMPSIT—STREET IMPROVEMENTS.

Where resident property owners of the town of Nome petitioned the common council to improve the street in front of their property, specifying the kind and character of improvement, and saw the work and labor done and the materials furnished in compliance with their written request, *held*, that the town

might recover the reasonable value of such work and materials in an action of assumpsit under their implied contract to pay.

Suit to recover for street improvements.

V. T. Hoggatt, for plaintiff.

Albert Fink, for defendant.

WICKERSHAM, District Judge. The plaintiff, the town of Nome, alleges in its complaint that it is a municipal corporation, and that the defendant is indebted to it in the sum of \$341.44 for street assessment due for the improvement of Steadman avenue in front of defendant's property; that said improvement consisted in the planking of the avenue; "that said improvement and planking was done and the labor and material furnished by the plaintiff at the special instance and request of defendant; that the same was done with defendant's knowledge, acquiescence, and consent; that said improvement directly benefited defendant's property, and that he received the benefit thereof; that the said sum of \$341.44 assessed and herein claimed was the reasonable value of the material furnished and work and labor performed in making said improvement, and was also the value of said benefit to defendant's property." The complaint further alleges that prior to the improvement the defendant, together with a majority of the owners of the lineal feet frontage on said Steadman avenue, had petitioned and requested the common council of the town of Nome to order the improvement done; "that defendant, in said petition, further requested that the common council improve Steadman avenue in such manner as to the common council might seem proper, and to exercise the power of said council providing for the improvement of said Steadman avenue, so as to cause said Steadman avenue to be repaired and put in fair condition for travel" from Front street to the northern end of the avenue; that by ordinance the common council provided for the improvement of the

street as requested; "that no portion of said sum of \$341.44 has been paid, although demand has been made upon the defendant for the payment of the same, and notice has been given to defendant that the same was due and payable." Plaintiff asks for judgment for the amount sued for, with interest.

Upon the face of this complaint the action is one in assumpsit for the recovery of the reasonable value of material and services rendered by the town of Nome in the improvement of the defendant's property at his request. Such a suit may be maintained. *Metropolitan Ry. Co. v. District of Columbia*, 132 U. S. 1, 12, 13, 10 Sup. Ct. 19, 33 L. Ed. 231.

The town of Nome has power, under chapter 21 of the Civil Code of Alaska (Act June 6, 1900, c. 786, 31 Stat. 520), "by ordinance to provide for necessary street improvements." It may be conceded that it has power and authority, under section 269 of chapter 28 of the Civil Code, extending the mechanics' liens to such cases, to file a lien for work done and material furnished in improving a street in front of the property by one who requested the improvement to be made. The municipal corporation is a person under the provisions of that section. *Metropolitan Ry. Co. v. District of Columbia*, 132 U. S. 1, 10, 10 Sup. Ct. 19, 33 L. Ed. 231. But I do not discover that any question in relation to special assessment or the mechanic's lien law arises under the allegations in the complaint demurred to. It is a suit in assumpsit to recover the reasonable value of money expended by the town of Nome, at the special instance and request of the defendant, in the improvement of the street in front of his property. It seems clear enough to me that the city may undertake such improvement under the wide power given it by statute, and, if the defendant requested the improvement to be made, an implied contract to pay for it may result. The complaint states a cause of action, and the demurrer may be overruled.

AMES v. KRUZNER et al.

(Second Division. Nome. May 24, 1902.)

No. 489.

1. INJUNCTION—JURISDICTION.

A temporary injunction or restraining order will not be granted until it affirmatively appears that the court has jurisdiction.

On October 16, 1900, T. Z. Kruzner and G. H. Woodruff, being indebted to the Ames Mercantile Company, made their note to that company for the sum of \$1,514.90, due 120 days from date. To secure the payment of the note, on the same date they made a mortgage in the name of F. H. Ames, as manager of the company, upon certain mining property, among others No. 2 above discovery on Bonanza creek. The mortgage is upon an undivided one-half interest in the property, that being all the interest owned by the makers of the note, the other half interest belonging to Julius Nelson. The note not being paid, a suit was brought by the plaintiff to foreclose the mortgage. The makers of the note, as well as Nelson and other parties laboring upon the claim, are made defendants, and the plaintiff asks for an injunction to restrain all of the defendants from working upon the claim pending the litigation. Kruzner and Woodruff appear by their attorney, and by affidavits make known to the court that at the time the note in question was made the Ames Mercantile Company was a foreign corporation doing business in Alaska, and that it had not complied with the statute requiring the filing of a copy of its articles of incorporation, a statement of its assets, and the consent to be sued within the district as provided by law. It elects to make void its obligation under the statute, and objects to the enforcement of the rights of the plaintiff against it. At the same time

Julius Nelson, the other half owner, appears, and objects to the granting of the injunction against him.

Ira D. Orton, for plaintiff.

Love & Knott, for defendants.

WICKERSHAM, District Judge. Two questions are raised: (1) Whether or not an injunction should be granted against a co-tenant in possession working the claim pending the foreclosure proceedings; and (2) whether or not an injunction ought to be granted against the defendants Kruzner and Woodruff, who made the note and mortgage, in the face of the showing that at the time the note was made the plaintiff, as a foreign corporation, had not complied with chapter 23 of the Civil Code of Alaska, Act June 6, 1900, c. 786 (31 Stat. 528), requiring the articles, consent, and statement to be filed. Section 228 of chapter 23 provides that:

"Every contract made by such corporation, or any agent or agents thereof, during the time it shall so neglect to file such statements, certificates, or consents, shall be voidable at the election of the other party thereto."

These parties elect to declare it void, and object to the jurisdiction of the court to enforce it. Section 231 also provides that:

"If any such corporation or company shall fail to comply with any of the provisions of this chapter, all its contracts with citizens of the district shall be void as to the corporation or company, and no court of the district, or of the United States, shall enforce the same in favor of the corporation or company so failing."

These sections seem to differ from the law contained in any of the citations made to the court by the plaintiff. They amount to a prohibition upon the jurisdiction of the court, and, if the facts in this case bring it within the prohibition, the court would not have jurisdiction to enforce the claim.

Without passing upon the question as to whether or not

this claim can be enforced, under the circumstances, in this court, the matter is in such a condition that the court will not at this time grant an injunction against the working of the claim.

The application for an injunction is denied, but without prejudice to its being renewed.

AMES v. KRUZNER et al.

(Second Division. Nome. May 24, 1902.)

1. EVIDENCE—PRESUMPTIONS.

Illegality is never presumed; on the contrary, everything must be presumed to have been legally done until the contrary is proved.

2. FORFEITURE—EVIDENCE.

Courts will never resolve a doubt, either of law or fact, in favor of a forfeiture of property. The intention of the law to forfeit the estate must be so clear as to leave no room for doubt. Equity often interferes to relieve against forfeitures, but never to divest estates by enforcing them. A forfeiture will not be declared unless the law so expressly declares.

3. FOREIGN CORPORATIONS—CONTRACTS—RESCISSON.

On October 16th, defendants gave their note to the Ames Mercantile Company, a foreign corporation, which had not yet filed its articles, statement, and consent of agent required by chapter 23 of the Civil Code of Alaska (Act June 6, 1900, c. 786, 31 Stat. 528). On the same day the defendants made a mortgage to Ames, the plaintiff, to secure the payment of that note and other contemplated indebtedness. The corporation filed its articles, etc., on October 20th, and thereafter plaintiff brought suit to foreclose the mortgage. Defendants seek to avoid their note, because it was made to the corporation in advance of their compliance with the statute. *Held*, that it was a voidable contract only, and could only be avoided by rescission and returning the consideration.

Foreclosure of a mortgage. Defendants seek to avoid their obligation upon a plea that the plaintiff, a foreign corporation, was not empowered to contract within the district. Demurrer to plea sustained.

Ira D. Orton, for plaintiff.

Love & Knott, for defendants.

WICKERSHAM, District Judge. On October 16, 1900, the defendants, Kruzner and Woodruff, at Nome, made and delivered their promissory note in the sum of \$1,514.90 to the Ames Mercantile Company, a foreign corporation. At the same time they made and delivered to the plaintiff, Ames, a mortgage upon an undivided one-half interest in placer mine No. 2 above discovery on Bonanza creek, in the Cape Nome mining district, and also upon the schooner Lady George, to secure the payment of the note and other advances to be made thereafter by the plaintiff, and which were afterwards made in the sum of \$206.93. This is a suit to foreclose the mortgage, the note and open account having been assigned to this plaintiff prior to bringing this action.

It is alleged as a defense that upon the date of the making and delivery of the note and mortgage the Ames Mercantile Company, to which the note was made payable, was a foreign corporation, and had not complied with the provisions of chapter 23 of the Civil Code of Alaska (Act June 6, 1900, c. 786, 31 Stat. 528), requiring such foreign corporation to file copies of its articles of incorporation, a statement of its financial condition, and the name and consent of its agent to be sued in this jurisdiction in the office of the clerk of this court. Each defendant, answering separately, then alleges that "defendant elects not to be bound by said note and mortgage executed and delivered on the said 18th (16th) day of October, A. D. 1900, to the said corporation, and described in the amended complaint of plaintiff herein, for the reason that said

corporation had, at the time mentioned, failed to comply with the provisions and requirements of chapter 23 of the Civil Code of Alaska herein." A stipulation is filed, signed by both parties, wherein it is agreed that the articles, financial statement, and consent of agent were filed with the clerk of this court on the 20th day of October, 1900—only four days after the date of the note and mortgage, and long before the maturity of the note. It is not shown when the indebtedness upon the open account for \$207.93, secured by the mortgage, was incurred by defendants. The court will not presume that it was prior to October 20, 1900. Paragraph 4 of the amended complaint alleges that it was "subsequent to the date of said mortgage," on October 16th, and, as no date is agreed upon or shown, the court will presume that it was subsequent to October 20th, the date when the Ames Mercantile Company became duly qualified to transact business in Alaska, for "illegality is never presumed; on the contrary, everything must be presumed to have been legally done till the contrary is proved." As this item is secured by the mortgage, and is sufficient to sustain this action, there must be a judgment and foreclosure in favor of the plaintiff for that amount, in any event. This leaves only the question of the validity of the note and mortgage of the date of October 16th in controversy. As to these the defendants elect to avoid their obligation under the provisions of the statute.

It is a sound principle of equity and good conscience that forfeitures are deemed odious, and courts will not resolve a doubt, either of law or fact, in favor of a forfeiture of property rights once fully and fairly vested. The intention of the law to forfeit the estate must be so clear as to leave the court no room for other action before it will enter the decree. Equity often interferes to relieve against forfeitures, but never to divest estates by enforcing them. A forfeiture will not be declared unless the law so expressly

provides. If the law does so provide, and the case falls unmistakably within the statute, the court must declare the forfeiture.

In this case the note was made on October 16th, and was due, according to its terms, in four months. Four days after the note was made—on October 20th—the corporation complied with the law. The defendants received the consideration for the note, and the defense has no merit except the technical wording of the statute which they plead.

Sections 228 and 231 of chapter 23 of the Civil Code of Alaska (Act June 6, 1900, c. 786, 31 Stat. 528), upon which defendants rely, read as follows:

"Sec. 228. Penalty for Failure to Comply. If any corporation or company shall attempt or commence to do business in the district without having first filed said statements, certificates, and consents required by this chapter, it shall forfeit the sum of twenty-five dollars for every day it shall so neglect to file the same; and every contract made by such corporation, or any agent or agents thereof, during the time it shall so neglect to file such statements, certificates, or consents, shall be voidable at the election of the other party thereto. It shall be the duty of the United States attorney for the district to sue for and recover, in the name of the United States, the penalty above provided, and the same, when so recovered, shall be paid into the treasury of the United States."

"Sec. 231. Penalty for Failure to Comply. If any such corporation or company shall fail to comply with any of the provisions of this chapter, all its contracts with citizens of the district shall be void as to the corporation or company, and no court of the district, or of the United States, shall enforce the same in favor of the corporation or company so failing."

Upon a careful study of the chapter including these two sections, it is plain that the purpose of the law is to require foreign corporations to file their articles of incorporation, a statement of their financial condition, and the appointment and consent of their agent to be sued, before they shall commence to do business in the district. A graduated series of

penalties is imposed in case of their failure to comply with the law in these respects. Three such penalties are imposed—two by the first section, and one by the last. If the corporation shall attempt or commence to do business without complying with the law, it shall forfeit the sum of \$25 per day for every day it shall so neglect, to be recovered by suit in the name of the United States, and paid into the treasury of the United States. This clause is general, and is not repeated in section 231, because it is understood to apply without being mentioned again. The real distinction between these two sections is seen in comparing the penal clause against the enforcement of contracts. Section 228 provides that, if such corporation shall attempt or commence to do business without complying with the law, it shall pay the daily penalty to the government, "and every contract made by such corporation, or any agent or agents thereof, during the time it shall so neglect to file such statements, certificates, or consents, shall be voidable at the election of the other party thereto."

I understand this section to mean that a contract made by any person on October 16th, with a foreign corporation which did not file its statements, certificates, and consent until October 20th, and which came to suit subsequent to that date, is voidable at the election of the other party thereto. It is not void, but only voidable. The other party thereto may waive his statutory privilege, and stand on his contract; it cannot be avoided by the corporation. If the other party thereto does waive his right to avoid, the contract may be enforced, even by the corporation, and the court is not without jurisdiction.

Section 231, however, has but one object, viz., it is a withdrawal of all jurisdiction in the court to enforce, in favor of the corporation, a contract falling within its terms. I understand it to mean that a contract made by any person, say, on October 16, 1900, with a foreign corporation, which wholly

failed thereafter to comply with the law, cannot be enforced by the court in favor of the corporation, for want of jurisdiction in the court. The contract, strictly speaking, is not void, but only voidable, when considered from the standpoint of the other party. Notwithstanding the fact that a foreign corporation has wholly failed to comply with the law, the other party may, under the provisions of either section, enforce his contract with the company. He can avoid it, also, under the terms of either section. In favor of the corporation the contract is only voidable under the terms of section 228, but wholly void for want of jurisdiction in the courts to enforce it under the terms of section 231.

It follows, from this imperfect analysis, that in the case at bar the contract note sued upon is, as against the corporation, only voidable under section 228, and not void under section 231. The court has jurisdiction to enforce the contract, unless it is avoided by its judgment.

This brings us to consider the law and practice when a party seeks to escape from his obligation under a voidable contract. The defendants allege only that they "elect not to be bound by said note and mortgage," for the reason that the corporation has failed to comply with the law. Can they thus repudiate a "voidable contract," and retain the consideration, or must they not return the consideration before rescission, or stand by the contract as made?

The avoiding of a voidable contract is termed rescission. "We have already seen that rescission is the avoiding of a voidable contract." Bishop on Contracts (Enlarged Ed.) § 679. "A party, to accomplish an adverse rescission, must return to the nonconsenting party what will place him in *statu quo*." "The party rescinding must return the consideration or whatever else he received under the contract, and otherwise do what will put him and the other party in *statu quo*, as already explained; and if he cannot do this—as, if he has de-

rived from the contract some benefit not of a sort to be refunded—he cannot rescind." Bishop on Contracts, §§ 818—833.

In the case at bar the defendants have received, and do not offer to return, the full consideration for the note which they elect to repudiate upon their voidable contract. This they cannot do, and their plea cannot avail them as a defense under the facts and the phraseology of section 228. For these reasons there must be a foreclosure and decree against the defendants for the full amount of the note and open account.

ANVIL GOLD MIN. CO. v. HOXIE and LYNG.

(Second Division. Nome. May 31, 1902.)

No. 520.

1. ATTACHMENT—BAIL—ESTOPPEL.

When the defendant in an attachment proceeding gives the bail bond provided for in sections 149 and 150 of the Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 356), instead of the redelivery bond provided for by section 145 (31 Stat. 355), he thereby admits the validity and necessity of the attachment, and waives any and all claims for damages for an alleged wrongful issuance thereof.

Suit to recover on attachment bail bond. The answer contains a plea in bar in effect that the giving of the bail bond is an estoppel. Demurrer overruled.

Keller & Fuller, for plaintiff.

John L. McGinn, for defendants.

WICKERSHAM, District Judge. This is an action to recover upon an attachment bond given by the defendants, as

sureties for one Carrie B. Lee, in a suit against the plaintiff in this action under the provisions of section 137 of the Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 354). Three several defenses are pleaded in the answer. The last of these defenses alleges that after the issuance of the writ of attachment on September 19th and on October 11th the plaintiff in this action (the defendant in that action) filed an undertaking for the release of the attached property in pursuance to the provisions of sections 149 and 150 of the Code of Civil Procedure. The defendants plead this action of the plaintiff as a bar to his right to recover on the attachment bond given by these defendants in the former action. A demurrer is interposed to each of the several defenses alleged in the answer, and the inquiry now is whether they severally state a defense.

There are three methods of securing the release of attached property pointed out by our Code: First. Section 151 provides that the defendant may, at any time before judgment, except where the cause of attachment and the cause of action are the same, apply to the court, or the judge thereof, where the action is pending, to discharge the attachment in the manner and with the effect as provided in sections 121 and 122 for the discharge of a writ of arrest. Sections 121 and 122 provide that a writ of arrest may be vacated upon motion, affidavits, or other proof, and a hearing thereon; and if, upon such hearing, it appears that there was not sufficient cause to allow the writ, or that there is other good cause which would entitle it to be discharged, it should be vacated. This method, however, seems to be without effect, and the provisions of section 151 to be impotent, for the reason that the cause of attachment and the cause of action are always the same under the Code of Alaska. These provisions in our Code were adopted from Oregon, and have been so construed by the Su-

preme Court of that state in the case of Bank of Winnemucca v. Mullaney, 29 Or. 268, 45 Pac. 796. That construction is also adopted by this court.

The next method is provided by section 145, and is accomplished by giving to the marshal a redelivery bond. The effect of this section is to secure the release of the property to the defendant upon his engaging to redeliver it, or pay the value thereof to the marshal; but such bond does not have the effect of dissolving the attachment. Drake v. Sworts, 24 Or. 201, 33 Pac. 563.

The third method is that which was adopted by the defendant in the former case (the plaintiff in this action), and is pointed out in sections 149 and 150. These sections provide for the giving of a bail bond by the defendant at any time after his appearance in the action. The bail bond is not given to the marshal, but to the plaintiff in the action. Its effect is to release the attached property, and to dissolve the attachment, and the suit thereafter proceeds in personam. The inquiry in this case now is whether, by the giving of the bail bond mentioned in sections 149 and 150, the defendant in the former suit did not thereby admit the validity and necessity of the attachment, and waive any and all claims to damages for any alleged wrongful issuance thereof.

If the defendant in the former case had given only a redelivery bond, and permitted the attachment proceeding to stand, it would have secured the possession of its property thereby, and at the same time could have met the issue, in so far as it is a matter of contest, upon the attachment proceeding in the original suit. By giving the bail bond, however, it withdrew that proceeding from the regular action, and, the authorities seem to hold, thereby admitted the validity and necessity of the attachment proceeding. The Supreme Court of Oregon, in the case of Drake v. Sworts, 24

Or. 201, 33 Pac. 563, practically decides the question at issue adversely to the plaintiff. The authorities seem to sustain that decision. 3 Am. & Eng. Enc. of Law (2d Ed.) 231; Ferguson v. Glidewell, 48 Ark. 195, 2 S. W. 711; Rachelman v. Skinner (Minn.) 48 N. W. 776; Fox v. Mackenzie (N. D.) 47 N. W. 386; McLaughlin v. Wheeler (S. D.) 47 N. W. 816; Wade on Attachments, § 183.

This effect has been given to the statute of Idaho by the United States Circuit Court for that district. Glidden v. Whittier (C. C.) 46 Fed. 437. I am of the opinion that the weight of authorities is in favor of the rule that the defendant waives all irregularities and defects in the original attachment proceedings, and admits an estoppel in the suit against the attachment sureties by giving the bail bond required by our statute. The demurrer to this cause of action may be overruled. The demurrer to the other causes of action will also be overruled, and an exception allowed to the plaintiff upon each.

THE CATHERINE SUDDEN.

(Second Division. Nome. June 7, 1902.)

No. 2a.

1. ADMIRALTY—EMBEZZLEMENT—SALVAGE.

Where a derelict is surrounded by the ice in Bering Sea, and in a sinking condition, abandoned by her officers and crew, as well as by her owners and underwriters, it was not embezzlement of her cargo for the rescuing vessel and her officers to use such parts of her cargo and supplies as were necessary to enable them to put their crew aboard and raise the vessel and tow her into port.

Objections to report of referee in admiralty

Frank A. Steele and James Keifer, for libelants.

Page, McCutchen, Harding & Knight and A. J. Daly, for claimant and for Corwin Trading Co., and other interveners.

Walter M. Willett, for underwriters.

WICKERSHAM, District Judge. This cause comes on for hearing upon the objections to the report of the referee heretofore filed. I have carefully read and examined the report and all the evidence upon which it is based, and have considered the objections thereto, and must sustain them in so far as they are hereinafter designated.

The evidence shows that about June 4, 1900, the steamer Corwin, then on her way from Unalaska to Nome, sighted a vessel in distress, and went to her rescue. She was some miles off the course of the Corwin, amid the floating ice of Bering Sea, and it was necessary for the Corwin to "buck" ice and run considerable risk in reaching the location of the derelict. Arriving there, they found the Catherine Sudden deserted by her master and crew. Near her were anchored the Pitcairn and the Rube L. Richardson, two small sailing vessels. The deck of the Catherine Sudden was level with the water and awash, and she was in a sinking condition. The Corwin, being under steam, was able to render assistance that neither of the sailing vessels could give. A line was sent from the Corwin to the deck of the Catherine Sudden, and attached to a small launch then resting on her deck, and it was pulled into deep water, furnished with coal, and made useful by the officers of the Catherine Sudden. For rescuing this launch, called the "Dorothy," and for towing her to Nome, the master of the Catherine Sudden agreed to pay to the Corwin the sum of \$2,500 which contract was afterwards carried out. The officers and crew of the Corwin went aboard the Catherine Sudden after she was fully abandoned

by her master and crew, stopped the inflow of water as far as they could, and succeeded with hoist and pumps in clearing her of water and getting her afloat. During these operations, some small portion of the cargo, such as provisions, coal, some liquors, paints, and small items were taken aboard the Corwin, but in the presence of and with the knowledge and consent of the master of the Catherine Sudden there present. A portion of her cargo had been taken from her decks and placed upon the decks of the Pitcairn and Richardson before the arrival of the Corwin upon the scene. After the vessel had been floated by the Corwin's crew, she was taken in tow, with her barges and boats, including the Dorothy, and brought to Nome. Arriving here, and finding no court of competent jurisdiction, the master of the Corwin caused her to be surveyed, and sold to the highest bidder. Her cargo was lightered ashore, distributed into lots, and sold. Suits were begun by some members of the crew of the Corwin to recover salvage for their services in assisting in the rescue of the Catherine Sudden, and the vessel was libeled with the remainder of the cargo, and the whole thereafter sold by the marshal. The fund received was placed in the registry of the court, and there is now on hand for distribution the sum of \$969.66.

I cannot agree with the referee in his finding that there was any embezzlement or unfair use made of the cargo of the Catherine Sudden by the master of the Corwin or her officers at the time of her rescue. It is clear that the master and crew of the Catherine Sudden had wholly abandoned her, and no possible dispute can arise in this action upon that question. They had knocked in her deadlights to assist in sinking her, that they might float the Dorothy from her deck, when the Corwin came upon the scene. Her captain notified the master of the Corwin that he abandoned her after the re-

moval of the Dorothy, and permitted him to go into peaceable and quiet possession for such salvage as he could secure by pumping her out and towing her from amid the ice floes to the beach at Nome. So complete was the abandonment by the master and owners of the Catherine Sudden, as well as by the underwriters, that no claim was made by either party, either then or at any other time, for any part or portion of the vessel, cargo, or proceeds. Neither the owners nor underwriters became parties to this proceeding, and have made no appearance in the suit, nor objection to the jurisdiction of the court or the disposal of the fund. *Warder v. La Belle Creole*, Fed. Cas. No. 17,165.

Such being the situation, I am inclined to view with greater leniency the use of portions of the cargo by the Corwin, even if such were shown, than would otherwise be allowed. All that was done by the Corwin, her master or owners, was open, and in full view of the master and underwriters of the Catherine Sudden, who did not object.

In the matter of the distribution of the funds on hand, I am guided by the conditions surrounding the rescue of the Catherine Sudden by the Corwin. It was made possible to bring her into Nome by the fact that the Corwin was a steamer. There was no storm or unusual condition, except ice, and no life was endangered in the rescue. The Corwin was on her way to Nome, but left her course, and went amid the heavy floating ice to where the Catherine Sudden lay. By reason of her motive power, she was able to rescue the Dorothy, pump out and raise the Catherine Sudden, and tow her and her cargo to Nome. These services could not have been performed by the Pitcairn or Richardson, which lay near by. There are, then, but two things to consider: First, the amount due to the Corwin and her owners for their services; and, second, the amount which ought to be paid to the offi-

cers and crew of the Corwin, who performed extra work and labor in pumping out and raising the Catherine Sudden. As compensation for the service of their steamer I am inclined to allow to the owners of the Corwin the coal which they took, as well as that which they sold to the Thrasher, if any; the amount paid for towing the Dorothy and the barges to Nome; and any other amount which they may have received from the sale of the vessel and her cargo.

In my judgment, they were justly entitled to the whole of it, for it was clearly abandoned and given to them by the master at the time of his abandonment, as well as by the underwriters afterwards. The decree will allow to the owners of the Corwin everything obtained from the sale of the Catherine Sudden and her cargo except the amount now in the registry of this court for distribution, and that will be divided among the officers and crew of the Corwin in proportion as I think they earned it by their services. The evidence in relation to the services performed is very meager and unsatisfactory, and I make the best allowance possible from it. I find that the master and first and second officers are entitled to the largest share of the fund on hand by reason of the fact of their responsibility and long hours of work. The remainder is distributed among those who labored in rescuing the Catherine Sudden, without regard to whether they were sailors or passengers, and in proportion as I find from the evidence they performed actual services and labor in raising the vessel. I have prepared a list of the names of the libelants, and the sum opposite each name is the sum which I find each of the libelants to be entitled to out of the fund in the registry of the court, viz.:

G. I. Foster	\$150 00
E. L. West	135 00
E. Coffin	120 00
R. H. Stahl	45 00
James Kirk	45 00
Wm. Simpson	15 00
George Trabert	30 00
J. T. McLees	45 00
A. W. Ottingen	30 00
Dan Jury	15 00
A. J. McChesney	30 00
S. Benson	30 00
A. Swanson	6 00
John Dubruell	30 00
N. D. Dumars	30 00
Hugh Daly	30 00
John A. Leaner	15 00
Wm. Prichard	6 00
D. C. Gilman	15 00
Magnus Norman	15 00
Thomas Jackson	6 00
Thomas A. Johnson	6 00
A. McClellan	15 00
L. W. Nestelle	30 00
A. G. Kingsbury	30 00
A. G. Maddren	15 00
Frank Fogg	15 00
H. B. Strong	6 00
A. H. Strong	6 00
 Distributed	\$966 00
Balance	3 66
 Total in fund	\$969 66

The balance of \$3.66 will be retained by the clerk for the payment of the clerk's costs. If there are other clerk's costs, they will be taken out of the fund before distribution, and the fund distributed to each man will be less in proportion. A decree will be entered in accordance with these findings, and the report of the referee is modified accordingly.

UNITED STATES v. RICHARDS and JOURDEN.

(Second Division. Nome. June 16, 1902.)

No. 176.

1. CRIMINAL LAW—ARREST OF JUDGMENT.

A motion in arrest of judgment lies only (1) for want of jurisdiction, and (2) that the facts stated do not constitute a crime.

2. SAME—JUDGMENT NOTWITHSTANDING VERDICT.

A motion for judgment for defendant notwithstanding the verdict is a civil remedy only, and has no application to criminal proceedings or contempt.

3. CONTEMPTS—CRIMINAL LAW.

While the provisions of the law of Alaska providing a punishment for contempt of court are found in the Civil Code, yet *held* to be penal in their nature, and controlled in practice by the rules of the criminal law.

4. SAME—NEW TRIAL.

An affidavit on a motion for a new trial, which states no fact or circumstance whatever, but is based wholly upon the unsupported alleged belief of the accused that the judge who heard the case was prejudiced against him, where no motion for change of venue or continuance was made, is not a sufficient ground for a new trial.

5. SAME.

A motion for a new trial will not be granted for accident and surprise which consists merely in the belief of counsel that a witness had been so impeached that they did not deem it necessary to deny his statements, and especially when he is strongly corroborated by unimpeached witnesses.

6. SAME.

A motion for a new trial will not be granted for newly discovered evidence which consists in the statements of the attorneys for the defendant and witnesses all of whom were present in court at the trial, and most of whom testified in relation to the very question claimed to be newly discovered.

7. SAME.

A motion for a new trial will not be granted upon affidavits which merely deny the findings of facts made by the court in immaterial matters, nor when such witnesses were present and could have been called at the trial.

Contempt proceeding before the court without a jury; defendants accused of jury-packing; found guilty, and fined \$300 each. Motion for a new trial denied.

John L. McGinn, Asst. Dist. Atty., and S. T. Jeffreys, for prosecution.

Sullivan & Fink, for defendants.

WICKERSHAM, District Judge. This cause now comes before the court upon a motion in arrest of judgment, a motion for judgment for the defendants notwithstanding the verdict, and a motion for a new trial; all having been submitted upon one argument. A motion in arrest of judgment may be founded on either or both of the causes specified in subdivisions 1 and 4 of section 90 of the Code of Procedure (Act March 3, 1899, c. 429, 30 Stat. 1294), and not otherwise. Section 173, Code of Criminal Procedure (Act March 3, 1899, c. 429, 30 Stat. 1304). These causes are: First, that the grand jury had no authority to inquire into the crime charged; and, next, that the facts stated do not constitute a crime.

The motion for judgment in favor of the defendants notwithstanding the verdict is allowed to be made in all civil cases. Section 257, Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 372). While the provisions of the law of Alaska, limiting the jurisdiction of this court to punish for contempt of its authority and fixing the penalty therefor, are found in chapter 58 of the Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 429), I am of the opinion that they are penal in their nature, and that the practice in rela-

tion thereto should be governed by the Criminal Code. See section 611, Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 430). As the arguments in favor of both the foregoing motions were not special, but general, and contained in that, on the motion for a new trial they will stand or fall with this latter motion.

The motion for a new trial in this case is based upon all of the causes allowed in section 168 of the Criminal Code (Act March 3, 1899, c. 429, 30 Stat. 1303), which reads as follows:

"Sec. 168. For What Cause Granted. That the former verdict or other decision may be set aside and a new trial granted, on the motion of the defendant, for any of the following causes materially affecting the substantial rights of such party:

"First: Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion, by which such party was prevented from having a fair trial.

"Second: Misconduct of the jury or prevailing party.

"Third: Accident or surprise which ordinary prudence could not have guarded against.

"Fourth: Newly discovered evidence, material for the defendant, which he could not with reasonable diligence have discovered and produced at the trial.

"Fifth: Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

"Sixth: Error in law occurring at the trial and excepted to by the defendant."

The principal argument in support of the motion seems to be based upon the first and third subdivisions, and the facts in support thereof are identical. For this reason they may be considered together.

The first subdivision of paragraph "a" of the motion for a new trial is based upon an alleged irregularity in the proceedings of the court and abuse of discretion on the part of the court, and charges that the judge of this court was, at the time of the trial, "acting under an erroneous impression that the defendant Richards had related scandalous matters con-

cerning him, the said Wickersham, to the Department of Justice at Washington," and was deeply incensed and prejudiced against the said Richards, and thereby became disqualified from judging fairly and impartially of the testimony of the said Richards given during the trial of said cause; and that by reason of said disqualification said court acted in an irregular manner in sitting in judgment on said cause without the aid of a jury, and in not making known such disqualification, in order that the defendants might demand a jury.

The first subdivision of paragraph "c" of the motion for a new trial is based upon the third subdivision of section 168, supra, and the accident and surprise complained of is that "the defendant Frank H. Richards did not know, until after the trial of the above-entitled cause, and after the evidence therein had been submitted," that the judge of this court was disqualified by reason of the bias and prejudice alleged in paragraph "a," which is again alluded to in this paragraph; "and therefore the defendant Frank H. Richards had no opportunity to ask for a change of venue in the above-entitled cause, or that the court call to its aid a jury for the trial of the above-entitled cause."

In support of this charge against the fairness of the judge the affidavit of Frank H. Richards, one of the defendants, is filed, wherein he alleges, under his oath, that the judge of this court "has been for some time a personal enemy of affiant, had bitter personal feelings against affiant, and was unable" to give "due weight to affiant's testimony and the credibility thereof, because affiant has good reason to believe, and therefore alleges the truth to be, that just before and during the trial of said cause, and while said cause was submitted, and before the rendition of the opinion in said cause," the judge of this court was of the erroneous opinion that the defendant Richards had related the said matters to the department at Washington, and was thereby deeply

incensed and prejudiced against the said Richards, and consequently became disqualified to judge fairly and impartially of the credibility of Richards' testimony; and that by reason thereof the court acted in an irregular manner in trying the cause, and should have intimated his bias, so that affiant could have asked for a change of venue or a jury trial.

These are all the pretended proofs or evidence offered by the defendants, or either of them, to support the charge of prejudice against the judge of this court. The charge is thus confined exclusively to Frank H. Richards, and does not apply to the other defendant, Jourden.

It will be noticed that no statement is made, either in the motion for a new trial or in the affidavit of Richards, of the character of the scandalous matter which is alleged to have so deeply incensed the court, or when the facts relating thereto occurred. It is nowhere shown or alleged whether the matters related to the past or present, private or official, character or acts of the judge. Counsel who prepared and signed this motion gave themselves the whole field of fact or imagination from which, now or in the future, to suggest the character of the alleged matter, or the time of its occurrence. Nor are they more specific in relation to the date when the information reached the court and the judge became imbued with the alleged bias and prejudice. The allegations are vague, shadowy, and indefinite; good enough for calumny and slander, but wholly lacking in courageous and specific statement of fact.

Nor is the affidavit of the defendant Richards in support of the motion any more specific or certain in its statements. No fact at all is stated, only the mere conclusion that the judge of this court "has been for some time a personal enemy of" the defendant, and "had bitter personal feeling against" him. No fact upon which ill feeling can be based is related either in the motion for a new trial or in the affidavit; neither

a threat nor other discourteous language, nor any act or other evidence of enmity, on the part of the judge, is stated. The only evidence of such ill feeling is the mere assertion of the defendant Richards, and the assertion is distinctly made in his own language, "because affiant has good reason to believe, and therefore alleges the truth to be, that just before and during the trial of said cause, and while said cause was submitted, and before the rendition of the opinion of said court," the judge of this court was of the erroneous opinion that the defendant Richards had related the aforesaid matters to the department about him. In short, the allegation of personal enmity in the breast of the judge is based solely upon the alleged belief of the defendant Richards, and not upon any fact whatever. Whether he has such a belief can never be tested by other evidence than his assertion. He alleges that within the hidden recesses of his mind he has a belief that there exists within the hidden recesses of the judge's mind a prejudice. The basis of this alleged but hidden prejudice is the allegation that the judge has or had an erroneous impression, which has never been publicly exhibited by word or deed, that the defendant Richards had scandalized him. It is not shown by any fact that this assertion is true, nor is any such claim made by counsel for defendants. The whole allegation of prejudice against the judge of this court is a willful, contemptuous, and unjustifiable attack upon the judge of this court by counsel and client, without a shadow of truth or fact to support it.

Upon his argument Mr. Fink frankly admits that no evidence could be produced to show any fact of prejudice, and he asserted that the knowledge thereof was wholly confined to the breast of the judge. Upon this admission I now state the fact to be that at the time of the trial and rendering my opinion and verdict in this case I had no erroneous or other impression, or any information or belief, that the defendant

Richards, or any one else, had reported any scandalous matter to the Department of Justice at Washington about me. I never heard of such a matter until I first read the motion for a new trial in this case. I did not have any prejudice or enmity against him for such or any other reason which would in the slightest degree influence my judgment in weighing and giving fair credit to this testimony.

Section 611 of the chapter relating to contempts, after providing for the summary punishment of contempts in the presence of the court, concludes:

"In other cases of contempt, the trial shall proceed upon testimony produced as in criminal cases, and the accused shall be entitled to be confronted with the witnesses against him, but such trial shall be by the court, or, in the discretion of the court, upon application of the accused, a trial by jury may be had as in any criminal case."

This action was called for trial without objection on the part of defendants, or any request for a continuance or change of venue. No jury was then in attendance upon the court, and no request or application was made by either of the defendants for a jury trial. It was then well known to the public and to the counsel for defendants and their clients that a successor to the presiding judge on the bench at Nome was soon to reach Nome, but no application for a continuance and trial before him was made.

Without the slightest intimation of prejudice, either from the defendants or within his own mind, the judge of this court was compelled by the law and the action of the parties to hear this case, to weigh the evidence, and, as honestly and fairly as in him lay, to render his verdict. No sooner is his verdict filed against the defendants than the defendant Richards makes the discovery of prejudice and personal enmity, based only upon his alleged belief. If such a contemptuous and baseless slander could be made a sufficient

ground for a new trial, no man could be convicted for an offense. In this division, where the court is cut off from the outside world for nine months, where no change of venue could be made available during that time, the court would be at the mercy of one who treated its authority with contempt if such a false and malicious statement should be held sufficient to rob the trial judge of jurisdiction. So far, then, as this particular branch of the motion and the affidavit in its support goes, I wish to denounce it as an unjustifiable attempt by counsel and client to interfere with the administration of justice by a base and untruthful attack upon the judge, after he had been compelled by the submission of the parties and the law to hear and pass upon the evidence in the case.

Another objection is urged by the affidavit of defendant Richards tending to show prejudice in the mind of the trial judge, though not specifically alleged in the motion for a new trial. It is based upon the allegation that prior to the trial the trial judge consulted with the United States district attorney in reference to the case, and conversed with witnesses on behalf of the United States prior to their testifying. It was very evident, from the questions which the district attorney asked the defendant Richards while on the witness stand, that the trial judge had talked with the district attorney about the conversation which the defendant Richards had at the Golden Gate Hotel with the trial judge. No evidence was then, or at any other time, produced by the defendants, or any one else, to show that the trial judge did consult with any witness in the case, and such is not the truth. In fairness to the defendant Richards, however, the court now states this to be the truth: That soon after the trial of the case of the United States v. Wright, Assistant District Attorney McGinn complained personally to the judge of this court that the jury in that case had been unfairly drawn

through the open venire system by the defendant United States Marshal Richards. Feeling that the charge against the marshal was a very serious one, and that it ought to be made only upon reasonable evidence and in the best of faith by the assistant district attorney, the trial judge, after hearing the complaint made by Mr. McGinn, and thinking the matter over, addressed a letter to him, asking for a detailed statement in writing. In answer thereto Mr. McGinn copied the letter, which was in the form of interrogatories, appended his answers, signed his name to each answer, and returned the same to the trial judge. A doubt having arisen in the mind of the court upon one question, the judge addressed another letter to Mr. McGinn, asking for a more complete statement. Mr. S. T. Jeffreys, one of the counsel in the case of Waterbury v. Ferguson, complained to the court about the same time that the jury in that case had been improperly approached, and the court declined to hear his statement, and said to him that it must be made in writing, because of the seriousness of the charge. Mr. Jeffreys made such a statement in writing, as a member of the bar, and delivered the same to the trial judge. The trial judge took these precautions for the purpose of preventing a charge of such a serious nature being brought against an officer of the court except upon what appeared to be reasonable and fair evidence. So much distrust and scandal had already arisen in the administration of justice in the Nome court that the trial judge determined not to permit an action to be brought in so serious a matter except it appeared to be necessary to defend the existence of the court.

Herewith I file copies of the communications hereinbefore referred to with the clerk of this court as a part of this opinion, so that the defendants may have the full benefit of the action of the court if it was error. While this is a quasi criminal prosecution, yet it is of such a peculiar character

that the court felt that it was justified in taking the action that it did. An attack on the integrity of the jury as a part of the court, the insidious and hidden methods by which such attacks are made, and the injustice falling upon litigants therefrom, ought to impel any fair court to take every possible precaution to protect itself and those whose rights are intrusted to it for decision from such assaults. If the judge of this court is compelled to sit with folded hands and permit any officer of this court unfairly to fill a jury for the purpose of swaying the decision one way or another, then the court becomes too contemptible and powerless to exist. Acting upon these impressions, and impelled, first, to protect the officers of this court from scandal, and, second, to protect the court and litigants from such outrageous attacks, the court did have a conversation with Mr. McGinn, who afterwards became a witness upon this trial. In that conversation the trial judge told him that Marshal Richards had, at the Golden Gate Hotel, on the evening of the trial of the case of the United States v. Wright, and while the jury was still out, repeated to him, the trial judge, without any solicitation, the statements which were contained in the questions asked by Mr. McGinn of Marshal Richards upon the witness stand. The trial judge did not speak to any other witness in relation to this case, or permit any other witness whatever to speak to him about it. The trial judge was not biased or prejudiced against the defendant Richards by reason of such conversation with Mr. McGinn, for that conversation was had as much to protect the marshal from an unjust assault as for the purpose of protecting the court and litigants from "pack-ed" juries.

Paragraph "b" of the motion for a new trial is based upon the alleged error or misconduct on the part of the assistant district attorney in propounding questions to witnesses unconnected with the issues then on trial, for the purpose of de-

grading the witnesses in the eyes of the court. The questions upon which this paragraph is based seem to have been those only which were addressed to the defendant Richards, and contained in the alleged errors numbered 11, 14, 15, 16, 17, and 18. No such objection appears to be made in the record with regard to the defendant Jourden. While such questions are in some cases, and under some circumstances, held to be objectionable, yet in this case it seemed the rule did not apply. This was a charge of conspiracy between Richards, Jourden, and Wright to fix the jury in the Wright case favorably to the acquittal of the defendant. The defendant Richards went upon the witness stand voluntarily, and testified, and section 149 of the Code of Criminal Procedure of Alaska (Act March 3, 1899, c. 429, 30 Stat. 1301) provides that any person accused "shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court, or to the discrimination of the magistrate, or other tribunal before which such testimony may be given; provided, that his waiver of such right shall not create any presumption against him; that such defendant or accused, when offering his testimony as a witness in his own behalf, shall be deemed to have given to the prosecution a right to cross-examination." The questions complained of were permitted to be asked the defendant Richards upon the theory that they affected his credibility, and tended to show conspiracy. As they did not affect Jourden, however, they will not be considered in connection with him.

The only irregularity set up in the motion for a new trial in paragraph "a" with regard to the defendant Jourden is that which relates "to certain erroneous personal impressions" of the presiding judge, which are alleged to be founded upon matters not introduced in evidence. They are alleged to relate to the character of Jourden and the jurors Hayden,

Sullivan, and Shea, and to the character of other jurors in the Wright case, the Bohemian Club, and the justice or injustice of the verdict in the Wright case. All those matters were fairly included within the evidence, and within the right of the court to consider.

The only reference to Jourden in paragraph "c" of the motion for a new trial is based upon the second subdivision thereof, which alleges that Richards and Jourden thought it was unnecessary to deny the statements made by the witness Eames, insomuch as they had been advised by their counsel that his testimony had been absolutely impeached. They allege accident and surprise in this respect, and that they could have produced Jack Jolly and other witnesses to deny his statements, and that their neglect to do so was caused by the belief on the part of counsel for defendant that it was unnecessary.

Paragraph "d" of the motion for a new trial relates to newly discovered evidence, and is supported in part by the affidavit of P. C. Sullivan, the senior counsel for the defendants. Mr. Sullivan admits that he was in court, and the court will take judicial notice of the fact that he was present at the trial. He heard the testimony of Eames and Minto, who swore positively that he was present in the saloon, and conversed with Jourden before Eames and Hayden were subpoenaed as jurors, yet he did not deny the statements.

The affidavits of Sullivan, Clarke, and Niebling are to the effect that they were present in the Lobby saloon at the time of the alleged conversation between Sullivan and Jourden, which is sworn to by Minto and Eames, and that no such conversation ever occurred. Mr. Sullivan's testimony, however, could have been procured at the time of the trial, and must, therefore, be held to come too late. The testimony of Clarke and Niebling, even if true, is immaterial. I am inclined to the opinion that whether or not Sullivan had the

alleged conversation with Jourden is not so material as to affect the substantial rights of either of the defendants, and is, therefore, insufficient, under section 168, as a basis for a new trial. It is true that that fact impressed the court, and was referred to in rendering the former opinion; but, even if it be conceded that no such conversation did occur, there is still sufficient evidence to sustain the verdict against both defendants.

The affidavits of Carrie J. Nunne, A. C. Griggs, and William R. Forest allege that Adam Johnson was not present at the time the subpoena tickets were made out in the marshal's office, and could not, therefore, have heard the marshal instruct Griggs to go to Jourden's saloon to serve the open venire. All of these parties were in attendance upon the trial, except Forest, who is the marshal's chief deputy; and there is no showing that he was not in the marshal's office, where his duties required him to be, and could have been produced at the trial. I am satisfied that a new trial should not be granted upon these affidavits, because the evidence is not newly discovered, nor was it out of the power of the defendants to introduce it at that moment, for these persons were present as witnesses in the case, and were fully interrogated upon this phase of the case. Nor is the shade of difference between the evidence of Johnson and Richards in relation to Griggs going to the Lobby to serve the subpoenas so material as to affect the substantial rights of the defendants in this case. I am satisfied that Adam Johnson heard just what he says he did, and that the testimony of Griggs and Richards that the instruction to go to both Jourden's and the Golden Gate Hotel was a concession to the truth stated by Johnson. An affidavit is filed by George Shea, one of the jurors in the Wright case, who now alleges that he was only a casual acquaintance of Wright's, a matter about which he was fully examined on the witness stand. He also alleges

that the judge of this court permitted the affiant to visit him in a social way, and then he discloses an alleged conversation of that character between himself and the judge, wherein he was informed of the judge's dissatisfaction with his action as a juror in the Wright case. He then testifies that he was present in the courtroom when the judge rendered his decision in the case of the United States v. Richards and Jourden, on the 7th day of June, 1902. He swears positively that within 20 minutes after the conclusion of the judge's decision a copy thereof was purchased on the streets of Nome, which had been published in the Nome News. The evident purpose of this testimony is to persuade somebody other than this court that the judge had given out the opinion to a newspaper prior to its reading in open court. The truth about the matter is that when the judge of this court first opened the opinion to read it from the bench his stenographer approached, and asked if it might be given to the newspapers, and was answered in the affirmative. Hereto attached is a copy of so much of the opinion as was published in the Nome News on that date:

(EXTRA.)

"Are Guilty of Contempt.

"U. S. Marshal Richards and Councilman Jourden Will Be Punished
For Interfering With the Joe Wright Jury.

"United States Marshal Frank H. Richards and Joseph Jourden, whose trial on a charge of jury fixing ended last Tuesday, were adjudged guilty of contempt of the authority of United States District Court in their dealings with the Joe Wright jury, at a few minutes after 10 o'clock.

"After reviewing the evidence at great length Judge Wickersham said:

"Upon all the evidence in this case, then, without stating it in any further detail, it is my judgment that each of the five allegations and charges made against each of the defendants is proven beyond a reasonable doubt; and it conclusively appears to me from

the evidence in the case that the right and remedy of the plaintiff in the case was defeated and prejudiced by such actions of each and both of the defendants.

"Verdict.

"Upon the evidence offered by the plaintiffs and defendants in this case, and the law applicable thereto, I do now find the defendants, Frank H. Richards, United States Marshal for this district, and Joseph D. Jourden, to be guilty of contempt of court in the manner and form alleged in the affidavit made by John L. McGinn, Assistant District Attorney, on May 29, 1902, and filed in this court and cause upon that day, and upon which these proceedings were and are based; and I do find that they and each of them shall be punished therefor as provided by law.

"Sentence will be passed at 10 o'clock next Monday morning."

The extract published contained just 180 words, though Mr. Shea testifies in his affidavit: "I am positive that not to exceed twenty minutes later after the time I heard the last paragraph in said decision contained read from the bench, when a copy thereof was purchased on the streets of Nome published in the Nome News." The clipping from the Nome News and this positive statement of Mr. Shea's indisputably prove, first, the enterprise of newspaper men, and, second, the utter recklessness with which Mr. Shea bears false witness. A moment's consideration by counsel for defendants would have shown them the utter falsity of this gratuitous contempt.

The allegations in the affidavits of Richards and Fink are that they believed that Richards had denied the statement of Eames, made at the cabin, wherein Eames testified that Richards said to him that he put Eames upon the jury because Griggs said that he was all right. These parties were all present in court during the trial, and could have testified to this effect, if they had then deemed it important. But Mr. Fink alleges in his affidavit "that affiant and said Sulli-

van did not deem it necessary to introduce said Jolly as a witness," because they believed Eames to be impeached.

I have carefully examined all of the alleged errors under paragraph "g" of the motion for a new trial, and do not deem them sufficient to warrant the granting of a new trial. Upon a careful examination of the motion for a new trial and the affidavits in support thereof, I am satisfied that there is not sufficient ground for a new trial in this case.

Some objections are urged to the conclusions made by the court in its argument upon which the verdict in this case is based. They are called "findings of fact" by counsel for defendants, and many objections are taken and made thereto. Whether they are findings of fact, or only the statement of argument of the court, is not for this court now to determine. I am satisfied with almost every statement made therein, although the court did make one error in the statement that Jourden was upon the official bond of Wright, and for that reason interested in his acquittal. Upon a further examination I ascertain the bond to be the bail bond of Wright, and not his bond as postmaster. The bond was only suggested, however, as proof of his intimacy and friendship with Wright, and it is equally as good proof whether it be called the official or bail bond. The mistake in designating the character of the bond did not affect any substantial rights of defendant Jourden, and cannot avail upon the motion for a new trial. This is true of many other objections urged by defendants to statements contained in the opinion prior to the verdict. If, upon all the evidence in the case, the verdict is right, the substantial rights of the defendants are not affected, and therefore, under section 168, they would not be entitled to a new trial.

After a careful re-examination of the evidence in this case, and after having heard everything offered in support of the

motions, I am still of my former opinion that both defendants are guilty of the contempts charged in the information.

The defendant Jourden had no official duty which he violated in his intermeddling with the jury, and, so far as it can be considered a palliation, had a friend's interest to protect. Such facts, however, afford no ground for leniency on the part of the court. On the other hand, the defendant Richards was and still is a sworn officer of this court, appointed by the President of the United States, and specially authorized by law, among other duties, to draw jurors upon open venire when ordered by the court. I am satisfied beyond a reasonable doubt that he violated his oath of office and his duty as marshal, and aided and assisted in drawing a jury of personal friends of Wright, with a view of securing his acquittal from a well-deserved punishment.

This case has given me greater anxiety and solicitude than any other since coming to Nome. It has involved two men from my own state, who are friends of my friends, and heretofore were my own friends. It has been most painful to me to have them connected with an offense the full effect of which tends to undermine the stability of this court and bring it into disgrace. A judge who would yield either to friendship or fear of personal consequences in such a case is unworthy to sit in so responsible a seat. I will bear with what fortitude and resignation I can such assaults as may come from the faithful performance of my duty, but I shall perform the duty.

The motions in arrest of judgment, for the entry of a judgment of not guilty notwithstanding the verdict, and the motion for a new trial are now hereby overruled, and the defendants, and each of them, will be allowed an exception to this action of the court.

In re C. E. WYNN-JOHNSON.

(First Division. Skagway, June 20, 1902.)

No. 138.

1. CONSTITUTIONAL LAW—LICENSES.

Sections 460-461 of the Alaska Penal Code (30 Stat. 1336, c. 429), as amended by section 29 of the Political Code, in the act of June 6, 1900, c. 786 (31 Stat. 332), providing for the collection of a tax upon certain designated trades and business conducted within the District of Alaska, are not unconstitutional for conflict with the first clause of section 8, art. 1, of the Constitution of the United States.

2. LICENSES—TERRITORIES.

Congress may provide by legislation for a system of licenses for the support of local government in territories. The act in question is one for the support of local government.

3. STATUTES—CONSTRUCTION.

A statute should be given such a construction as will effectuate its purpose, when that is possible, and no statute should be held invalid if it can be so construed, considering all its provisions, as to make it a valid statute.

Habeas corpus to test constitutionality of the license laws of Alaska. Held constitutional, and writ denied.

John G. Heid, for petitioner.

R. A. Friedrich, U. S. Dist. Atty., contra.

BROWN, District Judge. At the Skagway October, 1901, term of the court, one C. E. Wynn-Johnson and the Moore's Wharf Company were jointly indicted, under sections 460 and 461 of the crimes act of the District of Alaska (30 Stat. 1336, c. 429), as amended by Act June 6, 1900, c. 786 (31 Stat. 332), for conducting a wharf without first having obtained a license therefor as required by law. A bench warrant was issued upon said indictment, and the said C. E. Wynn-Johnson taken into custody by the United States marshal and brought into

court. The said Johnson, having failed and refused to give bail as required by law, was retained in the custody of the United States marshal, and while so in custody brought these proceedings in habeas corpus, and prayed to be discharged from custody.

No objection is made to the indictment, either in form or substance, nor to the writ under which the United States marshal holds the said Johnson in custody; but counsel for said Johnson alleges that the statute requiring the payment of this license fee is unconstitutional and void, and that said Johnson should be discharged from custody for that reason. The alleged unconstitutionality of the act of Congress is predicated upon the claim that such statute is in violation of that provision of the Constitution requiring uniformity in the laying and collection of taxes in the District of Alaska; in other words, that it is in violation of the first clause of section 8, art. 1, of the Constitution of the United States, which reads as follows:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States."

The acts of Congress providing for customs duties and internal revenue have for years been extended to Alaska by express act of Congress; and all such collections of taxes, and the laws under which they were made, were in force in Alaska at the time the act in question was passed. It will also be remembered that by the acts of Congress the Constitution of the United States and its beneficent provisions have been extended to Alaska, impliedly at least, if not in express terms.

Under the laws of the United States, license taxes of the forum attempted to be enforced in Alaska are not collected in any other part of the United States. On the face of the prop-

osition, it would seem that the question of uniformity of taxation under the Constitution is fairly raised. This question was considered at great length by the Supreme Court of the United States in the case of *Downes v. Bidwell*, 21 Sup. Ct. 770, 45 L. Ed. 1088, and the other "insular cases," and the arguments on all sides were practically exhausted.

It is a settled theory of the law that the Congress of the United States may create territorial governments in the territory belonging to the United States, under circumstances which seem to Congress sufficient to require such action. It has been the uniform practice of the Congress, in establishing these territorial forms of government, to provide for a system of taxation whereby such government, when established, might be self-sustaining, if not wholly, at least to a very large degree. If Congress has power to authorize a territorial legislature to provide a system of taxation for a territory—and this is unquestioned—surely it could exercise by direct legislation the power that it might delegate to another legislative body. That Congress may provide, by direct legislation, a system of taxation for the support of local government in the territories and districts of the United States, is, we think, practically unquestioned. Whether, then, the question of uniformity of taxation arises under the statutes now under consideration, depends, it would seem, upon the use of the moneys to be collected under this license law. If for the support of local government in the District of Alaska, no question of uniformity can arise; if for general purposes of the United States, and to be covered into the Treasury of the United States for general purposes, then the burdens placed upon the citizens of Alaska are excessive, and not uniform with the taxes levied in other portions of the United States. It therefore becomes necessary, in considering this question, to examine briefly the purposes of Congress in the levy of these license taxes.

Under section 7 of the Political Code for Alaska, passed June 6, 1900, c. 786 (31 Stat. 324), it is provided that the clerk of the court—

"Shall also receive all moneys collected from licenses, fines, forfeitures, or in any other case, except from violations of the customs laws, and shall apply the same to the incidental expenses of the proper division of the District Court, and the allowance thereof as directed by the judge, and shall account for the same in detail and for any balance on account thereof, quarterly, to and under the direction of the Secretary of the Treasury."

It will be observed that, under the terms of this section, the moneys realized from the collection of license taxes are to be disbursed for the expenses of the proper division of the District Court, and the balance of the money, if any, is to be accounted for in a report to the Secretary of the Treasury. Among the items of expense to be paid by the court is the construction of courthouses and jails; the courthouse not to exceed in cost \$5,000, and a jail \$3,000. It is also provided that one-half of the moneys paid in on these license taxes in incorporated towns shall be paid over to the treasurers of such towns for school and other purposes. It is further provided that one-half the moneys collected outside incorporated towns, and to be turned in to the Treasury of the United States, is to be expended for school purposes under the direction of the Secretary of the Interior.

It will be observed, therefore, that the larger portion of all the moneys collected from license taxes is to be expended for the purpose of local government within the district; but in the tenth section of the same act of Congress (31 Stat. 325), making further provision for a civil government in Alaska, it is provided that:

"Each clerk shall collect all moneys arising from the fees of his office, or on any other account authorized by law to be paid or collected by him * * * and any balance remaining in his hands,

after all payments ordered by the court shall be made, shall be by him covered into the Treasury of the United States, at such times and under such rules and regulations as the Secretary of the Treasury shall prescribe."

Does this language, "covered into the Treasury of the United States," necessarily mean that the money shall go into the Treasury for general purposes, and be paid out upon appropriations made by the Congress of the United States? If this is the necessary construction of the statute, and if there be any such balance to go into the United States Treasury, it would seem that, as to such balance, there was a gathering of taxes contrary to the constitutional provision of uniformity. It is a fact, about which there can be no dispute, that the expenditures of the general government for local government in the District of Alaska far exceed the moneys collected from license taxes; but the salaries of officers, such as Governor, Secretary, judges, marshals, etc., are paid out of the national Treasury on appropriations made by Congress from moneys in the Treasury of the United States. Such expenditures on appropriations made by Congress, though for the support of local government in Alaska, can hardly be deemed the application of moneys realized from the collection of license taxes within the District of Alaska to the support of local government in said district. But where the language of the statute is "covered" into the Treasury of the United States * * * under such rules and regulations as the Secretary of the Treasury may prescribe," such "rules and regulations" might refer to the purpose for which the money was to be paid into the Treasury, and that purpose is its expenditure for local government.

Should we not, therefore, indulge in the presumption that, by the use of the words "covered into the Treasury under rules and regulations prescribed by the Secretary of the Treasury," Congress intended that money should be covered

into the Treasury for lawful purposes, viz., to be expended for local government, rather than for an unlawful purpose, in violating the constitutional provision of uniformity?

It may be said in this connection that statutes should be given such a construction as will effectuate their purpose, where that is possible, and that no statute should be held invalid if it can be so construed, considering all its provisions, as to make it a valid statute; that is, the statute should be given a construction that will make it valid and effectual, if it can be fairly done, rather than a construction that will render it void. The legislative body, in passing upon the statute under consideration, has necessarily passed upon its validity and constitutionality, or it would never have been enacted by Congress or received the signature of the President. Constitutional courts that may properly pass upon the constitutionality of statutes never hold them unconstitutional and void unless no reasonable construction can be given them that will avoid such necessity. This court is a creature of legislation—is not a constitutional court, but a court created by an act of Congress. It would be a strange conclusion, indeed, for the creature of Congress to pronounce void the laws enacted by its creator. Under no circumstances would this court pronounce the act of Congress providing for these licenses unconstitutional and void. It is the opinion of this court that any such action would be a wrong assumption of power and authority.

Therefore, without discussing the questions involved in the application for a writ of habeas corpus, or the propriety of discharging the said Wynn-Johnson from custody under the claimed unconstitutionality of the license law, the court will refuse to discharge the said Johnson from custody, and will remand him to the custody of the United States marshal, to be held by him for trial on the indictment presented against him, and it is so ordered.

THOMSON et al. v. ALLEN et al.

(Third Division. Eagle. August 16, 1902.)

1. PLEADINGS—DEFAULT—JUDGMENT.

Plaintiff failed to reply to an affirmative defense in the answer. An intervener, claiming to be a purchaser pendente lite, was permitted to file a reply. On trial the intervener failed to connect himself with the location by purchase or otherwise. *Held*, that defendant was entitled to a default and judgment on the pleadings.

2. FORFEITURE—PLEADING.

The court will not declare a mining location void for conflict with a prior location not pleaded.

3. EVIDENCE—FORFEITURE

A mining location will not be declared forfeited on mere suspicion. The evidence upon which to base a forfeiture must be clear and convincing.

Suit in equity to quiet title to mining claim.

A. N. Post, for plaintiff Thomson.

Johanson & Hess, for plaintiff Halley.

J. Lindley Green, for defendant Loeser.

WICKERSHAM, District Judge. The plaintiff Thomson brought this action to quiet his alleged title to placer mining claim No. 6 below discovery on Slate creek, in the Slate Creek mining district. He alleges a location on the 16th day of July, 1900, and a compliance with the mining laws and local customs ever since, and then alleges that the defendants claim some right to or interest therein adverse to the plaintiff, and prays to have their claims adjudicated and his title quieted.

Only one of the defendants appeared in the action. Mattie Loeser appeared by her attorney, procured an injunction against working the claim, and filed an answer denying all

the allegations and equities of the plaintiff Thomson, and alleging a prior location of the same claim on August 27, 1899, and a full compliance with the mining laws and local customs subsequent thereto. No reply having been made to the affirmative defense of defendant Loeser, her attorney moved for judgment upon the pleadings; but, before any action of the court was taken, one James Halley appeared in the action, by L. C. Hess, his attorney, and moved that he be substituted as party plaintiff, upon the allegation that he had purchased the claim from Thomson by deed dated March 28, 1901. Halley was permitted to intervene to defend his interests. He appeared for himself alone, and filed a reply denying the material allegations of the Loeser affirmative defense, and alleging affirmatively a purchase of Thomson's interest on or about December 5, 1900.

In this condition of the pleadings, the case has gone to a referee to take and report the testimony, and the cause is now submitted to the court for decision upon the evidence reported and upon written briefs by counsel. Counsel for defendant Loeser now contends (1) that defendant is still entitled to judgment by default against plaintiff Thomson for want of reply to her affirmative defense; (2) that plaintiff Halley has failed to show any interest in the matter in litigation, and is not entitled to any relief upon the merits; and (3) that upon the evidence the defendant Loeser is entitled to a decree quieting her title under her senior location.

An examination of Halley's reply shows that it is limited to his own alleged interests, and was not intended to be the reply of Thomson. Unless Halley had some interest as the successor of Thomson, there is a failure to connect the pleadings of Thomson with Halley's reply. An examination of the testimony discloses that no attempt was made to prove the allegation of interest set up in Halley's reply, and counsel for Halley abandoned that claim in their argument, and re-

lied upon the alleged rights of Thomson. This failure to sustain the Halley purchase and the utter abandonment of his cause of action leaves the case just as it stood before Halley's intervention. There is no reply to the defendant Loeser's affirmative defense. Halley's reply is personal, and not for Thomson. It was allowed wholly as a defense to his own alleged purchased interest. It has wholly failed and is abandoned. Thomson abandoned the case and failed to reply. Halley abandoned the case upon the merits. In this condition of the pleadings and evidence, the defendant Loeser must be held to be entitled to judgment by default against Thomson for want of a reply to her affirmative defense. Upon his failure of proof, the court must hold that Halley fails to show any interest in the subject of litigation, and judgment must go against him on that account. No connection in interest is shown, by purchase or otherwise, between Thomson and Halley, and the defect in Thomson's pleadings cannot be supplied by the unauthorized reply filed by Halley. The application of defendant Loeser for default and judgment on the pleadings must be allowed.

It is within the discretion of the court to permit a reformation of the pleadings, even at this stage of this case, when necessary to the proper administration of justice. In view of this general rule, the court has carefully examined the case upon its merits, and has determined that, both on the pleadings and evidence, there must be a judgment for defendant Loeser. It is clearly shown that Thomson made a location of this claim at or about the time alleged in his complaint. The whole controversy hinges on the alleged prior location of Loeser, made about August 27, 1899. On the part of the plaintiff it is contended that at that time the claim was not open to location, owing to its prior location by one Ellington. I do not find from the evidence that the Ellington claim was ever perfected. It is shown that he did

set a stake or stakes, and posted thereon a notice of location. The evidence discloses, so far as it goes, however, that Ellington made no discovery of gold, and did not record his notice of location. It may be that a record was not necessary, but discovery certainly was; and there is some affirmative evidence that no discovery was made, and that Ellington voluntarily abandoned the claim. The most serious objection to a consideration of the Ellington claim, however, is that it is not pleaded. If, in reply to the defendant Loeser's location, the plaintiff had alleged the prior Ellington location, and sustained the allegation by proofs, the court would have held the Loeser location void, and sustained the Thomson location, under the rule established in the case of Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735. But there is a total lack of both allegation and proof, and the Ellington claim cannot be considered as a bar to the Loeser claim.

The next objection to the Loeser location is that there was a fraudulent change in the records, whereby the name of Ellington was erased and that of Loeser written in its place; that no record was ever made of the Loeser location, except in that way. The answer to this objection is that the statutes of the United States do not require that the notice of location be recorded, and no rule or custom of miners is pleaded or proved, requiring it. This objection fails, therefore, even if true in fact. Haws v. Victoria Copper Co., 160 U. S. 303, 16 Sup: Ct. 282, 40 L. Ed. 436.

Nor am I convinced that the record was falsified as alleged. It is shown that the name of M. Loeser is written in the record of the location in a different colored ink, and witnesses testify that there has been an erasure and a writing in over a former name; but whether it was only an honest mistake corrected, or a fraudulent change by interlineation, is not shown. If the case rested on this record alone, it would be more doubtful; but the recorder who

made this record testified positively that it is his work, and that he made the record at the time alleged. All the surrounding circumstances, shown by the testimony of unimpeached witnesses, support it. There is an utter absence of proof to impeach the record, except the appearance of the record itself. Counsel for plaintiff asks: Who could have any interest in changing the record, except the defendants? And then he argues that the erasure is sufficient to destroy the defendants' title. It may be asked in reply: Why should the defendants change a record, where it results in destroying their title? Is it not as reasonable to suppose that the plaintiff did it, if it is to be given that effect? A vested title to a mining claim cannot be divested on suspicion. The evidence must be clear and convincing, before the court will declare a title of that kind forfeited, and there is no such testimony in this record. Hammer v. Garfield Min. Co., 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964.

I am satisfied from the evidence in this case that the claim in controversy was located, staked, marked, worked, and recorded for the defendant Loeser, by her duly authorized agent, at the time alleged in her answer, and that it was not open to a relocation when Thomson made his claim thereto. Upon the face of the pleadings, as well as upon the evidence, the defendant Loeser is entitled to a decree; and findings of fact, conclusions of law, and a decree in accordance with this opinion may be prepared for her.

LOESER v. GARDINER et al.

(Third Division. Eagle. August 16, 1902.)

No. 49.

1. FORFEITURES—EVIDENCE.

Forfeitures are deemed odious in the law, and the evidence to sustain them must be clear and convincing. Every reasonable doubt will be resolved in favor of the validity of a mining claim, in opposition to a forfeiture.

2. MINES AND MINERALS—MONUMENTS—STAKES.

One center stake at each end of a claim, which is located from a common base by serial number as one of a well-known group, with written notices on both stakes, supported by general custom of miners, *held* sufficient.

3. MINES AND MINERALS—BOUNDARIES—MONUMENTS.

Where, by a general custom among miners, the boundaries of the location are marked by only one center stake at each end of the claim, the boundaries are formed by end lines at right angles to a center line drawn from center stake to center stake, and by side lines parallel to and equidistant from the center line, and far enough therefrom to embrace 20 acres within the parallelogram.

4. ABANDONMENT—EVIDENCE.

Abandonment is a question of intent, and can be sustained only by clear and convincing proof.

Suit in equity to quiet title to mining claim.

J. Lindley Green, for plaintiff.

Johanson & Hess, for defendants.

WICKERSHAM, District Judge. This suit is an action to quiet title to placer mining claim No. 7 below discovery on Slate creek, near Rampart, Alaska. The complaint alleges that Latham A. Jones located the claim on January 6, 1899; that he sold the claim and conveyed title thereto to one Baldry by deed dated April 3, 1901; and that Baldry sold the

claim and conveyed title thereto to plaintiff by deed dated April 15, 1901.

The answer consists of (1) a general denial of the allegations in the complaint; and (2) an affirmative plea of a junior location of the same mine by the defendants on July 16, 1900, and an allegation that at that time the land was unappropriated public land of the United States.

From the evidence it is clear that both plaintiff's grantors and defendants made the locations respectively alleged in fair compliance with the law; the objection made by the plaintiff to the defendants' location being only that it is a junior location, and made while a former valid location existed, and is therefore void. This objection is included in the arguments made by the defendants to sustain their objections to the Jones location, which are three in number, viz.: (1) The claim of Jones was not properly staked; (2) if staked in the first place, the stakes were not maintained, and no record was made of same; (3) Jones abandoned the claim, even if properly staked.

The first objection must be considered in view of the fact disclosed by the evidence that Jones located the claim in controversy as one of a system of locations above and below a central location known as "discovery claim." His record of location reads as follows:

"Claim No. 7 below dis. S. C. M. D. This certifies Mr. Latham A. Jones has recorded 500 ft. up and down stream for mining purposes in the Slate creek M. dis. claim designated No. 7 below dis.

"James W. Dillon, Recorder."

The record made for the defendants' location also depends upon the number 7 for its definite description. Without the number it could not be located upon the ground. The evidence in this case discloses that No. 7, the claim in controversy, joins No. 6, and is one of a series of claims numbered from discovery down Slate creek. It is a custom among

miners in this region, in locating placer mining claims along a cañon, gulch, or water course, to do so by numbering them from a discovery claim, as above or below that point; and this custom is so general and well known, and so varied and valuable are the interests affected thereby, that it must be noticed and not ignored by the court. In addition to locating by number, it is also a general custom, well known to the court, to mark the boundaries by an upper and lower center stake, upon one or both of which the miner places his notice of location. Frequently the area is limited in narrow valleys or gulches from "rim to rim." In other cases there is no specific limitation mentioned; the miner intending to take the maximum, or 20 acres, equally divided by a line drawn from center stake to center stake. The Jones location in controversy was of the latter kind. There were two center stakes, and no specific limitation on the sides or in area. Is this a sufficient marking of the boundaries of a placer mining claim?

The very point in question was decided in a leading and early case in California by Judge Sawyer, who said:

"To make a valid location, under the statute, it is required that the 'location must be distinctly marked on the ground, so that its boundaries can be readily traced'; but the law does not define or prescribe what kind of marks shall be made, or upon what part of the ground or claim they shall be placed. Any marking on the ground claimed, by stakes and mounds, and written notices, whereby the boundaries of the claim located can be readily traced, is sufficient." North Noonday Min. Co. v. Orient Min. Co. (C. C.) 1 Fed. 522; Jupiter Min. Co. v. Bodie Min. Co. (C. C.) 11 Fed. 666.

"If the center line of a location of a lode claim lengthwise along the lode be marked by a prominent stake or monument at each end thereof, upon one or both of which is placed a written notice showing that the locator claims the length of said line, upon the lode from stake to stake, and a certain specified number of feet in width on each side of said line, such location of the claim is so marked that the boundaries may be readily traced, and, so far as the marking

of the location is concerned, is a sufficient compliance with the law." North Noonday Co. v. Orient Co., *supra*.

In a leading case from Nevada, the court, by Judge Beatty, said, in considering this identical question:

"The object of the law in requiring the location to be marked on the ground is to fix the claim—to prevent floating or swinging—so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated, in order to make their location upon the residue. We concede that the provisions of the law designated for the attainment of this object are most important and beneficent, and that they ought not to be frittered away by construction. But it must be remembered that the law does not in express terms require the boundaries to be marked. It requires the location to be so marked that its boundaries can be readily traced. Stakes at the corners do not mark the boundaries. They are only a means by which the boundaries may be traced. Why not, then, allow the same efficacy to the marking of a certain line in a distinct way, where the extent of a claim on each side of the center line is established by the local rules? It would be safer, and therefore better, to comply with the recommendations of the land office, and erect stakes at the corners of the claim; but, if the grand object of the law is attained by the marking of a center line, we can see no reason why it should not be allowed to be sufficient. In this case the locators of the Paymaster marked the center line of the claim on the 10th of October, 1872. No miner, no man of common intelligence acquainted with the customs of the country, could have gone on the ground, and seen the monuments, notice, and work at the discovery point, and the two stakes, one three hundred feet southeast of the location monument, marked 'Southeasterly stake of Paymaster,' the other twelve hundred feet northwest of the location monument, and marked 'Northwesterly stake of Paymaster,' in a line with the croppings and with the discovery point, without seeing at a glance that they marked the center line of the claim. By the rules of the district and the laws of the land he would have been informed that the boundaries of the claim were formed by lines parallel to the center line and three hundred feet distant therefrom, and by end lines at right angles thereto. With this knowledge

he could easily have traced the boundaries, and, if such was his wish, ascertained exactly where he could locate with safety. We conclude, therefore, that the Paymaster location was sufficiently marked on October 10, 1872." Gleeson v. Martin White Min. Co., 13 Nev. 442, 9 Morr. Min. R. 429.

After conceding this to be a sufficient marking, Lindley (volume 1, § 373) states it as his opinion that such a rule stretches the law to the utmost limit of liberality; but I can perceive no reason for denying the benefit of even a liberal rule in the support of the locations of mining claims, made by persons who are neither versed in the technicalities of the law nor the niceties of surveying. The defendants were not misled into locating this claim by any act, commission, or speech of the plaintiff or her grantors. They knew the situation, and undertook to claim another person's property on technicalities, and the court will not aid them unless it is obliged by the law to do so. Forfeitures have always, in law, been deemed odious, and courts have universally insisted upon the forfeitures being made clearly apparent before enforcing them. Equity often interferes to relieve against forfeitures, but never to divest estates by enforcing them. Mt. Diablo Min. Co. v. Callison, 5 Sawy. 439, Fed. Cas. No. 9,886; 9 Morr. Min. R. 616. I am not without doubt upon the question whether two center stakes, with notices failing to specify the exact width of the claim, even when supported by a custom that it shall be a sufficient width to embrace 20 acres, and when the claim is staked by a number in a regular series, is a sufficiently distinct marking on the ground, so that its boundaries can be readily traced. Mt. Diablo Min. Co. v. Callison, 5 Sawy. 439, Fed. Cas. No. 9,886; 9 Morr. Min. R. 616. Where, however, the relocator is an intruder upon another location, as in the case at bar, I am inclined to insist that every reasonable doubt, either of law or fact, shall be resolved in favor of the protection of the

claims of the prior locator. Upon the principle of the authorities cited, I am of opinion that the location in question by two center stakes, posted or written notices, and by serial number, is a sufficient marking of the location; that under such circumstances the boundaries of the claim are formed by side lines parallel to the center line, and by end lines at right angles thereto; that the side lines shall be located equidistant from the center line, and far enough to embrace 20 acres, and no more, in the claim. Gleeson v. Martin White Min. Co., *supra*; Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113.

The next objection is that, even if the location was properly staked in the first instance, the stakes were not maintained, and no record was made of same. It is not alleged or shown that any record was required to be made by the local rules or customs, and therefore none need be shown. It was not necessary to make a record of the staking or marking the boundaries. What, then, is the effect of a failure to maintain the stakes?

In the case of *The Jupiter Min. Co. v. Bodie Min. Co.*, in speaking of this objection, Judge Sawyer said:

"Any marking on the ground claimed, by stakes and mounds and written notices, whereby the boundaries of the claim located can be readily traced, is sufficient. But there must be some such marking, and when a mining claim is once sufficiently marked out upon the ground, and all other necessary acts of location are performed, it vests the right of possession in the locator, which right cannot be divested by the obliteration of the marks or removal of the stakes without the fault of the locator, so long as he continues to perform the necessary work upon the ground, and to comply with the law in other respects." 11 Fed. 666, 667.

From the evidence of Dillon and Jones, I have no doubt that this claim was staked with two substantial stakes, and both marked with location notices. The defendant McDonald admits that he found the lower center stake set by Jones,

some time after he relocated the claim. He says he never saw the upper stake set by Jones, but did see the one set in its place by Baldry. There is no attempt to dispute, or even doubt, the positive evidence of Dillon and Jones that the stakes were originally set and marked with notices. It appears from the evidence that a fire had destroyed the trees around the upper stake, and had so obliterated the marks that Jones could not find the original, and he then caused Baldry to set up the new stakes. The stakes were fairly maintained, so far as the evidence shows, and the marking was sufficient, even at the time the defendants filed, to enable them to find and relocate the claim, and that is a fair test of the satisfactory character of the marking.

It is next claimed that the location was abandoned by Jones. Abandonment is largely a matter of intent. The only evidence of abandonment offered is a conversation between Jones and the Bigelow brothers on July 22, 1900, wherein Jones is alleged to have said that he had staked No. 7, but had not recorded it, and advised the Bigelows to go and stake and record it, as it was open, and that he had intended to chop his name off the stakes, but had no ax, and that he had located the ground for the water rights. Perry Bigelow testifies that some days later, and on July 26th, Jones told him, upon being informed that McDonald had relocated the claim, that he would make the boys no trouble, as he already had more ground than he could prospect. This is the substance of all the evidence of abandonment. It is denied positively by Jones, who says only that he offered to permit the Bigelows to work No. 7 upon their complaining that all the claims on the creek had been filed on. Then, too, the alleged conversation with the Bigelows took place six days after McDonald had relocated No. 7; and it is not shown that he had any notice of an abandonment, or any intention on the part of Jones to abandon, at that time. An

abandonment, like a forfeiture, can only be sustained by clear and convincing evidence. Hammer v. Garfield Min. Co., 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964. And the evidence in support of the alleged abandonment in this case is not of that character. Nor is it sufficient to create an estoppel in favor of the defendants, who did not act on the alleged conversation of July 22d and 26th when they made their relocation on the 16th. In the record I find this admission: "It is admitted by all parties to this suit that the assessment work on No. 7 below was done for the year 1900 by H. G. C. Baldry at the request of L. A. Jones." Baldry's testimony shows that this was done in November, 1900. Jones located this claim on January 6, 1899, and therefore had until December 31, 1900, to do his assessment work, and no location could be made for failure to comply with the law prior to that date. Belk v. Meagher, 104 U. S. 279, 26 L. 735. It is clearly proven that Jones did not chop his name off his stakes, nor do any other act indicating abandonment. On the contrary, he caused his assessment work to be done, and sold a half interest to Baldry; and the evidence is satisfactory to me that he did not intend at any time to abandon the mine.

Upon all the evidence in the case, under the law, it appears that the locator, Jones, distinctly marked the boundaries of the location so that the same could be readily traced; that the stakes were fairly maintained, and were, with the notices and the serial number of the claim, sufficient to enable the defendants and others to ascertain the boundaries and extent of the claim, and that the plaintiff's grantor did not abandon the rights thereto, but continued to comply with the law and maintain his possession by assessment work; that the plaintiff succeeded to the locator's rights by deed, and is entitled to a decree quieting her title.

It is impossible to determine from the evidence in this

case just how far the claim of the defendants may embrace ground not within the area included in the original Jones location, but, as both located No. 7, it must be presumed that both attempted to embrace the same area. The burden is upon the defendants, and, having failed to show clearly that they are entitled to any ground outside of the original Jones location, judgment must go against them. Let findings and decree be prepared accordingly.

In re ESTATE M. O. GLADOUGH.

(First Division. Juneau. September 30, 1902.)

No. 103a.

1. ESTATES—ADMINISTRATOR—APPEAL AND ERROR.

An administrator, as such, has no power to appeal from an order of the District Court either allowing or rejecting a claim against the estate. Only a party in interest, such as an heir or creditor, may take such appeal. An administrator may appeal in the interest of an heir or creditor, when so authorized.

2. ESTATES—CLAIMS—PARTNERSHIP.

A claim arising out of a mining partnership with the deceased may be presented like any other claim, allowed, and paid, without bringing suit to establish or dissolve the partnership.

3. I. A :S—CLAIMS—JUDGMENT.

When a judgment has been obtained against an estate upon a claim due, the administrator admitting that he has money on hand to pay it, the money was ordered paid into court.

Application of an administrator to be allowed to appeal from order of District Court allowing a claim against the estate.

T. R. Lyons and T. J. Donohoe, for administrator.
Crews & Hellenthal, for creditor.

BROWN, District Judge. This cause was tried at the last term of this court, and upon final hearing the court made its findings under the statute, and entered judgment in favor of the petitioner, Charles T. Rua, and against the administrator of the estate of M. O. Gladough. The plaintiff filed his petition in this court under section 823, pt. 4, c. 84, Alaska Code (Act June 6, 1900, c. 786; 31 Stat. 462), providing for the manner in which claims may be presented to the administrator, and thereafter providing for the bringing of such claims for hearing in the District Court.

The administrator now comes before the judge of this court, praying that he be allowed an appeal from the judgment of the court before rendered on said claim. The petitioner, Charles T. Rua, objects to the allowance of an appeal, and, in support of his objection, urges that the administrator has no interest in the matter litigated, and no interest in the result of the proceeding that would entitle him to an appeal.

It is evident that under the federal practice, which prevails in this jurisdiction, no appeal can be taken as a matter of course, and it can only be taken when allowed by the court on application duly presented. It would seem to be a fair and just rule to apply in this and all other such cases that the person seeking the appeal must have an interest in the subject-matter of the appeal, and his interest must be adversely affected by the judgment or decree that has been entered in the case, or no appeal should be allowed. In support of the contention of the original petitioner in the case, it is claimed that the administrator, Esterlee, has no interest whatsoever in the result of this litigation—no interest in the subject-matter litigated—and is therefore without any right of appeal. Counsel for petitioner cites many California cases, in all of which it appears that the matter sought to be appealed from was a decree or order of court making distribution of the estate; the court holding very properly in such cases that

the administrator could not represent any one of the heirs as against the rights of the other heirs, that he was without any interest whatsoever in the subject-matter of the judgment, and that he had no right of appeal. In my opinion, the correctness of the California courts upon this matter cannot be questioned. In all such cases the interests of the heirs are at stake, and it is the interest of one heir against that of another that is involved. Under such circumstances, clearly, it would be very improper for the administrator or executor to take sides as between the heirs, or undertake to represent either of them in court. But is that the case presented here? The petitioner, Rua, presents a claim against the estate of Gladough, and has maintained his claim by evidence that satisfied the court of its justice. Indeed, it seems to me, the evidence in support of Rua's claim is practically overwhelming; and counsel for the administrator very frankly admits that he can see no other conclusion that the court could have reached, under the evidence presented in this case, than the one announced by the court. But notwithstanding the strength of the claim made by plaintiff, Rua, it is a claim against the estate, in which the interests of the heirs and all of the heirs are adverse to Rua.

I conceive it to be the duty of an administrator not only to conserve the property of the estate, but to protect it against all claims that he deems either fraudulent or unjust. Should an administrator allow any claim, through an improper motive of gain to himself, that was unjust or fraudulent against an estate, the heirs or creditors of the estate who might be interested could move the dismissal and discharge of such administrator.

The case at bar is very different from the several cases cited by counsel, and, in my opinion, these cases, while very clear and of unquestioned propriety as applied to the facts under consideration, do not sustain the contention of counsel

here. I am clearly of the opinion that if the administrator had any good reason to believe that the heirs of the estate felt aggrieved by the decision of this court, and that their rights were injuriously affected by the judgment and decree of the court, upon their request it was the duty of the administrator, in their behalf, to present his application for an appeal in their interest; and in their interest such appeal may properly be allowed, if there is any reasonable ground for it whatsoever.

But what is the case presented, and what is the contention of counsel, and what has it been from the beginning of this case? Not that the result found by the court was unjust; not that the rights of the heirs, or any of the heirs, interested in the estate, have been injuriously or unjustly affected by the decision of the court; but that the method whereby this claim was presented, and the procedure in establishing the claim, are wrong. Not that the result is wrong, but that the procedure in reaching it is wrong. In other words, that the administrator and his counsel differ from the court as to the method of procedure, and not as to the justice of the judgment entered. And because of this difference of opinion the administrator seeks an appeal to a higher court, thereby perhaps subjecting the estate, as well as others, to expense and loss. It has also been persistently urged by counsel from the beginning that the court had no jurisdiction—a strange proposition, to say the least. The probate act of this jurisdiction gives the district court supervisory jurisdiction over all estates, and the section under consideration provides in express terms for a hearing in this court on a claim presented to the administrator and disallowed by him. In some jurisdictions, where an administrator disallows a claim, an action is required to be brought within a certain number of days thereafter, similar to any action of debt, to establish and

enforce the party's claim; but the section of our probate law under consideration reads as follows:

"If any executor or administrator shall refuse to allow any claim or demand against the deceased, after the same may have been exhibited to him in accordance with the provisions of this act, the claimant may present his claim to the commissioner having jurisdiction, or the District Court or the judge thereof, for allowance, giving the executor or administrator thirty days' notice of such application to the court. The District Court or the judge thereof shall have power to hear and determine, in a summary manner, all demands against any estate, agreeably to the provisions of this chapter, and which have been so rejected by the executor or administrator, and shall cause a precise entry of the allowance or rejection to be made on the entry of the order, which order shall have the effect of a judgment, from which an appeal may be taken, as in ordinary cases." Act June 6, 1900, c. 786 (31 Stat. 462).

Clearly the section under consideration gives the court jurisdiction of the subject of the action. Notice was given to the administrator of the presentation of said claim in this court, in accordance with the terms of this statute, so that the court acquired jurisdiction of the person of the administrator as well as of the subject-matter.

But counsel urge that this claim grows out of a pretended partnership, and that the partnership should first be established in some other procedure, and then a claim should be presented after such procedure had. I am inclined to the opinion that some proceeding in equity might have been had, whereby the partnership or joint interest of Rua in the Gladough claim might have been established; and when so established the plaintiff, Rau, might, under our statute, have had a right to administer the estate of the partnership, and have taken the entire property out of the hands of the present administrator. In such case there would have been no claim to establish upon a hearing, but Mr. Rau, the party proceeding here, would have had the adjustment of the estate in his

own hands, subject to the reasonable and proper control of the courts. This statute is a very peculiar one—one that I have never met with outside of those states which have followed or adopted the California Code. No case has been presented by counsel, and the court, in its limited examination of the question, has been unable to find a case, where the questions arising in this case have been adjudicated by the California court, or any court of last resort having like statutes.

The word "claim" is a very broad term. It is defined by Webster as:

"A right to claim or demand something; a title to any debt, privilege, or other thing in the possession of another; also a title to anything which another should give or concede to, or confer on, the claimant. A bar to all claims upon land. The thing claimed or demanded, as land to which any one intends to establish a claim; as a settler's claim; a miner's claim," etc.

Rapalje defines "claim" generally:

"A challenge by any man of the property or ownership of a thing not at the time in his possession, but, as he contends, wrongfully withheld from him."

As defined in many of the decisions, particularly of California, it is synonymous with "legal demand." In New York it is said to be equivalent to "a cause of action." It is not limited to money, but extends to lands, under act of Congress. *Dowell v. Cardwell*, 4 Sawy. 217, Fed. Cas. No. 4,039; *Minick v. City of Troy*, 83 N. Y. 516; *Gray v. Palmer*, 9 Cal. 616. From these definitions, it does not seem that the claim that is to be presented to the administrator is a claim of any peculiar or particular character, but is any claim that might be asserted as a cause of action or as a right demanded. The contention of counsel for administrator that because the claim for money presented by the petitioner, Rua, under this statute, grows out of a mining partnership alleged to have

existed—and which is very clearly shown by the evidence to have existed—it cannot properly be determined in this form of proceeding, is untenable. And so urgent have counsel been in this behalf, that they say the court is without jurisdiction to proceed at all in the case of the claim presented.

Counsel complain, too, that their motion for a continuance to another term of court was not granted. But time was given counsel—and ample time—to secure all the evidence that might be found bearing upon the question at issue; and the broadest latitude was given counsel in the introduction of testimony, so that every possible fact might be before the court, whereby their contention could be supported. All the evidence which they claimed they needed was obtained, save and except the testimony of one or two men; and neither counsel nor anybody else knew that these men, who were said to exist somewhere, had any special knowledge of facts that were material to the case, or could testify to any substantial fact. It is perfectly evident, also, that the administrator and his counsel had been indifferent in their pursuit of evidence—so much so that any greater indulgence than was allowed by the court could not have been shown without injustice. And these are matters that counsel are urging as erroneous conclusions on the part of the court, and that they should be allowed an appeal because of them. I have ever exercised the most liberal discretion in granting appeals, and have permitted appeals to be taken from the judgment of this court in one or two instances when I thought they were exceedingly frivolous. But as in this case counsel seem to urge that the interests of the heirs in this estate are at stake, if counsel for the administrator will amend his application by alleging therein that this appeal is sought by the administrator in the interest of the heirs, and at their request, I will allow the appeal. I will not, however, allow the administrator to use the moneys of the estate in pursuing

this appeal, or in providing attorney's fees, unless it is hereafter made clearly to appear to this court that the heirs are in fact demanding this appeal, and that it is not pursued on the whim or caprice of the administrator or his counsel. The application having been amended as indicated by the court, the appeal is allowed as prayed.

2. In connection with the matter of appeal, the petitioner for allowance of the claim, Charles R. Rua, by his counsel, asks that an execution issue against the administrator personally for the sum of \$2,500. Section 824 of our statutes (Act June 6, 1900, c. 786; 31 Stat. 463) provides that the effect of a judgment against an administrator is only to establish the claim, "unless it appear that the complaint alleges assets in his hands applicable to the satisfaction of such claim, and that such allegation was admitted or found to be true, in which case the judgment may be enforced against such executor or administrator personally."

In the case at bar the administrator admitted in his answer that he had received on the sale of this property the sum of \$5,000; bringing himself exactly within the proviso and the letter of section 824, viz., that under such circumstances the judgment may be enforced against the executor or administrator personally. Does this mean that an execution may issue against the administrator?

Possibly an execution might be allowed, and the execution returned "No property," for administrators are frequently found without means themselves, but having friends who have become security for them in the way of bond. I am not disposed in this case to order an execution, but I am entirely satisfied that Rua has a right to proceed against the administrator personally; and I think, on the application made here, that the court may properly order the administrator to pay into court the money that he admits he has received, and which, under the judgment and opinion of the court in this

case, belongs to Rua. As no stay bond on appeal is given, I think common justice requires that Esterlee, the administrator, should be required to pay this money into court. An order prepared to this effect by counsel for petitioner will be made by the court.

3. Another matter has been presented to the court, and the court is requested to make some order on that behalf. The records of this court seem to show that Rua applied for letters of administration as the copartner of M. O. Gladough, which application was refused by the probate court, and an appeal was taken to this court. No hearing upon the appeal of Rua in that behalf has been had up to this time. It seems, however, to be an admitted fact at this time that the entire purchase price of the mine will be paid on the 21st day of November next, and before a trial can be had of the case appealed by Rua, and his right determined as to the administratorship. In order that the rights of all parties may be protected pending this suit on appeal in this court, it is believed to be wise and prudent to require Meenach, the contracting party, to pay the remainder of the money on the purchase price into this court, to be disposed of according to the rights of the parties as they may be hereafter determined. I understand there is no serious objection made to this course on the part of counsel for the administrator. An order to this effect may be prepared, and, upon examination of the same, if it shall be found satisfactory to the court, the court will sign such order directing Mr. Meenach to pay the moneys due on the contract made with Gladough into the registry of this court, taking a receipt from the clerk for the moneys so paid, a copy of which said order, when properly made, must be served upon Meenach at an early day.

WEITZMAN v. HANDY et al.

(First Division. Skagway. October Term, 1902.)

No. 163.

1. APPEAL AND ERROR—JUSTICE OF THE PEACE.

A notice of appeal from a justice of the peace to the District Court of Alaska must be entitled in the proper court, directed to the adverse party, identify or refer to the judgment so distinctly that the appellate court can identify the judgment from the notice, contain the date of the judgment, the names of the parties plaintiff and defendant, and, when it is a money judgment, the amount thereof; and, if for the possession of real or personal property, the notice should indicate which, and describe the property. The notice in this case *held* insufficient. Appeal dismissed.

Motion to dismiss appeal for insufficiency of notice. Granted.

J. F. Dillon and J. G. Price, for motion.

T. A. Marqham and W. E. Crews, for defendants.

BROWN, District Judge. This case came on for hearing before the court on motion of the plaintiff to dismiss the appeal because of the insufficiency of the notice of appeal in the lower court. Several grounds are assigned in the motion for such dismissal, some of which are in substance as follows:

That the defendants are not properly described in the notice; that the judgment referred to in the notice of appeal is not so described that it could be identified; that there is no date given in said notice on which the judgment sought to be appealed from was entered, and the notice does not indicate who the defendants were, against whom such judgment was entered. The notice of appeal, as sent up from the Commissioner's Court with the record of the case, is in the following words, to wit:

"In the U. S. Commissioner's Ex Officio J. P. Court for the District of Alaska, at Skagway. S. J. Weitzman v. M. E. Handy et al. Notice of Appeal. To John F. Dillon, Attorney for Plaintiff Herein: You will please take notice that the defendants in the above-entitled action hereby appeal to the U. S. District Court for the District of Alaska, Division No. 1, from the judgment therein made and entered in the said Commissioner's Court on the _____ day of July, 1902, in favor of the plaintiff and against said defendants, and from the whole thereof. T. A. Marquam, Attorney for Defendants."

It further appears that the notice was served on Mr. Dillon, the attorney for the plaintiff, on July 11, 1902, by Deputy Marshal Snook, which certificate of service is indorsed upon the notice.

Section 996, c. 97, pt. 4, p. 346, Carter's Code, provides that appeals taken to the District Court may be so taken within 30 days from the date of entry of judgment. Section 997, following, provides as follows:

"An appeal is taken by serving a notice thereof on the adverse party or his attorney, and filing the original, with the proof of service indorsed thereon, with the justice, and by giving the undertaking for the costs of the appeal, as hereinafter provided."

There is nothing in our statute describing or indicating what the notice of appeal shall contain. The whole question, therefore, is one of construction, and is left to depend largely upon the practice that may be established in this court, and what may be deemed by the court sufficient to notify the parties properly of the intended appeal. Clearly, a notice stating merely that a party intends to appeal "from the judgment entered in said action" could hardly be deemed sufficient. Neither would a notice, it would seem, be deemed sufficient that was not addressed to the parties defendant, and that did not refer in an intelligible way to the judgment that had been entered. If a money judgment, it would seem that the amount for which judgment was rendered should be stated,

and the date on which such judgment was entered; and, if it were a judgment for the recovery of personal property, the notice should at least state that it was such judgment. There might on any day be judgments entered in the same court, between the same parties, and of a different character. There might be a judgment entered on a certain day for the recovery of personal property, and on the same day a money judgment on an entirely different cause of action might be entered between the same parties. To say that a party plaintiff or defendant appeals from a judgment entered in a certain court on a certain day, without in any way identifying or indicating the character of such judgment, would not, in my opinion, be a sufficient notice. The notice should so far and so clearly state the nature of the judgment that there would be no mistake in identifying it when the record should come to this court.

The notice of appeal provided by our statute is in the nature of a process whereby this court obtains jurisdiction of cases appealed; that is, the giving of the notice is a preliminary step to be taken, and, if followed by other steps required by law, this court thereby obtains jurisdiction of the case. Being in the nature of a process, it should, I think, as clearly describe the parties, the nature of the judgment sought to be appealed from, the date on which such judgment was entered, the court in which entered, and the court to which appeal is taken, as a summons is required to indicate the nature of the action, the court in which brought, the parties to the action, and the amount sued for, when issued from the district court.

It is very earnestly urged on the part of appellant that the notice should be informal, and that the notice in question is as full as is ordinarily required by the courts of last resort of the state of Oregon, where the same statute has been under consideration. And counsel further urges that inasmuch as this

statute of ours was evidently taken from that of Oregon, and adopted by the Congress of the United States as the law of Alaska, the construction given to the statute under consideration by the courts of last resort in the state of Oregon was also adopted by Congress. This contention is in accord with the general authority upon the proposition as stated, if the section of the statute was one peculiar to Oregon. An examination of the various statutes will disclose, however, that the same section has been included in the statutes of many states, and has received construction more or less in accord with that given by the courts of last resort of the state of Oregon. But the courts of Oregon seem to differ upon the construction of the section, rendering their own decisions at least uncertain, and not so far commanding as to control this court on the theory advanced by counsel for appellant. Indeed, where the statute had been construed by other courts long before it was adopted by the state of Oregon, this court would be more inclined to follow the decisions of those courts, if there were any material difference in the construction given by such other courts and that given by the courts of last resort of the state of Oregon.

In the case of Neppach, Administrator, v. Jordan, 10 Pac. 341, 23 Am. St. Rep. 145, the Supreme Court of Oregon passed directly upon the question at issue, and the conclusion of the court in that case meets my hearty approval. In that case the court says:

"Judgment was rendered against Jordan in a justice's court. Jordan appealed to the circuit court. In the circuit court the appellee moved to dismiss the appeal for the reason that the notice of appeal was insufficient, in this: (1) That it failed to describe the court in which judgment was rendered; (2) that it failed to describe the parties; and (3) that it failed to describe the judgment. The notice was of the tenor following:

"In Justice Court for Couch Precinct, William Neppach, Plaintiff, v. W. P. Jordan, Defendant. Notice of Appeal. Civil Action.

To William Neppach and Charles H. Hewell, Your Attorney: Please take notice that the defendant in the above-entitled action appeals from the judgment rendered and entered therein on the 5th day of June, A. D. 1885, in favor of the said plaintiff and against the said defendant, for the possession of the premises described in the complaint herein, and costs and disbursements, and from the whole of such judgment, to the circuit court of the state of Oregon, for the county of Multnomah. E. O. Dowd, Attorney for Defendant."

In passing upon the motion, the court says:

"The notice of appeal must be directed to the adverse party, and must inform him that the appellant appeals from the judgment. As this notice is a species of judicial process (Webster, J., in Driver v. McAllister, 1 Wash. T. 368), the sufficiency whereof must appear to the court on its face, the question whether the notice is sufficient to give the appellee actual knowledge of the intention of the appellant to appeal cannot be gone into. The court must be able to identify the judgment from the notice. Can it do so in this case? Evidently so. A judgment is sufficiently described when the court in which it is rendered is given, the names of the parties to the judgment, the date of the judgment, and for what it was rendered. Lewis v. Lewis, 4 Or. 209. * * * This notice gives the court, the names of the parties, the date, and that the judgment was for the possession of the premises described in the complaint. It was not necessary to give a description of the premises in the notice itself."

In that case, it will be observed, the notice specified that the judgment was for the possession of certain premises described in the complaint. It was not necessary to give a description of the premises, and that these premises "were described in the complaint." The court holds that the statement in the notice that the judgment was for the possession of property described in the complaint made it sufficient, quoting the familiar rule that "that is certain which can be made certain." In the above case, inasmuch as the notice described generally the character of the judgment, and referred to the complaint on file for a more complete description, an

examination of the complaint in that instance made the identity of the judgment clear and explicit in a high degree. I heartily coincide with the requirements of this decision as stated by the Supreme Court of Oregon; and, while there are other decisions in that state that seem not wholly in accord with this, I regard this as the one decision of the court of last resort of Oregon that I feel disposed to follow in construing the same statute in this jurisdiction.

Let it then be clearly understood hereafter that notices of appeal to this court must be entitled in the proper court, must be directed to the adverse party, must so identify or refer to the judgment that this court will be able to identify the judgment from the notice, and must contain the date of the judgment, and the names of the parties plaintiff and defendant, all of which must be in clear and unmistakable language. Where a money judgment is sought to be appealed from, the notice should state the amount of such judgment. If the judgment is for the possession of personal property, the notice should so state. If it is for the possession of real property, as in action of forcible entry and detainer, the notice should indicate the character of the action and the judgment. Indeed, I am of the opinion that the notice given in the case of Neppach, Administrator, v. Jordan, passed upon by the Supreme Court of Oregon (10 Pac. 341, 23 Am. St. Rep. 145), is one that may well be followed by all attorneys in this jurisdiction. I would add to that notice only one ingredient: Where it is a money judgment, the amount for which judgment was given should be stated in the notice. I am clearly of the opinion that the notice in the case at bar is insufficient. It does not properly describe the parties; it is without any date; it does not refer in unmistakable terms to the judgment rendered from which the appeal is sought to be taken; it is not addressed to the adverse party—although this objection

is not raised by the motion in this case—and is therefore insufficient.

The motion to dismiss is sustained, and the judgment of the court is that the appeal be dismissed.

AMERICAN GOLD MIN. CO. v. GIANT POWDER CO. et al.

(First Division. Juneau. December 5, 1902.)

No. 177a.

1. CORPORATIONS—AGENT—FOREIGN CORPORATIONS—SERVICE.

One who receives and stores for sale consignments of giant powder from the manufacturer, a foreign corporation not qualified to do business in Alaska for failure to comply with the law requiring it to file its articles, financial statement, and consent of agent, and who withdraws such amounts as he sells from time to time, and who is responsible to the corporation for the amounts of such sales, is nevertheless an agent upon whom service of summons in a suit against the corporation may be made.

On the 9th day of September, 1902, after complaint had been properly filed in this action, the clerk of this court at the request of plaintiff issued a summons. The summons was delivered to the United States marshal, and the following is the return of that officer as to the defendant, the Giant Powder Company:

"United States of America, First Division, District Court of Alaska—ss.: I hereby certify that I received the within summons on September 9, 1902, and that, after due and diligent search, I was unable to find the president, or other head of the Giant Powder Co., Consolidated, a corporation, or the secretary, cashier, or managing agent, and none of the officers of the corporation above named reside or have an office in this division or district; and I therefore served the same at Juneau, Alaska, on the 9th day of September, 1902, on the within-named defendant, the Giant Powder Co., Con-

solidated, a corporation, by serving a copy thereof together with a copy of the complaint in said action prepared and certified by Maloney & Cobb, plaintiff's attorneys, on William M. Ebner, personally and in person, as local agent of said defendant corporation.

"Dated at Juneau, Alaska, September 9, 1902.

"James M. Shoup, U. S. Marshal,

"By W. H. McNair, Chief Office Deputy."

On the 7th day of October, 1902, the defendant Giant Powder Company caused to be filed its motion to quash the service of summons theretofore made on William M. Ebner. The appearance of the powder company was special, and for the purposes of the motion only. The grounds for the motion to quash, as stated therein, were as follows: (1) That the copy of the summons herein served upon the defendant does not contain the name or title of the court in which said action is brought; (2) that said summons runs in the name of the president of the United States, and not in the name of the United States; (3) that the copy of the summons used in the service hereinafter described is not a true copy of the original summons in said action; (4) that said summons has not been served upon the defendant according to law. This motion was based upon the records and files herein, and upon the affidavit of William M. Ebner filed herewith.

The affidavit of William M. Ebner as to his agency for the Giant Powder Company, omitting the formal parts, reads as follows:

"That on the 9th day of September, 1902, a deputy U. S. marshal, W. H. McNair, delivered to me a copy of the complaint in the foregoing entitled action, together with a paper, a copy of which is annexed hereto, marked 'Exhibit A'; that I do not know the Pacific Surety Company, mentioned in said paper, and have never had any relation or connection with said company, and that I have no relation with said Giant Powder Company, mentioned in said paper, other than that of purchaser of their powder; that said company ships to me a consignment of powder in 10-ton lots, for which I am absolutely responsible, and liable at a stipulated price; that said

powder is paid for by me immediately upon my consumption of the same or use of the same; that I have no authority to bind said company in any way, shape, or form, nor to sell said powder on account of said company, except that I may withdraw said powder on my own account and make sale of the same; that I have not, and do not, represent said company in any way, shape, or form, and that my only relation with said company exists by reason of the facts heretofore stated; and that, if I make a sale of said powder to any other person or corporation, I myself am absolutely responsible for said powder, and cannot negotiate any terms of sale with any other person or corporation, or bind them in any way, or leave the responsibility or credit for such sale at the risk of said company."

In addition to this affidavit, there has been filed and submitted, in support of the motion to quash, the following affidavit made before a notary public of the city and county of San Francisco, in the state of California; this affidavit being made by the president of the Giant Powder Company:

"That said defendant is a corporation organized and doing business under the laws of the state of California; that William M. Ebner is not at the date of this affidavit, nor has he ever been, either a clerk or agent of said corporation in Alaska or any other place; that said corporation has not, nor has it ever had, either a clerk or an agent in Alaska, nor has it ever had a residence or place-of business in Alaska."

Maloney & Cobb, for plaintiff.

Louis P. Shackleford, for defendants.

BROWN, District Judge. The laws of the District of Alaska provide how summons shall be served, and, so far as is necessary for the consideration of the question now before the court, read as follows:

"If the action be against a private corporation, to the president or other head of the corporation, secretary, cashier, or managing agent; or in case none of the officers of the corporation above named shall reside or have an office in the district, then to any clerk or

agent of such corporation who may reside or be found in the district; or, if no such officer be found, then by leaving a copy thereof at the residence or usual place of abode of such clerk or agent." Act June 6, 1900, c. 786, § 46 (31 Stat. 339).

The statutes of the United States for the District of Alaska (section 225), further provide:

"All corporations or joint stock companies organized under the laws of the United States, or the laws of any state or territory of the United States, shall, before doing business within the district, file in the office of the secretary of the district and in the office of the clerk of the District Court for the division wherein they intend to carry on business, a duly authenticated copy of their charter or articles of incorporation, and also a statement, verified by the oath of the president and secretary of such corporation, and attested by a majority of its board of directors, showing: the name of such corporation * * *."

—And other matters enumerated in the statute. It is further provided that:

"Such corporation or joint stock company shall also file, at the same time and in the same offices, a certificate, under the seal of the corporation and the signature of its president, vice-president, or other acting head, and its secretary, if there be one, certifying that the corporation has consented to be sued in the courts of the district upon all causes of action arising against it in the district, and that service of process may be made upon some person, a resident of the district, whose name and place of residence shall be designated in such certificate; and such service, when so made upon such agent, shall be valid service on the corporation or company, and such agent shall reside at the principal place of business of such corporation or company in the district."

It is not claimed in this case that the agent upon whom service was made, or attempted to be made, was an agent appointed under this last section of the statute, so that the question of agency under this latter statute is not involved in the motion to quash. The president of the defendant corporation makes the bald statement that William M. Ebner is not, and

never has been, agent or clerk of the corporation in Alaska; that they never have had such agent or clerk in Alaska to do the business of the corporation, and never have had a residence or place of business in Alaska. However, Ebner states his exact relations to the company at the time service in this case was made. Of course, the return of the deputy marshal is based upon general report and such information as he might obtain as to the agency of the party upon whom he made the service. Such declaration of the marshal is *prima facie* evidence of a good and sufficient service, but the return may be rebutted by other evidence. Does the affidavit of Ebner, which recites his business relations with the company, constitute him in any respect the agent of the company? This is the question to be considered in this case, and upon which the determination of the motion turns. It is to be presumed that the affidavit of Ebner, having been prepared, no doubt, by the attorney for the powder company, is made as strong in favor of said company as it could truthfully be. It will be observed that, while Ebner says that the company ships the powder in 10-ton lots on consignment to him, he does not state that on the receipt of the same he becomes the owner thereof. He does say that he becomes responsible for the powder to the company. It would seem that he is to pay for said powder as he consumes it or "uses" it. If he is not owner of the powder at the time it is received, although responsible for it to the shipper, and sells the same from time to time, and thereby becomes liable for the powder sold, it seems to me that he deals with the powder as agent of the company. It is true that, if any agency exists, it is peculiar and of a very limited character.

It is said that by the creation of an agency "the principal bestows upon an agent a certain character. For some purposes, during some time, and to some extent, the agent is to be the alter ego, the other self, of the principal." It will be

observed that Ebner says he is to be responsible to the company for the powder if he sells it, and we may gather from his affidavit that he sells in his own name. If Ebner can be considered an agent of the company, his relation is most nearly described by the term "factor" or "commission agent," and of that peculiar form of factor described as one doing business on a "del credere commission." Mechem, in his work on Agency, defines a factor as "one whose business it is to receive and sell goods for a commission. He differs from a broker in that he is intrusted with the possession of the goods to be sold, and usually sells in his own name. He is invested by law with a special property in the goods to be sold, and a general lien upon them for his advances." Mechem on Agency, p. 815. The same author defines a del credere commission as follows: "Where, in consideration of an increased commission, the factor guarantees the payment of debts arising through his agency, he is said to sell upon a del credere commission." In this class of transactions the principal is usually styled the "consignor," and the factor the "consignee." Now, under the affidavit made by Ebner in this case, does he come within the purview of the definitions of factor that I have just referred to? If he does, he is an agent, the alter ego of the corporation, however limited his authority as such agent. If he does not come within these definitions, I take it that he is in no sense an agent, and can in no sense act for the corporation. Ebner does not claim to receive any commission whatever on these goods when sold, but he says he becomes "responsible" for the goods "at a stipulated price." If, then, he has any commission, it is the difference between the "stipulated price" he pays and the sum he receives for the goods when sold, less freight charges, etc. From Ebner's statement, I take it that he sells in his own name, because he says he becomes immediately responsible to the corporation for the goods when he "withdraws" and

sells them. If he became, immediately upon receipt of the consignment, responsible for the goods at the stipulated price, then surely when he would withdraw them from the consignment he would be no more responsible than in the first instance. Hence it would seem that his responsibility in the first instance was for the care and keeping of the goods; that they remained, in reality, the property of the company until sold by Ebner or consumed by him. However artfully the agency of Ebner may be concealed by the peculiar methods of the company in transacting business with him, it is quite evident to me that there was some sort of agency existing in Ebner, under which he handled the powder of the Giant Powder Company.

The case of Fairbank & Co. v. Cincinnati, N. O. & T. P. Ry. (decided by the Circuit Court of Appeals for the Seventh Circuit October 26, 1892) 4 C. C. A. 403, 54 Fed. 420, 38 L. R. A. 271, while not a case on all fours with the one at bar, has perhaps some of its earmarks. The Court of Appeals of the Seventh Circuit was then presided over by Judges Harlan, Gresham, and Woods. It appeared from the affidavits on file in said cause that—

"The persons mentioned in the returns were employed by the defendant, at the time of the alleged service of the writs, for the sole purpose of diverting freight and passengers destined south to such railroads leading out of Chicago as had running connections with the defendant's line at Cincinnati; that they had no authority to sell tickets, or make contracts or rates, for the transportation of freight or passengers over the defendant's road; that, to better enable them to thus serve the defendant, it supplied them, at its own expense, with desks in a room in Chicago, which was occupied in part by employés of other railroad companies; and that when the suit was commenced, and process served, as stated, the defendant's principal office was in the state of Ohio, and it had no office and owned no railroad or other property in Illinois. Judgment was entered quashing both returns and dismissing the suit for want of jurisdiction, and this writ of error was prosecuted by the plaintiff."

It is stated in the Fairbank Case, above referred to, that section 5 of the Illinois practice act (Rev. St. 1891, c. 110) provides that:

"Where suit is brought against any incorporated company, process shall be served upon the president, if he resides in the county, and if absent from, or he does not reside in, it, the summons shall be served by leaving a copy thereof with any clerk, cashier, secretary, engineer, conductor, or any agent of the company found in the county."

From which it appears that the statute of Illinois as to the service of summons on corporations is very similar to our own.

In Construction Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608, it is said by the Chief Justice, speaking for the court:

"Where a foreign corporation is not doing business in a state, and the president or any officer is not there transacting business for the corporation, and representing it in the state, it cannot be said that the corporation is within the state, so that service can be made upon it."

However, it may be remarked that in the case of Fairbank & Co. v. Railway Co., before referred to, it was held that the ruling of the Circuit Court quashing the service was correct, and was confirmed by the court deciding the case, Judge Woods dissenting. But in that case it will be remembered the people who were served with process as agents of the company could neither buy, sell, contract, nor deal in any way whatsoever for the company. They could simply solicit parties who had freight passing over certain roads beyond the limits of the state of Illinois to ship over other lines, etc. Not having power to contract, and not having authority to sell or dispose of anything—the company having no property within the jurisdiction—and having no authority to act, except to solicit people to do certain things, these persons could

hardly be classed as agents, although so called, but might be considered as on the same footing with a brakeman working on the trains of the company within the jurisdiction of another state. Surely it would not be claimed that service could be made on such a man. But the dissenting opinion of Judge Woods in that case is a very vigorous one, and is entitled to some consideration. The case of *Block v. Atchison, T. & S. F. R. R.*, decided by Justice Brewer, is of value in the consideration of the present case. At (C. C.) 21 Fed. 530, the learned justice says:

"In this case this corporation defendant has established a business office here, and has an agency. It does not run its railroads here, carry passengers, or transport freight within this district, but it has an office here for the purpose of soliciting business, and has an agent here—not a subagent, but a direct agent—employed for the purpose of furthering the transportation business of the corporation in the states where its road runs, the same as various manufacturing and insurance companies have offices established in different cities for the purpose of extending their business; and, wherever they have an office established, an agency is created. It seems to me that, within the purview of that statute, the corporation is found wherever such an office and agency is established. * * * If a contract was made here by their agent, there would be, under some circumstances, very just ground for saying that this was the place for litigating any question arising thereunder. If freight had been transported, and a dispute arose afterwards as to the terms of the contract, here would be the place where it was made, here would be the place where the rates of freight were proposed and accepted, and there might be great propriety in having the litigation here. So, where an insurance corporation of some Eastern state enters into an insurance contract here, any litigation in case of loss ought to be had here, and the insured ought not to be compelled to go to the state where the corporation exists for the purpose of establishing his demands. A very wise line of demarkation might be that, where a suit is brought against a corporation outside of the state where it exists in the first instance, the litigation should be limited to such contracts as are made at the place where the suit is commenced. But as the statute now is, if the corporation is found here

for the purposes of any suit, it is found for the purposes of all suits."

In Fairbank & Co. v. Railway, *supra*, the case was decided by a majority of the court, Judges Harlan and Gresham concurring. The case of Block v. Atchison, T. & S. F. R. R., 21 Fed. 529, was a case from the Circuit Court, E. D. Missouri, and was examined by Mr. Justice Brewer, of the Supreme Court. In the latter case the learned justice holds that the office being established and the agency created for any purpose, under the particular statute then under consideration, there was such an agency as would make good the service. About the same state of facts existed in both cases, and therefore the decisions seem to be somewhat in conflict; but the case in 54 Fed. being of later date, and by the court of last resort, instead of a single circuit judge, must have more commanding weight with this court. It seems to me that if the matters under consideration in this case grow out of a contract made by Ebner in the sale and disposition of powder, and it were in any sense a sale by the company, then the facts of the case at bar are very different from those in the cases before referred to, and a service upon him for those transactions might be good as a service upon the company. As suggested by Mr. Justice Brewer, it would seem that, if Ebner were agent of the powder company in any sense, he would be an agent, and present in the district, representing the corporation as to service of process. The position in which Ebner places himself by his affidavit makes the question of his agency an exceedingly close one. He first says: "The powder is shipped in 10-ton lots, for which I am absolutely responsible at a stipulated price; that said powder is paid for by me immediately upon my consumption of the same or use of the same." What is meant by the terms "consumption of the same" and "use of the same"? Are they synonymous terms? Do both expressions mean that the powder was used and

consumed by Ebner in his own business of mining, or are the word used in a different sense; the word "consumption" referring to the powder used by Ebner in his own mining operations, and the words "use of the same" meaning the use of the powder for purposes of sale on his own account? The language used, to say the least, does not give a very clear idea of the real nature of the transactions that may be had by Ebner. But this language is followed by the further statement: "I have no authority to bind the company in any way, shape, or form, nor to sell said powder on account of said company." If the affidavit stopped here, we might conclude that it would govern in the interpretation of what precedes it, and would constitute Ebner's relation with the powder company that of consignee or purchaser. But this is followed by the still further statement, "except that I may withdraw said powder on my own account and make sale of the same." Now consider the last clause as a whole: "That I have no authority to bind said company in any way, shape, or form, nor to sell said powder on account of said company, except that I may withdraw said powder on my own account and make sale of the same." That is to say, he cannot sell the powder on account of the company, except he withdraw it from the shipment on his own account, and make sale of the same. Under that language, the exception amounts to an admission that he is in some sense the agent of the company, and may withdraw this powder from the shipment made to him and sell the same. Again it is said in the affidavit:

"If I make a sale of said powder to any person or corporation other than myself, I am absolutely responsible for said powder, and cannot negotiate any terms of sale with any other person or corporation, or bind them in any way, or leave the responsibility or credit of such sale to the risk or credit of the company."

Ebner states that if he sells he is personally responsible. That is true of any agent selling on a *del credere* commission,

and does not tend to destroy the existence of the agency which he practically admits in the exception as to withdrawing powder from sale. After the most careful scrutiny of this affidavit and the circumstances as they appear from the same, and notwithstanding the statement of the president of the powder company in his affidavit that Ebner is not an agent of the corporation, I am driven to the conclusion that the peculiar character of business done by Ebner on behalf of the company, and the manner in which he says he deals in powder, constitute him the agent of the company for all powder that he sells, in spite of his personal liability and the fact that he sells the same in his own name and on his own personal responsibility. I am forced to this conclusion against my first impressions, which were on the other side of this agency controversy. Possibly, if the facts were more clearly stated, it might appear that there was no agency whatever in this case; but, as the relationship of Ebner is described in the affidavit (and it is supposed to have been drawn by the attorney for the powder company in a form most favorable to themselves) I cannot escape the conclusion that he places himself, through his dealings with the company (and these are treated as a contract between himself and the company), in the relation of agent of the corporation.

But this being a foreign corporation, and doing business here, through Ebner, in the sale of powder, should it not appoint a special agent, upon whom service might be made? It is quite clear to me that the powder company has tried to so conduct its business through Ebner as to avoid the appearance of doing business in Alaska, and thereby escape liabilities of every kind in Alaska. It would seem, from the affidavits, and the facts as they now appear to the court, that the company should have complied with the law, and named a person in the district upon whom service might have been made; but, inasmuch as they have not, it does not follow that

they cannot be served at all. If a person is found within the district who represents said powder company in the disposition of its goods consigned here to another, such person is an agent, within the purview of our statute, to whom process may be delivered, and a valid service thereby made upon the corporation.

The motion to quash the service in this case is overruled.

UNITED STATES v. FLORENCE alias MAUD RICE.

(First Division. Juneau. December 8, 1902.)

No. 328b.

1. APPEAL AND ERROR—BOND—UNDERTAKING.

Appeal from justice's court. Motion to dismiss appeal because the undertaking is void. A sufficient undertaking was offered before the motion to dismiss was heard. The undertaking was held so deficient as to be void and incapable of forming a basis of appeal. *Held*, not a "defective" undertaking, but wholly a void one. Appeal dismissed.

Motion to dismiss appeal from justice's court because the undertaking on appeal was void. Dismissed.

Robert A. Friedrich, U. S. Dist. Atty., for plaintiff.
Maloney & Cobb, for defendant.

BROWN, District Judge. The files and docket entries of G. M. Irwin, a United States Commissioner acting as justice of the peace at Douglas, Alaska, together with the undertaking on appeal accepted by him, have been duly filed by the clerk of this court. The district attorney moves to dismiss the appeal on the following grounds: (1) The notice of appeal does not sufficiently describe the judgment appealed from; (2) no undertaking has been filed by the defendant in this case, as required by section 442, c. 43, of the Alaska

Criminal Code (Act March 3, 1899, c. 429, 30 Stat. 1334); (3) no undertaking has been filed by the defendant in this case, as required by section 446, c. 43, of the Alaska Criminal Code.

In determining this case I am concerned only with the consideration of the undertaking of the appellant under section 443 of the Code. There is no question or dispute that an undertaking was filed and sent up with the papers in the case. Section 451 of the Code provides as follows:

"An appeal cannot be dismissed on motion of the appellee on account of the undertaking therefor being defective, if the appellant, before the determination of the motion to dismiss will execute a sufficient undertaking and file the same in the appellate court, upon such terms as may be deemed just."

Defective—what does it mean? Rapalje defines "defect" as "deficiency; insufficiency; the absence of something required by law." Webster defines it as "wanting in something; incomplete; lacking a part; deficient; imperfect; faulty." When the law speaks of a defective undertaking, it necessarily means that there is an undertaking; that there is something in which there is a defect; something wanting; something incomplete, deficient, imperfect. Can it be possible that the statute means that, where the attempt has been made to file an undertaking for appeal, it means anything—any kind of writing, though it lack all the essentials of an undertaking? I cannot so construe the language of our statute. It seems to me that a defective undertaking means one which contains most of the essentials of the statute, but lacks something not very material, and going to matters of form, and not of substance. If the pretended undertaking in this case is so defective in substance as to be void, then it would seem that such a paper would be no undertaking at all, and that any appeal undertaken with such a paper as its foundation must be treated as if no attempt whatever had been made to

file the undertaking required by statute. If the paper filed is defective in form merely, and is voidable, but not void, it would seem that such a paper would come within the purview of the statute as defective, and that an appeal should not be dismissed on account of such defect, if the appellant, before the determination of the motion to dismiss, should execute a sufficient undertaking and file the same in the appellate court.

In the determination of this motion, therefore, we are to consider it upon the theory that the paper filed is either void or voidable only. Surely it is very imperfect, and must come under one of these heads. Let us examine the original paper, called an "undertaking" or "cost bond." It reads as follows:

"In the United States Commissioner's Court, Douglas Island, Alaska. United States v. Florence alias Maud Rice, Cost Bond.

"Florence Rice, principal, and J. B. Caro and V. McFarland as sureties, hereby undertake that the said Florence alias Maud Rice will pay all costs and disbursements that may be awarded against her on the appeal taken by her from the judgment rendered in the above-named court and cause."

There is nothing in this so-called undertaking or cost bond to indicate what judgment had been pronounced, or when it had been pronounced, if at all, against the said Florence alias Maud Rice. It is recited that some judgment was rendered in the Commissioner's Court of Douglas Island, Alaska; but what judgment? Was it a judgment of imprisonment? Was it a fine? What is there in this paper to indicate from what this party was appealing? Nor is there anything in this paper to show to what court the appeal is addressed or is to be taken. The statute requires that this bond shall be given within 30 days from the date of judgment. When there is nothing in the bond by which the judgment could possibly be identified, not even the date of the judgment, how could any one examining this paper determine whether it was given

within the time required by law? If it is not given within the time limited, then no appeal can be taken. This obligation required by law, and called an "undertaking for appeal," is, in a sense, jurisdictional. No appeal can be granted without it, and the undertaking must be accepted by the magistrate before he can allow such appeal.

A form of undertaking is given in the statute where a stay of proceedings is intended. Section 216, Cr. Code. While it is not a form expressly provided for justice courts, in case of an undertaking such as is required here it gives a very general idea of such an undertaking as would cover the requirements of the statute. It is said:

"A recognizance or bond must be taken before an officer duly authorized, and in its form and attending formalities it must fill the requirements of the statutes and unwritten law of the particular state, or it will be void." Bishop, Crim. Procedure, § 264, and cases cited.

It is further said:

"If a condition prescribed by statute is omitted in the recognizance, it is void, although the surety be benefited." Alexander v. Bates, 33 Ga. 125; State v. McCown, 24 W. Va. 625.

So, too, if conditions not authorized by statute are inserted in the recognizance, thus making it more burdensome, it is invalid. Turner v. State, 14 Tex. App. 168; Loyd v. McTeer, 33 Ga. 37. A recognizance should state the ground on which it is taken, and show a cause in which the court or magistrate is authorized to take bail. 2 Am. & Eng. Enc. of Law, bottom of page 15, citing a large number of cases in support of the statement from New York, Massachusetts, Ohio, Georgia, and Kentucky.

The offense should be mentioned. People v. Rundle, 6 Hill, 506, and a large number of cases from Ohio, Kentucky, Louisiana, and other states. It is not necessary in a criminal recognizance to describe the offense in detail, or to state

facts in detail sufficient to show that a public offense was committed. All that is necessary is that the recognizance should either state or show that the defendant was charged with the commission of a public offense. 2 Am. & Eng. Enc. of Law, citing cases from Kansas, Tennessee, Iowa, Texas, and Louisiana. Where the crime is recited as "for the offense of being a common gambler," it is sufficiently described. *Chase v. People*, 2 Colo. 528. The offense should be so described as to be capable of being identified with the one named in the indictment. 44 Tex. 112. A penalty and a condition are indispensable to constitute a recognizance. *Caldwell v. Brindle*, 11 Pa. 293.

To be a good undertaking for appeal, the undertaking must describe the court in which taken; the name of the person prosecuted; the character of the crime committed; if it have a name, designating it, and, if it have no name, a general appellation by so describing the substance of the offense as to make it clear for what the accused was tried; the date of the judgment; the penalty of the judgment; if a fine, the amount thereof, and the costs; if imprisonment in the jail, the term of imprisonment; and the court to which the appeal is taken, together with the particular conditions prescribed by statute, viz., that the appellant will pay all costs and disbursements that may be awarded against him or her on the appeal. Anything less than this is, in my opinion, a defective undertaking, or one that may be so bad as to be no undertaking at all.

The paper tendered by the defendant in the case does not contain the date of the judgment, if any was pronounced; does not name or describe the offense for which the person was tried; does not set forth what penalty, if any, was adjudged against the defendant; does not name or refer to the court to which the appeal was taken; in fact, is so indefinite and uncertain in all its terms that it would be utterly impossible from its face to identify it in any manner with

the complaint or other proceedings occurring on the trial in the lower court.

The court is of the opinion that, under the authorities referred to by Bishop and the text of his valuable work on Procedure, the so-called undertaking in this case is not only defective, but lacks nearly all the essential ingredients to constitute it an undertaking of any force or validity in the case; in other words, it is void, and of no effect whatsoever. Being void, it does not come within the purview of the statute that an appeal cannot be dismissed on motion of the appellee on account of the undertaking therefor being defective, if the appellant, before the determination of the motion to dismiss, will execute a sufficient undertaking, and file the same in the appellate court, upon such terms as may be deemed just.

As before stated, if there is no bond, there is nothing to amend. It is not a defect; it is nothing. And the case stands as if no bond had been given, and the motion to dismiss must be sustained. But I am bound to say the defendant has offered and filed an undertaking in the case which is probably sufficient, in form and substance, before the determination of this motion to dismiss. The undertaking filed in this court by counsel as a substitute for the one upon which the case was appealed, in my opinion, would be an excellent mode to follow for all persons taking an appeal. It covers the requirements of the law precisely as I have stated them.

But, from my view of the law as applicable to this case, viz., that the paper filed as an undertaking is void, and therefore no undertaking at all, it is now too late to perfect the appeal by filing an undertaking which is good.

The motion to dismiss is sustained.

UNITED STATES v. SHEEP CREEK JOHN.

(First Division. Juneau. December 8, 1902.)

No. 338b.

1. APPEAL AND ERROR—BOND—UNDERTAKING.

The undertaking on appeal in this case *held* so deficient as to be void and incapable of forming the basis of an appeal. U. S. v. Florence alias Maud Rice, ante, 676, followed.

Motion to dismiss appeal from justice's court because the undertaking on appeal was void. Appeal dismissed.

Robert A. Friedrich, U. S. Dist. Atty., for plaintiff.

John G. Heid, for defendant.

BROWN, District Judge. In the case of the United States v. Sheep Creek John, in which a motion is made to dismiss the appeal, an examination of the undertaking on appeal discloses that the parties undertake "that the appellant will pay all costs which may be awarded against said defendant on appeal."

Section 443 of the Criminal Code (Act March 3; 1899, c. 429, 30 Stat. 1334) requires, as one of the conditions of the bond, that "the appellant will pay all costs and disbursements that may be awarded against him on appeal." Under the authorities referred to in the Case of Florence alias Maud Rice (just decided) ante, 676, I am quite clear that the undertaking in this case is void. The authorities hold that, if "a condition prescribed by statute is omitted in the recognizance, it is void." State v. McGown, 24 W. Va. 625; Alexander v. Bates, 33 Ga. 133.

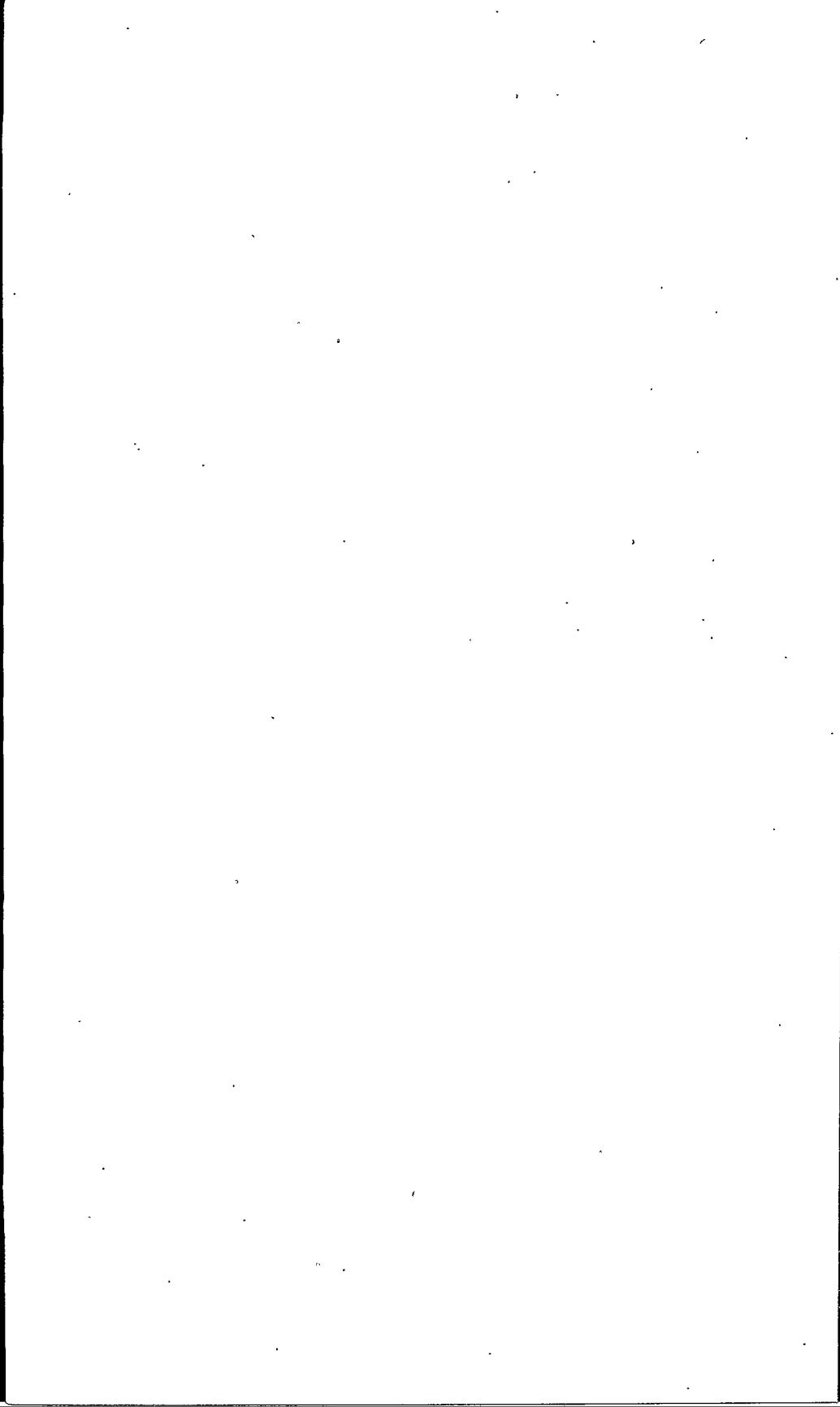
Accepting this authority as a fair statement of the law, I am compelled to hold that the paper offered as an undertaking in this case is totally void, and therefore one that cannot be treated as merely defective, and capable of being aided by

the filing of a new bond. A new undertaking has been filed, which is sufficient in form and substance; but it comes too late, the law requiring these appeals to be perfected within 30 days, and the bond on appeal to be filed within that time. Should a substitute bond be permitted to be filed now, it would be in direct violation of the terms of the statute. The motion to dismiss is therefore sustained, as in the case of U. S. v. Florence alias Maud Rice.

Judgment accordingly.

END OF CASES IN VOL. I.

*



INDEX.

ABANDONED MILITARY RESERVATIONS.

Sale of buildings on, see "Public Lands."

ABANDONMENT.

Of appeal, see "Appeal and Error."

Operates instanter, see "Mines and Minerals."

Of rights on public lands, see "Public Lands."

Of part of possessory claim, see "Public Lands."

Of water rights, see "Water and Water Courses."

1. Intent, evidence.

Abandonment is a question of intent, and can be sustained only by clear and convincing proof.

—Loeser v. Gardiner.....641

Abandonment is a question of intent. The evidence in support of the charge must be clear and convincing, and the burden of proof is upon the one alleging abandonment.

—Noland v. Coon.....36

ABATEMENT.

Another suit pending, see "Ejectment."

Of action, see "Parties."

1. Abatement, pleading.

Matters in abatement are not favored, and must be specially pleaded, or they are waived.

—Osgood v. Donnelly.....385

1 A.R.

(685)

ACCOUNT.

For court expenses, see "Courts."

By executor or administrator, see "Executors and Administrators." United States marshal, see "United States Marshal."

ACTION.

Civil, against justice for official acts, see "Justice of the Peace."

Character in proceeding for mining patent, see "Mines and Minerals."

Survival of, in administration, see "Parties."

1. In equity will not lie when remedy at law.

A suit in equity will not be sustained where a plain, adequate, and complete remedy may be had at law.

—Allen v. Myers.....114

2. To determine title to mining claim.

An action at law to recover possession when plaintiff is out of possession, or a suit in equity to quiet title when he is in possession, is an appropriate remedy to determine the right of possession of a mining claim, as between claimants, under Rev. St. U. S. § 2326 [U. S. Comp. St. 1901, p. 1430].

—Allen v. Myers.....114

ADMINISTRATION.

Survival of actions in, see "Parties."

ADMIRALTY.

Appeals in, see "Appeal and Error."

Jurisdiction of district court of Alaska in, see "Courts."

Forfeiture of vessel for illegal sealing, see "Forfeiture."

Prohibition in, to courts in Alaska, see "Prohibition."

Seizure for violation of navigation laws, see "Shipping."

See, also, "Maritime Liens," "Salvage," "Seamen," "Shipping."

1. Jurisdiction of Alaska courts.

Under the third section of the act of May 17, 1884, entitled "An act providing a civil government for Alaska" (23 Stat. 24),

the district court of Alaska acquired all the admiralty jurisdiction within the district of Alaska belonging to the district courts of the United States.

—*Ex parte Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232.

2. Suit in personam.

Under the general admiralty law (which is not limited in this respect by admiralty rule 19), a salvor of property, which has been taken from his possession by the owner, may maintain a suit in personam against the owner for salvage compensation.

—*Spaulding v. Alaska Com. Co.*.....497

3. Derelict barge.

A bark which has broken from her anchorage in an arm of the sea, drifted on a rocky beach in a heavy storm, been made fast to the trees by the captain and crew, fills with water during the night, is deserted the next day by all hands, they taking with them the ship's papers, compasses, side lights, and their personal effects, and the vessel, two days later, goes adrift again, and is found drifting before the storm 14 miles from her anchorage, *held* to be a derelict.

—*The Canada (D. C.)* 92 Fed. 196.

4. Forfeiture for violation of sealing law.

An application by a third party claiming to be the owner of certain boats and parts of the cargo of a schooner forfeited to the United States for a violation of the acts of Congress prohibiting the taking of the fur-bearing animals in Alaska comes too late after decree and without notice to the United States. All such boats and property on board were subject to forfeiture.

—*The St. Paul*.....71

5. Failure of voyage.

Where a vessel took freight and passengers for Kotzebue Sound, but wholly failed to make the voyage, and discharged both at Nome, the sailing point, and they were not afterward forwarded, *held*, that upon the total failure of the voyage the passengers are entitled to have the return of their passage and freight money.

—*The Schooner Arthur B.*.....403

6. Seaman's wages.

A seaman's claim for a contract salary must be supported by a fair preponderance of proof, where it is attempted to secure an unconscionable sum for a minimum service.

—The Independence 591

7. Suit for unearned freight.

A suit to recover unearned freight charges advanced, as well as for freight used by the vessel, is founded upon a maritime contract.

—The Skookum 394

8. Salvage.

One who assists in digging ice, snow, and sand from around a vessel lying on the beach at her home port, performed under contract with the charterer, is not entitled to a lien upon the vessel therefor.

—The Schooner Arthur B..... 403

Persons who are employed by the charterer in the home port of the vessel to dig ice, snow, and sand from about the vessel so that she could be launched over the ice from her bed on the beach, do not perform maritime services, and do not acquire a maritime lien on the vessel.

—The Arthur B..... 353

The Cottage City, a vessel of 1,800 tons and carrying 300 tons freight and 86 passengers, while lying in the harbor of Douglas, Alaska, was urgently requested, by the pilot of the passenger steamer City of Seattle, to go out in a heavy storm and attempt the rescue of the latter vessel and her crew and passengers from her perilous position near Point Bridget, where she had drifted and anchored, after dropping her propeller in the gale in Lynn Canal. A heavy northwest snowstorm was increasing, and threatened to drive both boats on the rocks, but, in the teeth of the storm, the Cottage City got lines aboard the City of Seattle, drew her out of danger, and towed her into Juneau. *Held* salvage services of a high order.

—The City of Seattle..... 471

Where a derelict was surrounded by the ice in Bering Sea, and in a sinking condition, abandoned by her officers and crew, as

well as by her owners and underwriters, it was not embezzlement of her cargo for the rescuing vessel and her officers to use such parts of her cargo and supplies as were necessary to enable them to put their crew aboard and raise the vessel and tow her into port.

—The Catherine Sudden.....607

9. Stipulation for release.

Where the claimants secure the release of the vessel libeled by bond, the judgment may go against both principals and sureties on the bond.

—The City of Seattle.....471

Where property under seizure is delivered to a claimant on his giving a bond conditioned that he would pay the value of the property into court, if it were condemned as forfeited by the final decree, *held*, that the liability of sureties on the bond is fixed on the rendering of such decree, though the libel on which it was rendered was amended subsequently to the execution of the bond.

—United States v. Mosely (D. C.) 8 Fed. 688.

10. Appeals.

Act Feb. 16, 1875 [U. S. Comp. St. 1901, p. 525], relieving the Supreme Court of the necessity of deciding questions of fact on appeals in admiralty, does not apply to the Circuit Courts of Appeals. (The Havilah, 1 C. C. A. 77, 48 Fed. 684; The State of California, 1 C. C. A. 224, 49 Fed. 172; The Philadelphian, 9 C. C. A. 54, 60 Fed. 423, followed.)

—The Coquitlam, 77 Fed. 744, 23 C. C. A. 438; Earle v. United States, Id.

Where an answer to a libel in admiralty to recover for goods lost denied all negligence on the part of the ship, and concluded by propounding to the libellant certain interrogatories with reference to the amount of goods loaded, their value, and the amount lost, etc., as authorized by admiralty rule 32, it was error for the court to hold such answer sham and frivolous, and grant plaintiff's motion for judgment on the pleadings while such interrogatories remained wholly unanswered.

—The Oregon, 116 Fed. 482, 53 C. C. A. 650.

ADMISSIONS.

As evidence in criminal cases, see "Evidence."

ADVERSE POSSESSION.

Basis of all titles in Alaska, see "Public Lands."

Sufficient to maintain ejectment, see "Ejectment."

Of mining claim, sufficient to maintain ejectment, see "Mines and Minerals."

Of town lot, sufficient to maintain ejectment, see "Public Lands."

Prior possession better than subsequent, see "Public Lands."

ADVERSE SUITS.

In support of application for mining patent, see "Mines and Minerals."

Practice in district court, see "Mines and Minerals."

AGENCY.

Service of agent of foreign corporation, see "Corporations."

ALASKA.

Within jurisdiction of United States courts, see "Courts."

District court in, a legislative court, see "Courts."

Limitation upon jurisdiction of courts in, see "Courts."

Customs laws extended to, see "Customs Duties."

Sales of liquor to Indians prohibited, see "Indians."

Civil rights of Indians in, see "Indians."

Importation and sales of liquor prohibited, see "Indian Country."

Not "Indian country," see "Indian Country."

Property rights in, under Russian rule, see "Property."

Oregon laws in Alaska not retrospective, see "Statutes."

Territory of the United States, see "Territories."

Powers of commissioners under Russian treaty, see "Treaties."

1. Public lands under Russian rule.

The Russian-American Company, at the time of the cession of Alaska to the United States, had only the privilege of making use of the public lands in Alaska and erecting buildings thereon. It had no ownership therein, but did have the privilege of conveying parcels of it in fee simple to its employés. In 1845 it erected a large log building in Sitka on the public land. *Held*, that the building passed with the land to the United States by the treaty of cession.

—*Kinkead v. United States*, 150 U. S. 483, 14 Sup. Ct. 172, 37 L. Ed. 1152.

2. Extortion by customs officer.

Section 5481 of the Revised Statutes [U. S. Comp. St. 1901, p. 3701], being passed June 22, 1874, after the cession of Alaska, is in force there from the time of its passage.

—*United States v. Carr*, 3 Sawy. 302, Fed. Cases No. 14,730.

3. Status of Indians.

The treaty of March 30, 1867, by which the territory of Alaska was ceded to the United States, made the uncivilized tribes therein subject to such laws and regulations as the United States might adopt in regard to them.

—*In re Sah Quah* (D. C.) 31 Fed. 327.

4. Alaska not "Indian country."

Alaska is not "Indian country," in the sense in which that phrase is used in the intercourse act of 1834 and the Revised Statutes.

—*Kie v. United States* (C. C.) 27 Fed. 351.

5. Alaska made "Indian country."

The act of congress of March 3, 1873, extending to Alaska two sections of the act of June 30, 1834, known as the "Indian Intercourse Laws," and relating principally to the interdiction of the liquor traffic among the Indians, is to be construed to make said territory "Indian country" only to the extent of the prohibited commerce, and did not put the Alaska Indians on a general footing with Indians in other parts of the United States.

—*In re Sah Quah* (D. C.) 31 Fed. 327.

6. Power of Congress over liquor traffic.

Congress has power in its discretion to prohibit the importation, manufacture, and sale of intoxicating liquors in the district of Alaska, and to make the violation of such prohibition a crime punishable by fine and imprisonment.

—Nelson v. United States (C. C.) 30 Fed. 112.

ALIENS.

Right to locate mining claims, see "Mines and Minerals."

1. Naturalization.

An Indian born in British Columbia will not be admitted to citizenship by naturalization in the United States.

—In re Burton.....111

AMENDMENT.

Of libel after stipulation, see "Admiralty."

APPEAL AND ERROR.

In admiralty cases, see "Admiralty."

Remarks by attorney not error unless excepted to, see "Attorney."

In bankruptcy cases, see "Bankruptcy."

Error in admission of evidence, see "Evidence."

Only trial judge can sign bill of exceptions, see "Exceptions, Bill of."

Administrator has no power to appeal, see "Executors and Administrators."

Habeas corpus not a writ of error, see "Habeas Corpus."

Appeal from default judgment before justice, see "Judgments."

Receiver may be required to restore property on, see "Receiver."

See, also, "Trial."

I. APPEALS FROM COMMISSIONERS TO DISTRICT COURTS.**1. Form of notice of appeal.**

A notice of appeal from a justice of the peace to the District Court of Alaska must be entitled in the proper court, directed to the adverse party, identify or refer to the judgment so dis-

tinctly that the appellate court can identify the judgment from the notice, contain the date of the judgment, the names of the parties plaintiff and defendant, and, when it is a money judgment, the amount thereof; and, if for the possession of real or personal property, the notice should indicate which, and describe the property. The notice in this case *held* insufficient. Appeal dismissed.

—Weitzman v. Handy.....658

2. Jurisdictional amount on appeal.

Under the laws of Oregon, made applicable to Alaska by the organic act of 1884 (Act May 17, 1884, c. 53, 23 Stat. 24), an appeal from a justice of the peace did not lie where the amount involved was less than \$200. *Held*, that in such cases a writ of certiorari or review would issue from the District Court of Alaska to correct the action of the lower court.

—Moore v. Rennick.....173

3. Appeals from probate court.

The District Court of Alaska, while exercising jurisdiction according to the laws of Oregon, will exercise its supervisory control over a proceeding in the probate court for the removal of an administrator through an appeal.

—In re Thompkins McIntire Estate.....73

4. Abandonment of appeal.

A notice and bond on appeal were filed in the probate department of the Commissioner's Court on January 14, 1898. The office and records were destroyed by fire on January 31, 1898. No application was made to extend the time for filing the transcript. *Held*, that the appeal was abandoned, and the court acquired no jurisdiction upon a transcript and record first filed in the District Court on December 2, 1898. Appeal dismissed.

—In re Estate of Wm. M. Bennett.....159

5. Void undertaking on appeal.

Appeal from justice's court. Motion to dismiss appeal because the undertaking is void. A sufficient undertaking was offered before the motion to dismiss was heard. The undertaking was held so deficient as to be void and incapable of forming a basis of appeal. *Held*, not a "defective" undertaking, but wholly a void one. Appeal dismissed.

—United States v. Rice.....676

The undertaking on appeal in this case *held* so deficient as to be void and incapable of forming the basis of an appeal. (U. S. v. Florence alias Maud Rice, ante, 676, followed.)

—United States v. Sheep Creek John.....682

6. Pleadings must be settled before appeal.

A commissioner sitting as a probate judge should pass upon a demurrer to a petition to remove an administrator before hearing the cause on its merits and allowing an appeal.

—In re Thompkins McIntire Estate.....73

II. APPEALS FROM DISTRICT COURT.

1. Nature and form of remedy.

Where a judge of the Circuit Court of Appeals of the Ninth Circuit allowed an appeal from the district court of Alaska, and signed the citation and approved a supersedeas bond, and thereafter the original citation and the original writ of supersedeas, together with the certified copies of the assignment of errors and of the supersedeas bond, and of the orders allowing the appeals, were filed in the district court of Alaska, *held*, that this was sufficient to give effect to the appeals.

—In re McKenzie, 180 U. S. 536, 21 Sup. Ct. 468, 45 L. Ed. 657.

An appeal lies from the district court of Alaska from an interlocutory order appointing a receiver.

—In re McKenzie, 180 U. S. 536, 21 Sup. Ct. 468, 45 L. Ed. 657.

A judge of the Circuit Court of Appeals for the Ninth Circuit has power to award an appeal from the district court of Alaska and to grant an order of supersedeas therein.

—In re McKenzzie, 180 U. S. 536, 21 Sup. Ct. 468, 45 L. Ed. 657.

Where, on the filing of an assignment of errors in the trial court, the clerk issued a writ of error, and a judge of the Circuit Court of Appeals approved a supersedeas bond and issued a citation, which was duly served on the defendant in error, the failure to file a formal petition for the writ as required by rule 11 of the Circuit Court of Appeals (90 Fed. cxlvii, 31 C. C. A.

cxlvi), was a defect of form, rather than of substance, and is covered and remedied by Rev. St. §§ 954, 1005 [U. S. Comp. St. 1901, pp. 696, 714], and 26 Stat. 826, 829, § 11 [U. S. Comp. St. 1901, pp. 488, 552]. Hence such failure is not ground for dismissing the writ of error.

—Alaska United Gold Min. Co. v. Keating, 116 Fed. 561,
53 C. C. A. 655.

It is not necessary that a writ of error be allowed by a judge. It is enough that it is issued and served by a copy lodged with the clerk of the court to which it is directed.

—Alaska United Gold Min. Co. v. Keating, 116 Fed. 561,
53 C. C. A. 655.

Under Rev. St. § 1005 [U. S. Comp. St. 1901, p. 714], providing that the Supreme Court may at any time, in its discretion and on such terms as may be just, allow an amendment of a writ of error, when there is a mistake in the teste of the writ or a seal to the writ is wanting, a mistake in the teste of a writ of error as to the date and the omission of the seal of the court therefrom may be corrected, and do not require that the writ be dismissed.

—Alaska United Gold Min. Co. v. Keating, 116 Fed. 561,
53 C. C. A. 655.

Appellate jurisdiction is not vested in the Circuit Court of Appeals, Ninth Circuit, to review the judgments of the district court of Alaska under the sixth section of the act of March 3, 1891 [U. S. Comp. St. 1901, p. 550], because the district court of Alaska is not a constitutional district court of the United States. Such appellate control, however, may be exercised under the fifteenth section of that act [U. S. Comp. St. 1901, p. 554] as from the Supreme Court of a territory.

—The Coquitlam, 163 U. S. 346, 16 Sup. Ct. 1117, 41 L. Ed. 184.

Act Feb. 16, 1875 [U. S. Comp. St. 1901, p. 525], applied to appeals taken from decrees of the District Court of the United States for the district of Alaska sitting in admiralty. Upon such appeal the Supreme Court was limited to a determination of questions of law arising upon the record, and to such rulings

of the court, excepted to at the time, as were presented by a bill of exceptions prepared as in actions at law.

—*Schooner Sylvia Handy v. United States*, 143 U. S. 513, 12 Sup. Ct. 464, 36 L. Ed. 246.

Alaska Code, § 507, authorizing an appeal to the Circuit Court of Appeals from any interlocutory order granting or dissolving an injunction, authorizes an appeal from an order granting an injunction, not "upon a hearing in equity," though Act Cong. June 6, 1900, 31 Stat. 660 [U. S. Comp. St. 1901, p. 551], gives the right of appeal from such orders only "upon a hearing in equity," and Alaska Code, § 508, provides that all provisions of law regulating procedure and practice in cases brought by appeal or writ of error to the Supreme Court of the United States or to the United States Circuit Court of Appeals for the Ninth Circuit, except in so far as inconsistent with the provisions of this act, shall regulate the practice in the district court of the district of Alaska; such provision not being intended to narrow or restrict the provisions of section 507.

—*Lane v. Jordan*, 116 Fed. 623, 34 C. C. A. 79.

2. Decisions reviewable.

Under Alaska Code, § 504, providing for appeals from the district court for the district of Alaska, and conferring upon the United States Circuit Court of Appeals for the Ninth Circuit "jurisdiction to review upon writ of error or appeal the final judgments and orders of the district court," where the amount involved or the value of the subject-matter exceeds \$5,000, an order made by the district court, by which a placer mining claim, together with personal property which is not involved in the litigation, is taken from one who is in the actual possession thereof, claiming ownership, and turned over to a receiver, with instructions to such receiver to work the claim, and extract therefrom the gold, which constitutes its sole value, and in so doing to use the personal property, is, in effect, a final decree, and appealable as such, where the property is of the required value, since its effect may be to depreciate, and perhaps entirely destroy, the value of defendant's property.

—*Tornanses v. Melsing*, 106 Fed. 775, 45 C. C. A. 615.

On the allowance of an appeal from a lower court, and the granting of a writ of supersedeas by a judge of the Circuit Court

of Appeals, a certified copy of the order allowing the appeal, and of the assignment of errors and bond, is sufficient to give effect to the appeal.

—*Tornanses v. Melsing*, 106 Fed. 775, 45 C. C. A. 615.

Under section 11 of the act creating the Circuit Court of Appeals [U. S. Comp. St. 1901, p. 552], which gives to any judge of that court the same powers as to the allowance of appeals and writs of error, and the conditions of such allowance, in respect to cases brought or to be brought to that court, as was then possessed by the justices or judges of the existing courts of the United States, a single judge, upon granting a writ of error or appeal, may also grant a supersedeas and prescribe its form and terms, and the Circuit Court of Appeals alone, subject to review of its actions by the Supreme Court, has authority to determine its jurisdiction of the case, and any question in relation to the form or scope of the writs or the manner of their services.

—*Tornanses v. Melsing*, 106 Fed. 775, 45 C. C. A. 615.

Alaska Code Civ. Proc. § 378, provides that where it is determined that plaintiff is entitled to no part of the relief demanded, on account of a failure of proof, the dismissal of his action may be without prejudice. *Held*, that where an action was so dismissed without prejudice for a failure of proof, and on appeal none of the evidence was contained in the record, the circuit court of appeals could not say that the dismissal without prejudice was an abuse of the court's discretion.

—*Ebner v. Zimmerly*, 118 Fed. 818, 55 C. C. A. 430.

The objection that the district court has not jurisdiction of a cause of seizure under the laws of impost, navigation, and trade, because it does not appear that the property was seized before the proceeding was commenced, may be urged successfully upon appeal in the Circuit Court, notwithstanding it was not taken in the district court.

—*The Fideliter*, 1 Sawy. 153, Fed. Cases No. 4,755.

To authorize an appellate court to reverse a judgment of conviction in a criminal case, it is not sufficient to show that error may have occurred, but it must be affirmatively shown by

the record that there was a prejudicial departure from established principles in the rulings of the trial court.

—Jackson v. United States, 102 Fed. 473, 42 C. C. A. 452.

On appeal all questions properly preserved are open to determination, while on prohibition the inquiry is confined to the matter of jurisdiction, so that it seems to follow that, unless under very extraordinary circumstances, the record proper should only be looked into in the latter class of cases.

—Ex parte Cooper, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232.

3. Amount or value in controversy.

See "Courts," 9.

Where the defendant appeals, and no question is presented growing out of a partial defense to the action, or a counterclaim or set-off, the amount involved is determined by the judgment below.

—Decker v. Williams (D. C.) 73 Fed. 308.

The amount of the judgment in this case being less than the statutory sum, the appeal is dismissed.

—Decker v. Williams (D. C.) 73 Fed. 308.

Where the defendant, plaintiff in error, compromised with one plaintiff, and that plaintiff "executed a satisfaction of all his right, title, and claim in and to said judgment, to wit, seven-eighths thereof," the real matter in dispute is in such case the balance still remaining due on the judgment.

—Thorp v. Bonnifield, 177 U. S. 15, 20 Sup. Ct. 533, 44 L. Ed. 652.

Where the defendant, plaintiff in error, by his own action has reduced the judgment by a voluntary settlement and payment below the amount necessary in order to give the court jurisdiction to review it, and both plaintiffs, defendants in error, ratify the agreement and move to dismiss, the writ of review will be dismissed for want of jurisdiction.

—Thorp v. Bonnifield, 177 U. S. 15, 20 Sup. Ct. 533, 44 L. Ed. 652.

4. Disposition on merits.

On an appeal from an interlocutory order appointing a receiver and granting an injunction, the Circuit Court of Appeals may dispose of the case on the merits, when it determines that there is no equity in the bill which would warrant the granting of ultimate relief to complainant.

—*Tornanses v. Melsing*, 109 Fed. 710, 47 C. C. A. 596.

An objection that the jury received evidence during their deliberations, if the fact is known to defendant or his counsel, should be made before the verdict is received; and it is not error for the court to overrule such objection when not made until the verdict has been received and read, and then only on the unverified statement of counsel. Nor is the court required, merely upon such statement, to interrogate the jury as to the facts.

—*Jackson v. United States*, 102 Fed. 473, 42 C. C. A. 452.

On appeal in an equity suit tried by a referee, who reports the evidence, as well as his findings, to the court, the appellate court should not reverse the cause merely because the referee admitted incompetent or irrelevant evidence, or excluded evidence which was admissible, where, upon all the facts, it is clear that such action did not affect the result.

—*Engelstadt v. Dufresne*, 116 Fed. 582, 54 C. C. A. 88.

A remark by counsel for the prosecution, in argument to the jury, "Why did not the defendant put a sworn witness on the stand?" is not necessarily to be considered as a comment on the failure of the defendant to take the stand, where it appeared from the testimony that there were many witnesses of the act charged in the indictment; and it is not such a plain error as to require a reversal on appeal, in the absence of an assignment of error thereon, especially where the jury were promptly admonished by the court that they should not be influenced thereby.

—*Jackson v. United States*, 102 Fed. 473, 42 C. C. A. 452.

A finding by the court on a question of fact upon which the evidence is conflicting cannot be rejected on appeal.

—*McKinley Creek Min. Co. v. Alaska United Min. Co.*, 22 Sup. Ct. 84, 46 L. Ed. 381.

The failure of a defendant to except to prejudicial remarks made by court or counsel will not preclude him from having the same reviewed on appeal, where they were the basis of a subsequent offer of evidence tending to cure their effect, the refusal to receive which was duly excepted to.

—Allen v. United States, 115 Fed. 3, 52 C. C. A. 597.

The prejudicial effect of remarks made by court or counsel, and heard by the jurors who tried the case, is not lessened nor affected by the fact that the jury had not then been impaneled.

—Allen v. United States, 115 Fed. 3, 52 C. C. A. 597.

Where a writ of error is issued and filed before the assignments of error are filed, in violation of rule 11 of the Circuit Court of Appeals (90 Fed. cxlvi, 31 C. C. A. cxlvi), and at the time of filing the latter, and before the time for suing out a writ of error has expired, plaintiff in error applies to the court for leave to withdraw the writ and correct the proceeding by presenting a new petition, writ, and bond, and such application is opposed by the defendant in error, his motion, thereafter made, to dismiss the writ because of such irregularity, should be denied.

—Alaska United Gold Min. Co. v. Muset, 114 Fed. 66, 52 C. C. A. 14.

5. Appeal and supersedeas suspend powers of receivers.

The granting of an appeal from an order appointing a receiver, and a supersedeas, by operation of law, suspend the powers of the receiver to act further under such order, and entitle the defendant to a restoration of the property which he has taken into his possession thereunder.

—Tornanses v. Melsing, 106 Fed. 775, 45 C. C. A. 615.

5½. Instructions.

Where the record does not purport to contain all the instructions, it is to be assumed, if others were needed to present fully to the jury the subordinate questions, that they were given. It is generally true that a party who thinks an instruction in respect to any matter ought to be given must ask for such instruction, and, failing to ask for it, will not be heard in a reviewing court to allege that there was error in the want of it.

—Bennett v. Harkrader, 158 U. S. 444, 15 Sup. Ct. 863, 39 L. Ed. 1046

Assignments of error based upon the refusal of instructions in a suit in equity in which the verdict is only advisory to the court cannot be entertained on appeal.

—McKinley Creek Min. Co. v. Alaska United Min. Co.,
22 Sup. Ct. 84, 46 L. Ed. 331.

6. Findings of fact and conclusions of law.

It is within the jurisdiction of the district court of Alaska, in deciding causes in admiralty or maritime jurisdiction of the instance side of the court, to find the facts and the conclusions of law upon which it renders its judgments or decrees, and state the facts and conclusions of law separately.

—Ex parte Cooper, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232.

Where the petitioner had his remedy by appeal from the decree, which was ineffectual because of his neglect to have included in those findings the exact locality of the offense and seizure, the writ of prohibition prayed for should not issue, even if, under any circumstances, the court consider the evidence taken below in determining whether a prohibition should issue after sentence.

—Ex parte Cooper, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232.

7. Abandonment of appeal.

When an appeal has been regularly taken by giving the necessary notice, bonds, bill of exceptions, assignment of errors, and supersedeas bond, and has been regularly allowed in the District Court, there is no jurisdiction in the latter court to vacate the order allowing the appeal, and to reinstate the cause for further action, for failure to file transcript in the appellate court.

—Rigley v. Hayden.....308

Where the appellant has regularly perfected his appeal, and will not forward the transcript to and file the cause in the Circuit Court of Appeals, the respondent may apply to that court for leave to docket the cause and dismiss the appeal.

—Rigley v. Hayden.....308.

Plaintiffs were allowed an appeal from an order of court dissolving an injunction against the defendants, but the order provided that, if an indemnifying bond of \$10,000 was not given

by defendants within 10 days, the injunction should stand. The bond was not given, and the injunction was not dissolved, and the appeal was thereby abandoned; the cause proceeding as if no such order had been made, and without objection by either party. *Held*, upon objection of defendants after judgment on the merits, that no appeal had been allowed or taken, and that the court had jurisdiction to enter judgment.

—*Russell v. Dufresne*.....575

APPEARANCE.

Will not make valid an order of arrest issued on Sunday, see "Sunday."

APPRENTICES.

1. Power to bind minors.

If the power to bind minors as apprentices pertain to probate courts, it should be excercised by the United States commissioner. If it does not, it belongs to "county business," and can only be exercised by the county judge and county commissioners, sitting together. There are no counties nor county commissioners in Alaska. In either case, the district court is without jurisdiction to bind minors as apprentices.

—*Ex parte Emma* (D. C.) 48 Fed. 211.

ARMY AND NAVY.

1. Minor may enlist in navy.

A minor over eighteen and under twenty-one years of age may enter into a binding contract of enlistment in the navy, and will not for that reason alone be discharged on habeas corpus.

—*In re Jesse Scott Oliver, Minor*.....1

2. Court-martial.

Where, by the sentence of a court-martial, a soldier is discharged from the service before the expiration of his term of enlistment, and such sentence is afterwards set aside as null and void, the status of such soldier is not affected in any way by such sentence, and he is deemed to have been in the service all the time between the sentence and the order setting it aside.

—*In re Bird*, 2 Sawy. 33, Fed. Cases No. 1,428.

Under article of war 88 [U. S. Comp. St. 1901, p. 967, art. 103] it appears that a soldier may be arrested and tried after the expiration of his term of service for a military offense committed during such term of service, so that the order for the court-martial is issued within two years from the commission of such offense.

—*In re Bird*, 2 Sawy. 33, Fed. Cases No. 1,428.

In any view of the matter, a soldier may be held for trial after the term of his enlistment, by military authority, if arrested for the offense before the expiration of his term of service.

—*In re Bird*, 2 Sawy. 33, Fed. Cases No. 1,428.

The petitioner, while in fact discharged from the army, but before the expiration of his term of enlistment, having committed a homicide, might be arrested and held for trial therefor by the military authority; the discharge being afterwards set aside as null and void, and the petitioner being at the time a soldier *de jure*.

—*In re Bird*, 2 Sawy. 33, Fed. Cases No. 1,428.

ARRAIGNMENT.

Record must show, see "Criminal Law."

ARREST.

By military officer for illegal sales of liquor, see "Intoxicating Liquors."

Under order made on Sunday, see "Sunday."

1. Arrest in civil action.

Before process in civil arrest will be vacated and the writ dismissed, it must appear that the defects in the affidavit or bond are such as to leave the process without jurisdictional support. Mere errors and irregularities are not sufficient. A substantial compliance with the statute is enough.

—*Alaska Com. Co. v. Raymond*.....154

It is not necessary that the principal obligor sign the undertaking on civil arrest, for he is bound without doing so. The under-

taking need only be signed by two sureties as security for the principal.

—Alaska Com. Co. v. Raymond.....154

ARREST OF JUDGMENT.

In contempt case, see "Criminal Law."

ASSAULT.

With intent to kill, see "Homicide."

1. Assault with deadly weapon, evidence.

On the trial of a defendant for an assault with a dangerous weapon, charged to have been committed during an affray between defendant and a number of associates on one side and a number of persons on the other, during which one person on each side was killed, the prosecution is entitled to prove the attendant facts and circumstances which show the nature of the assault, and the defendant cannot complain that the character and acts of the associates with whom he was acting were such as to prejudice his case before the jury.

—Jackson v. United States, 102 Fed. 473, 42 C. C. A. 452.

ASSUMPSIT, ACTION OF.

Town may collect for street improvements, see "Municipal Corporations."

ATTACHMENT.

1. On note payable at Victoria, B. C.

A justice of the peace in Alaska, under the laws of Oregon then in force there, was without jurisdiction to render a judgment in attachment upon a note payable in Victoria, B. C.

—Moody v. First Bank of Skagway.....104

2. Security impaired or rendered nugatory.

Where the plaintiff believed that certain machinery belonged to the defendant and was included in a bill of sale to secure a note, when in fact it belonged to another and was not covered, held not sufficient to sustain an attachment upon the ground

that the security had been impaired or rendered nugatory by any act of the defendant.

—Whitehead v. N. Y. & Alaska Min. Co.....245

3. Bail bond as an estoppel.

When the defendant in an attachment proceeding gives the bail bond provided for in sections 149 and 150 of the Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 356), instead of the redelivery bond provided for by section 145 (31 Stat. 355), he thereby admits the validity and necessity of the attachment, and waives any and all claims for damages for an alleged wrongful issuance thereof.

—Anvil Gold Min. Co. v. Hoxsie.....604

4. Voidable attachment protects officer.

Though a writ of attachment be based on proceedings so defective as to be voidable in a direct attack, yet in the hands of the officer who is bound to obey it, with the seal of the court and everything else on its face to give it validity, if he did obey it, and is guilty of no error in this act of obedience, it must stand as his sufficient protection for that act in all other courts.

—Marks v. Shoup, 181 U. S. 562, 21 Sup. Ct. 724, 45 L. Ed. 1002.

5. Attachment on goods in possession of another.

The levy of an attachment on goods in the possession of a third person, who claimed to be the owner thereof under a prior sale, is invalid under the statute of Oregon, in force in Alaska, and constitutes no defense to a suit against the officers for damages for the value thereof.

—Marks v. Shoup, 181 U. S. 562, 21 Sup. Ct. 724, 45 L. Ed. 1002.

ATTEMPT.

To bring liquor into Alaska, see "Intoxicating Liquors."

ATTORNEY AND CLIENT.

Prejudicial remarks by, see "Appeal and Error."

Counseling resistance to orders of appellate court, see "Contempt."

United States marshal has no authority to employ, see "United States Marshal."

1. Compensation and lien.

An attorney has the statutory right to retain money in his hands belonging to his client for the payment of his attorney fees. When a single member of a firm was cited to pay money into court belonging to the client, the court ordered the firm made parties, and when it appeared that a contention existed in good faith the cause was set for trial by jury.

—Nodine v. Hannum.....302

2. Authority to represent client.

The presumption is that an attorney appearing in court for a party has authority to do so, and where the want of authority is questioned the burden of proof is on the party attacking, and such want must be established by positive proof.

—Bonnifield v. Thorp (D. U.) 71 Fed. 924.

Authority must be questioned by a direct attack, and may be challenged by a motion to dismiss the action, to compel the party to show authority, or to vacate the appearance; and in cases where the validity of any order, judgment, or decree depends upon the jurisdiction of the court over the person of the party, acquired solely by appearance by attorney, the authority may be challenged on a motion to vacate the order, judgment, or decree.

—Bonnifield v. Thorp (D. C.) 71 Fed. 924.

Where a party appears by attorney, all the proceedings in court must be conducted, and all acts affecting the remedy, and not the cause of action, incidental or necessary to the prosecution or management of the suit, must be done, by the attorney.

—Bonnifield v. Thorp (D. C.) 71 Fed. 924.

A stipulation extending time to answer is one of such proceedings, and, if made by a party who is represented in court by an attorney, it should be disregarded.

—Bonnifield v. Thorp (D. C.) 71 Fed. 924.

3. Misconduct, no exception.

Improper remarks of the prosecuting attorney in his address to the jury cannot be considered on error, where no objection was made thereto at the trial and no exception taken.

—Shelp v. United States, 81 Fed. 694, 26 C. C. A. 570

4. Suspension and disbarment.

In disbarment proceedings, based upon a criminal conviction of the attorney, the information must set out the offense of which the attorney was convicted.

—United States v. Clark (D. C.) 76 Fed. 560.

Where the conviction is of a misdemeanor, the offense must be one involving moral turpitude, as provided by section 1047, p. 691, Hill's Code, and the information must so aver. (Following State v. Bannon [Or.] 42 Pac. 869.)

—United States v. Clark (D. C.) 76 Fed. 560.

Although courts possess the inherent power to purge the bar, an order of disbarment rendered upon an information which is fatally defective will be set aside.

—United States v. Clark (D. C.) 76 Fed. 560.

BAIL BOND.

Giving admits validity of attachment, see "Attachment."

BANKRUPTCY.**1. Appeals.**

A review of an order of a referee in bankruptcy by the District Court is to be obtained by a petition, and not by notice of appeal. No time is fixed by rule or otherwise within which such petition shall be filed, but it must be within a reasonable time. Ten days is a reasonable time, and a petition filed six months after the date of the order complained of dismissed.

—In re Sharick.....398

BOND.

Appeal bond void when, see "Appeal and Error."

BOUNDARIES.

Monuments prevail over courses, see "Mines and Minerals."

CERTIORARI.

From justice's court, see "Appeal and Error."

CIVIL LIABILITY.

Of justice for wrongful acts, see "Justice of the Peace."

CIVIL RIGHTS.

Of Indians in Alaska, see "Indians."

COMMERCE AND NAVIGATION.

Procuring fraudulent registration of vessel, see "Shipping."

COMMISSIONERS.

Powers of, to make formal transfer of Alaska, see "Treaties."
See, also, "United States Commissioners."

COMMON LAW.**1. In force in Alaska.**

The common law adopted in Alaska by sections 367 (Act June 6, 1900, c. 786, 31 Stat. 552) of the Code of Civil Procedure and 218 of the Criminal Code (Act March 3, 1899, c. 429, 30 Stat. 1285) is that body of law described by the Supreme Court of the United States in the case of *Patterson v. Winn*, 5 Pet. 241, 8 L. Ed. 108, in the following language: "The term 'common law' means both the common law of England, as opposed to written or statute law, and the statutes passed before the immigration of the first settlers to America."

—*Valentine v. Roberts*.....536

CONFIRMATION.

Of sales, see "Execution."

CONGRESS.

May prohibit importation of liquor, see "Alaska," "Intoxicating Liquors."

Power to govern territories, see "Territories."

CONSENT.

Jurisdiction not conferred by, see "Courts."

CONSTITUTIONAL LAW.

District court legislative court, see "Courts."

Appeal will not lie from mere protest, see "License."

Power of Congress over territories, see "Territories."

1. Distribution of governmental powers.

In matters committed by the Constitution and laws of the United States either to Congress or the Executive, or to both, courts are clearly bound by the action of Congress or the Executive, or both, within the limits of the authority conferred by the Constitution and laws.

—*Ex parte Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232.

Courts will not undertake to determine whether the political departments of the government are right or wrong, nor review their action, while negotiations are pending.

—*Ex parte Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232.

In legislating for the territories, Congress exercises "the combined powers of the general and of a state government," and may limit the term of office of territorial judges, or provide for their suspension or displacement, at its pleasure.

—*Ex parte Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232.

2. Sovereignty over Bering Sea.

The President and Congress are vested with all the responsibility and powers of the government for the determination of questions as to the maintenance and extension of our national dominion; and, they having assumed jurisdiction and sovereignty over the waters of Bering Sea outside of the three-mile limit, the people and the courts are bound by such action.

—*The James G. Swan* (D. C.) 50 Fed. 108.

By the award of the arbitrators under the treaty of arbitration between the United States and Great Britain (27 Stat. 948), it was settled that the United States have no exclusive jurisdiction in the waters of Bering Sea outside the ordinary three-mile limit, and no right of property in, or protection over, the fur seal frequenting the islands of the United States, when found outside of such three-mile limit. Therefore, the act of March 2, 1889, declaring that Rev. St. § 1956, which forbids the killing of fur-bearing animals in Alaska and the waters thereof, shall apply to "all the dominion of the United States in the waters of Bering Sea," must be construed to mean the waters within three miles of the shores of Alaska.

—The *La Ninfa*, 75 Fed. 513, 21 C. C. A. 434.

As by the terms of the treaty of arbitration "the rights of the citizens and subjects of either country" were involved in the decision of the arbitrators, citizens of the United States have the same right to rely upon the award, as to their rights under the statute, as the citizens and subjects of Great Britain.

—The *La Ninfa*, 75 Fed. 513, 21 C. C. A. 434.

The schooner *A.* was seized and libeled for violating Rev. St. § 1956, which prohibits the capture of fur-bearing animals within the territory of Alaska "or in the waters thereof." It was shown that she had made several captures of sea otter, and that her position at all times was within a line drawn from the southern end of Tugidak Island to Chirikof, thence in the direction of the mainland, through the Semidi group, on to Sutkwik Island, and thence to the mainland, and that when within this line she was less than 12 miles from land. *Held*, that this was within the territorial waters of Alaska, and the schooner was liable to forfeiture under the said section.

—The *Alexander* (D. C.) 60 Fed. 914.

3. Violations of fur seal law.

Rev. St. § 1956, forbids the killing of fur-bearing animals within the limits of Alaska territory, or the waters thereof, but empowers the Secretary of the Treasury to authorize the killing of such animals, except fur seal, under such regulations as he may prescribe. By an order of April 21, 1879, the Secretary forbade the killing of such animals by any other person than

natives, prohibited the use of firearms by the natives during certain months, and declared that no vessel would be allowed to anchor in the well-known otter-killing grounds, except vessels carrying parties of natives to or from such killing grounds. *Held*, that this regulation was not violated by a fur company which, in pursuance of an agreement made with natives at the beginning of the season, took on board of its ship parties of such natives and anchored with them in the killing grounds, furnishing them with clothing, provisions, and the necessary outfit, and allowing them to live on board and make hunting excursions therefrom in their canoes, and at the end of the season usually purchasing the skins from them, though each native was free to sell his skins elsewhere; no firearms being used, and no white men taking any part in the hunting or killing, and the natives not being in any way hired or engaged by the company.

—The Kodiak (D. C.) 53 Fed. 126.

4. Constitutionality of license laws.

The act of May 17, 1884, prohibiting the sale of liquors in Alaska except under certain regulations, is valid, being within the plenary legislative power possessed by Congress over the territories. (*Endleman v. U. S.*, 30 C. C. A. 186, 86 Fed. 456.)

—United States v. Binns.....553

Sections 460-461 of the Alaska Penal Code (30 Stat. 1336, c. 429), as amended by section 29 of the Political Code, in the act of June 6, 1900, c. 786 (31 Stat. 332), providing for the collection of a tax upon certain designated trades and business conducted within the District of Alaska, are not unconstitutional for conflict with the first clause of section 8, art. 1, of the Constitution of the United States.

—*In re C. E. Wynn-Johnson*.....630

5. Competency of witnesses.

Rev. St. § 858 [U. S. Comp. St. 1901, p. 659], providing that in actions by or against executors, administrators, or guardians, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, etc., has no application to territorial courts.

—*Corbus v. Leonhardt*, 114 Fed. 10, 51 C. C. A. 636.

Act May 17, 1884, "providing a civil government for Alaska" (23 Stat. 24), by section 3 provides for the establishment of district courts for said district, with the civil and criminal jurisdiction of district courts of the United States. Section 7 declares "that the general laws of the state of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States." The laws of Oregon at the time made no restrictions excluding witnesses from testifying in any cause (1 Hill's Ann. Laws Or. § 710). *Held*, that such laws were in force in Alaska, and parties were not restricted from testifying with relation to transactions with or statements of decedents.

—*Corbus v. Leonhardt*, 114 Fed. 10, 51 C. C. A. 636.

CONSTRUCTION.

Of statutes, treaties, see "Statutes," "Treaties."

CONTEMPT.

Accused refusing to answer on cross-examination, see "Witnesses."

1. Contempt proceedings criminal in nature.

While the provisions of the law of Alaska providing a punishment for contempt of court are found in the Civil Code, yet *held* to be penal in their nature, and controlled in practice by the rules of the criminal law.

—*United States v. Richards & Jourden*.....613

2. Jurisdiction.

Where an appeal from an order made by an inferior court has been regularly allowed by a judge of the Circuit Court of Appeals, a citation signed and issued, a bond on supersedeas taken and approved, and a writ of supersedeas issued and filed in the lower court and served, the Circuit Court of Appeals has acquired such jurisdiction as to enable it to enforce obedience to its writ by proceedings in contempt against one who, with knowledge of such facts, counsels disobedience to its commands or assists in resistance to its enforcement.

—*Anderson v. Comptois*, 109 Fed. 971, 48 C. C. A. 1.

3. Attorney counseling resistance to court.

An attorney has the right to advise his client as to the validity of an order of court, or of a writ issued under its authority, which affects the client's interests, and his advice to the effect that such order or writ is illegal and void, if given in good faith, will not render him liable for contempt, because of an error in judgment; but he is guilty of contempt if he goes beyond the right to advise in matters of law, and, actuated by a spirit of resistance, counsels or conspires with his client or others to disobey an order of court and obstruct its enforcement.

—Anderson v. Comptois, 109 Fed. 971, 48 C. C. A. 1.

4. Resistance to court's orders by receiver.

When a judge of the Circuit Court of Appeals has granted a writ of supersedeas, in a case brought for review from an inferior court, and has in writing approved its form, a receiver appointed by the court below, who is thereby required to restore to the party from whose possession it was taken property which has come into his hands by virtue of his office, cannot assume to determine for himself that such writ is invalid as to such requirement; but it is his duty to obey it, and, if he fails to do so, he will not be heard to urge its invalidity in defense of a proceeding against him for contempt.

—Tornanses v. Melsing, 106 Fed. 775, 45 C. C. A. 615.

A claim by a receiver that he acted under advice of counsel in refusing to obey a writ of supersedeas, requiring him to restore property which he had taken from the possession of the appellant by authority of the order superseded, constitutes no defense to a proceeding against him for the contempt committed, nor will it be considered in mitigation, where the facts and circumstances shown are such as to convince the court that it is merely a pretense, and that his action was deliberate, willful, and contumacious.

—Tornanses v. Melsing, 106 Fed. 775, 45 C. C. A. 615.

5. Acts constituting contempt.

The defendants were regularly enjoined from working the mine in dispute, and a subsequent order provided that, in the event the defendants gave an indemnifying bond in the sum of \$10,000, "they shall be allowed and permitted, without interference by the plaintiffs, their agents, successors, or employés, to

mine and operate" the claim. Plaintiffs thereafter entered, and drove the defendants from the claim. *Held*, that the injunction had been dissolved by the modifying order, and that plaintiffs were not guilty of any act of contempt of court.

—United States ex rel. McIntosh v. Price.....204

CONTINUANCE.

Not granted to procure immaterial testimony, see "Criminal Law." Loss of jurisdiction by unauthorized, see "Justice of the Peace." Good faith must be shown by application for, see "Trial."

CONTRACT.

Voidable against noncomplying foreign corporation, see "Corporation."

Grub-stake contract, see "Mines and Minerals."

Sufficiency of complaint on, see "Pleading."

Failure to substantially perform, see "Vendor and Purchaser."

1. Burden of proof on rescission.

Where several parties sign a mutual contract to locate and work mines in Alaska between two specified dates, one of the parties who locates a mine in his own name and interest between the dates mentioned has the burden of proof to show that the contract had been mutually rescinded prior to his location.

—Binswanger v. Henninger.....509

2. Specific performance.

Defendant contracted in writing to convey to complainant a half interest in a mining claim in exchange for a half interest in some one of a number of claims described, to be selected by him. The contract stated that such claims were then owned and operated by the complainant. In a suit for specific performance, the evidence clearly showed that no one of the claims to which complainant asserted title was at the time of the contract being operated by him, and that none of them had since been so operated or opened as to afford defendant an opportunity to make an intelligent selection between them. *Held*, that under such circumstances a decree refusing to compel a specific per-

formance by defendant was clearly within the court's discretion, and would not be disturbed on appeal.

—Engelstad v. Dufresne, 116 Fed. 582, 54 C. C. A. 38.

CORPORATIONS.

Stockholder cannot maintain suit to enjoin license, see "Injunction."

1. Agent, service of summons can be made upon.

One who receives and stores for sale consignments of giant powder from the manufacturer, a foreign corporation not qualified to do business in Alaska for failure to comply with the law requiring it to file its articles, financial statement, and consent of agent, and who withdraws such amounts as he sells from time to time, and who is responsible to the corporation for the amounts of such sales, is nevertheless an agent upon whom service of summons in a suit against the corporation may be made.

—American Gold Min. Co. v. Giant Powder Co. 664

2. Contracts of noncomplying foreign corporation.

On October 16th, defendants gave their note to the Ames Mercantile Company, a foreign corporation, which had not yet filed its articles, statement, and consent of agent required by chapter 23 of the Civil Code of Alaska (Act June 6, 1900, c. 786, 31 Stat. 528). On the same day the defendants made a mortgage to Ames, the plaintiff, to secure the payment of that note and other contemplated indebtedness. The corporation filed its articles, etc., on October 20th, and thereafter plaintiff brought suit to foreclose the mortgage. Defendants seek to avoid their note, because it was made to the corporation in advance of its compliance with the statute. *Held*, that it was a voidable contract only, and could only be avoided by rescission and returning the consideration.

—Ames v. Kruzner. 598

3. Corporation may be indicted.

A corporation may be indicted for any act done or omitted in violation of law within the sphere of its corporate capacity, or to an undefined extent beyond.

—United States v. Alaska Packers' Ass'n and Babler. 217

A corporation may not be indicted or punished for the commission of an act which is in the fullest sense ultra vires, and contrary to its corporate nature and purposes; and under this rule it may be indicted for the commission of either a felony or a misdemeanor, where the penalty may be either a fine or a forfeiture.

—United States v. Alaska Packers' Ass'n and Babler..217

COSTS.

For violation of town ordinances, see "United States Commissioner."

1. Witness fees in civil cases.

A witness who is neither subpoenaed nor called to testify is not entitled to either fees or mileage. One called within the courtroom is not entitled to mileage. One who attends without being subpoenaed, though he comes a long distance and testifies, and is a necessary witness, cannot recover mileage under the laws of Oregon, then applicable to Alaska.

—Græco-Russian Church v. Cohen.....32

2. Costs paid by United States marshal.

The marshal is bound to obey the order of the court for the payment of fees of jurors and witnesses, and his accounts of fees and costs paid under said order to such jurors and witnesses, even though they be officers of the United States, cannot be so re-examined by the accounting officers of the treasury as to charge him with erroneous taxation, but the payments must be allowed him in his accounts.

—United States v. Hillyer.....47

CO-TENANCY.

See "Tenancy in Common," "Mines and Minerals."

COUNTERCLAIM.

Judgment for, limited by court's jurisdiction, see "Courts."

COURTS.

Admiralty jurisdiction in Alaska, see "Admiralty."
Appellate jurisdiction over Alaska, see "Appeal and Error."
Amount in controversy reduced below jurisdiction, see "Appeal and Error."
Jurisdictional amount on appeal, see "Appeal and Error."
Power to apprentice minors, see "Apprentices."
Will not interfere with political questions, see "Constitutional Law."
Jurisdiction in murder cases, see "Homicide."
Jurisdiction in liquor seizures, see "Intoxicating Liquors."

1. Jurisdiction in Alaska prior to 1884.

Alaska being a place without the limits of any state or judicial district of the United States, within the meaning of section 14 of the act of March 3, 1825 (4 Stat. 118, Rev. St. § 730 [U. S. Comp. St. 1901, p. 585]), the court has jurisdiction to try a person charged with the commission of a crime therein, provided such person is found in the district of Oregon or first brought there. (Cited in U. S. v. Williams [C. C.] 2 Fed. 62.)

—United States v. Carr, 3 Sawy. 302, Fed. Cases No. 14,-730.

2. District court as a United States court.

By the organic act of May 17, 1884 (23 Stat. 24), the district court of Alaska was invested with the powers of a district court and a circuit court of the United States, as well as with general jurisdiction to enforce in Alaska the laws of Oregon, so far as they were applicable and were not inconsistent with the act and the Constitution and laws of the United States.

—McAllister v. United States, 141 U. S. 174, 11 Sup. Ct. 949, 35 L. Ed. 693.

It must be regarded as settled that courts in Alaska and other territories, created under the plenary municipal authority that Congress possesses over the territories of the United States, are not courts of the United States created under the authority conferred by the third article of the Constitution, but are legislative courts, subject to the control of Congress.

—McAllister v. United States, 141 U. S. 174, 11 Sup. Ct. 949, 35 L. Ed. 693.

3. Admiralty jurisdiction of district courts.

United States district courts sitting in admiralty are courts of superior jurisdiction, and every intendment is made in favor of their decrees, so that when it appears that the court has jurisdiction of the subject-matter, and that the defendant was duly served with process or voluntarily appeared and made defense, the decree is not open to attack collaterally.

—*Ex parte Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232.

The admiralty jurisdiction of the district court of Alaska is coextensive with that of a district court of the United States. Its common law and equity practice is limited by the codes of Alaska, but its admiralty practice is determined only by the course of admiralty proceedings in the United States district courts.

—*The Nugget*.....202

4. General jurisdiction of the district court of Alaska.

The district court of Alaska is not alone a district court of the United States and a district court exercising circuit court powers. It is also a court of general law and equity jurisdiction.

—*Ex parte Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232.

The district court of Alaska has jurisdiction over forfeitures and seizures on navigable waters, and on land and on waters not within admiralty and maritime jurisdiction. It has jurisdiction in admiralty to forfeit vessels for violations of section 1956, Rev. St., in killing fur-bearing animals on any of the navigable waters within the dominion of the United States, acquired by treaty from Russia.

—*Ex parte Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232.

The district court in Alaska, although invested with the civil and criminal jurisdiction of a district court of the United States, is a legislative court, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules

and regulations respecting territory belonging to the United States.

—The Coquitlam, 163 U. S. 346, 16 Sup. Ct. 1117, 41 L. Ed. 184.

The jurisdiction of the district court for the district of Oregon over offenses committed in Alaska, conferred by section 7, Act July 27, 1868, does not include the crime of distilling spirits therein without paying a tax therefor.

—United States v. Seveloff, 2 Sawy. 311, Fed. Cases No. 16,252.

An action at law will lie in a federal court upon a decree of divorce rendered by a state court of equity to recover all alimony accrued at the time of filing the complaint.

—Knapp v. Knapp (D. C.) 59 Fed. 641.

The District Court of Alaska is not, strictly speaking, a court of the United States, and does not come within the purview of the acts of Congress which speak of "courts of the United States" only.

—Allen v. Myers.....114

Under the organic act of Alaska, United States commissioners have jurisdiction in the first instance, subject to the supervision of the district judge, in all testamentary and probate matters, in accordance with the laws of Oregon applicable to that territory, and are vested with the jurisdiction of the county court of Oregon pertaining to probate courts.

—Ex parte Emma (D. C.) 48 Fed. 211.

A prosecution for murder, pending at the time of Act March 3, 1899, is within the jurisdiction of the district court.

—Bird v. United States, 23 Sup. Ct. 42.

5. Presumption of regularity of terms.

The presumption of law is that a special term of court held was duly convened, and that legal notice of the time and place had been given; and the burden of overcoming such presumption rests upon one attacking the validity of the proceedings on the ground of irregularity.

—Stockslager v. United States, 116 Fed. 590, 54 C. C. A. 46.

Act June 6, 1900 (31 Stat. 321), providing a civil government for Alaska, by section 4 establishes a district court for the district of Alaska, and provides for the appointment of three district judges, one to reside in each of the three divisions into which the district is divided. A regular term of court is fixed for each division, and it is further provided that special terms may be held by either judge at such place or places as may be deemed necessary and expedient; at least 30 days' notice to be given by the judge or the clerk of the time and place of holding special terms. The manner of giving such notice is not prescribed. During a special term being held at Nome, an order was made in open court convening a special term at Unalaska, in the same division, and directing notice thereof to be given, which was done. The Unalaska term was held by a different judge, who, after it had been in session some time, entered an order adjourning the term for a week, to be then held at Nome. After the time for it to reconvene at Nome, he there ordered a grand jury drawn, which returned an indictment against defendant. *Held*, that such facts did not sustain a motion to quash the indictment on the ground that the term at which it was returned was not legally held; it not appearing, from the record or otherwise, that notice of the holding of a term at Nome, at the time to which the Unalaska term was adjourned, had not been previously given, nor that the term previously convened at Nome had been adjourned.

—Stockslager v. United States, 116 Fed. 590, 54 C. C. A. 46.

6. Supreme Court of Alaska territory.

The district court of Alaska is to be regarded as the Supreme Court of that territory within the meaning of section 15 of the act of March 3, 1891 [U. S. Comp. St. 1901, p. 554], and of the order of the Supreme Court of the United States assigning Alaska to the Ninth Circuit.

—The Coquitlam, 163 U. S. 346, 16 Sup. Ct. 1117, 41 L. Ed. 184.

7. Transfer of causes from district court of Alaska.

Rev. St. §§ 601, 637 [U. S. Comp. St. 1901, pp. 484, 519], providing for the transfer by a district court of a cause in which the judge is interested or has been counsel "to the next circuit court for the district, and, if there be no circuit court therein, to the

next circuit court in the state, and, if there be no circuit court in the state, to the next circuit court in an adjoining state," do not authorize the transfer of a cause from the district court of Alaska to a circuit court in the district of Washington, as, though the district court of Alaska be considered as within the terms of the statute, Washington cannot be held to be an "adjoining state."

—Lewis v. Johnson (C. C.) 90 Fed. 673.

8. Prohibition from Supreme Court of United States.

The Supreme Court of the United States had jurisdiction to proceed in respect to the District Court of the United States for the district of Alaska by way of prohibition under section 688 of the Revised Statutes [U. S. Comp. St. 1901, p. 565].

—In re Cooper, 138 U. S. 404, 11 Sup. Ct. 289, 34 L. Ed. 993.

9. Appeals from commissioners to district court.

If a court of limited jurisdiction assumes to act in a case over which the law does not give it authority, the whole proceeding, from the issuing of the writ to the rendition of the judgment, is void. Consent of parties cannot confer jurisdiction where the law has not.

—Myers v. Swineford.....10

10. Amount in controversy on appeal.

See "Appeal and Error," 3.

The district court has no jurisdiction over cases brought here by appeal from United States commissioners, acting as justice courts under the statutes of Oregon, unless the amount involved is \$200 or more. Organic Act, § 7; 23 Stat. 24; 1 Supp. Rev. St. p. 430.

—Decker v. Williams (D. C.) 73 Fed. 308.

The amount involved is determined by the case as it appears in the district court, and not the sum in controversy in the court below.

—Decker v. Williams (D. C.) 73 Fed. 308.

Where a court has jurisdiction for the recovery of money or damages when the amount "claimed" does not exceed a specified sum, and an action is brought for a less amount than such.

specified sum, the court is not ousted of jurisdiction by the filing of a counterclaim for a sum exceeding the aggregate amount of such jurisdictional amount and the sum claimed by plaintiff.

—Bennett v. Forrest (D. C.) 69 Fed. 421.

The fact that a counterclaim exceeds in amount the jurisdiction of the court in which it is filed is not ground for refusing to allow defendant to set it up; but, in case the court finds that it is established, it can render judgment in defendant's favor only for the amount of which it has jurisdiction.

—Bennett v. Forrest (D. C.) 69 Fed. 421.

11. Mandamus to justice court.

By section 5 of the act of May 17, 1884, providing a civil government for Alaska, four commissioners are to be appointed, who shall exercise all the duties and powers conferred on justices of the peace under the general laws of Oregon, which laws in force at that time are adopted as the laws of the district, so far as applicable. Code Civ. Proc. Or. § 2057, provides that a civil action in a justice court is commenced and prosecuted to final judgment in the manner provided for similar actions in courts of record. Sections 906 and 907 provide that justice courts are always open for the transaction of business, and that the rules of proceeding and evidence are the same as in courts of record. Section 940 declares that, when jurisdiction is conferred on a court or judicial officer, all the means to carry it into effect are given, and that, if no method of proceeding is specified, any suitable mode or process may be adopted. *Held*, that where a commissioner's court has obtained jurisdiction of a cause, but the commissioner is necessarily absent on the day set for trial, he has authority to again bring the parties before him by issuing a proper notice, and on his refusal to do so mandamus will lie to compel action looking toward final judgment.

—Finn v. Hoyt (D. C.) 52 Fed. 83.

12. Stare decisis.

While the doctrine of stare decisis is not absolutely applied to decisions of the Supreme Court of Oregon on the questions at issue, yet, the laws of that state having been extended to Alaska, it must be presumed that Congress was familiar with the construction put upon the statutes of that state by its highest court,

and the decisions of that court should therefore have great weight with this court.

—Kohn v. McKinnon (D. C.) 90 Fed. 623.

13. Municipal courts.

The whole range of judicial power in Alaska having been expressly vested by Congress in district and justices' courts, and there being no apparent necessity for it, there is no authority in incorporated towns to create municipal courts independent of those created by Congress, and from which there is neither appeal nor other supervision.

—In re Bruno Munro.....279

14. Court expenses.

The court has the inherent power to provide for and direct the payment of the necessary and proper expenses, and when such payments are made by the marshal under the order or with the approval of the court they should be allowed him in his accounts.

—United States v. Hillyer.....47

CRIMINAL LAW.

Alaska held not "Indian country," see "Alaska"; "Indian Country". Proceeding for contempt a criminal cause, see "Contempt."

Admissions by joint defendant, see "Evidence."

Judicial notice that a "whisky cocktail" is intoxicating, see "Intoxicating Liquors."

Arrest by military officer for selling liquor, see "Intoxicating Liquors."

Attempt to bring liquor into Alaska, see "Intoxicating Liquors."

Verdict "without capital punishment," see "Homicide."

Jurisdiction in murder cases, see "Homicide."

1. Motion to quash indictment.

A motion to quash an indictment is ordinarily addressed to the discretion of the court, and the overruling thereof is not ordinarily assignable as error.

—Endleman v. United States, 86 Fed. 456, 30 C. C. A.
186.

2. Defense in illegal sale of liquor.

When the nonexistence of a license is not averred in an indictment for an unlawful sale of liquor, and the license is particularly within the knowledge of the accused, the burden is on him to produce such license and rely on it as a defense.

—United States v. Nelson (D. C.) 29 Fed. 202.

3. Continuances.

Where it appears, from the affidavit for a continuance, that the defendant procured, at the May term, 1901, an order of court that certain witnesses be subpoenaed at the expense of the government, but took no further step until August 26th thereafter, after which one was served, and the others shown to be out of the district; that neither of the witnesses was present at the time of the homicide, and they are shown by the application to have knowledge only of the existence of shot marks at the place of the homicide—the motion is denied.

—United States v. Homer Bird.....379

The action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court, unless it be clearly shown that such discretion has been abused; and in this case it could not be said that an abuse of discretion was clearly shown.

—Hardy v. United States, 186 U. S. 224, 22 Sup. Ct. 889, 46 L. Ed. 1117.

4. Previous general character and conduct of defendant.

On the cross-examination of a defendant charged with robbery, the district attorney was permitted to question him at great length as to his conduct during his whole life at various places, his habits, the amount of money he had received, from whom he received it, and how he spent it, whether he did not hang around saloons and gambling houses, etc. The questions were not asked for purposes of impeachment, his testimony being uncontradicted, but were admitted, as stated by the court, for the purpose of showing the habits and character of the defendant prior to the time of the alleged offense. Held, that such examination was irrelevant, unfair, and clearly prejudicial and erroneous; its only purpose and effect being to degrade defendant in the eyes of the jury.

—Allen v. United States, 115 Fed. 3, 52 C. C. A. 597.

5. Prejudicial remarks by court and counsel.

Defendant in a criminal case filed a motion for continuance on the ground of the absence of a witness, supported by the affidavits of himself and his counsel setting out the facts to which the witness would testify if present. The district attorney refused to admit that the witness would so testify, on the ground that the wife of the witness had told him that defendant's attorney had tried to get her husband to give such testimony, but that the same was not true. This statement by the district attorney was corroborated by the presiding judge as a matter of personal knowledge, the remarks of both being made in open court in the presence of the jurors, and the continuance was denied. Subsequently the court refused to permit defendant's counsel to renew his motion or to read an affidavit made by the wife of the absent witness, in which she denied having made the statement attributed to her, and deposed that her husband had told her that the facts were as set out in the affidavits of defendant and his counsel. *Held*, that the remarks of the attorney and court, reflecting, as they did, upon both defendant and his attorney, and going to the jurors unchallenged, were calculated to unduly prejudice them against defendant, and to prevent him from having a fair and impartial trial, and constituted reversible error.

—Allen v. United States, 115 Fed. 3, 52 C. C. A. 597.

A statement of a federal judge that he does not see any way in which the defendants can be acquitted, while not to be approved, is no ground for reversal, where he states the rules of law correctly and expressly leaves the matters of fact to the jury.

—Endleman v. United States, 86 Fed. 456, 30 C. C. A. 186.

Where defendant was indicted with two others for robbery, one of whom had been tried and convicted, and while examining a juror defendant's counsel asked if "he had an opinion as to the guilt or innocence of" the one so convicted, a remark by the court, in answer to such question, that "that is one of the things that is an established fact in this community," was error.

—Hawkins v. United States, 116 Fed. 569, 53 C. C. A. 663.

6. Record must show arraignment.

Until defendant has pleaded to the indictment, there is no issue to be submitted to the jury, and an omission to plead is fatal to the judgment in cases of misdemeanor, as well as infamous crimes.

—Shelp v. United States, 81 Fed. 694, 26 C. C. A. 570.

7. Record must show that plea was entered.

Where the record fails to show that any plea to the indictment was entered, the mere statement in the bill of exceptions that the "issue joined in the above stated cause * * * came on to be tried," and the "jury was impaneled and sworn to try the issues between the said parties," does not authorize the appellate court to infer that a plea was in fact entered, but that the clerk failed to note it in the record.

—Shelp v. United States, 81 Fed. 694, 26 C. C. A. 570.

8. Record must show defendant's presence.

In the trial of a criminal action involving corporal punishment, the record should show that the defendant was present; but it is sufficient if his presence may be inferred from the whole record, without being explicitly stated at every stage of the procedure.

—Kie v. United States (C. C.) 27 Fed. 351.

9. Proof to warrant conviction for illegal sale of liquor.

No question being raised under the exception provided by this statute, three facts only are necessary to be found to warrant conviction in this case: (1) That liquor was sold; (2) that the liquor was intoxicating; (3) that the sale was made by this defendant, either in person, or through his agents, servants, or employés, acting for him or under his management, direction, or control.

—United States v. Ash (D. C.) 75 Fed. 651.

10. Reasonable doubt in liquor cases.

In a prosecution for the illegal sale of liquors, every fact necessary to constitute the offense must be established by the evidence beyond a reasonable doubt.

—United States v. Ash (D. C.) 75 Fed. 651.

Therefore, findings from the evidence beyond a reasonable doubt that the defendant, either in person or by his agents,

servants, or employés, sold the liquor commonly known as "whisky," or the drink commonly called "whisky cocktails," are sufficient to warrant a verdict of guilty.

—United States v. Ash (D. C.) 75 Fed. 651.

11. Credibility of Indian witnesses.

No witness is to be discredited merely because of his race or color, and where counsel have asserted that comparatively little credit is to be attached to the evidence of ignorant and semi-barbarous Indian witnesses, there is no error in the court saying that both white men and Indians lie, and that the evidence of both is entitled to the same credit, and such credibility is to be determined by the same rules of law, when this is coupled with a correct statement of the jury's right to consider the intelligence, appearance, apparent candor, opportunities of knowledge, etc., of each witness.

—Shelp v. United States, 81 Fed. 694, 26 C. C. A. 570.

12. Instructions.

An instruction that if the jury found "that said killing was malicious, premeditated, and willful, and that said killing was not in the necessary defense of defendant's life or to prevent the infliction on him of great bodily harm," they should find the accused guilty, was error, under the theory and evidence of the defense, "because not qualified by the further charge that if the defendant believed, and had reason to believe, that the killing was necessary for the defense of his life, or to prevent the infliction on him of great bodily harm, then he was not guilty."

—Bird v. United States, 180 U. S. 356, 21 Sup. Ct. 403, 45 L. Ed. 570.

Where the trial judge allowed and signed a bill of exceptions to his instructions, it cannot be fairly presumed that an error in the instructions therein complained of was healed by any modification made in some other part of his charge.

—Bird v. United States, 180 U. S. 356, 21 Sup. Ct. 403, 45 L. Ed. 570.

An instruction on self-defense *held*, in connection with other instructions given, not objectionable.

—Bird v. United States, 23 Sup. Ct. 42.

Requested instruction not based on facts *held* properly refused.

—Bird v. United States, 23 Sup. Ct. 42.

Instruction as to effect of attempt to escape *held* proper.

—Bird v. United States, 23 Sup. Ct. 42.

Requested instructions covered by the general charge *held* properly refused.

—Stockslager v. United States, 116 Fed. 590, 54 C. C. A. 46.

Instructions given upon the trial of a defendant, charged with uttering a forged check with intent to injure and defraud, considered and approved.

—Stockslager v. United States, 116 Fed. 590, 54 C. C. A. 46.

13. General exception to instruction insufficient.

If any part of the charge requires the jury to consider matters not proved, it is the duty of counsel to call the attention of the trial court to the language complained of. A general exception is insufficient to raise the point before an appellate court.

—Shep v. United States, 81 Fed. 694, 26 C. C. A. 570.

14. Arrest of judgment.

A motion in arrest of judgment lies only (1) for want of jurisdiction, and (2) that the facts stated do not constitute a crime.

—United States v. Richards & Jourden.....613

15. Judgment for defendant notwithstanding verdict.

A motion for judgment for defendant notwithstanding the verdict is a civil remedy only, and has no application to criminal proceedings or contempt.

—United States v. Richards & Jourden.....613

16. New trial.

An affidavit on a motion for a new trial, which states no fact or circumstance whatever, but is based wholly upon the unsupported alleged belief of the accused that the judge who heard the case was prejudiced against him, where no motion for change of venue or continuance was made, is not a sufficient ground for a new trial.

—United States v. Richards & Jourden.....613

A motion for a new trial will not be granted for accident and surprise which consists merely in the belief of counsel that a witness had been so impeached that they did not deem it necessary to deny his statements, and especially when he is strongly corroborated by unimpeached witnesses.

—United States v. Richards & Jourden.....613

A motion for a new trial will not be granted for newly discovered evidence which consists in the statements of the attorneys for the defendant and witnesses, all of whom were present in court at the trial, and most of whom testified in relation to the very question claimed to be newly discovered.

—United States v. Richards & Jourden.....613

A motion for a new trial will not be granted upon affidavits which merely deny the findings of facts made by the court in immaterial matters, nor when such witnesses were present and could have been called at the trial.

—United States v. Richards & Jourden.....613

17. Cruel and unusual punishment.

A sentence to imprisonment in a penitentiary, on conviction for violation of a criminal statute, for a term not exceeding that prescribed by the statute, cannot be regarded as a cruel or unusual punishment, within the provisions of article 8 of the Constitution of the United States, and its imposition furnishes no ground for reversal of the judgment.

—Jackson v. United States, 102 Fed. 473, 42 C. C. A.
452.

18. Excessive sentence remitted by appellate court.

When a statute under which a defendant is convicted in a court of the United States prescribes "imprisonment in the penitentiary" as a punishment for its violation, it is error to add the words "at hard labor" to a sentence thereunder, although hard labor may be required of the prisoner under the disciplinary regulations of the prison where the sentence is directed to be executed; but such error does not render the sentence void, or require the reversal of the judgment and the granting of a new trial. It is voidable only, and may be corrected by amendment, and such correction may be made by the Circuit

Court of Appeals, where the case is before it for review on a writ of error.

—Jackson v. United States, 102 Fed. 473, 42 C. C. A. 452.

19. Order of proof in discretion of court.

A judgment of conviction in a criminal case will not be reversed by an appellate court because of the order in which the trial court permitted the introduction of evidence, unless there was an abuse of discretion prejudicial to defendant.

—Stockslager v. United States, 116 Fed. 590, 54 C. C. A. 46.

CUSTOMS DUTIES.

Evidence in customs cases, see "Evidence."

Extortion by customs officers, see "Extortion."

Enforcement of liquor law by officers, see "Intoxicating Liquors."

Construction of statutes relating to, see "Statutes."

1. Indian intercourse act of 1834 not extended to Alaska.

The act of July 27, 1868 (15 Stat. 240), extending the laws "relating to customs, commerce, and navigation" over Alaska, construed not to extend the Indian intercourse act of 1834 over that territory, although the latter is a regulation of commerce "with the Indian tribes." (Cited in U. S. v. Leathers, Fed. Cases No. 15,581; U. S. v. Stephens [C. C.] 12 Fed. 53.)

—United States v. Seveloff, 2 Sawy. 311, Fed. Cases No. 16,252.

2. Transferring cargo within limits of collection district.

Rev. St. §§ 2867, 2868 [U. S. Comp. St. 1901, p. 1908], imposing penalties and forfeitures for unlading or transferring cargoes, "after the arrival of any vessel laden with merchandise and bound to the United States," within the limits of any collection district, before the vessel has come to the proper place of discharge, and has been authorized to unload by the proper customs officer, are not violated by an unlading and transfer of cargo after vessels have casually arrived within the limits of a collection district, if they are not bound to the United States and

have no cargo destined to be unladen in the United States. (D. C.; 57 Fed. 706, reversed.)

—The Coquitlam, 77 Fed. 744, 23 C. C. A. 438.

3. Vessel arriving from adjacent foreign country.

The statute requiring the master of any foreign vessel entering the waters of the United States from foreign territory adjacent to the northern, northeastern, and northwestern frontiers of the United States to report at the office of the nearest collector, and obtain a permit before proceeding further inland, either to unlade or to take in cargo (Rev. St. § 3109 [U. S. Comp. St. 1901, p. 2030]), is not violated by merely bringing a foreign vessel without such permit within the limits of the United States casually, and without intent to unlade or take on cargo there, and without, in fact, proceeding further inland.

—The Coquitlam, 77 Fed. 744, 23 C. C. A. 438.

4. Articles omitted from manifest.

The statute providing for the forfeiture of merchandise omitted from the manifest (Rev. St. §§ 2806, 2807, 2809 [U. S. Comp. St. 1901, pp. 1874-1876]) applies only to merchandise belonging or consigned to the master, mate, officers, or crew; and other merchandise which is omitted from the manifest is not forfeitable thereunder.

—The Coquitlam, 77 Fed. 744, 23 C. C. A. 438.

5. Illegal unlading before arriving at port.

An illegal unlading within the limits of the United States and before arrival at any port within such limits is a violation of Rev. St. § 2867 [U. S. Comp. St. 1901, p. 1908]; but an illegal unlading after arrival at such port should be prosecuted under section 2872 [page 1910]. (The Active, Ready, 165, Fed. Cases No. 33, followed.)

—The Coquitlam (D. C.) 57 Fed. 706.

If, for the purpose of exchanging cargo, vessels rendezvous at a place within four leagues of the shore, and one of them then tows the others beyond the four-league line, where the exchange is made, then the continued, concerted, necessary action for the effectuation of that purpose, including the towing out, should probably be considered as a part of the actual exchange,

being a part of the res gestæ of the offense which the statute was intended to prevent.

—The Coquitlam (D. C.) 57 Fed. 706.

6. Arrival from adjacent foreign country, failure to obtain permit.

A Canadian steamer, laden with supplies for sealing vessels in the North Pacific Ocean and Bering Sea, arrived in the waters of the United States about 30 miles from St. Paul, on Kadiak Island, which is a port of entry. She did not report to the United States revenue officer there, but went on through United States waters to Tonki Bay, where she exchanged merchandise with sealing vessels, and then proceeded to Port Etches, where she anchored in the inner harbor. *Held*, that the steamer was liable to forfeiture under Rev. St. § 3109 [U. S. Comp. St. 1901, p. 2030], which requires the master of any foreign vessel arriving in United States waters from any foreign territory adjacent to the northern, northeastern, or northwestern frontiers of the United States to report to the collector at the nearest port to the place of entry to such waters, and obtain a permit before proceeding further inland for the purpose of lading or unloading cargo.

—The Coquitlam (D. C.) 57 Fed. 706.

7. Absence of manifest of cargo.

A steamer fitted out with supplies for the sealing fleet sailed from Victoria, B. C., and according to preconcerted arrangement met vessels of the fleet at Touki Bay and Port Etches, in the waters of the United States, within four leagues of the shore, and there transferred to them part of her cargo and received sealskins from them in violation of the revenue laws. She was then seized by the federal authorities, and found to be without any manifest of her cargo, as required by Rev. St. §§ 2806, 2807, 2809 [U. S. Comp. St. 1901, pp. 1874-1876]. *Held*, that under these sections the part of her original cargo still on board and the sealskins received were subject to forfeiture.

—The Coquitlam (D. C.) 57 Fed. 706.

8. Cargo received on high seas.

Where a vessel bound from a foreign port to a port of the United States receives cargo on the high seas and brings it into the United States, such cargo must be regarded as brought from

a foreign port, and is forfeitable under Rev. St. §§ 2806-2809 [U. S. Comp. St. 1901, pp. 1874-1876], if there is no manifest thereof.

—The Coquitlam (D. C.) 57 Fed. 706.

Where a cargo is seized for want of a manifest thereof, the master cannot prevent a forfeiture by thereafter making out a manifest and tendering it to the officers making the seizure.

—The Coquitlam (D. C.) 57 Fed. 706.

9. Forfeiture, burden of proof.

Where probable cause is shown for the seizure of a vessel and cargo for violation of the revenue laws, the burden of proof to establish the innocence of the property is placed on the claimant by Rev. St. § 909 [U. S. Comp. St. 1901, p. 679].

—The Coquitlam (D. C.) 57 Fed. 706.

10. Meaning of "arrived" and "bound" in Rev. St. §§ 2867, 2868 [U. S. Comp. St. 1901, p. 1908].

When a vessel comes within four leagues of the shore of the United States, and makes a transfer of merchandise with another vessel there, without authority from the revenue officers, it should be held to have "arrived" there, and be treated as a vessel "bound" to the United States, within the meaning of Rev. St. §§ 2867, 2868 [U. S. Comp. St. 1901, p. 1908], providing for the forfeiture of the vessel and cargo in such cases.

—The Coquitlam (D. C.) 57 Fed. 706.

11. Vessel liable for penalty under revenue laws.

Rev. St. § 3088 [U. S. Comp. St. 1901, p. 2016], providing that when a vessel, or its owner or master, has become subject to a penalty for violation of revenue laws, it shall be holden therefor, does not render it liable for a penalty imposed on its mate under section 2867, making the master and mate respectively liable for a penalty where the cargo of a vessel is unladen without authority of the customs officers.

—The C. G. White, 64 Fed. 579, 12 C. C. A. 314.

Under Rev. St. § 3088 [U. S. Comp. St. 1901, p. 2016], providing that, when a vessel's master has become subject to a penalty for violation of revenue laws, it shall be holden for the payment thereof, and may be seized and proceeded against to recover the penalty, the lien may be enforced by seizure of the vessel without judgment being first obtained against the master.

—The C. G. White, 64 Fed. 579, 12 C. C. A. 314.

DAMAGES.

Measure of, in ejectment, see "Ejectment."
Trespass on mines, see "Mines and Minerals."

DANGEROUS WEAPON.

Court will take notice that a pistol is a, see "Evidence."

DEEDS.

When held to be a mortgage, see "Mortgage."
Deeds must be recorded, see "Records."

DEFAULT.

See "Judgments."

DEPOSITIONS.

1. Practice in taking depositions.

Under the organic act of May 17, 1884 (23 Stat. 24, c. 53), the depositions of witnesses residing outside of the District of Alaska can only be taken in strict compliance with sections 806-808 of the General Laws of Oregon, providing for notice to the opposite party, and the filing of interrogatories and cross-interrogatories, and the issuance of a commission to some officer to examine the witnesses, and reduce their answers to writing, and certify the same to the clerk of the District Court of Alaska.

—Dunbar v. De Groff..... 25

DERELICT.

See "Admiralty."

DESCENT AND DISTRIBUTION.

1. Real estate and debts.

Real property descends directly to the heir upon the death of the ancestor, "subject to his debts." The only jurisdiction of the probate court lies to enforce the lien of the ancestor's debts

against the real property. If there are no debts, the heir becomes vested at once with the title of the ancestor.

—Binswanger v. Henninger.....509

DESERTION.

From fishing vessel, see "Seaman."

DISTRICT COURT.

See "Courts."

DIVORCE.

Suit in federal courts to recover alimony, see "Courts."

EJECTMENT.

See "Actions."

Statute of limitations, see "Limitation of Actions."

Possession sufficient to sustain, see "Mines and Minerals."

Sufficiency of complaint in, see "Pleadings."

Action sustained by possessory claims, see "Public Lands."

Judgment in, does not affect co-tenant not served, see "Tenancy in Common."

Instructions on evidence outside of issues, see "Trial."

1. Possession sufficient to sustain ejectment.

By the law of Oregon, which is in force in Alaska, a person in possession may maintain an action to recover possession of real property from which he has been ousted by a mere intruder.

—Campbell v. Silver Bow Basin Min. Co., 49 Fed. 47,
1 C. C. A. 155.

The treaty for the purchase of Alaska, after reserving certain lands in fee simple to the owners and occupants thereof, vests the title to all other lands in the United States. Act Cong. May 17, 1884 (23 Stat. 24, § 8), provides that no person in the territory shall be disturbed in the possession of any land in his actual use or occupation, but that the terms under which he may acquire title shall be reserved for future legislation by Congress. *Held*, that use and occupation must be deemed a sufficient legal estate, and right to present possession, to maintain ejectment

against one who enters for the government, and that such possession endures at lease until legislation is had.

—Miller v. Blackett (D. C.) 47 Fed. 547.

One who erects a cabin upon a town lot in Alaska, and acquires the undisputed possession and occupancy thereof, may maintain ejectment against another, who ousts him of possession by going into his cabin and claiming possession thereby.

—Price v. Brockway.....233

2. Ejectment by executor or administrator.

They cannot maintain actions in ejectment to recover possession of real estate claimed to be the property of the deceased.

—Kohn v. McKinnon (D. C.) 90 Fed. 623.

3. Complaint in ejectment.

Under the provisions of section 301 of the Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 383) a complaint in ejectment may allege ownership, ouster, and damage for a wrongful withholding as one cause of action, and upon such cause of action may recover (1) possession and (2) damages for withholding.

—Kimball v. Miller.....347

4. Measure of damages in ejectment.

The measure of damages for withholding lands from which the plaintiff was wrongfully ejected is the reasonable rental value of the property during the time withheld.

—Kimball v. Miller.....347

5. Subsequent suit for trespass stayed pending ejectment suit.

Where the defendants in a suit in ejectment bring a subsequent suit against the plaintiff in the ejectment suit for damages for trespass upon the same property, the suit in trespass will be stayed until that in ejectment is tried, or the two may be consolidated and tried as an ejectment suit.

—Yager v. Ring.....305

ELECTIONS.

In incorporated towns, see "Municipal Corporations."

ENLISTMENT.

Minor may enlist in navy, see "Army and Navy."

EQUITY.

1. Will not interfere where remedy at law exists.

Equity will not interfere where the parties have a plain and adequate remedy at law.

—Corbus v. Alaska Treadwell Co. (D. C.) 99 Fed. 334.

To entitle the plaintiff to relief in equity, and to invoke remedial relief by injunction, it must be made to appear on the face of the petition that he cannot redress his supposed grievance in an action at law. Equity will not take cognizance of cases where the law affords an ample remedy.

—United States v. The North-West Trading Co.5

Where there is no adequate, plain, and complete remedy at law, equity may be invoked. *Held*, in this case, upon the allegations of the bill, that a suit in equity will lie for want of such remedy.

—Callsen v. Hope (D. C.) 75 Fed. 758.

2. Pleading multiplicity of suits.

To induce a court of equity to take jurisdiction of a suit on the ground that a multiplicity of suits is threatened and irreparable injury about to be sustained thereby, the facts must be so pleaded that the court can reasonably infer that such allegations are true.

—Corbus v. Alaska Treadwell Co. (D. C.) 99 Fed. 334.

3. Dismissal without prejudice—Discretion of court.

The propriety of permitting a plaintiff to dismiss his bill without prejudice is a matter within the discretion of the court, which discretion is to be exercised with reference to the rights of both parties.

—Ebner v. Zimmerly, 118 F. 818, 55 C. C. A. 430.

4. Jury findings in equity cases.

In a suit in equity the court is not bound by the findings of a jury, but may make its own findings under the evidence, or may

adopt the findings of the jury for its own, if they are sustained by the evidence to the satisfaction of the judge.

—Pratt v. United Alaska Min. Co.....95

ESTATES.

See "Descent and Distribution," "Executors and Administrators."

ESTOPPEL.

Bail bond is, in suit for damages in attachment, see "Attachment." By deed, see "Mines and Minerals."

Junior location not aided by, see "Mines and Minerals."

To dispute validity of land patent, see "Public Lands."

To deny title, see "Public Lands."

1. Officer cannot repudiate his source of authority.

Where the commissioner receives costs by virtue of his assumed jurisdiction to enforce town ordinances, he is estopped to deny the authority of the town and retain the "costs." He must pay them over to the town, and may be compelled to do so by mandamus.

—Town of Nome v. Reed, Com'r.....395

2. Estoppel by deed, in part only.

The fact that defendant had contracted to purchase a mining claim from plaintiff, conditioned upon the obtaining of a patent therefor, did not deprive him of the right to contest the allowance of such patent as to a portion of the claim which overlapped a prior claim owned by himself.

—Griffin v. Am. Gold Min. Co., 114 Fed. 887, 52 C. C. A. 507.

EVIDENCE.

Must be clear to sustain abandonment, see "Abandonment."

In suits for seamen's wages, see "Admiralty."

Cures want of exception, when, see "Appeal and Error."

Circumstances may be shown, see "Assault with Deadly Weapon."

Physician testifying against decedent, see "Constitutional Law," "Executors and Administrators."

To support forfeiture must be clear and convincing, see "Forfeitures."

Joint acts of defendants in homicide, see "Homicide."

Presumption in favor of trial record, see "Homicide."

Judicial knowledge that whisky is intoxicating, see "Intoxicating Liquor."

Judicial notice of general mining methods, see "Mines and Minerals."

Of boundaries and local rules, see "Mines and Minerals."

To show that deed was intended as a mortgage, see "Mortgage."

In equity after new trial granted, see "New Trial."

Verdict on insufficient evidence, see "New Trial."

Fraudulent clearance of vessel, see "Shipping."

Judicial notice of treaty with Russia, see "Treaties."

Instruction on evidence outside of issues, see "Trial."

1. Judicial notice.

A dangerous weapon is one likely to produce death or great bodily injury. A loaded pistol is not only a dangerous, but a deadly, weapon. The prime purpose of its construction and use is to endanger and destroy life. This is a fact of such general notoriety that the court must take notice of it.

—United States v. Williams (C. C.) 2 Fed. 61.

2. Presumptions.

Illegality is never presumed; on the contrary, everything must be presumed to have been legally done until the contrary is proved.

—Ames v. Kruzner.....598

The presumption is that buildings belong to the owner of the land on which they stand as a part of the realty.

—Kinkead v. United States, 150 U. S. 483, 14 Sup. Ct. 172, 37 L. Ed. 1152.

3. Relevancy, materiality, and competency in general.

Evidence was received, over the objection of the defendant, that a month prior to the homicide the accused was violent in his language toward, and threatened, other members of his party. Held too remote, and error. Evidence was also received that six months after the homicide the accused tried to pick a

quarrel with other members of his party. *Held* too remote, and error.

—*Bird v. United States*, 180 U. S. 356, 21 Sup. Ct. 403, 45 L. Ed. 570.

4. Hypothetical questions.

Where, in examining a witness concerning the necessary and proper precautions to be taken for the protection of workmen who are being lowered down a mine shaft, it is necessary to ask questions in the nature of hypothetical questions, it is not error to overrule objections that such questions are leading.

—*Alaska United Gold Min. Co. v. Keating*, 116 Fed. 561, 53 C. C. A. 655.

5. Best and secondary evidence.

Where the defense offered a calendar in evidence to prove that on the night a homicide was committed it was too dark to see the defendant, it was competent for the prosecution to prove on rebuttal that the defendant was recognized by the flash of light from a pistol.

—*Fitzpatrick v. United States*, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078.

6. Admissions.

Admissions made by a person under arrest charged with crime to a committee of citizens met to investigate the charge, at a time when there was no public excitement or danger of violence to him, and which were not induced by threats or promises, were voluntary, and are admissible in evidence against him.

—*Jackson v. United States*, 102 Fed. 473, 42 C. C. A. 452.

Statements made by one of two joint defendants in the absence of the other defendant, while admissible against the party making the statement, are inadmissible against the other party.

—*Fitzpatrick v. United States*, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078.

Voluntary statements, made by a defendant before and after a preliminary examination, are admissible in evidence, when made to a magistrate who conducted the preliminary examination.

—*Hardy v. United States*, 186 U. S. 224, 22 Sup. Ct. 829, 46 L. Ed. 1137.

7. Weight and sufficiency.

To warrant a conviction of an assault with a dangerous weapon, charged to have been a loaded revolver, it is not essential that the fact that the revolver was loaded should be proved by direct evidence, but it may be inferred by the jury from other facts and circumstances shown in evidence.

—Jackson v. United States, 102 Fed. 473, 42 C. C. A. 452.

The admission of testimony by a witness as to the apparent freshness of the cartridges in a revolver taken from the defendant on his arrest, some hours after the alleged commission of an assault with such revolver, is not error, although the witness is not shown to be an expert.

—Jackson v. United States, 102 Fed. 473, 42 C. C. A. 452.

An Indian woman of a low order of intelligence, who voluntarily disclosed the fact that a murder had been committed by her husband and another, and conducted the officers to the spot, and on the trial testified against him, should be permitted to state on cross-examination whether, since her husband's arrest, she has not been living with another man, also an Indian and a witness against her husband in the homicide case, for the purpose of affecting her character and credibility.

—Tla-koo-yel-lee v. United States, 167 U. S. 274, 17 Sup. Ct. 855, 42 L. Ed. 166.

Such a witness should also be permitted to testify on her cross-examination fully in regard to an alleged drunken sleep of her husband at that time, and his statements when he awoke, for the purpose, also, of testing her bias and credibility.

—Tla-koo-yel-lee v. United States, 167 U. S. 274, 17 Sup. Ct. 855, 42 L. Ed. 166.

Testimony was introduced on behalf of the plaintiff connecting an imperfect description in the notice of a mining location with a full and correct description of the boundaries contained in the complaint, and tending to show that the property described by the one is that described by the other. Held, that it was perfectly proper to introduce the location certificate, however defective in form, for the purpose of showing the time

when the possession was taken, and to point out, so far as it did, the property which was taken possession of.

—Bennett v. Harkrader, 153 U. S. 444, 15 Sup. Ct. 863, 39 L. Ed. 1046.

On a question whether the cargoes of certain sealing schooners were transferred to a steamer within 12 miles of the shore, so as to violate the revenue laws, the testimony of the masters of the schooners that the transfer was made at more than that distance should be received with caution, if not wholly rejected, where it is contradicted by other evidence, or rendered improbable by circumstances, since they stand much in the light of accomplices in the wrong charged.

—The Coquitlam (D. C.) 57 Fed. 706.

A mining location will not be declared forfeited on mere suspicion. The evidence upon which to base a forfeiture must be clear and convincing.

—Thomson v. Allen.....636

EXCEPTIONS, BILL OF.

Presumption in regard to matters not disclosed by, see "Criminal Law."

New trial denied where no exception taken, see "New Trial."

1. Settlement, signing and filing.

Where a bill of exceptions is not included within the record as certified by the clerk, and appears to have been signed at a succeeding term after the decree, and does not purport to contain all the evidence, and contains only a general exception "to the ruling of the court and the law as declared by the court," the decree appealed from was affirmed.

—Schooner Sylvia Handy v. United States, 143 U. S. 513, 12 Sup. Ct. 464, 36 L. Ed. 246.

The allowance and signing of a bill of exceptions under the provisions of section 953, Rev. St., is a judicial act, which can only be performed by the judge who sat at the trial, or by the presiding judge if more than one sat. See Act Cong. July 5, 1900, amending section 953, Rev. St. [U. S. Comp. St. 1901, p.

696], and authorizing the succeeding or other judge to sign a bill of exceptions.

—Malony v. Adsit, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163.

The appellate court will not consider a bill of exceptions not signed by the trial judge, and such failure or omission cannot be supplied by agreement of the parties. The only remedy is to be found in a motion for a new trial.

—Malony v. Adsit, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163.

Where the judge who heard the case and to whom the bill of exceptions was presented for settlement left the district temporarily without signing the bill, but intended to return before the expiration of the year for appeal had expired, another judge, sitting in his absence, refused either to sign the bill or to grant a new trial. See section 953, Rev. St., as amended by Act June 5, 1900, 31 Stat. 270, c. 717, 2 Supp. Rev. St. 1892-1901, p. 1190 [U. S. Comp. St. 1901, p. 696].

—Woods v. Beaton.....344

EXECUTION.

1. Return day.

Under Code Or. § 278, in force in Alaska, the return day of an execution is ascertained by computing 60 days from the day of its receipt by the marshal, and not from the day of its issuance.

—Mason v. Bennett (D. C.) 52 Fed. 343.

2. Sale under execution after return day.

When a levy is made under an execution before the return day thereof, the marshal may make the sale after the return day without new process.

—Mason v. Bennett (D. C.) 52 Fed. 343.

3. Confirmation of sale.

Under Code Or. § 296, in force in Alaska, an execution sale cannot be set aside for mere inadequacy of price, in the absence of fraud, collusion, or substantial irregularity, to the injury of the complaining party, especially when the property consists of an undeveloped mining claim, the value of which is conjectural and speculative.

—Mason v. Bennett (D. C.) 52 Fed. 343.

EXECUTORS AND ADMINISTRATORS.

Supervisory power over, by appeal, see "Appeal and Error."

Cannot maintain ejectment, see "Ejectment."

Claims against partnership, see "Partnership."

1. Powers and duties.

Executors and administrators have no power over the real estate of their decedents, except such as is conferred by statute or the will of the testator.

—Kohn v. McKinnon (D. C.) 90 Fed. 623.

The laws of Oregon in force May 17, 1884, on this subject, are the laws of this district; and under these executors and administrators are entitled to the possession of the real estate of their decedents for the purpose of administration only.

—Kohn v. McKinnon (D. C.) 90 Fed. 623.

2. Claims against estate.

In an action by a physician against an administrator for services rendered his decedent during the latter's lifetime, plaintiff's testimony as to his services, the value thereof, and that no part had been paid, did not relate to any transaction with or statement of the decedent, and was admissible.

—Corbus v. Leonhardt, 114 Fed. 10, 51 C. C. A. 636.

Defendant's evidence tended to show that decedent was employed by a corporation, and was a subscriber to a hospital, and that a verbal contract existed between the hospital and the company that all the latter's employés, by paying one dollar per month, should be entitled to medical attendance at the hospital free. There was conflict in the evidence as to whether subscribers were entitled to treatment at their homes, where decedent's treatment was received. Plaintiff testified that he never agreed to attend subscribers away from the hospital, which was not denied. Held not to sustain the defense that plaintiff could not recover because the services were rendered under contract with the hospital.

—Corbus v. Leonhardt, 114 Fed. 10, 51 C. C. A. 636.

A receipt given decedent by a physician recited: "To attending Mrs. D. [decedent's wife] and baby, \$25; ferry charges, \$34. Received payment in full to date." In an action by the physi-

cian for services rendered decedent himself, plaintiff admitted that he had been paid for his services in attending the wife and baby. There was direct conflict as to whether at the time of its payment the physician had not stated that it was in full for all charges for treating decedent, as well as his wife and baby. *Held*, that a charge that defendant had introduced in evidence a receipt reciting the payment in full to date, and that the receipt was *prima facie* evidence that all indebtedness was paid, etc., was properly refused.

—Corbus v. Leonhardt, 114 Fed. 10, 51 C. C. A. 636.

When a judgment has been obtained against an estate upon a claim due, the administrator admitting that he has money on hand to pay it, the money was ordered paid into court.

—In re Estate M. O. Gladough.....649

3. Removal.

A petition for the removal of an administrator should be heard as a distinct and separate proceeding from the settlement of his accounts.

—In re Thompkins McIntire Estate.....73

4. No power of appeal.

An administrator, as such, has no power to appeal from an order of the District Court either allowing or rejecting a claim against the estate. Only a party in interest, such as an heir or creditor, may take such appeal. An administrator may appeal in the interest of an heir or creditor, when so authorized.

—In re Estate M. O. Gladough.....649

EXTORTION.

Section 5481, Rev. St. [U. S. Comp. St. 1901, p. 3701], extends to Alaska, see "Alaska."

1. Extortion by customs officer.

Section 12 of the act of March 3, 1825 (4 Stat. 118), defining the crime of extortion under color of office, so far as officers of the customs are concerned, is an act relating to customs, and was therefore extended over Alaska by section 1 of the act of July 27, 1868 (15 Stat. 240).

—United States v. Carr, 3 Sawy. 302, Fed Cases No. 14,730.

FEES.

See "Costs."

Of United States marshal and deputies, see "United States Marshal."

FELLOW SERVANT.

See "Negligence."

Question for the jury, see "Trial."

FINDINGS.

In admiralty, see "Appeal and Error."

FISH.

1. Common right in tidal waters.

The right to take fish in the sea and tidal waters of Alaska is one common to all persons and no exclusive grant will be presumed.

—Sutter v. Heckman.....188

FOREIGN CORPORATIONS.

Service on agent, see "Corporations."

FORFEITURES.

For violation of game laws, see "Admiralty."

For killing fur seal, see "Constitutional Law."

District court has jurisdiction in, see "Courts."

For violation of customs laws, see "Customs."

For illegal sealing, see "Game."

Benefit of doubts against, see "Mines and Minerals."

1. For illegal sealing.

A vessel is not engaged in the violation of section 1956, Rev. St., which provides that "no person shall kill any * * * fur seal * * * within the limits of Alaska territory," etc., unless such vessel is used or employed in the actual killing of

such seal; and a mere preparation or intention on the part of her master or owners so to employ her is not sufficient to constitute the offense, if for any reason no seal are killed.

—The Ocean Spray, 4 Sawy. 105, Fed. Cases No. 10,412.

Where an American vessel on a whaling voyage has taken seal within the dominion of the United States, in Bering Sea, she is subject to forfeiture under Acts Cong. July 27, 1868, and March 2, 1889, and is not exempted by the fact that, after taking the seal, she is boarded by a United States revenue cutter, served with the president's proclamation, and warned to leave the seas, after which she makes no further attempts to take seal.

—The La Ninfa (D. C.) 49 Fed. 575, reversed 75 Fed. 513, 21 C. C. A. 434.

The unauthorized killing of fur seal anywhere within the boundaries described in the treaty of March 30, 1867, between the United States and Russia, is unlawful, and vessels found within said boundaries engaged in that business are subject to seizure and condemnation as forfeited to the United States.

—The James G. Swan (D. C.) 50 Fed. 108.

Where a vessel is seized for violation of Rev. St. § 1956, forbidding the killing of fur-bearing animals within the limits of Alaska territory or the waters thereof, such seizure being made within the entrance of Cook's Inlet, as determined by a line drawn from Cape Douglas to Point Bede, by a United States vessel acting in pursuance of orders from the government, it must be presumed that such orders were given in the assertion of territorial jurisdiction over the waters of the inlet; and, as the right to such jurisdiction is a political question, the courts will not inquire into it, but will assume jurisdiction, as thus determined by the political branch of the government.

—The Kodiak (D. C.) 53 Fed. 126.

Rev. St. § 1956, prohibits the killing of fur-bearing animals within the limits of Alaska territory, "or in the waters thereof," and provides that any vessel "engaged in violating this section" shall be forfeited. *Held*, that a vessel equipped for hunting sea otter and cruising in Alaskan waters for that purpose, is "engaged in the violation" of this section, although the animals

have to be captured by boats sent out, often to considerable distances from the vessel.

—The Alexander (D. C.) 60 Fed. 914, reversed 75 Fed. 519, 21 C. C. A. 441.

By the award of the arbitrators under the treaty between the United States and Great Britain it was settled that the United States have no jurisdiction to forbid the killing of fur-bearing animals in the waters of Bering Sea, more than three miles from the shore. (The La Ninfa, 75 Fed. 513, 21 C. C. A. 434, followed. 60 Fed. 914 [D. C.] reversed.)

—The Alexander, 75 Fed. 519, 21 C. C. A. 441.

A vessel and her tackle, boats, apparel, furniture, cargo, engines, and fixtures are forfeited to the United States for violation of section 1956, Rev. St., for the protection of the fur-bearing animals of Alaska.

—The Challenge.....70

2. Of mining claim.

The court will not declare a mining location void for conflict with a prior location not pleaded.

—Thomson v. Allen.....636

Forfeitures are deemed odious in the law, and the evidence to sustain them must be clear and convincing. Every reasonable doubt will be resolved in favor of the validity of a mining claim, in opposition to a forfeiture.

—Loeser v. Gardiner.....641

3. General rule.

Courts will never resolve a doubt, either of law or fact, in favor of a forfeiture of property. The intention of the law to forfeit the estate must be so clear as to leave no room for doubt. Equity often interferes to relieve against forfeitures, but never to divest estates by enforcing them. A forfeiture will not be declared unless the law so expressly declares.

—Ames v. Kruzner.....598

FRAUD.

By trustee, see "Trustee."

FRAUDULENT CONVEYANCES.

Of real estate, see "Vendor and Purchaser."

FREIGHT.

Wages on sealing voyage not dependent on, see "Shipping."

FUR SEALS.

Unauthorized killing in Bering Sea, see "Forfeitures."

FUTURE ADVANCES.

Mortgage providing for, see "Mortgages."

GAME.

Vessels engaged in illegal sealing, see "Admiralty."

Violation of game laws in Alaska, see "Constitutional Law."

Forfeiture of vessels for illegal sealing, see "Forfeitures."

GRAND JURY.

1. Petit juror not disqualified to serve on.

The provision of Civ. Code Or. § 918, as amended by St. Or. 1882, p. 61, that no person shall be summoned as a juror more than once in one year, applies only to petit jurors, and the fact that several grand jurors on a panel have served as petit jurors within the year past will not disqualify them, nor render the indictment insufficient.

—United States v. Clark (D. C.) 46 Fed. 633.

2. Challenge on account of bias.

The impaneling of a grand jury in Alaska is governed by the statutes of Oregon, extended by act of Congress to that territory; and under such statutes, which provide that no challenge shall be allowed to an individual juror, except for some one of the grounds of disqualification enumerated, it was not error to refuse to discharge a grand juror from the panel on a challenge for actual bias made by an accused, whose

case would come before such jury, but the rights of the accused were sufficiently protected by a direction not to take part in or vote upon that particular case.

—Jackson v. United States, 102 Fed. 473, 42 C. C. A. 452.

3. Drawing in vacation.

The drawing of grand jurors, upon the order of the judge in vacation, instead of in open court, constitutes no ground for quashing an indictment, especially where it is not shown that any prejudice to the defendant resulted therefrom.

—Stockslager v. United States, 116 Fed. 590, 54 C. C. A. 46.

GRUB-STAKE CONTRACT.

See "Mines and Minerals."

GUARDIAN AND WARD.

See "Parent and Child."

HABEAS CORPUS.

Minor not discharged from navy on, see "Army and Navy."

Indian slave released on habeas corpus, see "Indians."

Prisoner held for civil trespass discharged on, see "Indictment and Information."

1. Power of municipal court by.

Where one is in custody by virtue of a judgment of a municipal court created by a town in Alaska, he may be discharged on habeas corpus.

—In re Bruno Munro.....279

2. Jurisdiction to sustain writ.

The writ of habeas corpus cannot be availed of as a writ of error, and unless the writ or orders, for a violation of which petitioner is being punished, are absolutely void, the writ must be denied.

—In re McKenzie, 180 U. S. 536, 21 Sup. Ct. 468, 45 L. Ed. 657.

HIGHWAYS.

Vacation in towns, see "Municipal Corporations."

HOMICIDE.

Trials and practice, see "Criminal Law."

Taking proofs in, see "Evidence."

Objections to indictments, see "Indictment and Information."

1. Laws punishing murder.

The district court of Alaska has jurisdiction, under sections 5339, 5341, Rev. St. [U. S. Comp. St. 1901, pp. 3627, 3628], to try and punish any inhabitant of the district for the crime of murder or manslaughter committed by the killing of any human being therein; but the law of Oregon, defining the crime of murder or manslaughter and prescribing the punishment therefor, is not in force in Alaska.

—Kie v. United States (C. C.) 27 Fed. 351.

2. Erroneous sentence.

The plaintiff in error, being convicted of manslaughter, was sentenced to punishment therefor under the law of Oregon, instead of the act of 1875 (18 Stat. 473 [U. S. Comp. St. 1901, p. 3629]), whereby his imprisonment was authorized for 20 days in excess of the punishment allowed by said act. *Held*, that the judgment was erroneous, and the same was reversed, with direction to have the plaintiff in error sentenced according to law.

—Kie v. United States (C. C.) 27 Fed. 351.

3. Laws of United States take precedence.

The organic act of the district of Alaska (Act Cong. May 17, 1884, 23 Stat. 24) declares the general laws of the state of Oregon in force at that date to be the law of the district so far as the same may be applicable and not in conflict with the provisions of that act or the laws of the United States, and, in another section, that the laws of the United States, not locally inapplicable and not inconsistent with the provisions of that act, are thereby extended thereto. *Held*, that the laws of the United States would take precedence of the laws of Oregon relating to the same subjects, and the crime of murder committed in such district would be punished in accordance with

Rev. St. § 5339 [U. S. Comp. St. 1901, p. 3627], and not with Cr. Code Or. § 506.

—United States v. Clark (D. C.) 46 Fed. 633.

4. Procedure in homicide cases.

Rev. St. § 5339 [U. S. Comp. St. 1901, p. 3627], providing for the punishment of the crime of murder, having made no provision as to the form of procedure, resort must be had, in testing the sufficiency of an indictment for a murder committed in Alaska, to the laws of Oregon in force May 17, 1884.

—United States v. Clark (D. C.) 46 Fed. 633.

5. Evidence of joint action.

Where there was some evidence tending to show a joint action on the part of three defendants, any fact having a tendency to connect them with the murder was competent upon the trial of either; and it is proper to lay before the jury the acts and conduct of all the defendants, from the time the homicide was contemplated to the time the transaction was closed.

—Fitzpatrick v. United States, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078.

5½. Accomplices.

A person does not become an accomplice by not disclosing the fact that a homicide has been committed until some time afterward.

—Bird v. United States, 23 Sup. Ct. 42.

6. Conviction for capital offense.

As section 5339, Rev. St. [U. S. Comp. St. 1901, p. 3627], inflicts the penalty of death for murder, the power given the jury by Act Jan. 15, 1897, 29 Stat. 487, c. 29 [U. S. Comp. St. 1901, p. 3620], to qualify the verdict by adding the words "without capital punishment," does not make the crime of murder anything less than a capital offense, or a conviction for murder anything less than a conviction for a capital crime, by reason of the fact that the punishment actually imposed is imprisonment for life. The test is, not the punishment which is imposed, but that which may be imposed, under the statute. (See, also, section 4, c. 2, Pen. Code Alaska.)

—Fitzpatrick v. United States, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078.

7. Attempt to commit murder.

There is no punishment provided for an assault with a dangerous weapon, committed within the exclusive jurisdiction of the United States, if committed on land, even though it should involve an attempt to commit murder.

—United States v. Williams (C. C.) 2 Fed. 61.

INDIAN COUNTRY.

Alaska is not "Indian country," see "Alaska."

1. What is "Indian country."

The "Indian country," within the meaning of the act declaring it a crime to introduce spirituous liquors therein, is only that portion of the United States which has been declared to be such by act of Congress; and a country that is owned or inhabited by Indians in whole or in part is not, therefore, a part of the "Indian country."

—United States v. Seveloff, 2 Sawy. 311, Fed. Cases No. 16,252.

The act of June 30, 1834 (4 Stat. 729), defining the limits of the "Indian country," and regulating the trade and intercourse with the Indian tribes therein, is a local act, and was therefore not extended proprio vigore over the territory of Alaska upon its cession to the United States. (Cited in Waters v. Campbell, Fed. Cases No. 17,264; U. S. v. Williams [C. C.] 2 Fed. 62; U. S. v. Bridleman [D. C.] 7 Fed. 896; Kie v. U. S. [C. C.] 27 Fed. 352.)

—United States v. Seveloff, 2 Sawy. 311, Fed. Cases No. 16,252..

Upon the extension of sections 20 and 21 of the Indian intercourse act of 1834 (4 Stat. 732) over the territory of Alaska, by force of Act March 3, 1873 (17 Stat. 530), said territory became, so far as the introduction and distribution of spirituous liquors therein is concerned, what is known in the law as "Indian country." and therefore the military force of the United States may be employed therein for the arrest of persons who violate either of said sections. (Cited in Waters v. Campbell, Fed.

Cases No. 17,264; Kie v. U. S. [C. C.] 27 Fed. 352. See U. S. v. Stephiens [C. C.] 12 Fed. 52.)

—In re Carr, 3 Sawy. 316, Fed. Cases No. 2,432.

Alaska is not "Indian country," in the technical sense of that phrase, only so far as the introduction and disposition of spirituous liquors is concerned, and, subject to this restraint, it is open to occupation and trade generally. (Cited in U. S. v. Williams [C. C.] 2 Fed. 62; Kie v. U. S. [C. C.] 27 Fed. 352.)

—Waters v. Campbell, 4 Sawy. 121, Fed. Cases No. 17,264.

INDIANS.

Naturalization, see "Indians."

Status of, in Alaska, see "Alaska."

Witness of low order of intelligence, see "Evidence."

Prohibiting sale of liquor to, see "Intoxicating Liquors."

Guardianship of Indian children, see "Parent and Child."

Protection to lands, see "Public Lands."

Slavery among, see "Slaves."

1. Slaves released on habeas corpus.

A custom or rite prevailing among the uncivilized tribes of Indians in Alaska, whereby slaves are bought, sold, and held in servitude, against their free will, and subjected to ill-treatment at the pleasure of the owner, is contrary to the thirteenth amendment to the Constitution of the United States and the civil rights bill of 1866, and a person so held in slavery will be released by order of the court upon writ of habeas corpus.

—In re Sah Quah (D. C.) 31 Fed. 327.

2. Alaska Indians not free and independent tribes.

No treaty having ever been made with the Alaska Indians, or tribal independence recognized, they are not to be regarded as within the operation of the custom and policy of the government arising out of the ordinance of 1787, relating to the Northwest Territory, whereby the Indian tribes of the United States have been treated as free and independent within their respective

territories, governed by their tribal laws and customs in all matters pertaining to their internal affairs.

—*In re Sah Quah* (D. C.) 31 Fed. 327.

3. Indians subject to criminal laws.

The Alaska Indians, while not citizens within the full meaning of the term, are dependent subjects, amenable to the penal laws of the United States, and subject to the jurisdiction of its courts. The act of Congress of March 3, 1885, making all Indians amenable to the criminal laws of the United States for the offenses therein designated, is to be regarded as aiding this construction of the law, and the act of March 3, 1871, prohibiting future recognition of tribal independence among the Indians, is to be construed in the same connection.

—*In re Sah Quah* (D. C.) 31 Fed. 327.

4. Construction of Indian treaty.

The treaty between the United States and the Makah tribe of Indians gave no rights or privileges to the Indians peculiar from or superior to those of the citizens of the country in general.

—*The James G. Swan* (D. C.) 50 Fed. 108.

INDICTMENT AND INFORMATION.

Corporation may be indicted, see "Corporation."

Quashing indictment discretionary, see "Criminal Law."

Laws in Oregon in procedure, see "Homicide."

Surplusage in, see "Intoxicating Liquors."

1. Misdemeanor may be prosecuted by information.

Misdemeanors may be prosecuted in the national courts by information. (Cited in *U. S. v. Ebert*, Fed. Cases No. 15,019; *U. S. v. Maxwell*, Fed. Cases No. 15,750; *U. S. v. Block*, Fed. Cases No. 14,609; *U. S. v. Reilley* [C. C.] 20 Fed. 46; *Ex parte Wilson*, 114 U. S. 425, 5 Sup. Ct. 939, 29 L. Ed. 89. Followed in *U. S. v. Ronzone*, Fed. Cases No. 16,192.)

—*United States v. Waller*, 1 Sawy. 701, Fed. Cases No. 16,634.

Misdemeanors for which no infamous punishment is provided by law may be prosecuted in Alaska upon information; felonies only upon indictment.

—*United States v. Powers and Robertson*.....180

2. Exceptions need not be negatived.

It is not necessary for an indictment for the violation of section 14 of the act of May 17, 1884, by the sale of intoxicating liquor in the district of Alaska, to allege that such sale was not made for mechanical, medicinal, or scientific purposes; but the same must be shown, if at all, as a defense.

—Nelson v. United States (C. C.) 30 Fed. 112.

In an indictment for a statutory offense, it is only necessary to negative an exception in the statute when that exception is such as to render the negative of it an essential part of the definition of the offense.

—Shelp v. United States, 81 Fed. 694, 26 C. C. A. 570.

In an indictment for selling liquor to Alaskan Indians, contrary to the act forbidding the "importation, manufacture, and sale of intoxicating liquors" in Alaska, "except for medicinal, mechanical, and scientific purposes" (23 Stat. 28, § 14), it is not necessary to negative the exception mentioned in the statute.

—Shelp v. United States, 81 Fed. 694, 26 C. C. A. 570.

Under the Oregon Criminal Code, in force in Alaska, which dispenses with technicalities in pleading, an indictment charging that defendant, on or about a certain date, and at other times before, did sell "to John Doe and Richard Roe, and to divers others persons," whose real names are unknown, "an intoxicating liquor called 'whisky,' to wit, one glass, pint, quart, gallon of said liquor (the real quantity is to the grand jurors unknown)," etc., is not bad as charging more than one offense.

—Endleman v. United States, 86 Fed. 456, 30 C. C. A. 186.

When the enacting clause of a statute describes the offense with certain exceptions, it is necessary to state in the indictment all the circumstances and to negative the exceptions; but, if the exceptions are contained in separate clauses of the statute, they may be omitted in the indictment, and the accused must show that his case comes within them, to avail himself of their benefit.

—United States v. Nelson (D. C.) 29 Fed. 202.

As a rule, an exception in a statute by which certain particulars are withdrawn from the operation of its enacting clause,

defining a crime concerning a class or species, constitutes no part of the definition of such crime, whether placed near to or remote from such enacting clause, and an indictment charging a person with a violation of such statute need not negative such exception.

—United States v. Nelson (D. C.) 29 Fed. 202.

3. Requisites and sufficiency of indictment.

The form of statement for an indictment for murder, contained in the appendix of the Oregon Code, is not exclusive, and an indictment may be drawn in other apt words in conformity with the general requirements of section 1268 of Hill's Ann. Laws of Oregon. (See sections 38 and 40 of the Alaska Penal Code for similar provisions.)

—Fitzpatrick v. United States, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078.

An indictment which charges that the accused "did unlawfully, willfully, knowingly, feloniously, purposely, and of deliberate and premeditated malice, make an assault upon one Samuel Roberts," and a certain revolver "then and there feloniously, purposely, and of deliberate and premeditated malice did discharge and shoot of, to, against, and upon the said Samuel Roberts," and one of the bullets aforesaid discharged as aforesaid, "feloniously, purposely, and of deliberate and premeditated malice, did strike, penetrate, and wound him, the said Samuel Roberts, in and upon the right breast, * * * one mortal wound, of which he, the said Samuel Roberts, instantly died," and, further, that the defendant "did then and there kill and murder the said Samuel Roberts in the manner and form aforesaid, contrary," etc., held sufficient.

—Fitzpatrick v. United States, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078.

Under the Criminal Code of Alaska, which provides that no indictment shall be insufficient by reason of a defect or imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant, an indictment for uttering a forged check is not insufficient because the words "with intent to injure and defraud" are separated from those charging the uttering and publishing by the copy of the instrument which

is set out, instead of being used in immediate connection therewith.

—Stockslager v. United States, 116 F. 590, 54 C. C. A. 46.

Under a statute making an intent to "injure and defraud" an essential element of the crime of uttering a forged instrument, an indictment charging an intent to "injure and defraud" is sufficient.

—Stockslager v. United States, 116 Fed. 590, 54 C. C. A. 46.

The entitling of an indictment returned in the district court for the district of Alaska, "In the District Court of the United States for the District of Alaska," although inaccurate, is merely a clerical or technical error, which does not vitiate such indictment, either upon general principles or under the statute of Oregon in force in the territory.

—Jackson v. United States, 102 Fed. 473, 42 C. C. A. 452.

The conclusion of an indictment returned in the district court for the district of Alaska, "against the peace and dignity of the United States," is proper; the only laws in force in the territory, and which an accused can be charged with violating, being those provided by the Congress of the United States.

—Jackson v. United States, 102 Fed. 473, 42 C. C. A. 452.

The designation of the grand jurors in an indictment found in the district court for the district of Alaska as "the grand jurors of the United States of America, selected, impaneled, sworn, and charged within and for the district of Alaska," is not a substantial error which vitiates the indictment; and under the Code of Oregon (Hill's Ann. Laws, § 1280), also, such defect must be disregarded, as not tending to the prejudice of the substantial rights of the defendant upon the merits.

—Jackson v. United States, 102 Fed. 473, 42 C. C. A. 452.

Under Hill's Ann. Laws, § 1744 (Cr. Code Or. § 536), making it an offense "if any person, being armed with a dangerous weapon, shall assault another with such weapon," and the provision of section 1279 that an indictment is sufficient if the act charged

is clearly set forth in ordinary and concise language, in such manner as to enable a person of common understanding to know what is intended, an indictment charging an assault with a dangerous weapon, substantially in the language of the statute, and which specifies that such weapon was a revolver charged with gunpowder and leaden bullets, is sufficient; and it need not aver that at the time of the assault the defendant was within striking distance of the person assaulted, or within the distance that the revolver would carry.

—Jackson v. United States, 102 Fed. 473, 42 C. C. A. 452.

In an indictment for the violation of section 14 aforesaid, the name of the purchaser, if known, ought to be alleged as a convenient means of identifying the transaction; but the omission to do so is not sufficient cause for the reversal of the judgment on error.

—Nelson v. United States (C. C.) 30 Fed. 112.

An indictment must charge that the act was unlawfully done, with wrongful intent.

—United States v. Alaska Packers' Association.....217

4. Variance between indictment and proof.

There is no substantial variance between an indictment for robbery which describes the property taken as "pieces of paper money of the Dominion of Canada" of stated denominations and value, and evidence showing that the bills taken were issued either by the Dominion of Canada or by banks chartered by the Canadian government, circulating as money in the Dominion.

—Allen v. United States, 115 Fed. 3, 52 C. C. A. 597.

5. Names of witnesses on indictment.

On an indictment for selling intoxicating liquors in Alaska, the accused has the right to have indorsed on the indictment only the names of the witnesses examined before the grand jury; this being the provision of the Oregon statute made applicable by the act of Congress. Rev. St. § 1033 [U. S. Comp. St. 1901, p. 722] requiring a list of all the witnesses to be furnished before the trial, applies only to trials for capital crimes.

—Shelp v. United States, 81 Fed. 694, 26 C. C. A. 570.

6. Accused committed on mere trespass discharged on habeas corpus.

Person committed on information will not be released on habeas corpus for mere irregularity in the proceedings. The information, however, must show upon its face that the acts charged constitute a crime, and are not merely a trespass. *Held*, that an information charging that the prisoner did, "on the 17th day of August, 1888, take and appropriate for his own benefit gold dust belonging to Henry Coon & Co., the said gold dust so appropriated by the said Norman Dubuque being more than one hundred dollars in value," does not charge a crime under the laws of Oregon, but only a trespass.

—*Ex parte Dubuque* 16

INFANT.

May make binding contract of enlistment, see "Army and Navy."

INJUNCTION.

Will not issue when a remedy at law exists, see "Equity."

Tenant in common may have against another, see "Mines and Minerals."

Will issue to protect tide-land occupant, see "Public Lands."

1. Will not lie at suit of stockholder.

An injunction by one stockholder against the corporation to restrain the latter from applying for a license and paying the tax or fee imposed by law for conducting a business upon which Congress has imposed such tax will not lie.

—*Corbus v. Alaska Treadwell Co.* (8 cases; D. C.) 99 Fed. 334.

2. Will lie to prevent damage by trespass.

One who, within the District of Alaska, trespasses upon the tide lands not subject to location under the mineral laws of the United States, may be enjoined from sinking shafts thereon, and causing an increased flow of water into, and threatening the complete flooding and irreparable injury to, lower levels excavated by an adjoining mine owner underneath the same tide lands in following his vein or lode beyond his boundary line.

—*The Alaska Gold Min. Co. v. Barbridge* 311

3. Jurisdiction must first be shown.

A temporary injunction or restraining order will not be granted until it affirmatively appears that the court has jurisdiction.

—Ames v. Kruzner.....596

4. Injunction will not justify ejectment of possessor.

Alaska Civil Government Act, § 386 (31 Stat. 397), providing that when it appears by affidavit that the defendant is doing, or about to do, or procuring or suffering to be done, some act in violation of the plaintiff's rights concerning the subject of the action, and tending to render the judgment ineffectual, the court may enjoin the defendant from doing such particular act, did not confer on the court the power, in an action to recover a mining claim, in addition to enjoining the defendants from mining the claim pending the order of the court, to command them to surrender and deliver possession to the plaintiffs, and remove their personal property from the premises.

—Lane v. Jordan, 116 Fed. 623, 54 C. C. A. 79.

INSTRUCTIONS.

Review, see "Appeal and Error."

In criminal cases, see "Criminal Law."

Already covered properly refused, see "Trial."

General exception to, not sufficient, see "Trial."

INTENT.

Abandonment a question of, see "Abandonment."

INTERNAL REVENUE LICENSE.

See "Intoxicating Liquors."

INTERVENTION.

Municipal corporation may intervene in adverse suit, see "Mines and Minerals."

Must connect with original cause of action, see "Pleadings."

INTOXICATING LIQUORS.

Congress may prohibit importation into Alaska, see "Alaska."
Congress may regulate or prohibit sale of, see "Constitutional Law."
Defense for illegal sale of, see "Criminal Law."
Evidence necessary to convict, see "Criminal Law."
Sale in Alaska prohibited, see "Indian Country."
Sufficiency of indictment for illegal sale, see "Indictment and Information."
Name of purchaser in indictment, see "Indictment and Information."
Exception not stated in indictment, see "Indictment and Information."
Moving saloon without leave of court, see "Licenses."

1. Importation into Alaska prohibited.

Congress had power to authorize the President to regulate or prohibit the introduction of distilled spirits into the district of Alaska, under penalties, as prescribed by Act July 27, 1868, 15 Stat. 241. (Cited in U. S. v. Nelson [D. C.] 29 Fed. 207.)

—The Louisa Simpson, 2 Sawy. 57, Fed. Cases No. 8,533.

Distilled spirits are imported into the district of Alaska, when brought from an American port, outside of said district, into the waters within the headlands of Point Hope and Cape Prince of Wales, and there unloden or disposed of, or with the intent to so unloden and dispose of them. (Cited in The Kodiak [D. C.] 53 Fed. 129.)

—The Louisa Simpson, 2 Sawy. 57, Fed. Cases No. 8,533.

By the act of March 3, 1873 (17 Stat. 530), the introduction of spirituous liquors and wine into Alaska is absolutely prohibited, subject to the power of the War Department to permit such introduction for the use of the army therein, and semble, that section 2 of the Alaska act of June 27, 1868 (15 Stat. 240; section 1954, Rev. St.), which gave the President "power to restrict and regulate or to prohibit the importation and use of * * * distilled spirits" into Alaska, is still so far in force, notwithstanding

ing the passage of said act of March 3, 1873, as to authorize him to permit the introduction of said spirits, but not wine, as a regulation of the subject.

—United States v. Stephens (C. C.) 12 Fed. 52.

By section 20 of the act of June 30, 1834 (4 Stat. 729), extended over Alaska by the act of March 3, 1873, supra, it was made a crime to attempt to introduce wine or spirituous liquors into Alaska. *Held*, that a person resident in Alaska who ordered 100 gallons of whisky to be shipped to him at Alaska, by a wholesale dealer in San Francisco, who had the whisky on hand and for sale, with intent to introduce the same into Alaska, was not guilty of such attempt, because he had done no act to accomplish his illegal intent of which the law will take cognizance; the offer to purchase the liquor, and even the purchase itself, being acts preparatory and indifferent in their character.

—United States v. Stephens (C. C.) 12 Fed. 52.

Semblé, that a criminal attempt to introduce liquor into Alaska cannot be committed unless the act done in pursuance of the illegal attempt is performed after the liquor is brought so near some point or place of the "mainland, islands, or waters" of the district as to render it convenient to introduce it from there, or to make it manifest that such was the present purpose of the parties concerned.

—United States v. Stephens (C. C.) 12 Fed. 52.

Under Organic Act Alaska (Act May 17, 1884) § 14, prohibiting the importation of intoxicating liquors, except for certain purposes, under penalty of forfeiture, as provided by Rev. St. § 1955, on petition by the collector of customs, alleging that a person has secreted about his premises intoxicating liquor unlawfully imported from other parts of the United States, a warrant to search for and seize such liquor will be issued.

—In re Moore, Collector of Customs (D. C.) 66 Fed. 947.

Rev. St. c. 3, § 1955, provides for the forfeiture of liquor unlawfully imported into Alaska; section 1957 provides that violations of the provisions of that chapter shall be prosecuted in the courts of California, Oregon, or Washington, until otherwise provided by law, and authorizes the collector for Alaska

territory to seize vessels and merchandise liable to forfeitures or fines. Organic Act (Act May 17, 1884) § 3, establishes a district court for Alaska. *Held*, that the collector of customs was authorized to execute a warrant issued by such court to search for and seize intoxicating liquor unlawfully imported.

—*In re Moore, Collector of Customs* (D. C.) 66 Fed. 947.

2. Sales of may be prohibited.

Congress has power to enact that intoxicating liquors shall not be manufactured or sold as a beverage in Alaska, and to authorize the President of the United States to make such regulations as may be necessary to carry out the provisions of the law.

—*United States v. Nelson* (D. C.) 29 Fed. 202.

Section 14 of the organic act of Alaska (Act May 17, 1884), prohibiting the importation, manufacture, and sale of intoxicating liquors, and continuing in force the provisions of Rev. St. § 1955, in regard thereto, covers the whole subject, and hence repeals by implication all prior laws. These provisions, therefore, together with the regulations made in pursuance thereof by the President, constitute the existing law of Alaska on the subject. (*Nelson v. United States* [C. C.] 30 Fed. 112, 12 Sawy. 285, followed.)

—*United States v. Warwick* (D. C.) 51 Fed. 280.

Under these provisions, an indictment charging that defendant, on a stated day, did unlawfully and willfully sell a quantity of intoxicating liquor to two Indian women, states a punishable offense; and, as it is immaterial under the law whether the sale is to Indians or white persons, the allegation as to the Indian women may be regarded as descriptive, or as mere surplusage.

—*United States v. Warwick* (D. C.) 51 Fed. 280.

Section 14, Act Cong. May 17, 1884 (22 Stat. 24; Supp. Rev. St. p. 435), prohibits the importation, manufacture, or sale of intoxicating liquors in Alaska, except for medicinal, mechanical, and scientific purposes.

—*United States v. Ash* (D. C.) 75 Fed. 651.

A sale, within the meaning of this statute, has the usual definition; i. e., the transfer of any piece of property or thing

of value from one person to another person for current money of the United States.

—United States v. Ash (D. C.) 75 Fed. 651.

This court will assume judicial knowledge that the liquor commonly known as "whisky" is an intoxicating liquor, and that the drink commonly called a "whisky cocktail" is an intoxicating drink.

—United States v. Ash (D. C.) 75 Fed. 651.

The payment by the defendant of the tax imposed by the internal revenue laws of the United States, and the issuing to him of an internal revenue license thereunder by the treasury department, is no defense to this indictment.

—United States v. Ash (D. C.) 75 Fed. 651.

3. Arrest for illegal sales by military authorities.

Section 23 of the Indian intercourse act, which authorizes the President to employ the military force of the United States to make arrests in the Indian country, was in force in Alaska, so far as the introduction and disposition of spirituous liquors therein is concerned, from and after the extension of said sections 20 and 21 of said act over said territory.

—In re Carr, 3 Sawy. 316, Fed. Cases No. 2,432.

No person arrested by the military authority in the Indian country for the introduction or disposition of spirituous liquors therein, contrary to law, can be lawfully detained by such authorities more than five days after such arrest before removing him for delivery to the civil authorities for trial. (See Waters v. Campbell, Fed. Cases No. 17,265.)

—In re Carr, 3 Sawy. 316, Fed. Cases No. 2,432.

A person arrested by military force for the violation of section 20 or 21 of the Indian intercourse act of June 30, 1834 (4 Stat. 732), is not a military prisoner subject to the articles of war, but a citizen charged with a nonmilitary crime, and must be removed for trial by the civil authorities within five days from his arrest or discharge, and his detention thereafter under any circumstances is unlawful.

—Waters v. Campbell, 5 Sawy. 17, Fed. Cases No. 17,265.

A person under arrest as above stated may be confined in the military prison, but he cannot be lawfully required to labor or perform any duty other than taking care of his person.

—Waters v. Campbell, 5 Sawy. 17, Fed. Cases No. 17,265.

4. Indian intercourse act extended over Alaska.

The provision of the general appropriation act of March 3, 1873 (17 Stat. 530), extending sections 20 and 21 of the Indian intercourse act of June 30, 1834 (4 Stat. 729), over Alaska, being local in its character, was not repealed by the repealing clause of section 1954, Rev. St. The proviso in section 1954, Rev. St. should be placed at the end of it, and not in the middle of the second clause of it, as now printed. (Cited in Eyre v. Harmon, 92 Cal. 585, 28 Pac. 780.)

—Waters v. Campbell, 4 Sawy. 121, Fed. Cases No. 17,264.

5. Sale of liquors to Indians.

Section 20 of the act of 1834, *supra*, as amended by act of March 15, 1864 (13 Stat. 29), making the disposing of spirituous liquors to Indians a crime, is in this respect a general act, and *prima facie* applies wherever the subject-matter exists—an Indian under the charge of an agent appointed by the United States; but Alaska being acquired by the United States after the enactment of such amendment, it is doubtful whether it was extended over that territory, *proprio vigore*, upon its acquisition, and the act of July 27, 1868, *supra*, having provided for the subject of the introduction and use of distilled spirits in Alaska, by implication, Congress thereby excluded such amendment therefrom.

—United States v. Seveloff, 2 Sawy. 311, Fed. Cases No. 16,252.

6. Tax on distilled spirits.

The act of July 20, 1868 (15 Stat. 125), imposing a tax on distilled spirits, being a general act, and passed since the acquisition of Alaska, is in force there.

—United States v. Seveloff, 2 Sawy. 311, Fed. Cases No. 16,252.

7. Payment of revenue tax not license to sell liquor.

The payment of the special tax levied by the general government on the business of retailing liquors is no defense to a prosecution for illegally selling liquor in Alaska.

—Endleman v. United States, 86 Fed. 456, 30 C. C. A. 186.

JUDGE.

Disqualification to act, see "Courts."

JUDGMENT.

Notwithstanding verdict, civil remedy, see "Criminal Law."

Against administrator, see "Executors and Administrators."

Upon former evidence after new trial granted, see "New Trial."

Pleading foreign judgment, see "Pleading."

No effect against co-tenant not served, see "Tenancy in Common."

1. Judgment for want of answer, appeal dismissed.

The defendant filed a formal answer in the justice's court, but did not appear or offer any evidence on the day of trial. Upon the testimony of plaintiff, and in the absence of the defendant, the justice rendered judgment for plaintiff. Defendant appealed, and upon a motion to dismiss the appeal in the District Court it was held that defendant's unexplained failure to appear at the trial was an abandonment of his answer, and that judgment was properly rendered against him, and that he had no absolute right of appeal to and trial in the District Court. Appeal dismissed.

—Everton v. Smith..... 422

2. Opening, modifying, or vacating judgment.

It is a general rule that, in the absence of legislative direction, no court has the power to change, modify, alter, or vacate any final judgment upon any proceeding begun after the term in which it was rendered has passed.

—Banks v. Wilson..... 241

Generally a default judgment will be opened when entered after service through neglect of the attorney. The inattention

and neglect of the attorney is the inattention and neglect of the client.

—Daly v. Gardner.....357

A default will not be set aside when the defendant was personally served with summons and an injunction, which he violated, after a year of absence from the jurisdiction, during which time judgment was entered, execution issued, and the property sold to third parties.

—Daly v. Gardner.....357

Judgment by default, entered upon personal service, will not be set aside unless defendant shows clearly that he has been prevented from defending through no fault of his own, and has a good and meritorious defense.

—Marx & Weiss v. Valentine.....28

Motions to vacate defaults in this court are within the provisions of the statutes of Oregon (Hill's Code, pp. 242, 243, § 102), which provide that the court may, in its discretion, "relieve a party from a judgment, order, or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect." *Held*, that the showing made by the defendant herein is not sufficient to warrant the court in vacating the default under this statute.

—Bonnifield v. Thorp (D. C.) 71 Fed. 924.

JURISDICTION.

When appeal not effective, see "Appeal and Error."

Upon consent of parties, see "Courts."

Of district courts in Alaska, see "Courts."

Indictment or information must show, see "Indictment and Information."

Must appear before injunction issues, see "Injunction."

Of justice of the peace, see "Justice of the Peace."

Justice's docket must show, see "Justice of the Peace."

JURY.

See "Grand Jury."

Prejudicial remarks before, by court and counsel, see "Appeal and Error," "Criminal Law."

Jury fees paid by U. S. marshal, see "United States Marshal."

1. Selection and qualification of jurors.

Jurors to serve in the district court of Alaska must be selected in the manner provided in section 2 of the act of June 30, 1879 (21 Stat. 43), and have the qualifications prescribed by the laws of Oregon.

—Kie v. United States (C. C.) 27 Fed. 351.

It appeared from the record that when the case was called for trial a jury came, who were duly impaneled and sworn. *Held* that, in the absence of anything to the contrary, the presumption is that the jury were selected and drawn according to law.

—Kie v. United States (C. C.) 27 Fed. 351.

2. Challenge to juror in criminal cases.

Under Act March 3, 1899 (providing a Code of Criminal Procedure for Alaska), § 129, providing that all challenges to jurors shall be taken first by the defendant and then by the plaintiff, and the defendant shall exhaust his challenges to a particular juror before the plaintiff begins, all challenges shall be taken to each juror as he is drawn and appears and before another juror is drawn, unless the court, for good cause shown, shall permit a challenge to be taken afterwards, and before the number of the jury is complete, and section 130, defining the order in which challenges shall be made, but providing that either party may take peremptory challenges at any time before his right of challenge ceases, the right of challenge to each juror ceases when such juror is accepted, and defendant cannot return to and challenge peremptorily without cause a juror who has been passed and accepted.

—Hawkins v. United States, 116 Fed. 569, 53 C. C. A. 663.

The mere fact that a defendant under indictment prefers to exercise the right to use his last peremptory challenge against a juror who has been passed and accepted, instead of against the last juror called, who is still subject to challenge, is not sufficient cause to entitle him to make such challenge.

—Hawkins v. United States, 116 Fed. 569, 53 C. C. A. 663.

After the jury is completed and sworn, and the district attorney has made his opening statement, a request to challenge a juror peremptorily, made by defendant on the ground that he has just learned that such juror had expressed an opinion as to the guilt or innocence of defendant, unfavorable to him, comes too late.

—Hawkins v. United States, 116 Fed. 569, 53 C. C. A. 663.

Where, after defendant's challenge of jurors for actual bias was denied, he challenged them peremptorily, and when the jury was completed he had not exhausted his peremptory challenges, the error, if any, in denying the challenges for cause, was not prejudicial.

—Hawkins v. United States, 116 Fed. 569, 53 C. C. A. 663.

Where, on a trial under an indictment, defendant's challenge of a juror for actual bias was erroneously denied, he may rely on such error, though he had not exhausted his peremptory challenges, since he cannot be required to use such challenges against jurors who are shown on examination to be disqualified.

—Hawkins v. United States, 116 Fed. 569, 53 C. C. A. 663.

Where defendant was indicted with two others for robbery, and one had been tried and convicted, the fact that a juror had read all the published account of such trial, and heard the matter discussed by persons who listened to the trial, and formed a fixed opinion as to the guilt or innocence of the defendant, but had no such opinion at that time, and, if selected as a juror, would try the case impartially, from the law and evidence produced on the trial, did not render denial of the challenge error; defendant having two peremptory challenges remaining.

—Hawkins v. United States, 116 Fed. 569, 53 C. C. A. 663.

There is no impropriety in permitting the government to search the mind of a juror, to ascertain if his views on circumstantial evidence were such as to preclude him from finding a

verdict of guilty, with the extrekest penalty which the law allows.

—Hardy v. United States, 186 U. S. 224, 22 Sup. Ct. 889, 46 L. Ed. 1137.

On a trial under an indictment, it is not error for the court to require the defendant to exhaust all grounds of challenge to each juror, both for cause and peremptory, as he is called, before the prosecution is called upon to challenge, and before another juror is called into the box.

—Dolan v. United States, 116 Fed. 578, 54 C. C. A. 34.

Defendant and two others are jointly indicted for robbery. At separate trials each of the others was convicted before defendant was tried. He challenged four jurors for bias, each of whom testified that he had read the published testimony given at the trials of the other two, or heard the testimony, and had heard it talked about, and formed an opinion as to the guilt of the others and of defendant, and that it would require evidence to remove such opinion, but that he could decide the case impartially on the evidence produced at the trial, uninfluenced by such former opinion. Cr. Code Alaska, tit. 2, § 127 (30 Stat. 1298), provides that on the trial of a challenge for actual bias, although it should appear that the juror has formed an opinion on the merits of the cause from which he has heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied from all the circumstances that the juror cannot disregard such opinion and try the case impartially. *Held*, that it does not appear that the court failed to exercise a proper legal discretion in overruling the challenges.

—Dolan v. United States, 116 Fed. 578, 54 C. C. A. 34.

JUSTICE OF THE PEACE.

Requisites of notice of appeal from, see "Appeal and Error."

Certiorari from, see "Appeal and Error."

Jurisdiction on note payable in Victoria, B. C., see "Attachment."

Jurisdictional amount on appeal, see "Courts."

Appeal from default judgment before, see "Judgment."

1. Jurisdiction in civil cases.

Under the organic act of May 17, 1884 (23 Stat. 24, c. 53), a commissioner in Alaska, sitting as a justice of the peace, is limited in his civil jurisdiction to controversies where the amount involved does not exceed \$250.

—Myers v. Swineford.....10

2. Record must show jurisdiction.

A justice's record must show jurisdiction. Where he enters judgment after an unexplained continuance for more than a year, it was without jurisdiction and void.

—Hackleman v. Geise.....568

3. Justice liable for judicial act outside of jurisdiction.

A justice of the peace is an inferior judicial officer, and for any judicial act performed by him outside of his jurisdiction he may be sued in a civil action.

—Mitchell v. Galen.....339

Where a justice of the peace acts in collusion with other persons, and issues a warrant for the arrest of a mine owner for an alleged trespass or crime upon his own property, in order that he may be removed therefrom, so that these other persons, acting with the justice, may get into possession, and thereby secure his mine, he may be sued civilly for such act.

—Mitchell v. Galen.....339

LACHES.

Prohibition may be lost by, see "Prohibition."

LAND DEPARTMENT.

Power to determine character of public land, see "Mines and Minerals."

LANDLORD AND TENANT.

Purchaser estopped to deny title, see "Public Land."

LAW, REMEDY AT.

Remedy at law bars equity, see "Action."

LEVY OF EXECUTION.

Sale after return day without new process, see "Execution."

LICENSES.

For trade and business in Alaska, see "Constitutional Law."

Defense must produce, see "Criminal Law."

1. License law constitutional.

Congress may provide by legislation for a system of licenses for the support of local government in territories. The act in question is one for the support of local government.

—*In re C. E. Wynn-Johnson*.....630

The act of June 6, 1900 (31 Stat. 321, c. 786), imposing a license upon transfer companies and other trades and businesses carried on in Alaska, is valid, being within the plenary legislative power possessed by Congress over the territories.

—*United States v. Binns*.....553

2. License for trade and business.

There is no law of the United States requiring persons to be licensed to trade in Alaska even with the Indians.

—*Waters v. Campbell*, 4 Sawy. 121, Fed. Cases No. 17,264.

Under the Alaska Code, a liquor license issues for a particular building, and the liquor seller is without authority or license to sell in any other place or building, unless the transfer is first authorized by the court.

—*United States v. Powers and Robertson*.....180

Within the meaning of the license laws of Alaska, a corporation engaged in the wholesale cold storage and sale of all kinds of meats for the public generally, as well as for its own meat markets, is a mercantile establishment, and not a meat market, and must pay license accordingly.

—*In re Pacific Cold Storage Company*.....429

3. Refund of license money.

The court will not order a refund of license money paid under section 460 as amended in section 29 of the Political Code of

Alaska of June 6, 1900 (31 Stat. 330, c. 786), a year or more after its payment, and after it has been carried into the public accounts and expended for the necessary expenses of the court, or covered into the treasury. Petitioner's remedy, if he has any, is by an application to Congress for relief.

—In re Hill's Bottling License.....436

4. Protest against payment of license.

A mere protest against the payment of a license tax on the ground that the law seeking to impose the same is unconstitutional will not give the court jurisdiction to try and determine the constitutionality of the law.

—Corbus v. Alaska Treadwell Co. (8 cases; D. C.) 99 Fed. 334.

LIEN.

Equitable, for building used, see "Property."

LIMITATION OF ACTIONS.

1. Does not run against government.

It has long been the settled doctrine that a statute of limitations does not run against the government, and that no prescriptive right or title can be acquired to public lands.

—Lewis v. Johnson.....529

2. Begins to run in mining claim from location.

The 10-year statute of limitations begins to run in favor of one in adverse possession of a part of a mining claim from the time of the location, and not from the date of the patent. The proviso at the end of section 4 of the Code of Civil Procedure (Act June 6, 1900, c. 786, 31 Stat. 334) held to have no meaning or effect in Alaska.

—The Tyee Consol. Min. Co. v. Langstedt.....439

3. Action of ejectment under Oregon Code.

The action of ejectment under the Oregon Code is not barred by the three-year statute of limitations provided in bar of forcible entry and detainer.

—Malony v. Adsit, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163.

4. When statute begins to run in Alaska.

Where a cause of action accrued in the state of Oregon, of which state the defendant was a resident, more than six years prior to the time at which action is brought, and the defendant removed to the District of Alaska admittedly less than six years prior to the time the action was brought, *held*, that the statute begins to run, not from the date the cause of action accrued in Oregon, but from the date of the removal of defendant to Alaska.

—Van Schuyver v. Hartman.....431

Statutes of limitations, so called, affect the remedy, but not the right of action. Necessarily, therefore, the lex fori must control in all matters of procedure.

—Van Schuyver v. Hartman.....431

The statute of limitations of this jurisdiction cannot begin to run until there is found some one within the jurisdiction of the forum capable of being sued.

—Van Schuyver v. Hartman.....431

LOCATION.

Of mining claim in excess of legal area, see "Mines and Minerals."

MANDAMUS.

United States Commissioner may be compelled to act by, see "Courts."

MARITIME LIENS.

See "Admiralty"; "Seaman"; "Shipping."

What class of labor authorizes, see "Admiralty."

MILEAGE.

When allowed as costs, see "Costs."

When deputy marshal allowed, see "United States Marshal."

MILITARY.

Enforcement of liquor law by, see "Intoxicating Liquors."

MINES AND MINERALS.

Action to recover mines, see "Actions."
Appointment of receiver for, see "Appeal and Error."
Estoppel on sale of mine, see "Estoppel."
Imperfect location notice as evidence, see "Evidence."
Trespassers on may be enjoined, see "Injunction."
Statute of limitations runs from location, see "Limitation of Actions."
Negligence in working mines, see "Negligence."
Claim on United States reservation, see "Reservation."
Joint owners in are co-tenants, see "Tenancy in Common."
Contract of sale, failure in, see "Vendor and Purchaser."

1. Mineral laws of the United States in Alaska.

Act Cong. May 17, 1884, providing a civil government for Alaska (23 Stat. 24; Supp. Rev. St. p. 433), extends the mineral laws of the United States to said territory.

—Meydenbauer v. Stevens (D. C.) 78 Fed. 787.

2. Tide lands not subject to location.

Lands lying below ordinary high tide on the shore of the ocean and arms of the sea in the District of Alaska are not subject to location under the mining laws of the United States.

—Alaska Gold Min. Co. v. Barbridge.....311

3. Order of acts in locating.

It is immaterial in what order the acts necessary to constitute a valid placer mining claim are performed, as that the marking of the boundaries preceded the discovery. If all the necessary acts are done prior to an attempted location by another locator, it is sufficient, and the claim is valid.

—Heenan v. Griffith.....264

4. Discovery of mineral.

When the employés and agents of a future locator entered upon a placer claim which had previously been located, but was then not in the actual possession of the locator or any one else, and peaceably and without objection explored the same for gold, and discovered a valuable pay streak thereon, and thereafter and on January 1st, after the prior location had lapsed on De-

ember 31st for failure to work the claim, the said employés and their employer went upon the ground, and the employer, having knowledge of all the facts, then located the claim, set the stakes and otherwise complied with the law in time, *held*, that the prior discoveries of gold by his employés were a sufficient discovery on which to base his location.

—Russell v. Dufresne.....486

Under the federal statute, a lode claim cannot exceed 1,500 feet in length by 600 feet in width, and should be in the form of a parallelogram, having its side lines equidistant from the center of the lode, with end lines parallel to each other.

—Meydenbauer v. Stevens (D. C.) 78 Fed. 787.

A lode is a zone, belt, or body of quartz, or other rock, lodged in the earth's crust, and presenting two essential and inherent characteristics, viz.: (1) It must be held "in place" within or by the adjoining country rock; and (2) it must be impregnated with some of the minerals or valuable deposits mentioned in the statute.

—Meydenbauer v. Stevens (D. C.) 78 Fed. 787.

The finding of such a belt, zone, or body is a discovery, within the meaning of the statute, and will authorize the location of a lode claim.

—Meydenbauer v. Stevens (D. C.) 78 Fed. 787.

As a condition precedent to the appropriation of the mineral lands of the United States by persons lawfully entitled to make such appropriation, a discovery of some of the precious metals therein in some appreciable quantity is necessary.

—Moore v. Steelsmith.....121

5. Location under power of attorney.

A location made under power of attorney is as lawful as if made by the locator in his own proper person.

—Moore v. Steelsmith.....121

6. Marking the boundaries.

In locating a lode claim all that the statute requires is that the location shall be distinctly marked on the ground, so that its boundaries can be readily traced.

—Meydenbauer v. Stevens (D. C.) 78 Fed. 787.

Whether any markings have been made, and whether they are such that the boundaries of the location can be readily traced, are questions of fact.

—Meydenbauer v. Stevens (D. C.) 78 Fed. 787.

But where the distances and courses set out in the description as recorded vary from the monuments or markings made on the ground, the latter prevail, and will determine the locus of the claim.

—Meydenbauer v. Stevens (D. C.) 78 Fed. 787.

Courts will take judicial notice of those general methods which are common to all districts of locating and designating mines by serial number above and below a common base known as "discovery" or "No. 1."

—Butler v. Good Enough Min. Co.....246

Where a mining claim is located by number above or below "discovery" or "No. 1," the court will presume, in the absence of proof to the contrary, that the adjoining claims of the system of which the one in question is part and described by serial number are well-known natural objects or permanent monuments.

—Butler v. Good Enough Min. Co.....246

A placer claim is not void because there is a discrepancy between the courses and distances mentioned and called for in the location notice and the stakes and monuments set by the locator to mark the boundaries of his claim. Where there is such a conflict, the stakes and monuments must prevail, if they are sufficient to identify the claim, as they are in the case at bar.

—Price v. McIntosh.....286

Where there is a discrepancy between the courses and distances mentioned in the notice of location of a placer mining claim and the stakes and monuments set by the locator, the latter must prevail. Section 682, Code Civ. Proc. (Act June 6, 1900, c. 786, 31 Stat. 440).

—Steen v. Wild Goose Min. Co.....255

When the notice of location of a placer mine describes the claim as "commencing at the upper or north end of claim No. 4, thence running along the bed of the creek 1,500 feet, thence 300 feet east and west from the center stake," and there were two

center stakes, one at each end, *held*, that the claim was correctly located as a parallelogram 1,500 feet long by 300 feet in width on each side of a straight line drawn from one center stake to the other, and not along the sinuosities of the stream.

—Steen v. Wild Goose Min. Co.....255

One center stake at each end of a claim, which is located from a common base by serial number as one of a well-known group, with written notices on both stakes, supported by general custom of miners, *held* sufficient.

—Loeser v. Gardiner.....641

Where, by a general custom among miners, the boundaries of the location are marked by only one center stake at each end of the claim, the boundaries are formed by end lines at right angles to a center line drawn from center stake to center stake, and by side lines parallel to and equidistant from the center line, and far enough therefrom to embrace 20 acres within the parallelogram.

—Loeser v. Gardiner.....641

7. Notice of location, posting and recording.

A record made in a memorandum book of the location of a placer mining claim, without designating any natural object or permanent monument, or any designation or work by which the placer claim could be identified, the memorandum book being retained in the possession of the locator of the claim, *held* to be not in compliance with section 2324, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1426], and of no legal force as a record.

—Fuller v. Harris (D. C.) 29 Fed. 814.

At the time of the location of a quartz mining claim by the employés of the claimant, there were no local rules of the mining district requiring a record of the location. Subsequently the claim was relocated by the owner so as to conform to the requirements of the act of Congress. *Held*, that as there was a real location of the claim by the employés of the claimant, his title dated back to the first location.

—Fuller v. Harris (D. C.) 29 Fed. 814.

The statute does not require any record of location, but when one is made it prescribes what the same shall contain, viz., the

name of the locator, the date of location, and such a description of the claim by proper references as will identify the claim.

—Meydenbauer v. Stevens (D. C.) 78 Fed. 787.

The principal object of the record of the location is the identification of the claim; and if, considering everything it contains —the name of the locator, the date of the location, and the description by reference to some natural object or permanent monument—the claim can be identified, the record is sufficient.

—Meydenbauer v. Stevens (D. C.) 78 Fed. 787.

No notice of location is required by the statute, but when the same is posted on the ground it may be considered as a marking to aid in tracing the boundaries of the location.

—Meydenbauer v. Stevens (D. C.) 78 Fed. 787.

When a notice of location contains a description of the claim, and is recorded, it operates as constructive notice that the locator claims the ground described.

—Meydenbauer v. Stevens (D. C.) 78 Fed. 787.

The description of the location as shown by the record ordinarily will bind the locator as to the locus of the claim.

—Meydenbauer v. Stevens (D. C.) 78 Fed. 787.

A sufficient location of placer mining claims is made by notices upon a stump in a creek, of a claim running 1,500 feet along the creek bottom and extending 300 feet each way from the center of the creek, adding that it is an extension of another claim named, a certain distance from the first falls on said creek.

—McKinley Creek Min. Co. v. Alaska United Min. Co.,
22 Sup. Ct. 84, 46 L. Ed. 331.

A stake placed at each end of a mining claim on the center line thereof, with a notice thereon claiming 1,320 feet up and down the creek and 330 feet on each side of said stake and center line for placer mining purposes, is a sufficient marking of the claim to comply with section 2324, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1426]. If, however, there is a great amount of brush and timber on the ground, and the posts marking the claim and the notices thereon are established in an inaccessible place, or where the brush and timber are so thick that a person honestly looking for indications of mineral and for vacant ground

would not be able to see such stakes or notices, then such marking would be insufficient.

—Moore v. Steelsmith.....121

When a location is once lawfully made, and the ground constituting the same thereby severed from the great body of the mineral lands of the United States, the locator's right of possession becomes fully vested, and cannot be divested by the removal or obliteration of notices, stakes, or monuments without the act or fault of the locator.

—Moore v. Steelsmith.....121

8. Miners' customs, rules, and regulations.

Local rules and regulations of miners, although recognized by the statute, are not subjects of judicial notice, but must be presented with the evidence in the case.

—Meydenbauer v. Stevens (D. C.) 78 Fed. 787.

After June 6, 1900, the date of the approval of the Alaska Code, a miner had "ninety days within" which to record his notice of location. This meant that he might safely record at any time "not beyond ninety days" from discovery and staking.

—Butler v. Good Enough Min. Co.....246.

Since the passage of the act of June 6, 1900, c. 786 (31 Stat. 321), a miners' rule, regulation, or custom cannot limit the time within which a miner may file his notice of location to less than 90 days.

—Butler v. Good Enough Min. Co.....246.

9. Limitation upon area, excessive location.

A mining claim located on surveyed lands "shall conform as nearly as practicable with the United States system of public-land surveys, and the rectangular system of such surveys" (Act May 10, 1872, c. 152, 17 Stat. 91). On unsurveyed lands they may be located, surveyed, platted, and patented without regard to the public surveys, and need not conform thereto in any particular.

—Price v. McIntosh.....286.

The only limitation placed by law upon a placer mining claim located upon the unsurveyed public domain in Alaska is that it shall not exceed 20 acres in area.

—Price v. McIntosh.....286.

A miners' rule, custom, or regulation arbitrarily fixing the size of all placer claims at 1,320 feet long by 660 feet wide is void. A miners' rule, custom, or regulation cannot limit a placer mining claim to less than 20 acres, nor fix its unvarying form upon the unsurveyed public domain; and such a rule, custom, or regulation is void.

—Price v. McIntosh.....286

A mining location embracing more than 20 acres by mistake does not invalidate the claim. *Quære:* Does a mining notice, which includes by its terms more land than is permitted by the mineral laws of the United States, invalidate the location. (*Richmond Min. Co. v. Rose*, 5 Sup. Ct. 1055, 114 U. S. 576, 29 L. Ed. 273; *Jupiter Min. Co. v. Bodie Min. Co.* [C. C.] 11 Fed. 666; *Stemwinder Min. Co. v. Emma Min. Co.* [Idaho] 21 Pac. 1040; *Rose v. Richmond Min. Co.* [Nev.] 27 Pac. 1105; *Price v. McIntosh* [2d Div., Nome, Nov. 16, 1901] ante, 286.)

—Pratt v. United Alaska Min. Co.....95

As between two locator^s, and as affecting their rights only, one cannot locate ground of which the other is in actual possession under claim or color of right, because such ground would not be vacant and unappropriated. Where a junior locator attempts to relocate the excess in area in a placer claim, he must locate some portion of the excessive claim not actually occupied by the diggings or property of the senior locator.

—Price v. McIntosh.....286

10. Estoppel.

One who was employed by another to prospect for and locate mining claims, in his receipt for wages, received for said work, certified that his employer's claim was the first one located in the neighborhood; and thereupon his employer procured laborers, and expended money and labor in developing the mine. *Held*, that the employé was estopped from setting up a prior claim in himself, and that it was immaterial whether the admission in the receipt was true or false; the fact of its having been acted upon being conclusive upon the party making the admission.

—Fuller v. Harris (D. C.) 29 Fed. 814.

One Russell made a valid location of a placer mine for himself and Niebling. Dufresne made a subsequent location of the same claim upon the suggestion of Niebling. *Held* that, whatever force estoppel may have in another case, it cannot make a second location of a placer claim good as to Niebling's part and bad as to Russell's. The first valid location excludes any subsequent location during its continued validity.

—Russell v. Dufresne.....486

11. Tenancy in common in mining claims.

A mining claim is real property. By section 62 of the Civil Code of Alaska (Act June 6, 1900, c. 786, 31 Stat. 501) joint tenancy is abolished, and all persons having undivided interests in real property, including mines, are tenants in common.

—Binswanger v. Henninger.....509

One tenant in common may maintain an action for the recovery of a mining claim without joining his co-tenants as parties. One co-tenant may enjoin another from waste or from appropriating the entire proceeds of the mine.

—Binswanger v. Henninger.....509

A purchaser of a mining claim, who buys from the locator of record, takes it subject to the rights of other co-tenants who are in actual, open, and notorious possession, and engaged in working the mine.

—Reedy v. Wesson.....570

12. Abandonment.

Possessory rights in mining claims may be divested (1) by sale or gift; (2) by forfeiture; or (3) by abandonment.

—Harkrader v. Carroll (D. C.) 76 Fed. 474.

Where intention to abandon and a surrender of the claim unite, abandonment is complete, and operates instanter to restore the claim of the United States.

—Harkrader v. Carroll (D. C.) 76 Fed. 474.

Where sale and conveyance take place after abandonment, the vendee or grantee takes no title. *Held*, in this case, that the testimony establishes an abandonment by plaintiff's grantor prior to sale and conveyance, and therefore no title passed.

—Harkrader v. Carroll (D. C.) 76 Fed. 474.

The location of a mining claim by an alien, and the rights following therefrom, are voidable, not void, and are free from attack by any one except the government.

—McKinley Creek Min. Co. v. Alaska United Min. Co.,
22 Sup. Ct. 84, 46 L. Ed. 331.

13. Location by alien.

The fact that the locator of a mining claim is an alien cannot be made the basis of an action against him by a subsequent locator to recover possession of such claim; the question of the effect of his alienage on the validity of his location being one which cannot be raised and determined in an action between private persons to which the United States is not a party.

—Tornanes v. Melsing, 109 Fed. 710, 47 C. C. A. 596.

14. Grub-stake contract.

A grub-stake contract was made between Hollister and two other parties at Santa Barbara, Cal., but, after arriving in Alaska, one of these parties for himself and as the agent of the other verbally released Hollister from the grub stake. Hollister afterward located the mine in question. Held, that neither the grub-stake parties nor an assignee had any interest in the location.

—Eubanks v. Petree.....427

15. Right of possession.

By Rev. St. U. S. § 910, no possessory action shall be affected by the paramount title of the United States, but each case must be adjudged by the law of possession.

—Meydenbauer v. Stevens (D. C.) 78 Fed. 787.

The effect of a valid location is to segregate from the public lands the ground located, and the prior location gives the prior and better right.

—Meydenbauer v. Stevens (D. C.) 78 Fed. 787.

A valid location vests in the locator the exclusive right of possession and enjoyment of the ground located, together with all lodes therein.

—Meydenbauer v. Stevens (D. C.) 78 Fed. 787.

The maxim that the plaintiff must recover on the strength of his own title does not apply in the case of a naked trespasser or intruder, although the party in possession may have a de-

fective location. In such case the latter's possession alone is sufficient to maintain ejectment.

—Meydenbauer v. Stevens (D. C.) 78 Fed. 787.

The possessory right of a locator of the mineral lands of the United States, when a location thereof has been lawfully made, though the ultimate title remains in the United States, is as much property, and under his control, as if the fee thereof was vested in him, as long as he conforms to the laws of the United States and local regulations in the exercise of his possessory right.

—Moore v. Steelsmith.....121

16. Adverse suit in patent proceedings.

It was obviously the purpose of Congress in passing the eighth section of the act of May 17, 1884, providing a civil government for Alaska (23 Stat. 24), to secure to those parties who were in actual possession of mineral claims in the territory of Alaska the privilege of acquiring full title thereto; and this, notwithstanding their failure to take all the steps required by the general mining laws of the United States in reference to the location of such claims.

—Bennett v. Harkrader, 158 U. S. 444, 15 Sup. Ct. 863,
39 L. Ed. 1046.

The ultimate questions presented to a jury in an adverse suit upon an application for a mining patent are: Is the plaintiff or the defendant the owner of the claim? Who is entitled to the possession thereof? And, was the claim located on the ground by either or both as described in their several pleadings? Instructions submitting such questions *held* correct statements of the law.

—Bennett v. Harkrader, 158 U. S. 444, 15 Sup. Ct. 863,
39 L. Ed. 1046.

The proceedings directed and authorized by section 2326, Rev. St. [U. S. Comp. St. 1901, p. 1430], may be either by suits in equity or actions at law; the former when the plaintiff is in possession, and the latter when he is out of possession, of the premises.

—Young v. Goldsteen (D. C.) 97 Fed. 303.

By section 2322, Rev. St. [U. S. Comp. St. 1901, p. 1425], the locator of a mining claim is entitled to hold and enjoy the profits of the surface included within the boundary lines of his claim, and, if in possession of the claim in person or by agent, any one who enters upon and takes therefrom mineral or other valuable substances is liable in damages as a trespasser.

—Fuller v. Harris (D. C.) 29 Fed. 814.

A mining locator acquires a present vested estate in his claim, good against the world, which he may defend by ejectment or a suit in equity to quiet title.

—The Tyee Consolidated Min. Co. v. Langstedt....439

When an application is made to the United States Land Department for a patent to a mining claim, and an adverse claim thereto is regularly made, and a suit brought in a court of competent jurisdiction to determine the right of possession, all proceedings in the Land Office shall be stayed until the determination of such suit, and the judgment therein shall determine the rights of possession.

—Fox, Administrator, v. Mackay.....329

The issuance of a patent to a mining claim necessarily determines the priority of right thereto, the discovery of mineral in place, and that the claim was properly located and marked, so that its boundaries could readily be traced.

—Fox, Administrator, v. Mackay.....329

When the applicant for a mining patent, pending an adverse suit over a conflicting overlap with another location, obtains a patent for the part not in dispute, he does not thereby waive his right to contest for the part in litigation.

—Fox, Administrator, v. Mackay.....329

An adverse suit brought by an applicant for a mining patent may be maintained in the District Court of Alaska, the practice and parties being regulated solely by the Codes.

—Nome-Sinook Min. Co. v. Simpson.....578

A municipal corporation, though not an adverse claimant in the land office proceeding, may intervene in a suit against an adverse claimant by the applicant for a mining patent, and pro-

tect its public property lying within the limits of the mining location, by showing that neither has complied with the law.

—Nome-Sinook Min. Co. v. Simpson.....578

Under its power to dispose of the public domain, the Department of the Interior has sole jurisdiction and power to determine the mineral or nonmineral character of lands so held for disposition. The court has no such jurisdiction.

—Behrends v. Goldsteen.....518

The owner of a town lot in Alaska, unpatented, lying within the exterior boundaries of a mining claim, may contest the mining location and determine the character of the ground by a protest filed in the land office.

—Behrends v. Goldsteen.....518

The owner of a town lot in Alaska, unpatented, may adverse an application for a patent for a lode claim, and may maintain an action in a court of competent jurisdiction in support of such adverse.

—Young v. Goldsteen (D. C.) 97 Fed. 303.

After the applicant for patent has once initiated the proceeding in the land office under sections 2325, 2326, Rev. St. [U. S. Comp. St. 1901, pp. 1429, 1430], an independent suit in equity to quiet title, not in any way connected with the patent proceeding, will be dismissed, because the plaintiff has in the patent proceeding a plain, adequate, and complete remedy at law.

—Allen v. Myers.....114

As a general rule the recitals in a mining patent are conclusive evidence of the extent and boundaries of the claim; other evidence may be admitted to determine the location of the monuments and boundaries called for by the patent.

—Alaska Gold Min. Co. v. Barbridge.....311

17. Forfeiture of mining claim.

It is a sound principle of equity and good conscience that forfeitures are odious in the law, and courts will not resolve a doubt, either of law or fact, in favor of a forfeiture of property rights.

—Butler v. Good Enough Min. Co.....246

18. Mining ditches and water rights.

Mining ditches and flumes are real estate, and do not pass as appurtenant upon the sale of a mining claim. They must be conveyed with as much formality as any other real estate.

—Noland v. Coon.....36

MISAPPROPRIATION OF PUBLIC MONEY.

See “United States Marshal.”

MISDEMEANORS.

May be prosecuted by information, see “Indictment and Information.”

MONUMENTS.

Mining monuments prevail over description, see “Mines and Minerals.”

MORTGAGES.

Must be recorded like deeds, see “Record.”

1. Deed intended as a mortgage.

Parol evidence will be admitted by a court of equity to show that a deed to real property, absolute upon its face, was intended to be, and was in fact, a mortgage, when the deed was placed in escrow and accompanied by a written agreement to the effect that the vendor might redeem the property by making certain payments, and where the deed was given to a mortgagee who already held the mortgage upon the premises.

—Lewis v. Wells (D. C.) 85 Fed. 896.

An attempt to maintain an instrument to be a deed, when in fact it was intended to be but a mortgage, is a fraud in equity, and it is upon this theory that extraneous evidence is admitted to show the real facts; and this is not in contravention of the doctrine that parol evidence cannot be admitted to vary the terms of a written instrument.

—Lewis v. Wells (D. C.) 85 Fed. 896.

Although the right of the mortgagee to purchase the mortgaged property is conceded, where the same was bought in good

faith and for full value, yet courts of equity will scrutinize such transactions closely, and, where any inequitable advantage is taken of the debtor, the sale will be set aside, and the deed declared to be but a mortgage, even though the parties intended it to be absolute.

—Lewis v. Wells (D. C.) 85 Fed. 896.

Where the consideration is grossly inadequate to induce a sale, and the lender has exacted a usurious rate of interest from the borrower, and has taken advantage of his necessities to exact such interest and the execution of the deed, these facts will all be considered in determining whether the transaction constituted a sale, or a security for a loan. In this case all these facts are *held* to be established by the evidence.

—Lewis v. Wells (D. C.) 85 Fed. 896.

Evidence in this case *held* to establish the fact that neither the grantor nor the grantees intended the deed to be absolute, but treated it at the time of its execution, and afterwards, as a security for the payment of money only.

—Lewis v. Wells (D. C.) 85 Fed. 896.

Under the laws of Alaska, a mortgage does not convey the title to the property, but creates only a security for the payment of the debt. *Held*, in this case, no consideration was paid by the mortgagor when he took the deed, and therefore the mortgagor's title to the property was not extinguished.

—Lewis v. Wells (D. C.) 85 Fed. 896.

2. Mortgage to secure open account.

Burns made a note and mortgage upon the property in controversy to secure both present and future credit from Young. He made a payment consisting of drafts and gold dust sufficient at that time to pay the amount then due, but before the value of the deposit of gold dust was known from the assay office he procured further advances, and afterwards sold the mortgaged property to the plaintiff, who brought this suit to cancel the mortgage, upon the allegation that it had been paid and discharged by the gold dust and drafts. *Held*, that the payment was on an open account secured by note and mortgage.

—Jorgensen v. Young & Burns.....335

MUNICIPAL CORPORATIONS.

Have no power to create municipal courts, see "Courts."

May intervene in adverse suit, see "Mines and Minerals."

No control or power over school fund, see "Schools."

1. General powers.

Towns in Alaska have only such powers as are expressly granted to them by Congress, and such as are necessary to enable them to carry into effect those that are expressly granted.

—*In re Bruno Munro*.....279

2. Municipal elections.

A taxpayer in an incorporated town in Alaska has a sufficient interest to enable him to maintain a suit in equity to restrain municipal officers from incurring or paying the expenses of an election called without authority and in violation of the law..

—*Bates v. Mayor, etc., of Nome*.....208

An ordinance providing for the appointment by the mayor of the successor to a councilman who resigns is void for conflict with section 200 of the Civil Code of Alaska, Act June 6, 1900, c. 786 (31 Stat. 520), which provides that such successor shall be "elected."

—*Bates v. Mayor, etc., of Nome*.....208

Where the organic act provides that the council shall have power "to make rules for all municipal elections," an election called by the mayor without any general or special action by the council is void, and will be enjoined.

—*Bates v. Mayor, etc., of Nome*.....208

The common council in incorporated towns in Alaska is not authorized by law to divide the town into wards, and cause the election of councilmen in such wards by less than a majority of all the electors of the town.

—*Bates v. Mayor, etc., of Nome*.....208

3. Vacation of streets.

Streets and public ways set apart for the public use by town-site settlers will be protected by the courts from trespassing

claimants, though dedicated prior to a formal application for entry under the town-site act.

—Macintosh v. Town of Nome.....492

Such public ways cannot be abandoned or otherwise disposed of so as to cut off the public easement, even by the town council, and such an attempt would be ultra vires and void. It does not affirmatively appear that the town council of Nome is given any power by the act of June 6, 1900, c. 786 (31 Stat. 321), or any other law, to vacate or abandon the public easement upon a street or alley. It has no such inherent power.

—Macintosh v. Town of Nome.....492

A resolution of the town council of Nome to vacate a public way dedicated by the town-site settlers *held* ultra vires, and does not serve as an estoppel to the plea.

—Macintosh v. Town of Nome.....492

4. Street improvements.

Where resident property owners of the town of Nome petitioned the common council to improve the street in front of their property, specifying the kind and character of improvement, and saw the work and labor done and the materials furnished in compliance with their written request, *held*, that the town might recover the reasonable value of such work and materials in an action of assumpsit under their implied contract to pay.

—Town of Nome v. Lang.....598

Naturalization of Indian, see "Aliens."

NEGLIGENCE.

Complaint in action for, see "Pleading."

1. Fellow servant.

A foreman or boss of a particular gang of men, to which the plaintiff belonged, and with whom he worked in breaking ore in a mine, who drew the gate and permitted rock to run in a chute, without notifying the plaintiff, whereby he was injured, is neither a vice principal with, nor a representative of, the corporation defendant, but is a fellow servant with the plaintiff, for whose act the company was not responsible.

—Alaska Treadwell Gold Min. Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390.

2. Vice principal.

Where a corporation owning two mining plants has a general superintendent, with general oversight over both plants, and a foreman of each mine, who employs and discharges the men, and directs and controls the entire operations of his mine and of the various gangs of men there employed, such foreman is a vice principal, for whose acts and negligence in the conduct of the mine the owner is responsible.

—Alaska United Gold Min. Co. v. Muset, 114 Fed. 66,
52 C. C. A. 14.

A mate of a ship, intrusted with the work of discharging the cargo upon a wharf, and having control and supervision of the ship's appliances for that purpose, the entire manner of using which was left to his judgment and discretion, is a vice principal of the defendant vessel owner.

—Gibson v. Canadian Pac. Nav. Co.....407

3. Negligence in mining.

Plaintiff's intestate and another were employed in defendant's mine at the bottom of the shaft, and when about to blast they gave a certain signal to the engineer, who signified that he understood by raising the bucket a few feet and then lowering it. They then ignited the fuse and signaled the engineer to hoist, and were raised a short distance and then lowered, and the engineer shouted down the shaft that the compressed air by which the elevator was operated was cut off. Deceased's companion climbed up the elevator rope and escaped, but deceased could not do so, and was killed by the explosion. The air was cut off by the foreman, who had full charge of the operation of the mine. There had been an iron ladder in the shaft, which was removed, some weeks before the accident, to be replaced by a new chain ladder, which was on the ground, and was to be placed in the shaft that day. *Held*, that defendant was negligent in failing to provide adequate means of escape for the men engaged in the blasting.

—Alaska Treadwell Gold Min. Co. v. Whelan, 64 Fed.
462, 12 C. C. A. 225.

Where a mine owner negligently lowered men into a mine without first ascertaining that the shaft was free from obstructions, and the bucket came in contact with obstructions negligi-

gently left in the shaft by a servant, the fact that one of the men stood on a bar above the bucket, and received injuries which he would not have received had he been in the bucket, did not contribute as a proximate cause of the accident, and hence was not contributory negligence.

—Alaska United Gold Min. Co. v. Keating, 116 Fed. 561, 53 C. C. A. 655.

Where it was customary in lowering men down a mining shaft to lower five men at once, with a bucket $3\frac{1}{2}$ feet square, those who could not stand in the bucket standing on the edge and on a crossbar above, and there is testimony that it was customary to stand on such crossbar, and no more dangerous than standing on the bucket, the question whether standing on such bar was negligence was for the jury.

—Alaska United Gold Min. Co. v. Keating, 116 Fed. 561, 53 C. C. A. 655.

While plaintiff was being rapidly lowered to his place of work in defendant's mine, the bucket came in contact with an obstruction which a fellow servant had negligently left across the shaft, and plaintiff was injured. A number of witnesses testified that, because of the danger of obstructions and displaced timbers caused by blasting operations, it was the custom in many mines to send the empty bucket down the shaft to ascertain that it was clear of obstructions before sending the workmen down. *Held*, that it was not error to submit to the jury the question whether sending the bucket on a trial trip was a necessary precaution for the safety of the men before sending them down to their place of employment.

—Alaska United Gold Min. Co. v. Keating, 116 Fed. 561, 53 C. C. A. 655.

4. Negligence in unloading vessel.

Though appliances for unloading the cargo of a vessel may be suitable and sufficient at one stage of the tide, if used when the tide is so low as to render their use in raising heavy loads dangerous, it becomes negligence for which the owner is liable.

—Gibson v. Canadian Pac. Nav. Co. 407

5. Contributory negligence.

The question of contributory negligence of deceased and of his fellow workmen in not having a chain ladder in place be-

fore the accident was properly left to the jury, there being evidence that the mine foreman had directed the foreman of the gang in which deceased worked to place such ladder in the shaft at noon, the accident occurring in the forenoon, and also that deceased and the other men did not know the ladder had been furnished ready to place in the shaft.

—Alaska United Gold Min. Co. v. Muset, 114 Fed. 66,
52 C. C. A. 14.

In an action for injuries to an employé in a mine, the question of plaintiff's contributory negligence *held* properly left to the jury.

—Alaska Treadwell Gold Min. Co. v. Whelan, 64 Fed.
462, 12 C. C. A. 225.

Where the defendant requested the court to charge that plaintiff could not recover if the jury found that his injuries were in any manner the result of want of ordinary care on his part, it was not error for the court to modify such instruction by adding "unless the defendant was guilty of gross negligence, and the plaintiff's negligence was slight."

—Alaska Treadwell Gold Min. Co. v. Whelan, 64 Fed.
462, 12 C. C. A. 225.

The plaintiff could not be charged with a degree of contributory negligence, such as would defeat recovery, simply because he knew the appliances were defective in the manner in which used, unless a reasonably intelligent and prudent man, under like circumstances, would have known or apprehended the risks and danger which the use of the defective appliances would indicate.

—Gibson v. Canadian Pac. Nav. Co.....407

NEW TRIAL.

Prejudice of judge in contempt case, see "Criminal Law."
Only trial judge can sign bill of exceptions, see "Exceptions."
Instructions on evidence outside of issues, see "Trial."

1. Newly discovered evidence.

Where it appears, from the affidavits filed upon a motion for a new trial on the ground of newly discovered evidence, that the new evidence proposed is substantially the same as that

introduced at the trial, and that certain records sought to be introduced were available to the party making the motion as evidence at the trial, the motion will be denied.

—Fuller v. Harris (D. C.) 29 Fed. 814.

2. Insufficient evidence to support verdict.

When there is a conflict of testimony, the court ought not to set the verdict of a jury aside and grant a new trial, even though the judge would have reached a different verdict upon the same evidence. When, however, the jury renders a verdict upon evidence insufficient to justify it, or in violation of the law, it is the duty of the judge to set it aside and grant a new trial.

—McMorry v. Ryan.....516

Where a nonsuit was granted for the insufficiency of evidence to support a verdict, a new trial will not be granted by a judge who did not hear the trial, where the evidence was not preserved in the record.

—Banks v. Wilson.....,.....241

A motion for a new trial for error in law will not be granted where no exception was taken to the alleged error.

—Banks v. Wilson.....241

3. Verdict sustained.

This action was brought against Frye-Bruhn & Co., a copartnership consisting of Frye-Bruhn Company, a corporation, and Herman Meyer. The answer was a general denial. Meyer admitted an indebtedness to the plaintiffs. The jury found a verdict in favor of Frye-Bruhn & Co. Upon a motion for a new trial the verdict was sustained as to form and effect.

—Carstens Bros. v. Frye-Bruhn & Co.....140

4. Findings upon evidence after new trial.

Where a new trial is granted because wrong findings of fact and conclusions of law were drawn from the testimony, it is not necessary or proper to require or permit the evidence to be taken *de novo*, but the court should make correct findings and conclusions from the evidence already taken, and render judgment thereon.

—Russell v. Dufresne.....575

5. Motion.

A ground of motion stated in the language of the statute that "the verdict is against the law" or "error in law occurring at the trial, and excepted to by the party making the application," states no ground for a new trial upon which the court is required to pass.

—Moore v. Steelsmith.....121

NOTICE OF LOCATION.

Construction, see "Mines and Minerals."

OFFICERS.

Election of municipal, see "Municipal Corporations."

Removal of territorial judges, see "Territories."

OREGON LAWS.

Laws of United States take precedence, see "Homicide."

Not retrospective in Alaska, see "Statutes."

PARENT AND CHILD.**1. Contract releasing custody of child.**

A parent who has surrendered the custody of a child under a parol agreement is not entitled, after long acquiescence, to repudiate the agreement and recover the child upon habeas corpus as of course, without showing a breach of the agreement by the custodian, or a neglect of some duty in regard to the care, education, or moral training of the child. The controlling consideration in such case is, what is for the best interests of the child?

—In re Can-ah-couqua (D. C.) 29 Fed. 687.

In such case the wishes of the child are to be considered, but are not conclusive. *Held*, accordingly, in the case of a male Indian child in Alaska, surrendered by its mother to the care of the officers of a Presbyterian mission school, when the child was five years old, to remain five years, that the mother could

not reclaim him after three years, although the child wished to go back to his mother, it appearing that he was being well cared for and educated; but held that the mother could be allowed to visit him at the mission.

—*In re Can-ah-couqua* (D. C.) 29 Fed. 687.

PARTIES.

In adverse suits for mining claims, see "Mines and Minerals."

Taxpayer may maintain suit, see "Municipal Corporations."

Officers of unincorporated societies, see "Religious Societies."

Judgment does not affect co-tenant not served, see "Tenancy in Common."

1. Action does not survive to administrator.

While, under section 956, Rev. St. [U. S. Comp. St. 1901, p. 697], an action may be continued by one surviving plaintiff against a surviving defendant without abatement, an administrator can neither continue nor defend an action of this character.

—*Fox, Administrator, v. Mackay*.....329

PARTNERSHIP.

Rescission of mining contract, see "Contracts."

Joint owners of mining claim, see "Tenancy in Common."

1. Judgment on partnership contract.

Where a suit is brought against a partnership consisting of a corporation and an individual, though the individual may admit a personal indebtedness, a verdict in favor of the partnership will be upheld. The partnership debt sued on was joint, the indebtedness admitted and proved was several, and not sufficient to sustain a judgment in the action, even against the individual partner.

—*Carstens Bros. v. Frye-Bruhn & Co.*.....140

2. Claims against deceased partner's estate.

A claim arising out of a mining partnership with the deceased may be presented like any other claim, allowed, and paid, without bringing suit to establish or dissolve the partnership.

—*In re Estate M. O. Gladough*.....649

PATENT FOR MINING CLAIM.

See "Mines and Minerals."

Estoppel to dispute validity, see "Public Lands."

PAYMENT.

1. Of license for trade or business.

Where a person engaged in business in Alaska voluntarily and without duress pays his license fees for the business in which he is actually engaged, he cannot recover the same, or any part thereof, because of an alleged mistake on his part, either of law or fact.

—In re Hill's Bottling License.....436

PETIT JURORS.

Service as no disqualification to serve as grand juror, see "Jury."

PHYSICIAN.

Claim against decedent's estate, see "Executors and Administrators."

PLEADINGS.

Abatement must be specially pleaded, see "Abatement."

Must be settled before appeal from probate court, see "Appeal and Error."

Abandonment of answer, see "Judgments."

Motion to vacate default, see "Judgments."

Instructions on evidence outside of issues, see "Trial."

1. Complaint in ejectment.

A complaint in ejectment which alleges that the plaintiff was in the actual prior occupancy and possession of a tract of land in Alaska, and had substantial improvements thereon, and continued in possession thereof under claim of right until ejected

by the defendant, sufficiently states the nature of his title, and is good as against demurrer.

—Malony v. Adsit, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163.

Where there is no separate statement of the allegations in support of recovery of possession in ejectment from those stating damages for withholding possession, and no demurrer or answer upon this objection is taken to the complaint, it is thereby waived, under section 62 of the Code of Civil Procedure (Act June 6, 1901, c. 786, 31 Stat. 342).

—Kimball v. Miller.....347

2. Complaint on contract.

In an action on a contract, whereby defendant agreed to pay to plaintiff an indebtedness of a third person for goods sold such third person "when and as soon as the same should thereafter become due," executed at the time of the sale, and as a part of the same transaction, plaintiff need not allege either that he has exhausted his legal remedies against such third person, or that he is insolvent.

—Esberg-Bachman Leaf-Tobacco Co. v. Heid (D. C.) 62 Fed. 962.

3. Complaint in damages.

A complaint for damages through negligence, which states that plaintiff was injured in unloading freight from a vessel to the wharf, and briefly describes the relative positions of the vessel and wharf, the defective appliances used, and points out the defects therein, and the acts constituting the negligence, is good against demurrer.

—Gibson v. Canadian Pacific Nav. Co.....407

4. Complaint on foreign judgment.

A complaint in an action to recover on a foreign judgment is good against demurrer, under the laws of Oregon applicable to Alaska, when it sets forth in plain and concise language the name of the court, where and when the judgment was rendered, and the amount thereof. The presumption is in favor of the jurisdiction of the foreign court.

—Baker & Co. v. Healey.....45

5. Demurrer.

The objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by an objection to take the objection or demurrer.

—Kohn v. McKinnon (D. C.) 90 Fed. 623.

A complaint in equity praying for a receiver and an injunction, which shows that plaintiff has only an option to purchase, and fails to disclose the character of defendant's titles, on demurrer, *held*, that it does not state facts sufficient to constitute a cause of action.

—McBride v. Coy.....238

Where a complaint alleges several causes of action not separately stated, the proper practice is to move to strike the pleading, or to make it more definite and certain by separating and distinctly stating the different causes, and not by a demurrer.

—Mitchell v. Galen.....339

The fact that the complaint prays for several forms of damages does not render it open to demurrer.

—Mitchell v. Galen.....339

6. Default.

Plaintiff failed to reply to an affirmative defense in the answer. An intervenor, claiming to be a purchaser pendente lite, was permitted to file a reply. On trial the intervenor failed to connect himself with the location by purchase or otherwise. *Held*, that defendant was entitled to a default and judgment on the pleadings.

—Thompson v. Allen.....636

POLITICAL RIGHTS.

Courts will not interfere with, see "Constitutional Law."

POSSESSION.

In suit to quiet title, see "Quieting Title."

PRESUMPTION.

Illegality never presumed, see "Evidence."

PRINCIPAL AND AGENT.

Sale of mine by one co-tenant, see "Sale."

PRISONS.

Support of, see "United States Marshal."

PROBATE COURTS.

United States commissioners act as, see "Courts."

PROCESS.

On civil arrest, see "Arrest."

Protection to officer serving, see "Attachment."

1. Publication of summons.

Where it affirmatively appears, from the return of the marshal on the summons, that the defendants could not be found within the district of Alaska after due and diligent search, and, from the affidavit of plaintiff's attorney, that one party was a foreign corporation organized under the laws of Oregon, and that none of its officers or agents resided or were within the district, and that the other defendant was not a resident of Alaska, but resided in Oregon, *held* sufficient to vest jurisdiction upon publication of summons.

—Marx v. Ebner, 180 U. S. 314, 21 Sup. Ct. 376, 45 L. Ed. 547.

PROHIBITION.

A question of jurisdiction only, see "Appeal and Error."

May issue from supreme court of the United States to Alaska, see "Courts."

1. In admiralty causes.

When the district court of Alaska is exercising its admiralty jurisdiction as a district court of the United States, the Su-
1 A.R.—51

preme Court of the United States has power to issue the writ of prohibition to that court in a proper case.

—*Ex parte Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232.

The writ of prohibition provided for by section 688, Rev. St. [U. S. Comp. St. 1901, p. 565], is the common-law writ which lies to a court of admiralty only when that court is acting in excess of, or is taking cognizance of, matters not arising within, its jurisdiction. Its office is to prevent an unlawful assumption of jurisdiction, and not to correct mere errors and irregularities.

—*Ex parte Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232.

Where a case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings, the granting of the writ of prohibition, which even if of right is not of course, is not obligatory upon the court, and the party applying for it may be precluded by acquiescence from obtaining it.

—*Ex parte Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232.

2. **Laches.**

Where an application is made to stay the enforcement of a decree three years after its rendition and after the pendency of an appeal, an appeal being allowable, the court will not intervene by prohibition, unless upon an irresistible case, and adequate reason shown for delay.

—*Ex parte Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232.

PROPERTY.

Presumption that buildings belong to landowner, see "Evidence."

1. **Cession of property by Russian treaty.**

It was intended by the clause reserving private individual property in the treaty of cession from Russia, to include, as within the cession to the United States, not only all real property belonging to the Russian government, but all buildings erected by its permission upon such property, except such as

belonged to private individuals. All of the real property of the Russian-American Company passed, and any subsequent sale by the company was void.

—Kinkead v. United States, 150 U. S. 483, 14 Sup. Ct. 172, 37 L. Ed. 1152.

2. Interest of owner of building in real estate.

The owner of a building who permits another to place it upon his lot and build it into other permanent buildings does not thereby acquire an interest in the real estate, nor does he acquire a lien in equity for the value thereof. He must bring his action at law to recover its value.

—Chambers v. Hannum.....468

PROTEST.

Not a "case" subject to appeal, see "Licenses."

PUBLIC LANDS.

Russian rights in public lands in Alaska, see "Alaska."

Occupant may maintain ejectment, see "Ejectment."

Proceedings for mineral patent, see "Mines and Minerals."

Owner may quiet title in equity, see "Quieting Title."

1. General disposition.

In the condition of things in Alaska, under the act of May, 1884, providing a civil government for Alaska, and under the twelfth section of the act of March 3, 1891, 26 Stat. 1100 [U. S. Comp. St. 1901, p. 1467], the only titles that could be held were those arising by reason of possession and continued possession, which might ultimately ripen into a fee-simple title under letters patent issued to such prior claimant when Congress might so provide by extending the general land laws or otherwise.

—Malony v. Adsit, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163.

The act of Congress of May 17, 1884, providing a civil government for Alaska, also provides that "the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now

claimed by them, but the terms under which such persons may acquire title to such lands are reserved for future legislation by Congress." By this provision, all persons in the peaceable possession of lands in Alaska on the date of said act are guarantied the right to ultimately acquire a perfect title to such lands through such legislation as Congress may enact for that purpose.

—Young v. Goldsteen (D. C.) 97 Fed. 303.

The paramount title to all lands in Alaska is in the United States.

—Carroll v. Price (D. C.) 81 Fed. 137.

Citizens of the United States have the right to go upon the public lands of the United States in this district, and possess, occupy, use, and improve the same. This right has been so repeatedly acceded to by the general government that it has now become the settled policy of this country, and in this district the right is expressly recognized by Congress in the first proviso of section 8 of the act providing a civil government for Alaska. 23 Stat. 26; Supp. Rev. St. (2d Ed.) 433.

—Carroll v. Price (D. C.) 81 Fed. 137.

Where two persons claim adversely to each other the possession of any piece or parcel of government land, the one having the prior possession has the prior right. This rule, which prevails universally in the Western states, has also met with the approval of Congress in the proviso to section 12 of chapter 561, St. 1891, 26 Stat. 1100 [U. S. Comp. St. 1901, p. 1467], relating to public lands in Alaska.

—Carroll v. Price (D. C.) 81 Fed. 137.

Priority of possession between two contending claimants to the same piece of government land is a question of fact for the jury, and while no notice of location, such as is customary in case of mining claims, is necessary, still, where such location notice is made on nonmineral lands, it may be received in evidence and considered by the jury as tending to show possession in the locator, together with any other acts indicating possession, such as actual occupation of the ground, making improvements of any nature thereon, tilling the soil, clearing the land from trees and stumps, fencing, and placing structures

thereon, or other acts which tend to show a bona fide intention to occupy and hold the land.

—Carroll v. Price (D. C.) 81 Fed. 137.

The possessory right in and to government lands, when once acquired, may be conveyed from one person to another, and instruments in writing making such conveyances are admissible in evidence, and may be considered by the jury as tending to establish this right in the last grantee.

—Carroll v. Price (D. C.) 81 Fed. 137.

The presumption of law is in favor of the regularity of all proceedings in the land office anterior to the issuance of the patent.

—Harkrader v. Carroll (D. C.) 76 Fed. 474.

A party who is seeking to obtain title under a patent granted to another cannot at the same time dispute its validity.

—Harkrader v. Carroll (D. C.) 76 Fed. 474.

2. Russian grants in Alaska.

Lands granted in fee simple by Russia prior to the treaty did not pass to the United States.

—Callsen v. Hope (D. C.) 75 Fed. 758.

A want of continuous occupancy and user on the part of persons holding such title will not render such lands a part of the public domain of the United States, so as to subject them to possession and occupancy by citizens of the United States adversely to the owners of the fee.

—Callsen v. Hope (D. C.) 75 Fed. 758.

This court will protect the possession of the owners of such fee, such protection being among the obligations assumed by the United States under the treaty, and injunction may be invoked to restrain intrusion thereon.

Callsen v. Hope (D. C.) 75 Fed. 758.

3. Possessory claims to public lands.

There is nothing in the act of July 5, 1884 (23 Stat. 103, c. 214 [U. S. Comp. St. 1901, p. 1607]), for the disposal of abandoned or useless military reservations, offering or granting to settlers or occupants entering into possession subsequent to the date of the act and the executive order of withdrawal, any preference right

of entry or purchase. Subsequent adverse claims to lots or lands in such tract must be determined by the law of possession.

—Walsh v. Ford.....146

No citizen may question the occupation or possession of one residing on the lands or lots belonging to the United States, except he shows a better right or title in himself. The actual prior possession of the first occupant would be better than the subsequent possession of the last. Campbell v. Mining Co., 1 C. C. A. 155, 49 Fed. 47.

—Walsh v. Ford.....146

A right to the possession of government lands cannot be initiated by a forcible entry and trespass upon the peaceable possession of another person.

—Walsh v. Ford.....146

By section 8 of the act of May 17, 1884 (23 Stat. 26, c. 53), Congress intended to protect Indians and settlers in Alaska in the exclusive possession of those lands only which they then actually used or occupied.

—Sutter v. Heckman.....188

One who purchased a town lot and obtained possession thereby from the owner without paying the whole of the purchase price will not be permitted and is estopped to deny the title of the owner, and to repudiate the balance of the purchase price, and assert hostile possessory title, as an original occupant and settler under the land laws of the United States.

—Malone v. Hoxsie.....267

4. Abandonment of possession.

One who abandons a portion of his possessory rights on the public domain of Alaska, including one entire boundary line, thus leaving the limits of his claim open, indefinite, and undetermined, is limited in his possessory claim in the direction of his abandoned boundaries to lands actually occupied and used.

—Haines Wharf Co. v. Dalton.....555

A party having acquired possessory rights in government lands may lose or forfeit the same by removing therefrom or abandoning his claim, and in such case the land becomes restored to its original status in the public domain, and is subject to occupancy and possession by any other citizen of the

United States; but, if the original occupant resumes possession before any other party has acquired possession thereof, the rights of such original occupant become thereby restored and re-established.

—Carroll v. Price (D. C.) 81 Fed. 137.

5. United States reservations.

The acts of the Secretary of the Navy in reserving parts of the public domain are, in legal effect, the acts of the President. A portion of the public lands in Alaska set apart by order of the Secretary of the Navy, and used by that department for public purposes connected with the navy, constitutes a valid reservation by the executive.

—Behrends v. Goldsteen.....518

When a military post located upon lands belonging to the United States is abandoned, the Secretary of War has no power, in the absence of authority from Congress, to order a sale of the buildings, and such a sale is void.

—Lear v. United States (D. C.) 50 Fed. 65.

6. Townsites.

One who lays out a town site into lots, blocks, streets, and alleys acquires no rights thereby. Such lots can be held only by one in the actual use, occupation, or possession thereof, and such use, occupation, and possession may be evidenced by stakes, fencing, buildings, residence, and other improvements showing the fact.

—Price v. Brockway.....233

It was the aim of Congress to dispose of town lots in Alaska only to actual settlers and occupants. Improvements are evidence of the intention of the settler to use and occupy.

—Sawyer v. Van Hook.....108

Whoever enters upon a vacant town lot and makes the first act of settlement or occupancy in good faith, with the intention of following it up and claiming the benefit of the law, is the first settler or occupant. The first settler or occupant in point of time is entitled to the lot.

—Sawyer v. Van Hook.....108

That a claimant for a tract of land within a town site camped on the ground two nights while passing on a journey, and

also two nights on his return, at which time he set stakes at its corners, without any other mark of settlement or occupancy; that next spring he occupied a tent on the tract for a short time with dozens of other persons, but made no other settlement or occupancy, are not such acts of occupancy and use as enabled him to acquire a preference right by possession against one who first built a dwelling house on the lot, and continuously and in good faith occupied the ground thereafter.

—Osgood v. Donnelly.....385

The owner of a town lot in Alaska, unpatented, lying within the exterior boundaries of a mining claim, may not adverse an application for a patent for said mining claim, under sections 2325, 2326. Rev. St. [U. S. Comp. St. 1901, pp. 1429, 1430], and cannot maintain an action in a court of competent jurisdiction in support of such adverse. Contra, Young v. Goldsteen (D. C.) 97 Fed. 303.

—Behrends v. Goldsteen.....518

A town-site trustee is charged with the duty of determining who of several claimants to a lot or lots was in rightful possession, and to make title to the rightful possessor. The Department of the Interior has sole jurisdiction over such matters, and its action thereon is final.

—Lewis v. Johnson.....529

7. Tide lands.

The official survey and plat of any townsite located on government lands, and the lots and blocks thereof, are permanent landmarks, and may be considered as such by the jury for the purpose of establishing the exact locus in quo of adjoining lands outside of the townsite, and in this case may be so considered with reference to the piece of ground in dispute.

—Carroll v. Price (D. C.) 81 Fed. 137.

Where the title to tide lands along the shores of a state is vested in such state by virtue of its sovereignty, the tide lands along the shores of any territory are held in trust by the general government for the future state; nevertheless, the rule now is that during the territorial period the United States holds the permanent title to tide lands, and may make grants thereof.

—Carroll v. Price (D. C.) 81 Fed. 137.

Where the right of navigation is not impaired, possessory rights to tide lands here will be determined by the rules of law governing similar rights to uplands until "future legislation by Congress" concerning such uplands, and, as to the tide lands, until the ultimate sovereignty, whether state or federal, shall otherwise provide.

—Carroll v. Price (D. C.) 81 Fed. 137.

This court will entertain an action of ejectment for the purpose of determining the right of possession to either uplands or tide lands in this district between two contending parties claiming the same piece of ground.

—Carroll v. Price (D. C.) 81 Fed. 137.

Citizens of the United States claiming, in good faith, uplands in Alaska, and in actual occupation and possession thereof, take the same littoral rights as are incident to ownership in fee.

—Lewis v. Johnson.....529

Among these is the right of access over and across abutting tide lands to deep water.

—Lewis v. Johnson.....529

Equity will interfere by injunction to prevent the impairment or destruction of such right.

—Lewis v. Johnson.....529

A trespasser cannot acquire a prescriptive right or title to tide lands by mere occupancy. The upland owner has a right to build a wharf upon tide lands in front of his property, notwithstanding a trespasser's presence on the tide lands.

—Lewis v. Johnson.....529

Tide lands in Alaska are not held for sale. No one can occupy them except as a trespasser. They can only be held by such character of possession as constitutes actual occupancy. A pile or two, or temporary and uncertain structures, are not sufficient to acquire a right of possession or occupancy.

—Juneau Ferry Co. v. Alaska Steamship Co.....533

The owners of uplands and shore line have a right to pass out over tide lands to deep water, subject to the rights of navigation and commerce.

—Juneau Ferry Co. v. Alaska Steamship Co.....533

The owner of uplands bordering on the sea has littoral rights in the fronting tide flats and approaches to the sea, of which he cannot be deprived without due compensation; he may construct wharves and land fish nets thereon, and will be protected in the unobstructed use thereof by injunction.

—Sutter v. Heckman.....188

The owner of uplands bordering upon the sea in Alaska has no proprietorship in the tide lands lying immediately in front of his property. The title to such tide lands is held by the United States, in trust for the future state.

—Sutter v. Heckman.....81

The title to tide lands in Alaska being held in trust by the United States for the future state, no presumption of a grant to an occupier will be admitted, nor title by prescription recognized.

—Sutter v. Heckman.....81

The owner of uplands bordering on the seashore in Alaska has the right of ingress and egress between his land and the sea over tide lands. Injunction will protect him in the exclusive enjoyment of his rights.

—Sutter v. Heckman.....81

An upland owner may extend his wharf across tide lands to deep water at right angles to his shore line, but may not deprive other upland owners of an equal privilege. The defendants erected their wharf on diagonal lines and at an acute angle from their shore line, thereby crossing the line of approach from deep water to plaintiffs' land. A perpetual injunction was granted.

—Martin v. Heckman.....165

Where different persons own portions of the upland shore line of a small semicircular bay, each party can have only an equitable portion of the approaches to deep water, and a court of equity will protect their several rights by injunction.

—Martin v. Heckman.....165

8. Lands for trade and manufactures.

A mere occupancy for a brief time by camping on the ground in a tent is not a sufficient evidence of the occupation of public-

land for the purpose of trade and manufacture upon which to base title under the land laws.

—Osgood v. Donnelly.....385.

PUBLICATION.

Of summons, see "Process."

QUIETING TITLE.

Suit will lie to quiet title of mining claim, see "Mines and Minerals."

Suit will lie to regain possession of public lands, see "Public Lands."

1. May quiet title to possessory claim.

One who is in possession of a lot on the public lands in Alaska, and using the same for purposes of trade or residence, may maintain a suit to quiet his title thereto.

—Foss v. Dam.....346.

2. Complaint in suit to quiet title.

In a suit to quiet title the plaintiff must allege and show that he is in possession of the disputed property, owning an estate of freehold, or an unexpired term of not less than 10 years, and that the defendant claims some interest therein adverse to plaintiff.

—United States v. North-West Trading Company.....5.

RECEIVER.

Appeal lies from order appointing, see "Appeal and Error."

Refusing to restore property on appeal, see "Contempt."

1. Receiver must restore property on court's order.

Where the appointment of a receiver is superseded, it may become his duty to restore that which has come to his hands to the parties from whom it has been withdrawn, and this may be directed to be done by the judge or court authorized to issue the supersedeas and grant the appeal, and such order is not void.

—In re McKenzie, 180 U. S. 536, 21 Sup. Ct. 468, 45 L. Ed. 657.

RECORDS.

Of location of mining claim, see "Mines and Minerals."
A private record not sufficient, see "Mines and Minerals."

1. Of mortgages.

Under section 98 of the Civil Code of Alaska (Act June 6, 1900, c. 786, 31 Stat. 505), mortgages must be recorded with the same effect as deeds and other conveyances. An unrecorded mortgage is void as against an innocent purchaser in good faith for value, and without notice of the existence of the mortgage.

—Nestor v. Holt.....567

RELIGIOUS SOCIETIES.

1. Trustees may sue in equity.

Trustees of a nonincorporated religious association have legal capacity to sue in equity in behalf of such association, if not as trustees, as members thereof.

—Callsen v. Hope (D. C.) 75 Fed. 758.

RELOCATION.

Of mining claim dates back to original, see "Mines and Minerals."

REMEDY AT LAW.

Bars suit in equity, see "Action," "Equity."

REPEAL.

Of statutes by implication, see "Intoxicating Liquors."

RESERVATIONS.

Abandoned military, see "Public Lands."
On the public domain, see "Public Lands."

1. Mining claim cannot be located on reservation.

A discovery of mineral within a tract of land reserved by proper authority, and used for naval purposes, is without effect

and void, and will not sustain a location of a mining claim. The discovery of such mineral within the boundaries of such reservation will not sustain a mineral location which lies partly within and partly without such reservation. The whole mining claim is void.

—Behrends v. Goldsteen.....518

RESULTING TRUSTS.

See "Trusts."

RETURN.

Of execution, see "Execution."

REVENUE LAWS.

Forfeiture of vessel for violation of, see "Customs."

REVIEW.

Of judgment of justice, see "Appeal and Error."

Of bankrupt proceedings, see "Bankruptcy."

ROBBERY.

Variance between indictment and proof, see "Indictment and Information."

SALES.

On execution after return day, see "Execution."

Definition in sales of liquor, see "Intoxicating Liquors."

Fraud in sale of mine by co-tenant, see "Mines and Minerals."

1. Sale of mine by one co-tenant.

When one co-tenant of a mining claim, acting as the agent of the other, sells his interest to a third party, he assumes no trust relationship, and a suit in equity will not lie for an accounting, the proper remedy being a suit at law to recover the amount alleged to be due.

—Garside v. Norval.....19

SALVAGE.

Derelict in Bering Sea ice floes, see "Admiralty."
Suit in personam for salvage, see "Admiralty."

1. Reasonable allowance.

A vessel and cargo of the estimated value of \$60,000 brought only \$2,000 at the marshal's sale, the great loss to vessel and cargo having been sustained prior to libelant's finding her. *Held*, that a moiety of one-half of the net proceeds is a reasonable allowance as salvage money.

—The Canada (D. C.) 92 Fed. 196.

Evidence of the continued increasing severity of the danger, and the probable certainty of the loss of the vessel had she not been rescued at the time, may be shown for the purpose of fixing the value of the salvage services actually rendered. The character and value of the vessels may also be shown, and will be considered in determining the amount of the award.

—The City of Seattle.....471

Salvage compensation may be expanded to comprehend reward for peril of life and property. The amount rests in the sound discretion of the court, and is dependent upon the labor, perils, risk, and damages incurred, and also upon the character and value of the vessels engaged.

—The City of Seattle.....471

Where libelants knew that barges had been driven on shore by a heavy on-shore wind at a point designed by the master of the tow, reached them ahead of the owner's employés, went aboard dry-shod, put out an anchor on shore, and attached a line thereto, but did no meritorious act or thing toward saving them or the property aboard, or rendering either more secure, *held*, that they were trespassers, and not entitled to salvage compensation.

—Spaulding v. Alaska Com. Co.....497

SCHOOLS.

Construction of school laws, see "Statutes."

1. Control of school fund in towns.

Under the laws of Alaska, the legislative duty is imposed on town councils "by ordinance to provide for the maintenance of

public schools" by taxation or other methods necessary to meet that demand.

—Chambers v. Solner, Treasurer of Nome.....271

The town council has no other direction over the school fund paid into the school treasury by the clerk of the District Court from licenses, than to consider the amounts in determining the budget to be raised by taxation or otherwise under their duty to provide for the maintenance of the public schools.

—Chambers v. Solner, Treasurer of Nome.....271

The school board has "the exclusive supervision, management, and control of the public schools and school property" within the school district, including the power and duty of expending the funds paid in by the clerk of the District Court.

—Chambers v. Solner, Treasurer of Nome.....271

The common council has no control for municipal purposes over the school fund or any portion thereof until such portion is segregated and set apart for municipal use by an order of the District Court.

—Chambers v. Solner, Treasurer of Nome.....271

That part of the school fund paid in by the clerk of the District Court from license receipts is a part of "the school property within the said corporation," over which the school board is given "exclusive supervision, management, and control" by section 202 of the Civil Code (Act June 6, 1900, c. 786, 31 Stat. 521).

—Chambers v. Solner, Treasurer of Nome.....271

The school board in incorporated towns in Alaska has the sole power to expend and pay out that part of the school fund paid into the treasury by the clerk of the District Court and derived from licenses paid within the town. The council has no power of expending any part thereof except that part segregated and set apart for municipal purposes by the District Court. (Chambers v. Solner, supra, followed.)

—Brace v. Solner, Treasurer of Nome.....361

SEAL FISHERIES.

See "Constitutional Law."

Forfeiture of vessel for illegal sealing, see "Forfeiture."

SEAMEN.

Evidence in suit for wages, see "Admiralty."
Employés on sealing vessels are mariners, see "Shipping."
Labor on Sunday, see "Sunday."

1. Prosecution of seamen for refusing duty.

A prosecution cannot be maintained against a seaman for any of the offenses defined in section 4596, Rev. St. [U. S. Comp. St. 1901, p. 3113], unless an entry of the circumstances is made by the master in the official logbook of the vessel as soon as possible after the occurrence, and read over to the seaman, or a copy furnished him, and his reply thereto entered in the same manner.

—United States v. Brown, 3 Sawy. 602, Fed. Cases No. 14,672.

SHIPPING.

See "Admiralty," "Forfeitures," "Seamen."

1. Jurisdiction in seizure cases.

The jurisdiction of the district courts over cases of seizure, under the laws of impost, navigation, and trade, under section 9 of the judiciary act of 1789 (1 Stat. 77), does not attach, unless it is alleged and proved that the property proceeded against was openly and visibly seized prior to the commencement of such proceeding, either within the district where the proceeding is had, or upon the high seas, and afterwards brought within such district. (Cited in the May Case, Fed. Cases No. 9,330; U. S. v. One Raft of Timber [C. C.] 13 Fed. 799; U. S. v. The Frank Silvia [C. C.] 45 Fed. 642.)

—The Fideliter, 1 Sawy. 153, Fed. Cases No. 4,755.

2. Fraudulent sale of vessel to procure American register.

Where the owner of a vessel makes a bill of sale thereof without consideration to another, and retains the possession of such vessel for the purpose of fraudulently obtaining an American register for the same, such transaction is a nullity, and does not vest any legal title or right in the pretended vendee, so as to authorize the statement in the oath for a register under section 4

of the act of December 31, 1792 (1 Stat. 289), that he is the true and only owner thereof.

—The Fideliter, Deady, 620, Fed. Cases No. 4,756.

A sale of a British vessel by an American citizen to a Russian subject at Alaska, after the ratification of the treaty of purchase with Russia, and before the country was formally turned over to the American government, for the purpose of having such vessel thereby become an American bottom under the act of 1792, was not a false oath, as the ownership therein referred to is the legal ownership.

—United States v. The Fideliter, Fed. Cases No. 15,088.

The vessel was not the property of a Russian inhabitant of Alaska, within the meaning of the treaty, she was not entitled to be registered as American, and the register was fraudulently obtained for a vessel not entitled to the benefit thereof.

—United States v. The Fideliter, Fed. Cases No. 15,088.

3. Employés on sealing voyage are mariners.

A vessel enrolled and licensed for the fisheries does not violate section 4337, Rev. St. [U. S. Comp. St. 1901, p. 2969], which prohibits such vessel from proceeding on a foreign voyage without being registered, by touching at or entering the foreign port of Victoria, for supplies or any purpose other than trade, on her way from San Francisco to the fishing grounds on the northwest coast.

—The Ocean Spray, 4 Sawy. 105, Fed. Cases No. 10,412.

All persons who are employed on a vessel to assist in the main purpose of the voyage are mariners, and therefore persons who shipped on the Ocean Spray at Victoria as sealers to take seal in the northern waters, that being the object of the voyage, are mariners, and have a lien upon the vessel for their wages. (Cited in The Minna [D. C.] 11 Fed. 760. Distinguished in the Ole Oleson [C. C.] 20 Fed. 384, 385; The Sarah E. Kennedy [D. C.] 29 Fed. 266, 267; Telles v. Lynde [D. C.] 47 Fed. 916; Holt v. Cummings, 102 Pa. 216, 48 Am. Rep. 199; Scarff v. Metcalf, 107 N. Y. 216, 13 N. E. 796, 1 Am. St. Rep. 807.)

—The Ocean Spray, 4 Sawy. 105, Fed. Cases No. 10,412.

When a voyage is broken up or lost by the act or fault of the master or owner, the seamen are, nevertheless, entitled to their

wages for the full voyage, or the time which it would probably require to complete it.

—The Ocean Spray, 4 Sawy. 105, Fed. Cases No. 10,412.

The rule, "Freight is the mother of wages," does not apply to a fishing or sealing voyage, and appears to be abolished altogether by section 4525, Rev. St. [U. S. Comp. St. 1901, p. 3076].

—The Ocean Spray, 4 Sawy. 105, Fed. Cases No. 10,412.

4. Fraudulent clearance of vessel.

When the clearance of a vessel, as shown by her papers, is questioned as being intentionally misleading or fraudulent, the port or harbor for which she is actually bound may be proved by the course she sails, the landings she makes, and other facts connected with the voyage.

—The Coquitlam (D. C.) 57 Fed. 706.

STARE DECISIS.

Decisions of Oregon courts, see "Courts."

STATUTES.

Exception in definition of crime need not be stated, see "Indictment and Information."

Repeal of statute by implication, see "Intoxicating Liquors."

1. Recitals in, as evidence of facts.

It is well settled that a mere recital in an act, whether of fact or of law, is not conclusive unless it be clear that the legislature intended that the recital should be accepted as a fact in the case. While the recitals in public acts are regarded as evidence of the facts recited, it is otherwise with reference to private acts. They are not evidence except against the party who procured them.

—Kinkead v. United States, 150 U. S. 483, 14 Sup. Ct. 172, 37 L. Ed. 1152.

2. Do not operate retrospectively.

The provision in the organic act of Alaska (Act Cong. May 17, 1884), adopting the laws of Oregon in part as the laws of Alaska, does not operate retrospectively; there being nothing in the act from which it can be inferred that it was so intended.

—In re Can-ah-couqua (D. C.) 29 Fed. 687.

3. Construction of statutes.

Acts of Congress declaring forfeitures of vessels and cargoes for violation of the revenue laws are not to be construed with the strictness applicable to penal laws, but rather are to be so construed as to accomplish the purpose for which they were intended, for, in the technical sense, they are not penal, but rather remedial, intended to effect a public good and to prevent frauds. (*Ten Cases of Opium, Deady*, 70, Fed. Cases No. 13,828, followed. *The Cargo ex Lady Essex* [D. C.] 39 Fed. 765, distinguished.)

—*The Coquitlam* (D. C.) 57 Fed. 706.

Such a construction must be given to statutes as will sustain and give fair effect to each part when possible.

—*Chambers v. Solner, Treasurer of Nome*.....271

A statute should be given such a construction as will effectuate its purpose, when that is possible, and no statute should be held invalid if it can be so construed, considering all its provisions, as to make it a valid statute.

—*In re C. E. Wynn-Johnson*.....630

A statute must be construed with reference to the whole system of which it forms a part. Such parts are to be read in pari materia, and taken together and construed as one system. They are to be construed in view of the evident purpose which the legislative body had in enacting them. They should, if possible, be so construed that no sentence or word should be superfluous, void, or insignificant.

—*Brace v. Solner, Treasurer of Nome*.....361

The word "provided" in the first clause of section 203 of the Civil Code of Alaska (Act June 6, 1900, c. 786, 31 Stat. 520), as amended by the act of March 3, 1901, has the meaning and significance of the conjunction "but" or "and" only.

—*Brace v. Solner, Treasurer of Nome*.....361

4. Construction of criminal statute.

Where the penalty fixed by statute is or may be one year's imprisonment, without stating whether it is in the penitentiary or the county jail, and where the imprisonment in the penitentiary adds forfeiture of civil or other rights or offices, and makes the offense a felony, the court will give the accused the benefit of the doubt, and fix the term of imprisonment in the county jail.

—*United States v. Powers and Robertson*.....180

**STATUTES CITED AND CONSTRUED IN CASES
REPORTED IN THIS VOLUME.**

ALASKA.		
CARTER'S ANNOTATED	§ 716	539
CODES.	§ 717	540
Page 15	CODE OF CIVIL PROCEDURE..	
Page 40, § 184.....	Ch. 12	154
Page 165, § 100.....	Ch. 32, § 303	589
Page 271, § 609.....	Ch. 58	614
Page 286	Ch. 70, §§ 698, 699, 700	282
Page 346, ch. 97, pt. 4, §§	Ch. 76, § 742.....	303
996, 997	Ch. 76, § 751.....	302
Page 367	Ch. 84, § 823.....	650, 653
Page 384	§ 4	429, 454, 459
Page 393	§ 46	667
Page 394, ch. 21.....	§§ 57-61	349
§ 702	§ 62	347, 349
§ 962	§ 84	351
	§§ 87, 88	564
	§ 93	243
CIVIL CODE.	§ 96	343, 349
Ch. 20	§ 97	565
Ch. 21	§§ 121, 122	155, 605
Ch. 21, § 198	§ 136	246
Ch. 23	§ 137	605
Ch. 23, §§ 228, 231.....	§ 145	604
597,	§§ 149, 150	604-606
598, 601-603	§ 151	605
Ch. 28; § 269.....	§§ 237, 238	242
§ 4	§ 239	244
§ 62	§ 257	614
§ 75	§ 301	120, 348, 350-352, 452
§ 98	§ 303	452, 563
§§ 119, 120	§ 304	452
391, 393, 567	§ 367	536, 540
§ 168	§ 475	116
§ 198	§ 506	345
§ 199	§ 581	155
§ 200	§ 611	615, 619
208, 214, 215, 364	§ 682	255, 262, 289
§ 201.....	§ 702	424
215, 274, 281,	§ 716	539
364, 368, 369, 397	§ 717	540
§ 202	§ 752	304
272, 274, 276, 278,		
364, 366, 369, 371, 378		
§ 203		
274, 276, 362,		
364, 366, 368-371		
§ 225		
667		
§ 367		
536, 540		

§ 824	656	UNITED STATES
§ 962	425	CONSTITUTION.
§ 995	423	
§ 1012	423, 425	Art. 1, § 8
§ 1042	457	555, 630, 631
CODE OF CRIMINAL PROCEDURE.		Art. 1, § 9
§ 149	623	554
§ 173	614	Art. 8, § 1
CODE OF PROCEDURE.		112
§ 3	183	STATUTES AT LARGE.
§ 90, subds. 1, 4	614	1783, Sept. 24, ch. 20, 1 Stat.
§ 410	282	82
§§ 419, 441	285	116
§ 460	429, 436	1865, Feb. 27, ch. 64, 13 Stat.
§§ 465, 469	181	440
§ 472	180, 186, 187	292
§ 473	181, 182	1866, July 4, ch. 166, 14 Stat.
§ 474	183, 184, 187	85
CRIMINAL CODE.		291
Tit. 2, ch. 7	218	1866, July 26, ch. 262, 14
Ch. 43, § 442	676	Stat. 251
Ch. 43, §§ 446, 451	677	293
§ 75	342	1868, ch. 273, § 4, 15 Stat.
§ 141	539	241
§ 168	615	185
§ 184	183	1870, July 9, ch. 235, 16 Stat.
§ 196	187	217
§ 216	679	291
§ 218	536, 541	1870, July 9, ch. 235, § 12, 16
§ 410	282	Stat. 217
§§ 419, 441	285	293
§ 443	677, 682	1872, May 10, ch. 152, 17
§ 466	112	Stat. 91
PENAL CODE.		286
§§ 460, 461	630	1872, May 10, ch. 152, § 2,
POLITICAL CODE.		17 Stat. 91 [U. S. Comp.
§§ 7, 10	633	St. 1901, p. 1424]
§ 15	252, 253	290
§ 16	254	1872, May 10, ch. 152, § 10,
§ 29	429, 436, 553, 554, 630	17 Stat. 94 [U. S. Comp. St.
ENGLAND.		1901, p. 1432]
29 Car. II., ch. 7, § 6	544-546	294
		1875, Feb. 22, ch. 95, 18 Stat.
		333 [U. S. Comp. St. 1901,
		p. 648]
		50
		1879, May 12, ch. 5, 21 Stat.
		3
		2
		1881, Feb. 23, ch. 73, 21 Stat.
		338
		3
		1881, March 3, ch. 140, 21
		Stat. 505 [U. S. Comp. St.
		1901, p. 1430]
		581, 582
		1884, May 17, ch. 53, 23 Stat.
		24 ..10, 25, 58, 75, 82, 173, 453
		1884, May 17, ch. 53, § 5, 23
		Stat. 24
		11, 13, 78, 79
		1884, May 17, ch. 53, § 7, 23
		Stat. 25
		13, 14, 107, 176
		1884, May 17, ch. 53, § 8, 28
		Stat. 26
		188, 198, 235, 289

1884, May 17, ch. 53, § 9, 23 Stat. 26	59	1899, March 3, ch. 429, §§ 446, 451, 30 Stat. 1334, 1335	677
1884, July 5, ch. 214, 23 Stat. 103 [U. S. Comp. St. 1901, p. 1607]	146, 150	1899, March 3, ch. 429, § 460, 30 Stat. 1336. Amended by Act 1900, June 6, ch. 786, § 29, 31 Stat. 330, 332..	429,
1887, Feb. 8, ch. 119, § 6, 24 Stat. 388	113	436, 630	
1891, March 3, ch. 561, § 11, 26 Stat. 1099 [U. S. Comp. St. 1901, p. 1467].....	108, 347, 389, 390, 494	1899, March 3, ch. 429, § 461, 30 Stat. 1337. Amended by Act 1900, June 6, ch. 786, § 29, 31 Stat. 330, 332.....	630
1891, March 3, ch. 561, § 12, 26 Stat. 1100 [U. S. Comp. St. 1901, p. 1467].....	235, 347, 389, 390	1899, March 3, ch. 429, § 466, 30 Stat. 1338	112
1891, March 3, ch. 561, §§ 13, 14, 26 Stat. 1100 [U. S. Comp. St. 1901, pp. 1467, 1468]	389	1899, March 3, ch. 429, § 472, 30 Stat. 1340	180
1896, June 9, ch. 387, 29 Stat. 316	92	1899, March 3, ch. 429, § 474, 30 Stat. 1340	187
1898, May 14, ch. 299, § 10, 30 Stat. 413 [U. S. Comp. St. 1901, p. 1469].....	198	1900, June 5, ch. 717, 31 Stat. 270 [U. S. Comp. St. 1901, p. 696]	344
1899, March 3, ch. 429, § 75, 30 Stat. 1263	342	1900, June 6, ch. 786, 31 Stat. 321..118, 246, 254, 492, 553, 554	
1899, ch. 429, § 90, subds. 1, 4, 30 Stat. 1294.....	614	1900, June 6, ch. 786, 31 Stat. 342	218
1899, March 3, ch. 429, § 141, 30 Stat. 1274	539	1900, June 6, ch. 786, 31 Stat. 364	202
1899, March 3, ch. 429, § 149, 30 Stat. 1301	623	1900, June 6, ch. 786, 31 Stat. 429	614
1899, March 3, ch. 429, § 168, 30 Stat. 1303	615	1900, June 6, ch. 786, 31 Stat. 520	595
1899, March 3, ch. 429, § 173, 30 Stat. 1304	614	1900, June 6, ch. 786, 31 Stat. 521	280
1899, March 3, ch. 429, § 218, 30 Stat. 1285	536, 541	1900, June 6, ch. 786, § 4, 31 Stat. 323	437
1899, March 3, ch. 429, § 410, 30 Stat. 1330	282	1900, June 6, ch. 786, § 4; 31 Stat. 334	439, 454, 459
1899, March 3, ch. 429, § 419, 30 Stat. 1331	285	1900, June 6, ch. 786, § 4, 31 Stat. 494	459
1899, March 3, ch. 429, § 441, 30 Stat. 1334	285	1900, June 6, ch. 786, §§ 7, 10, 31 Stat. 324, 325.....	633
1899, March 3, ch. 429, § 442, 30 Stat. 1334	677	1900, June 6, ch. 786, § 15, 31 Stat. 327	252, 253
1899, March 3, ch. 429, § 443, 30 Stat. 1334	682	1900, June 6, ch. 786, § 16, 31 Stat. 328	253
		1900, June 6, ch. 786, § 27, 31 Stat. 330	113

- 1900, June 6, ch. 786, § 29, 31
 Stat. 330, 332 429, 436, 630
- 1900, June 6, ch. 786, § 46, 31
 Stat. 339 667
- 1900, June 6, ch. 786, § 62, 31
 Stat. 342 347, 349
- 1900, June 6, ch. 786, § 62, 31
 Stat. 501 509
- 1900, June 6, ch. 786, § 75, 31
 Stat. 503 392
- 1900, June 6, ch. 786, § 84, 31
 Stat. 345 351
- 1900, June 6, ch. 786, §§ 87,
 88, 31 Stat. 346 564
- 1900, June 6, ch. 786, § 93, 31
 Stat. 346 243
- 1900, June 6, ch. 786, § 96, 31
 Stat. 347 343
- 1900, June 6, ch. 786, § 98, 31
 Stat. 505 391, 393, 567
- 1900, June 6, ch. 786, §§ 121,
 122, 31 Stat. 351 155
- 1900, June 6, ch. 786, § 136,
 31 Stat. 354 246
- 1900, June 6, ch. 786, § 137,
 31 Stat. 354 605
- 1900, June 6, ch. 786, §§ 145,
 149, 150, 31 Stat. 355, 356.. 604
- 1900, June 6, ch. 786, § 198,
 31 Stat. 520 364
- 1900, June 6, ch. 786, § 199,
 31 Stat. 520 364
- 1900, June 6, ch. 786, § 200,
 31 Stat. 520 208, 364
- 1900, June 6, ch. 786, § 201,
 31 Stat. 521.. 274, 281, 364, 397
- 1900, June 6, ch. 786, § 202,
 31 Stat. 521.. 272, 274, 364
- 1900, June 6, ch. 786, § 203,
 31 Stat. 521. Amended by
 Act 1901, March 3, ch. 859,
 31 Stat. 1438..... 274, 276, 362,
 364, 366, 368-370
- 1900, June 25, ch. 786, § 225,
 31 Stat. 528 667
- 1900, June 6, ch. 786, §§ 228,
 231, 31 Stat. 528, 529.....
 597-599, 601
- 1900, June 6, ch. 786, §§ 237,
 238, 31 Stat. 368..... 242
- 1900, June 6, ch. 786, § 239,
 31 Stat. 368 244
- 1900, June 6, ch. 786, § 257,
 31 Stat. 372 614
- 1900, June 6, ch. 786, § 269,
 31 Stat. 563 595
- 1900, June 6, ch. 786, § 301,
 31 Stat. 383.. 348, 350-352, 452
- 1900, June 6, ch. 786, § 303,
 31 Stat. 383 563
- 1900, June 6, ch. 786, § 367,
 31 Stat. 552 536, 540
- 1900, June 6, ch. 786, § 475,
 31 Stat. 410 116, 120
- 1900, June 6, ch. 786, § 506,
 31 Stat. 415 345
- 1900, June 6, ch. 786, § 611,
 31 Stat. 430 615
- 1900, June 6, ch. 786, § 682,
 31 Stat. 440..... 255, 262, 289
- 1900, June 6, ch. 786, §§ 698-
 700, 31 Stat. 442, 443..... 282
- 1900, June 6, ch. 786, § 702,
 31 Stat. 443 424
- 1900, June 6, ch. 786, § 716,
 31 Stat. 445 539
- 1900, June 6, ch. 786, § 717,
 31 Stat. 445 540
- 1900, June 6, ch. 786, § 742,
 31 Stat. 449 303
- 1900, June 6, ch. 786, § 751,
 31 Stat. 449 302
- 1900, June 6, ch. 786, § 823,
 31 Stat. 462 650, 658
- 1900, June 6, ch. 786, § 824,
 31 Stat. 463 656
- 1900, June 6, ch. 786, § 962,
 31 Stat. 483 425
- 1900, June 6, ch. 786, § 995,
 31 Stat. 487 423
- 1900, June 6, ch. 786, § 1012,
 31 Stat. 489 423, 425
- 1900, June 6, ch. 786, § 1042,
 31 Stat. 493 457
- 1901, March 3, ch. 859, 31
 Stat. 1438 .. 274, 275,
 277, 278, 362, 364

REVISED STATUTES.		COMPILED STATUTES 1901.	
§ 363 [U. S. Comp. St. 1901, p. 208]	65	Page 208	65
§§ 627, 728 [U. S. Comp. St. 1901, p. 584]	13	Page 584	13
§ 829 [U. S. Comp. St. 1901, p. 636]	59, 65, 66	Page 636	59, 65, 66
§ 830 [U. S. Comp. St. 1901, p. 639]	57, 67	Page 639	57, 67
§ 846 [U. S. Comp. St. 1901, p. 647]	52	Page 647	52
§ 850 [U. S. Comp. St. 1901, p. 655]	51	Page 648	50
§ 855 [U. S. Comp. St. 1901, p. 657]	52	Page 655	51
§§ 856, 857 [U. S. Comp. St. 1901, pp. 657, 658]	59	Page 657	52, 59
§ 953 [U. S. Comp. 1901, p. 696]	344	Page 658	59
§ 956 [U. S. Comp. St. 1901, p. 697]	329, 330	Page 696	344
§ 1117 [U. S. Comp. St. 1901, p. 818]	3	Page 697	329, 330
§§ 1418, 1419 [U. S. Comp. St. 1901, p. 1007]	2	Page 813	3
§ 1883	59	Pages 1007, 1008	2, 3
§ 1891	551	Page 1272	13
§ 1956	70, 71	Page 1338	112
§§ 2025, 2026 [U. S. Comp. St. 1901, p. 1272]	13	Page 1424	290, 315
§§ 2079, 2103	113	Page 1425	451, 460
§ 2169 [U. S. Comp. St. 1901, p. 1333]	112	Page 1426	121, 249
§ 2319 [U. S. Comp. St. 1901, p. 1424]	312	Pages 1429, 1430	115-120, 333,
§ 2320 [U. S. Comp. St. 1901, p. 1424]	286, 290	518-520, 578, 580, 581	
§ 2322 [U. S. Comp. St. 1901, p. 1425]	451, 460	Page 1432	293, 294
§ 2324 [U. S. Comp. St. 1901, p. 1426]	121, 249	Page 1437	38
§ 2325 [U. S. Comp. St. 1901, p. 1429]	115-120, 333, 518-	Page 1457	110, 390
	520, 578, 580, 581, 584, 590	Page 1467	109, 235, 347, 389, 390
§ 2326 [U. S. Comp. St. 1901, p. 1430]	115-120, 333, 518-	Page 1468	389
	520, 578, 580, 581, 584-586	Page 1469	198
		Page 1607	146, 150
		Page 2326	580
		Page 3608	13
TREATIES.			
With Russia, March 30, 1867,			
15 Stat. 539			
5			

ILLINOIS.		§ 777	50
REVISED STATUTES 1891.		§§ 1094, 1100	81
Ch. 110, § 5	671	GENERAL LAWS 1843-1872.	
		Page 251, § 699.....	34
NEBRASKA.		Page 266, § 779	34
COMPILED STATUTES 1901.		Page 267, § 785	35
Ch. 19, § 38	545	Page 267, § 786	36
NEVADA.		Page 604	61
COMPILED LAWS.		§ 552	18
§ 1674	586	§§ 806-808	25, 26
OREGON.		§ 809	27
CONSTITUTION.		§§ 811, 812	28
Art. 7, § 9	79	HILL'S ANNOTATED LAWS.	
CODE OF CIVIL PROCEDURE.		Page 230, § 86	45
Page 169, § 293	40	Page 242, § 102	30
Page 169, § 296	41	Page 412, § 396	168, 169
Pages 284, 285	13	Pages 502, 503	174
Page 169, §§ 298, 301.....	40	Page 637, § 895	161
Pages 515; 687	38	Ch. 2, tit. 1, § 178.....	168
§ 85	45	Ch. 2, tit. 5, §§ 218, 219.....	169
		Ch. 6, tit. 4, § 541.....	161, 163
		§ 537, subd. 5.....	161
		§§ 582, 583, 585.....	175
		§ 902	161
		§ 1078	77
		§ 1546	19

STIPULATION.

Amending libel after giving, see "Admiralty."

STOCKHOLDER.

Cannot maintain suit to enjoin license, see "Injunctions."

STREET.

Vacation in town site, see "Municipal Corporations."

STREET IMPROVEMENTS.

Town may collect for, by assumpsit, see "Municipal Corporations."

SUMMONS.

Publication of, see "Process."

SUNDAY.

1. Seaman must labor on.

A scaman has no right to refuse duty required of him on Sunday by our calendar, it appearing that, at the port of Unalaska, the day, owing to a difference in the calendar, was not observed as a holiday; but the master had no right to expel him from the ship for such refusal. (Cited in Pearson v. The Alsalfa [D. C.] 44 Fed. 358. See, also, Nelson v. Pyramid Harbor Packing Co., 4 Wash. St. 689, 30 Pac. 1096.)

—Johnson v. The Cyane, 1 Sawy. 150, Fed. Cases No. 7,381.

2. Order of arrest issued on Sunday is void.

The issuance and service of an order of arrest in a civil action on Sunday is void, and cannot be aided or cured by appearance and giving bond for appearance.

—Valentine v. Roberts.....536.

SUPERSEDEAS.

Judge of Circuit Court of Appeals may grant, see "Appeal and Error."

SUPREME COURT OF ALASKA.

District court is such on appeal, see "Courts."

SURVIVORSHIP.

Of actions, see "Parties."

TAXATION.

For school purposes, see "Schools."

TENANCY IN COMMON.

Injunction against co-tenant, see "Mines and Minerals."

1. Co-owners in mining claim are co-tenants and not copartners.

When two persons locate a mining claim together, as to such claim only, their relationship is that of co-tenants of real estate, and not copartners in business.

—Garside v. Norval.....19

2. Co-tenant not bound by judgment without notice.

A tenant in common, who is in actual possession with his co-tenant, is not affected by the judgment in an action of ejectment against the latter, to which he was not a party, and of which he knew nothing.

—Miller v. Blackett (D. C.) 47 Fed. 547.

TERRITORIES.

Congress has power to establish courts in, see "Courts."

Power of Congress to license trade and business, see "Licenses."

Power of United States to acquire and govern, see "United States."

1. Power of United States to acquire territories.

The power conferred by the Constitution on the government of the United States to make war and treaties implies the power to acquire territory, either by conquest or treaty, and the power to govern such territory until it is fit to be admitted into the Union as a state results from the acquisition thereof.

—Nelson v. United States (C. C.) 30 Fed. 112.

2. Alaska is a territory.

Alaska is one of the territories of the United States. It was so designated by the Supreme Court of the United States by its order of May 11, 1891 (139 U. S. 707, 11 Sup. Ct. iv), and has always been so regarded.

—The Coquitlam, 163 U. S. 346, 16 Sup. Ct. 1117, 41 L. Ed. 184.

3. Power of Congress over.

Congress has full legislative power over the territories, unrestricted by the limitations of the Constitution.

—Endleman v. United States, 86 Fed. 456, 30 C. C. A. 186.

The power of Congress over a territory of the United States extends to all rightful subjects and methods of legislation not denied to it by the Constitution, and consistent with the spirit and genius of the same, and the purpose for which such territory may have been acquired.

—Nelson v. United States (C. C.) 30 Fed. 112.

Congress has full legislative power over the territories, unrestricted by the limitations of the Constitution. (Endleman v. U. S., 30 C. C. A. 186, 86 Fed. 456, followed.)

—United States v. Binns.....553

In legislating for Alaska, Congress exercises the combined powers of the general and state government. The Alaska Code is to be considered and construed as if enacted by the Legislature of a state.

—Allen v. Myers.....114

4. Removal of territorial judge.

The whole subject of the organization of territorial courts, the tenure by which the judges of such courts shall hold their offices, the salary they receive, and the manner in which they may be removed or suspended from office, was left by the Constitution with Congress, under its plenary power over the territories of the United States.

—McAllister v. United States, 141 U. S. 174, 11 Sup. Ct. 949, 35 L. Ed. 693.

Under the power conferred upon the President under section 1768, Rev. St., he had authority, in his discretion, to remove a district judge of Alaska and to appoint another in his place.

—McAllister v. United States, 141 U. S. 174, 11 Sup. Ct. 949, 35 L. Ed. 693.

TIDE LANDS.

Not subject to location as mineral lands, see "Mines and Minerals."

No title acquired on, by forcible trespass, see "Public Lands."

TOWN SITE.

Occupant may maintain ejectment, see "Ejectment."
Title by occupancy only, see "Public Lands."
Settlement and occupancy, see "Public Lands."
First occupant entitled to lot, see "Public Lands."
Adverse claim in patent proceeding, see "Public Lands."
Trustee's powers, see "Public Lands."

TRADE AND MANUFACTURES.

Possession of land for purposes of, see "Public Lands."

TRANSFER COMPANIES.

License for conducting business, see "Territories."

TREATIES.

Cession of Alaska to United States, see "Alaska."
Force of, with Makah Indians, see "Indians."

1. Russian cession of Alaska.

The commissioners appointed to make formal delivery of the ceded territory of Alaska from Russia to the United States were not invested with judicial power to determine titles to property; their powers were purely ministerial, and their action in making inventories of property was simply a matter of convenience, and a method of determining *prima facie* what property the government should appropriate to itself for the time being, and what should be left to the individual proprietors. They possessed no power to vary the language of the treaty, nor to determine questions of title or ownership.

—Kinkead v. United States, 150 U. S. 488, 14 Sup. Ct. 172, 37 L. Ed. 1152.

Where, as in this case, the bill alleges a fee-simple title to real estate derived from Russia prior to the treaty of cession of 1867, the court will take judicial notice of such treaty, and of the protocol of transfer, and the property inventories and map of New Archangel, or Sitka, thereunto attached, and made a part of such

protocol, and executed by the commissioners appointed by Russia and the United States to make the formal transfer of Alaska.

—Callsen v. Hope (D. C.) 75 Fed. 758.

2. Supreme law of the land.

A treaty is the law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

—Ex parte Cooper, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232.

An award of arbitrators under a treaty between the United States and another nation, by which the contracting nations agree that the decision of the tribunal of arbitration shall be a final settlement of all questions submitted, becomes the supreme law of the land, and is as binding on the courts as an act of Congress. (D. C.; 49 Fed. 575, reversed.)

—The La Ninfa, 75 Fed. 513, 21 C. C. A. 434.

TRESPASS.

Not an indictable offense, see "Indictment and Information."

On mining claim, see "Mines and Minerals."

Forcible entry on possessory rights, see "Public Lands."

No title acquired on tide lands by, see "Public Lands."

TRIAL.

Presumptions on appeal, see "Appeal and Error."

Prejudicial remarks of court or counsel, see "Criminal Law."

Jury findings in equity cases, see "Equity."

Instructions in adverse mining suit, see "Mines and Minerals."

Contributory negligence as a defense, see "Negligence."

Verdict on insufficient evidence, see "New Trial."

1. Continuance.

A continuance will not be granted when the applicants had notice of the time and place of the trial, and their efforts to be present do not appear to have been made in good faith.

—Pratt v. United Alaska Min. Co.....95

A complainant who, with knowledge that his suit is at issue and ready for trial, voluntarily leaves the district without obtaining or applying for a continuance, or arranging for the taking of his testimony, cannot complain because the court refused to grant a continuance to procure his testimony when the cause was reached for trial.

—Englestad v. Dufresne, 116 Fed. 582, 54 C. C. A. 38.

2. Instructions.

A requested charge is properly refused where covered by charges given.

—Corbus v. Leonhardt, 114 Fed. 10, 51 C. C. A. 636.

In a suit in ejectment evidence was offered by both plaintiff and defendant, and was received without objection, of a second and later location of a mining claim by the plaintiff, which was not specially pleaded in the complaint, and the court submitted all the evidence to the jury, who found for the plaintiff upon the location not specially pleaded. Defendant excepted to the instruction submitting the last location as not within the issue, and made that alleged error a ground for a motion for a new trial. *Held*, that where the evidence offered is broader than the issues tendered by the pleadings, or otherwise varying therefrom, and is received without objection, it was the duty of the judge, and not error, to instruct the jury upon the whole thereof.

—Black v. Teeter.....561

3. Question of fellow servant, or not, for jury.

In an action for personal injuries, it appeared that plaintiff was one of a gang of workmen employed in defendant's mine to break up rock in the ore pit, from which the broken rock was drawn, from time to time, through chutes, to a lower level, at which the chutes were closed by gates. Defendant had a general manager and a superintendent in charge of each of several works belonging to it, and the gang to which plaintiff belonged worked under the direction of one F., its boss, whose duties were to see that the men did their work, to direct them where to work, to notify them when rock was to be drawn through the chutes, and to direct when rock should be drawn through any particular chute. There was a conflict of evidence as to whether F. was authorized to employ and discharge men at work under him.

Plaintiff, who was at work on the top of a pile of rock, covering the head of a chute, was injured by being drawn through the chute with the rock. There was a conflict of evidence as to whether, on the occasion in question, F. notified plaintiff that the chute was to be drawn. *Held*, that it was properly left to the jury to determine whether or not F. was a fellow servant of plaintiff.

—Alaska Treadwell Gold Min. Co. v. Whelan, 64 Fed. 462, 12 C. C. A. 225.

4. Findings and conclusions.

In this court, *held*, that findings of fact and conclusions of law are not of such binding force as to affect adversely the rights of the defendants.

—Martin v. Heckman.....165

5. General verdict.

In the trial of an action for the possession of real estate, a general verdict for the plaintiff is a finding that he is entitled to the possession of all the property described in the complaint. In an action in support of an adverse claim to a mining location, the only question presented is the priority of right to purchase the fee, and a general verdict for plaintiff is sufficient.

—Bennett v. Harkrader, 158 U. S. 444, 15 Sup. Ct. 863, 39 L. Ed. 1046.

6. Reopening of case.

Where, after both parties had announced that the evidence was closed, the court, at the request of the plaintiff, and in the interest of substantial justice, reopened the case to receive further testimony on one of the issues, and it is not claimed that the defendant suffered any injustice, or that his rights were prejudiced thereby, such action should not be held to be an abuse of discretion.

—Alaska United Gold Min. Co. v. Keating, 116 Fed. 561, 53 C. C. A. 655.

TRUSTEE.

Powers of a town-site trustee, see "Public Lands."

TRUSTS.

1. Resulting trusts.

When L. bought the land in dispute from B., and paid the entire consideration therefor, causing the deed to be made to S., a resulting trust was thereby created, and S. held the land in trust for L.

—Lewis v. Wells (D. C.) 85 Fed. 896.

The premises having been in the possession of S. and defendant, as his executor, since January 1, 1895, and having come into S.'s possession by virtue of his trusteeship and agency, defendant must account to the plaintiffs for the rents and profits from that date.

—Lewis v. Wells (D. C.) 85 Fed. 896.

2. Violation of trust by trustee.

The trustee in this case, in dealing with the trust property, demanded and obtained a certain six-acre tract of the property to be reserved for and conveyed to him before he would sign necessary contracts of settlement with third parties for the cestui que trust. *Held*, that his act was wrongful, and the conveyance void.

—Moore v. Moore.....225

UNITED STATES.

See "Territories."

Questions of sovereignty, see "Constitutional Law."

Laws of take precedence over those of Oregon, see "Homicide."

Force of treaty with Makah Indians, see "Indians."

Control over liquor traffic in Alaska, see "Intoxicating Liquor."

Acquires wharves only by act of Congress, see "Wharves."

UNITED STATES COMMISSIONER.

Jurisdiction under act of May 17, 1884, see "Courts."

1. Acting municipal judge must pay over "costs."

Where a commissioner assumes to act as a police magistrate under the authority of town ordinances, and to impose fines and forfeitures, and costs, in enforcement of such ordinances,

for crimes not recognized by the laws of Alaska, he has no right to retain the "costs" after having paid over the "fines and forfeitures." There is no law or rule to justify his paying the "costs" to the United States.

—Town of Nome v. Reed, Commissioner.....395

UNITED STATES MARSHAL.

1. Powers of deputies in Alaska.

Deputy United States marshals appointed under the provisions of paragraph 3, § 6, Act May 17, 1884, providing a civil government for Alaska (28 Stat. 24; 1 Supp. Rev. St. p. 430), have power to serve and execute process issued by the United States commissioners of said district, exercising the powers of justices' courts according to the statutes of Oregon.

—Holden v. Williams (D. C.) 75 Fed. 798.

The marshal of said district is liable for acts done by said deputies under color of office in executing or serving such processes.

—Holden v. Williams (D. C.) 75 Fed. 798.

2. Mileage to deputy in transporting prisoners.

No mileage is allowed to deputy marshals while transporting prisoners to prison and returning therefrom. Their actual traveling and subsistence expenses are allowed.

—United States v. Hillyer.....47

3. Burden of proof in settling marshal's accounts.

In actions against the marshal to recover for a misappropriation of funds under his charge, where his accounts have been approved, the burden of proof rests on the government.

—United States v. Hillyer.....47

4. Settlement of accounts of marshal.

The approval of the accounts of the United States marshal by the court is *prima facie* evidence of the correctness of the items, and, in the absence of clear and unequivocal proof of mistake on the part of the court, it is conclusive.

—United States v. Hillyer.....47

The marshal is necessarily vested with discretionary power in the disbursement of public funds for medical services and attendance and the support of prisoners, and his accounts therefore, when approved by the court for reasonableness and necessity, are conclusive as to the proper exercise of his discretion, and cannot, in the absence of fraud and unequivocal mistake, be disallowed by the department.

—United States v. Hillyer.....47

5. Marshal has no authority to employ attorney.

The power to retain and employ attorneys and counselors for the government rests solely with the Attorney General, and the marshal has no authority to expend funds for that purpose.

—United States v. Hillyer.....47

6. Allowance of witness fees paid by marshal.

A marshal is entitled to witness fees paid by him to officers of the United States by order of the court, the payment of which has been ordered by the court, under Rev. St. § 846 [U. S. Comp. St. 1901, p. 647], and for which no itemized account was presented or audited by such officers, notwithstanding the provisions of section 850 [page 655], requiring them to furnish a sworn itemized account of such fees.

—United States v. Hillyer, 58 Fed. 678, 7 C. C. A. 428.

7. Allowance of accounts not appealable.

The allowance of the items under section 846, Rev. St. [U. S. Comp. St. 1901, p. 647], paid under order of the court, is not reviewable in an action against the marshal by the government to recover the same as paid contrary to law. (McMullen v. U. S., 146 U. S. 360, 13 Sup. Ct. 127, 36 L. Ed. 1007, distinguished.)

—United States v. Hillyer, 58 Fed. 678, 7 C. C. A. 428.

8. Salary and fees of marshal.

Under Act Cong. 1884, c. 53, § 9, fixing the salary of a United States marshal in Alaska at \$2,500 per annum, and providing that he shall pay the fees received by him into the treasury of the United States, he is required to pay over all fees received by him, whether for services rendered to the government or for those rendered to private litigants.

—United States v. Hillyer, 58 Fed. 678, 7 C. C. A. 428.

VENDOR AND PURCHASER.

Fraud in sales by co-tenant, see "Mines and Minerals."

1. Recovery where failure in part of entire contract.

Plaintiff contracted to sell to defendants' assignor a mining claim, which he had located and to which he had made application for a patent, described in accordance with the survey thereof made by the government surveyor. He deposited a deed in escrow, and agreed to prosecute his application and obtain a final receipt before the purchase money became payable. A portion of the claim as so surveyed overlapped a placer claim owned by the purchaser, and to which it afterwards received a patent. Thereafter it filed a protest against the issuance of a patent for such portion of plaintiff's entry, on the ground that there was no known lode or vein thereon at the time it was patented under the placer location. This issue was tried and decided by the land department in favor of the protestant, and plaintiff's entry was held for cancellation as to such portion of his claim, which included about one-half its surface area. *Held*, that such determination was conclusive, and since his contract was entire, and he could not give title to the land sold and described in his deed, he could not maintain an action for the purchase money.

—Griffin v. American Gold Min. Co., 114 Fed. 887, 52 C. C. A. 507.

2. Fraudulent purchase of real property.

One who purchases real estate for a mere nominal consideration, with knowledge of a prior sale and of a prior unrecorded deed, made in good faith, and for a valuable consideration, is not a bona fide purchaser for value. Nor was he a "subsequent innocent purchaser in good faith, and for a valuable consideration," such as is protected by section 98 of the Civil Code of Alaska (Act June 6, 1900, c. 786, 31 Stat. 505).

—Crossly v. Campion Min. Co.....391

VERDICT.

"Without capital punishment," see "Homicide."

General verdict in real actions sufficient, see "Trial."

VICE PRINCIPAL.

Mate in charge of ship is, see "Negligence."

WAIVER.

By patent, see "Mines and Minerals."

Prohibition lost by, see "Prohibition."

WATER AND WATER COURSES.

Conveyance necessary to pass, see "Mines and Minerals."

1. Abandonment of mining ditches by nonuser.

Water rights, ditches, and flumes *held* abandoned, and the use and possession thereof lost, under the laws of Oregon applicable to Alaska, for nonuser for one year or more, and they will then be open to relocation and possession by the next locator.

—Noland v. Coon.....36

WHARVES.

Upland owner may extend across tide lands, see "Public Lands."

1. Acquired by United States only by act of Congress.

An appropriation of a water front for the purposes of wharfage to the United States can only be made by an act of Congress.

—United States v. North-West Trading Co.....5

WITNESSES.

Excluded on account of interest, see "Constitutional Law."

Procuring testimony outside of district, see "Depositions."

Of a low order of intelligence, see "Evidence."

Names on indictment, see "Indictment and Information."

Not discredited by race or color, see "Trial."

Marshal's receipts for fees allowed, see "United States Marshal."

1. Accused as a voluntary witness.

Where an accused party waives his constitutional privilege of silence, takes the stand on his own behalf, and makes his own

statement, it is clear that the prosecution has a right to cross-examine upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime, though he cannot, on cross-examination, be compelled to furnish original evidence against himself.

—Fitzpatrick v. United States, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1.8.

While the court would probably have no power of compelling an answer to any question put to a defendant who voluntarily goes upon the stand in his own defense, yet refusal to answer a proper question put upon cross-examination has been held to be a proper subject of comment to the jury.

—Fitzpatrick v. United States, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078.

2. Competency.

A woman who has been married and divorced is not an incompetent witness in a capital case because designated in the list of witnesses furnished defendant by her maiden name.

—Bird v. United States, 23 Sup. Ct. 42.