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Cover Photograph:
The men of the Chollar Mine, Virginia City, Nevada, Ca. 1880.
(Huntington Library)



Judge James R. Browning
United States Court of Appeals, Ninth Circuit
Appointed 1961; Chief Judge 1976-1988

DEDICATION: JUDGE JAMES R. BROWNING

THE HONORABLE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE
SUPREME COURT OF THE UNITED STATES

Jim Browning has given twenty-seven years of dedicated service to the Ninth Circuit as one of its judges, a splendid achievement in forty-two years of nearly continuous public service.

The position of chief judge is not an honorary title. By law the chief judge is responsible for the administration of the courts in his circuit. Easily enough said. The Ninth Circuit as an institution comprises over 150 jurists and hears and decides more cases and more appeals than any other circuit in the country. Although he is aided in the task by councils and committees drawn from all of these judges, it is the Chief who is the focal point for the stream of decisions regarding equipment, budgets, schedules, illnesses, and substitutes; not to mention the decisions he must make with regard to staff personnel matters, the work he must coordinate with various state and federal agencies, his responsibilities under various federal laws including the Judicial Conduct and Disability Act and the Speedy Trial Act, and his membership on the Judicial Conference of the United States. Additionally, in the Ninth Circuit, the chief judge presides over every en banc hearing.

Formal structures, however, can carry us only so far. In the last analysis, the prestige and judicial reputation of a court as an institution depend upon the character of judges to whom judicial responsibility is entrusted. The chief judge's own temperament and judicial bearing set the standard for every judge in the circuit. Chief Judge Chambers, Jim's predecessor, understood the importance of ensuring that each individual judge in the Ninth Circuit was confident of his or her own independence in determining how best to discharge judicial duties. Jim Browning built upon and strengthened this Ninth Circuit tradition, and did so during a time when the dramatic expansion of the case load might well have led a less imaginative and committed man to go in the opposite direction. He has shaped the institution that is the Ninth Circuit into a refined and powerful judicial entity without permitting a

bureaucracy to stifle judicial character or independence. With his warmth, good sense, and devotion to the law, Jim Browning was the right person, in the right place, at the right time. Jim has served this circuit with a dedication that is exemplary in all respects. I am fortunate to have served with so fine a jurist, to have learned from so fine an administrator, and to have so admirable and close a friend.

THE HONORABLE ALFRED T. GOODWIN, CHIEF JUDGE
UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

When Judge Browning, mid-way in his career as an active circuit judge, took over the tasks of chief judge, he brought to the office many talents for which the Ninth Circuit has reason to be grateful.

Jim Browning was already a seasoned appellate judge who had watched the court grow over a period of a dozen years from a nine-judge court to a thirteen-judge court. Although he probably did not foresee the dimensions of the growth that was about to overtake him, he did know that growth was inevitable and he was prepared to deal with it. Shortly after Jim Browning assumed the title of chief judge, the court doubled in size and a few years later, gained five more active judges.

Dramatic growth tested Jim Browning's talent as a peacemaker and dispenser of collegiality. He passed with the highest marks. Jim Browning meets every problem with a smile. He combines optimism with the ability to cause persons of widely different views to work together to solve problems. His confidence in the court's ultimate ability to solve its problems and his wise counsel in helping it find the solutions have kept many a potential crisis from becoming noteworthy. His ability to develop harmony within an institution of strong-minded, independent men and women has provided a remarkably smooth operation while preserving independence and individual expression in the important work of deciding cases. It is good that Jim is remaining active and will give his successors the benefit of his wise counsel. He has earned the reputation of prophet with honor in his own time.

THE HONORABLE ROBERT F. PECKHAM, CHIEF JUDGE
UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA

W e who serve in various capacities in the Ninth Circuit acknowledge a great gratitude to Chief Judge James R. Browning for the twelve splendid years that have become known as the "Browning Years." From the perception of a district judge, he has been the consummate chief circuit judge — selflessly dedicated to the improvement of the circuit, uncommonly able to involve judges at every level to address common problems before they overcame us (and problems we have had in this vast, ever proliferating circuit), and most of all to lead us in harmony and with understanding, creativity, and resolve. What this leadership has produced is truly remarkable. Let me enumerate a few illustrations:

- The mini en banc circuit panel concept is unique to the Ninth Circuit — a significant restructuring that has been essential to the preservation of the Ninth Circuit in its present form.
- The Ninth Circuit was the first circuit to have equal representation between circuit and district judges on the Judicial Council, making it a more vital, effective governing body.
- Chief Judge Browning established permanent conferences of chief district judges, chief bankruptcy judges, magistrates, clerks, and chief probation officers to act as clearinghouses for communication throughout the circuit and to generate proposals for improvements in court administration.
- No circuit exceeded the Ninth in adapting modern technology to court administration during these dozen years.
- He has utilized the many talents of the lawyers of the Ninth Circuit by making them members of committees of the Judicial Council, the Ninth Circuit Conference, and the Senior Advisory Board.

His impact extended beyond the circuit. On Capitol Hill and at the Judicial Conference, he has been a driving, constructive force. This national leadership role was recently recognized at a

Washington, D.C. reception in his honor when the Chief Justice paid a warm tribute to Jim as an excellent leader of the federal judiciary.

We salute you, Jim, and from the bottom of our hearts say thank you for the "Browning Years."

JOHN A. SUTRO, SR., ESQUIRE
PILLSBURY, MADISON & SUTRO, SAN FRANCISCO

It is a privilege and pleasure to have the opportunity to join in recognition of Judge James R. Browning.

As a judge of the United States Court of Appeals for the Ninth Circuit Judge Browning is a most highly regarded and respected jurist. Judge Browning was Chief Judge of the United States Court of Appeals for the Ninth Circuit from February 1, 1976, to June of this year. Judge Browning will become seventy years of age on October 1 of this year.¹ Professor Arthur Hellman of the University of Pittsburgh School of Law has made a scholarly examination of Judge Browning's work on improvements in the administration of justice and found Judge Browning's accomplishments to have been many.

When Judge Browning became chief judge, the Ninth Circuit had the worst record for case processing. Under his leadership the disposition time of cases was about half the time it was when he became chief judge. Despite the tremendous amount of time Judge Browning spent on administration of the Ninth Circuit, he wrote many excellent opinions.

Judge Browning's dedication to the Ninth Circuit Court of Appeals is evidenced by the existence of the Ninth Judicial Circuit Historical Society, a nonprofit public benefit corporation. It was Judge Browning who conceived of the Society; he is literally the father of it. To accomplish the purposes of the Society, Judge Browning has given generously of himself.

¹ 28 U.S.C., section 45(C) provides:

"No circuit judge may serve or act as chief judge of the circuit after attaining the age of seventy years unless no other circuit judge is qualified to serve as chief judge of the circuit under paragraph (1) or is qualified to act as chief judge under paragraph (2)."

MAKING LAW IN THE GREAT BASIN: THE EVOLUTION OF THE FEDERAL COURT IN NEVADA, 1855-1905

BY JAMES W. HULSE

The total absence of precedent was once the occasion of quite an original remark uttered by the late Senator William M. Stewart, then one of the shining young legal lights of the local bar. Mr. Stewart had asked for a ruling which the court was inclined to consider unreasonable. "But Mr. Stewart," interpolated His Honor, "How can you expect me to entertain such a request? We find no precedent."

"Then, Your Honor, let us make one!" was Stewart's quick reply. "In all this vast Territory we find no precedent for anything. We have no statutes, so we can only quote from memory, and as mortal man is prone to err, our memory might be faulty. In my opinion it is time we pulled off our coats and made a little history on our own account. In this particular instance, so far as I am concerned, I am quite willing to accept Your Honor's ruling, and respect it as reverently as I shall after it has been confirmed by the Supreme Court of the United States."

Needless to say, Mr. Stewart's eloquent plea containing such a cleverly implied compliment to the court carried, and the ruling was made in his favor.¹

James W. Hulse is Professor of History at the University of Nevada, Reno. The author thanks Professor Russell Elliott and Russell W. McDonald, Esq., former director of the Nevada Statute Revision Commission, for their advice, suggestions, and criticisms.

¹ J. P. O'Brien, ed., *History of the Bench and Bar in Nevada* (San Francisco, 1913) 7.

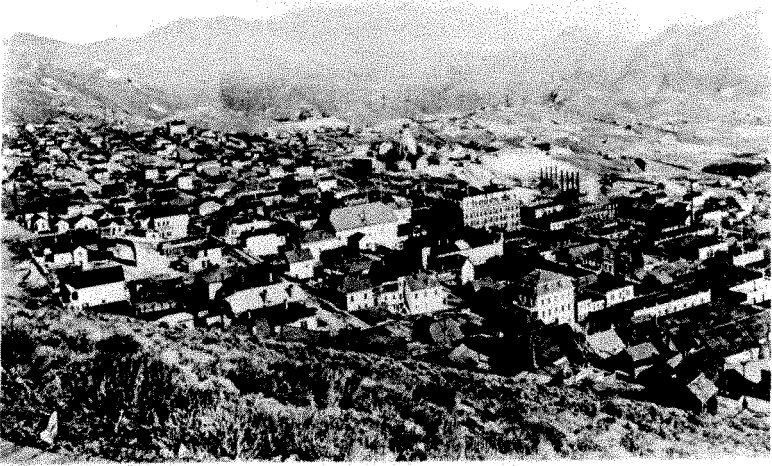
Much case law came into being by this method on the Nevada mining frontier of the 1860s, and the judiciary of necessity was more pliant than it was disposed to be in jurisdictions where the traditions of law were better known and more widely respected. Nevada provides an example of a place where the federal courts had to make their way by stages, and where personality often carried more weight than precedent.

The early history of the federal court system in Nevada is the record of the gradual establishment of judicial authority in a region where there was great wealth at stake before the basic instruments of law and government had been established, and where there was little incentive for the citizenry to respect the principles of American law established on the other side of the continent. For about forty years, the original oligarchic system of frontier "justice" — personified in part by William M. Stewart — tried to influence the traditional functioning of the courts and to use them for non-judicial purposes. Our purpose in this essay will be to trace the early development of the federal judicial authority in Nevada from the mid-nineteenth century until the first decade of the present century and to analyze its struggle for integrity and impartiality.² From this reading, it appears evident that the judges were often more honorable than the system which produced them.

THE JUDICIAL FRONTIER IN WESTERN UTAH TERRITORY, 1851-1861

In 1850, when the Great Compromise extended statehood to California and acquiesced in the Fugitive Slave Law, companion legislation created the Territory of Utah, whose jurisdiction extended westward from the Wasatch front to the Sierra Nevada — nearly 500 miles of almost totally uninhabited desert. Brigham Young, territorial governor and Mormon Church president, tried to guarantee the control of this region for his denomination by sending out men who would be both territorial officers and leaders of the Latter-day Saints Church. There was no question of an independent court system under these circumstances.

² The best early study of the legal profession in Nevada is Frank H. Norcross, "The Bench and Bar," in Sam P. Davis, ed., *History of Nevada*, 2 vols. (Reno and Los Angeles, 1913) i: 273-314. O'Brien, *History of the Bench and Bar in Nevada*, supra note 1, is in part based upon Norcross's study.



View of Virginia City mining works, ca. 1880. (Huntington Library)

When Young appointed Orson Hyde, an Apostle of the Church, as probate judge, he meant to assure Mormon authority over the populace both legally and spiritually. Judge Hyde — in addition to creating a government for Carson County, making new settlements at the extreme western edge of the region, arranging for a boundary survey to fight off the claims of California, trying to build his own mill, growing his own crops, and performing his religious duties — also presided over civil and criminal matters among settlers who often resisted the Utah (and Mormon) jurisdiction which he represented. His tenure lasted for less than a year, when he was released at his own request to the Utah heartland.³ A federal district judge, George P. Styles, accompanied Hyde initially, but there is no evidence that he ever heard a federal case in the district.

The office of probate judge had been established by Congress in the usual manner for territorial governments, but its role had been expanded by the Utah territorial legislature in an act of February 4, 1852. It had authority to adjudicate criminal and civil matters,

³ Leonard J. Arrington, *The Mormons in Nevada* (Las Vegas, 1979); Russell R. Elliott, *History of Nevada* (2nd edition, Lincoln, 1987) 54-56; Effie Mona Mack, *Nevada: A History of the State from the Earliest Times through the Civil War* (Glendale, 1936) 156-59, 164-66 [hereinafter cited as Mack, *Nevada*]. An excellent summary of the early judiciary during the era of Utah's jurisdiction is available in William D. Swackhamer, *Political History of Nevada: 1973* (Carson City, 1974) 34-65.

guardianships and estates, and together with select men to share the normal responsibilities of county supervisors. The holder of this office thus had broad administrative as well as judicial authority, and there was little distinction between them. The act provided that decisions of the probate court could be appealed to the federal territorial court; but in Utah Territory, Mormon authorities tried to avoid such appeals, because the judges were usually non-Mormons.

There was very little opportunity to use the judicial provisions of the Utah Territorial Probate Act. In the five years after the departure of Hyde (i.e., 1856-1861), Carson County — which included approximately the western third of the present state of Nevada — had three different probate judges and three district judges. None was able to exercise authority for very long (if at all), and this period has often been called a time of anarchy by historians of Nevada. The population was very small and very fluid in the western Great Basin. This was an era when disappointed miners from California were probing the canyons and mountainsides for gold, and Mormons were trying to maintain their tenuous hold in the valleys.⁴

The first federal judge for Utah Territory who tried to exercise appellate authority in Carson County was W. W. Drummond. He arrived in July of 1856, held court in a barn, summoned a grand jury and encountered immediate hostility because he placed too many non-Mormons upon it.⁵ Drummond, who had been appointed to the federal bench by President Franklin Pierce, had already encountered hostility from the leadership of the Latter-day Saints Church in Salt Lake City, and he was apparently on his way toward San Francisco to find a ship back to the East when he reached Genoa. It seems likely that he never intended a long sojourn in western Utah Territory, but he meant to do as much as possible while there to reduce the power of the Mormons.⁶

Either en route to Washington or after he reached there, Drummond resigned his judgeship to President Buchanan with a stinging letter that accused the Mormons of burning federal court records and other forms of defiance of federal authority.⁷ His accusations — almost certainly exaggerations of the facts — were partly responsible for Buchanan's decision to send U. S. Army

⁴ Mack, *Nevada*, supra note 3 at 173-91; Elliott, *History of Nevada*, supra note 3 at 57-61. There are files of the Carson City Court from the Utah territorial period, 1855-1861, available in the Nevada State Archives in Carson City, or on microfilm at the University of Nevada – Reno.

⁵ Myron Angel, ed., *History of Nevada 1881, with Illustrations* (Oakland, 1881; reprint, Berkeley, 1958) 40, 333 [hereinafter cited as Angel, *History of Nevada*]; Norcross, "The Bench and Bar," supra note 2 at 276.

⁶ Norman F. Furniss, *The Mormon Conflict: 1850-1859* (New Haven, 1960) 38, 55.

⁷ Ibid. at 56-58.

units westward in the spring of 1857 to enforce order in a territory which seemed to be in rebellion. The so-called Utah war of 1857 was the result.

More than two years expired between the departure of Judge Drummond and the next effort to hold a session of the federal court in Carson County. In the meantime, a county probate judge named Charles Loveland occasionally sat on the Carson County bench, presiding over his last session on April 13, 1857. During that summer, news arrived about the approach of a federal army toward Salt Lake City, and the much-publicized departure of the Mormons from Carson Valley followed in September of that year. Upon learning of the approach of the army, Young had summoned the far-flung colonies of Mormons back to the Salt Lake Valley to defend the heartland of Zion, and nearly all Mormons in western Utah heeded his call. When the Mormons withdrew — and Loveland with them — he was given credit for presiding over the final settlement of accounts between the Mormons and the “Gentiles,” who in many cases tried to take over the immovable property of the departing Latter-day Saints.⁸

At this point, there was limbo in Carson County. In 1857, as part of the arrangement which ended the crisis between the U. S. government and the Mormons, President Buchanan removed Young as territorial governor and replaced him with Alfred Cummings, a non-Mormon. In 1858, Cummings appointed John S. Child, a 33-year-old native of Vermont who had lived in the Carson Valley since 1854, as probate judge. He had no legal training; he had been engaged in merchandising and cattle raising in the region for two or three years. He apparently held only occasional sessions of the court during the next year, until the local non-Mormons held an unauthorized “constitutional convention” to try to form a separate territory.

THE CONSTITUTIONAL EFFORTS OF 1859

In late July 1859, members of a self-styled constitutional convention met for nine days in Genoa to create a separate territory in order to escape the jurisdiction of Utah Territory and its Mormon authorities. There had been earlier separatist agitation in 1857 and 1858, but the 1859 convention delivered a more articulate political message. It identified a “long chain of abuses and usurpations on the part of the Mormons of eastern Utah, towards the people of western Utah.” Several of these perceived

⁸ Mack, *Nevada*, supra note 3 at 170-71, citing the *Daily Alta California*, October 10, 1857.

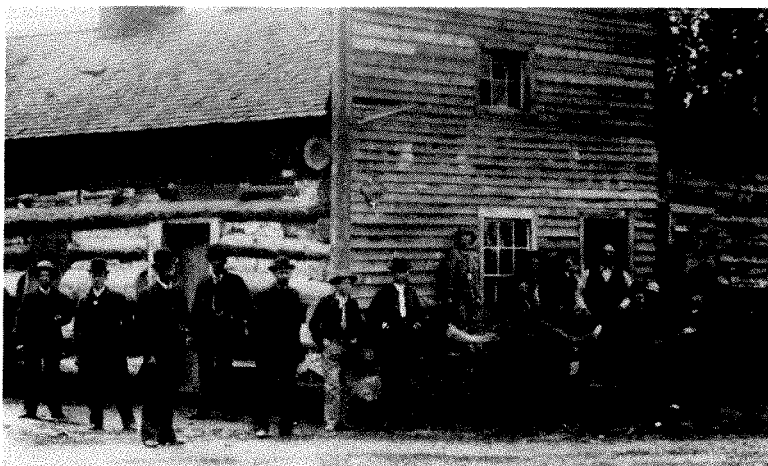


Photo of the old Mormon fort near Genoa, ca. 1890. [Nevada Historical Society]

abuses related to judicial practices, and they were echoes of the complaints of the long-departed Judge Drummond:

They have denied to the judges of the United States a right to try in the courts violators of the law, when such violations were numerous.

They have conferred upon Probate Judges the sole right to select juries in civil and criminal cases, in violation of all law and all precedent. They have also given to such Judges, and Justices of the Peace, absolute jurisdiction in all civil and criminal cases.⁹

In the following September, Judge Child called a session for the first time since the departure of Loveland more than two years earlier.¹⁰ Again, there was little disposition among the prospectors and settlers to recognize his authority. Child continued, at least nominally, as probate judge until the creation of Nevada Territory in 1861, but few cases came before him. The rude building that had been used for a courthouse in Genoa fell into a bad state of disrepair, a fitting symbol for the condition of government in the region. The effort to establish a separate territorial government in 1859 fizzled for lack of support, and Utah provided no substitute.

The next presiding territorial judge in the western Utah district was John Cradlebaugh, a "tall, lean middle-aged lawyer from Ohio," who had arrived in the Salt Lake Valley with his judicial

⁹ *Territorial Enterprise* (2:1), a report of the self-styled constitutional convention participants of Genoa, July 30, 1959.

¹⁰ Angel, *History of Nevada*, *supra* note 5 at 64.

credentials in November 1858.¹¹ He had held court in Provo for several months and had taken an active part in trying to learn the facts about the notorious Mountain Meadow Massacre. This had involved the murder of 120 emigrants near the old Mormon Trail in southern Utah in September 1857, with the complicity of some Mormons who were personally close to Brigham Young. Cradlebaugh, like a score of investigators before and after, suspected the direct responsibility of the Church leaders for the atrocity. He conducted his own personal inquiry, riding south to the scene of the crime with an escort of 200 soldiers. More than a year had elapsed, witnesses had scattered, and he was unable to collect sufficient evidence to prove his suspicions.¹² In the course of his investigations, and because of his vigorous investigatory tactics, he became as hateful to Young as Drummond had been.

Cradlebaugh moved to Carson Valley just as the Comstock Lode — the greatest gold and silver bonanza of the Far West — had been discovered and the litigation had increased to flood proportions. Although no one at that time had any understanding of how vast or how rich the vein was, there was already a myriad of disputes over titles to portions of the outcroppings. Cradlebaugh stepped into a judicial responsibility that was fully as charged with passion as the one he had left in Provo. Not only were many mining titles in dispute, but also the population was divided between Northern and Southern sympathizers in the chaotic pre-Civil War election which pitted Abraham Lincoln against Stephen O. Douglas and two other Democrats.

Judge Cradlebaugh opened court in Genoa in September, 1860

...in the only available room, a badly lighted chamber, over a livery stable. The town was filled to overflowing with lawyers, litigants, witnesses, and jurors. A bundle of straw in a barn was eagerly sought as a bed, and the judge slept contentedly between rival attorneys, while the humbler attendants spread their blankets on the sage-brush.¹³

The two most prominent attorneys among the high-spirited population were William M. Stewart and David Terry, both large and physically vigorous men. Stewart was a former attorney general of California and a Union supporter, Terry a one-time Justice of the California Supreme Court and a pro-Southern

¹¹ Furniss, *The Mormon Conflict: 1850-1859*, supra note 6 at 208.

¹² Leonard J. Arrington, *Brigham Young: American Moses* (New York, 1985) 276-280; Furniss, *The Mormon Conflict: 1850-1859*, supra note 6 at 215-19.

¹³ Eliot Lord, *Comstock Mining and Miners* (Washington D.C., 1881; reprint, Berkeley, 1959) 101. Lord cites the *Sacramento Union*, September 18, 1861. Also see *Territorial Enterprise*, supra note 9 at "Historical Reminiscences," June 13, 1872.



Senator William Stewart, Nevada statehood and mining advocate and a powerful voice in federal court bench appointments. (Nevada Historical Society)

sympathizer. They represented clients who had conflicting claims at both ends of the Comstock Lode, and they agreed to try their cases before Judge Cradlebaugh soon after his arrival.¹⁴ As the tangled litigation was proceeding, President Buchanan abruptly ordered the removal of Cradlebaugh from the bench and appointed Robert P. Flenniken, a Southern sympathizer, as his replacement. Cradlebaugh refused to accept this arrangement on the ground that the president had no right to remove a sitting judge, and (according to Stewart's memoirs written forty years later) Stewart and Terry agreed to proceed with their cases before Cradlebaugh, with the understanding that one of his rulings would be appealed to the Utah Supreme Court to assure the validity of his jurisdiction. When Judge Cradlebaugh ruled in Stewart's favor on an

¹⁴ These events are described — with obvious partiality — in William Stewart's *Reminiscences of William M. Stewart* (George Rothwell Brown, ed., New York and Washington, 1908) 129-39.

important issue, however, Terry had second thoughts and sought out "Judge" Flenniken. In the meantime, seventy-five armed men who supported Terry and the Southern cause had seized the property in dispute.

Stewart's remembrance of this incident in later years paints himself as a bold knight in defense of virtue, receiving the appropriate ruling from the territorial capital, averting bloodshed, and nobly forcing Judge Flenniken at the point of a gun to go to the telegraph office and to transmit his letter of resignation as a judge. The rebellious rebels who had seized the property then obeyed the lawful order of Cradlebaugh's court.¹⁵ Stewart was obviously proud of his peaceful settlement of the issue, and most historians have accepted his account. Frank H. Norcross, however, who first analyzed this account carefully in about 1910 (and who later became federal district court judge in Nevada), could find no evidence in the territorial papers that the appeal to which Stewart referred ever occurred.¹⁶

Even though Stewart was hardly a credible witness when he described his own achievements, there is no reason to doubt his methods as regards the courts. His tactics, as described in his autobiography and by others, reveal many efforts to bend the political and judicial institutions to his will. It is entirely plausible that Stewart's influence helped keep Cradlebaugh on the bench — such as it was — until the jurisdiction of Utah Territory ended with the creation of Nevada Territory by the Act of Congress approved on March 2, 1861. He also took pride in his efforts to remove his enemies from the bench.

NEVADA TERRITORY, 1861-1864: THE BRIEF CAREER OF JOHN WESLEY NORTH

When Congress established the Territory of Nevada by the Act of March 2, 1861 it made the traditional arrangements for territorial courts. James W. Nye of New York, whom President Lincoln appointed as the first territorial governor, assisted in the development of a typical judicial system, with a three-judge supreme court, each of whom was responsible for a district.

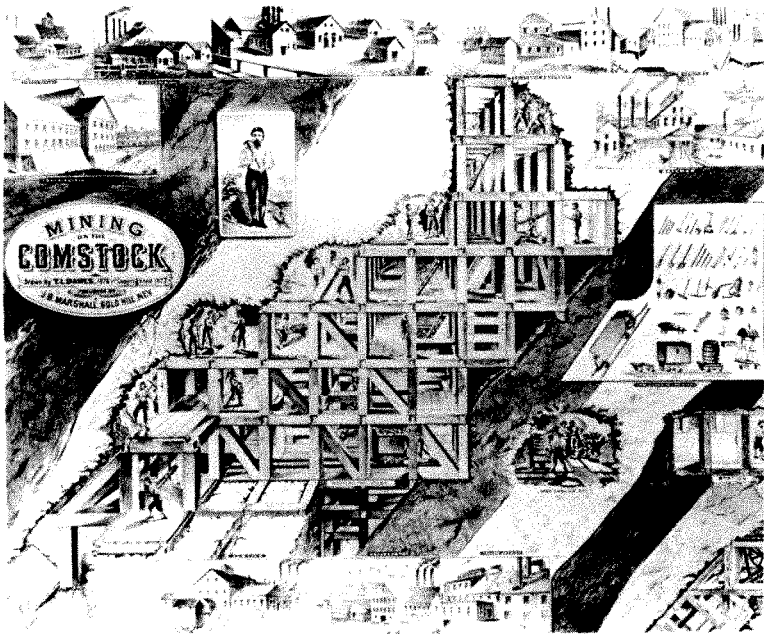
The courts were soon overwhelmed by litigation arising from disputed mining claims and related matters. In 1860, when Stewart began his practice in Carson County, he had few competitors; two years later the "profession" was overcrowded. The census of 1860

¹⁵ Lord, *Comstock Mining and Miners*, supra note 13 at 106-08; Stewart, *Reminiscences*, supra note 14 at 134-39.

¹⁶ Norcross, "The Bench and Bar," supra note 2 at 277-81.

for the western edge of Utah Territory showed five lawyers (mostly doing non-legal work); two years later there were at least thirty-five practicing attorneys in Virginia and Carson City.¹⁷ The total population cannot have been more than 10,000 at the time.

The brief judicial career of John Wesley North provides a revealing example of the vulnerability of the territorial bench in these circumstances.¹⁸ North had come to Nevada from Minnesota in 1861 with an appointment from President Lincoln as territorial surveyor. He became active as an investor in mills and in the practice of law, as well as in the surveyor's trade. In 1862 his fellow lawyers in Virginia City unanimously recommended him for a vacancy on the territorial supreme court, and, following his appointment, he assumed his duties in the late summer of 1863. He survived for less than a year, mainly because he made individual rulings sitting on the Storey County (i.e., Virginia City) district bench that displeased the large mining investors who had



"Mining the Comstock," an 1876 illustration by T.L. Davies, showing ledge workers, mining tools, and Nevada's major mining companies. (Huntington Library)

¹⁷ Richard E. Lingenfelter, "Introduction," in J. Wells Kelly, *First Directory of Nevada Territory* (1862; reprint, Los Gatos, 1962) iv.

¹⁸ David A. Johnson, "The Courts and the Comstock Lode: The Travail of John Wesley North," *The Pacific Historian* 27 (Summer 1983) 31-46.

taken control of the main mines of the district — and who were represented by Stewart.¹⁹

The most delicate issue which North had to decide as judge involved the geological structure of the huge Comstock Lode. One might think of the lode as an irregular hedge-row buried beneath the surface of the earth, with only the very top of the growth visible in scattered places on the surface. The ore occurred within the lode in irregular clusters of varying size; much of the lode was barren, but some parts had large deposits of fantastic wealth. The original claim-stakers had adopted traditional California mining district regulations, which provided that each locator after the original discoverer was entitled to 300 feet along the lode, and he could follow it downward and outward indefinitely with all its "dips, spurs, and angles." There were no side-lines to such a claim, and one might extract the ore for any distance right or left, so long as one remained within the end-lines. While it was apparent that the "strike" of the Comstock Lode was a line running roughly north and south, it was also obvious that outcroppings of ore could be found in places several hundred feet to the east and west. According to the original mining district regulations, if these remote outcroppings were part of a separate ledge or "lode," they could be claimed and mined separately. If, on the other hand, they were connected to the main Comstock Lode beneath the surface, the ore belonged to the locator of the original 300-foot claim.

It was not obvious at the time Judge North assumed the bench whether the "single-ledge" or "many-ledge" theory was geologically correct; no mines had been developed to sufficient depth to provide a definitive answer. Yet potential millions of dollars were at stake, and litigation was abundant. Stewart, representing the larger financial investors — mostly from San Francisco — who had bought the original claims, insisted on the "single-ledge" theory; the smaller "wild-cat" miners, who had staked claims on the so-called parallel ledge, relied upon the hypothesis that "many ledges" existed.

Judge North dealt with a crowded calendar in September and October of 1863, and then stepped down temporarily from the bench to participate in a constitutional convention which the territorial legislature had arranged to promote Nevada's bid for statehood. The highly-respected North was elected president of this convention, and Stewart was a leading participant in its deliberations. The sessions continued from November 2 until December 11, 1863, and Stewart and North took opposite sides on the question of whether mining claims should be taxed in the same manner as other property. North argued that they should be so taxed, and Stewart — ever protective of the interests of the large

¹⁹ There is an excellent summation of North's judicial career in Nevada in Merlin Stonehouse, *John Wesley North and the Reform Frontier* (Minneapolis, 1965) 151-77.

mine owners who were his clients — took the opposite position.²⁰ He argued eloquently that to tax mines would be to tax men's hopes and to discourage their enterprise. North's position prevailed by a vote of 21 to 10. The judge and the most prominent counsel of the territory had thus locked horns on an explosive political issue in the constitutional convention. And the battle became more intense when they returned to the courtroom.

North's most important ruling on the geological question came down in the case of *Ophir v. Burning Moscow* soon after the adjournment of the convention.²¹ The Ophir Company owned one of the original properties on the north end of the lode where the first discoveries had been made in 1859; it was one of the richest claims in the region. Burning Moscow Company had a claim a few hundred feet directly west on (apparently) another outcropping, and was promoting shares valued at \$480,000 on the basis that it had discovered a new and different ledge. Ophir had brought suit in March 1863 to recover possession of the disputed ground.²² There was physical violence during the spring and summer as the conflicting parties tried to take or hold the claims by force.

In the first hearings, Ophir (represented by Stewart, among others) asked Judge North for an injunction against Burning Moscow, but after taking testimony, North denied the injunction.

In view of the facts...I cannot hold that they [i.e., the ledges] are proven to be one, and without this fact being proven the plaintiff falls far short of proving title to the ground on which the defendant's works are situated. At the depth where this controversy arises the evidence on both sides shows that there are several and distinct ledges. If at a greater depth there shall be found conclusive evidence that all these are blended in one, when that depth is reached and that evidence is adduced, then will be the proper time to determine what ledges run out and what continue.²³

This was a prudent and reasonable ruling in the circumstances, and Judge North soon appointed a prominent San Francisco

²⁰ Andrew L. Marsh and Samuel L. Clemens, *Reports of the 1863 Constitutional Convention of the Territory of Nevada* [as written for the Territorial Enterprise and for the *Virginia Daily Union* by Amos Bowman] [Carson City, 1972] 238-52, 269-81.

²¹ One of the better discussions of this case may be found in Charles Howard Shinn, *The Story of the Mine: An Illustrated History of the Great Comstock Lode in Nevada* (1896, 1910; reprint, Reno, 1980).

²² Lord, *Comstock Mining and Miners*, *supra* note 13 at 139-44.

²³ *Ibid.* at 144, quoting from *San Francisco Evening Bulletin* of December 29, 1863 and *Sanborn's Weekly Circular* of January 2, 1864.

attorney, John Nugent, as a referee to take further testimony on this and similar matters.

After Judge North rendered his tentative decision for the "many-ledge" theory, Stewart mounted a campaign for the ratification of the constitution. It was his reasoning that statehood would bring a new set of judges and allow for a different ruling on the "single-ledge" versus "many-ledge" issue. Simultaneously with his support of the draft constitution he launched an assault on the integrity of Judge North and the entire territorial court system. Stewart's slanders against North were particularly bitter, including charges that the judge had been bribed and that he owed money to some of the parties who had litigation in his court.²⁴

North, in the meantime, continued his political career by seeking the nomination of the Union Party to become a candidate for governor of the new state, but he lost because Stewart's allies opposed him. Later, Stewart made a series of personal attacks on the judge in the press of Virginia City and demanded an open debate at the local opera house. Judge North accommodated him and, according to some accounts, got the better of the match. In the balloting, the proposed constitutional document was overwhelmingly repudiated, and presumably Stewart along with it. There were some irregularities in the reporting of the vote, but the result was reported as 8,851 against ratification and only 2,217 in favor.²⁵

The game was not over, however, for Stewart's slanders continued, and he insisted that the judiciary as a whole was so corrupt that only the granting of statehood would solve the problem. Judge North made another ruling for the many-ledge theory. And during that spring and summer, there was an economic slump in the mining business which worked to Stewart's benefit.

In the course of that summer season, pressures from across the continent — rather than local politics — dictated statehood for Nevada. The Union and Lincoln's Republican Party were in desperate need of another state, and Nevada was the best candidate. Stewart's supporters were able to combine this sentiment with their crusade against the territorial judiciary. They revised the discredited 1863 constitution by greatly modifying the provision relative to the taxation of mining property. The newly-drafted document provided for the taxation only of the *proceeds* of the mines. The revised constitution went before the electorate and won ratification in time to enable Nevadans to vote in the 1864 election.²⁶ Lincoln won easily in the new state.

²⁴ This entire controversy is thoroughly discussed and documented in Johnson, "The Courts and the Comstock Lode," *supra* note 18 at 36-38; and in Russell R. Elliott, *Servant of Power* (Reno, 1983) 36-45.

²⁵ Angel, *History of Nevada*, *supra* note 5 at 85.

²⁶ Elliott, *History of Nevada*, *supra* note 3 at 84-89.

In the meantime, Judge North, troubled by ill-health and harrassed to the point that he could no longer perform his judicial duties, resigned on August 22, 1864.²⁷ During one of his last days on the bench, he received the referee's report indicating that the "single-ledge" theory was correct, and issued a judgment accordingly. Judge North's companions on the territorial bench resigned almost simultaneously on August 22, obviously under pressure from Stewart.

To clear his name, North sued Stewart for slander. By mutual consent, the matter was referred to three court-appointed arbitral referees. In the summer of 1865, the referees rendered a judgment that cleared North of all charges and affirmed that Stewart had been responsible for slander. North, however, had already departed from the territory soon after filing the suit. He won the battle for his good name *in absentia*.

But Stewart won the political war. When the first state legislature came into session in December, Stewart easily won one of the new seats in the United States Senate. The balloting for the second seat was complicated by internal legislative politics. At a crucial point, Stewart notified one of the candidates — his old friend, former Judge Cradlebaugh — that the legislators would elect him to the second seat, on one condition; i.e., Cradlebaugh would be required to yield all patronage privileges to Stewart. A contemporary historian wrote:

The reply of Judge Cradlebaugh was characteristic of the man. "Tell Stewart," said he, "that I had rather be a dog and bay the moon than such a Senator."²⁸

So Cradlebaugh did not go to Washington as a senator, but Governor Nye did. Stewart controlled the earliest appointments to the federal bench in Nevada and continued to work his winning ways with the courts.

SENATOR STEWART IN WASHINGTON

One of the first responsibilities of the Nevada delegation was to fashion a bill creating a federal judicial district for Nevada. Within three weeks after his arrival on Capitol Hill, Senator Stewart and Nevada Congressman Henry G. Worthington had helped to insert in the Nevada "Courts Bill" a provision that recognized the "possessory" titles of the miners to the land from which they were extracting ore in Nevada, even though the United States had

²⁷ See Lord, *Comstock Mining and Miners*, *supra* note 13 at 156-61; Johnson, "The Courts and the Comstock Lode," *supra* note 18 at 41-43.

²⁸ Angel, *History of Nevada*, *supra* note 5 at 88.

"paramount title" to the land.²⁹ Thus for the first time a federal statute embraced the practice governing title to mining claims that had become customary in California and Nevada. This provision, though it was included only within a statute creating the federal district court for Nevada, was eventually understood to have broader application in the western mining districts.

The first test for this statute came on a case in which the ubiquitous Stewart had been involved. When he had been a practicing attorney in Nevada Territory in 1862-1863, he had represented the defendant in *Sparrow v. Strong*, a territorial district court matter involving a disputed mining title. The case had been decided in favor of his client, Charles L. Strong (who was superintendent of a large mining company), but the plaintiff had asked the territorial supreme court for a new trial. When this motion was denied by that court, Sparrow's attorneys appealed to the U. S. Supreme Court on a writ of error, where the matter was argued on December 8, 1865 on a motion to dismiss.³⁰

Chief Justice Salmon P. Chase wrote the opinion for the Court in January 1866. In a brief ruling that was confined to the immediate issues involving jurisdiction, he denied the motion to dismiss on a writ of error and held the matter over until next term (December 1866), when it was argued more fully. On the second hearing, the Court allowed the decision of the territorial supreme court to stand without review. Chief Justice Chase once again wrote the opinion, and this time dismissed the case on a relatively narrow technical ground.³¹ No question of mining law or land policy was involved in either ruling.

At the time of his first ruling in January 1866, Chief Justice Chase did Stewart an unusual favor. In an appendix, he placed in the Supreme Court record a long letter which Stewart had written to Senator Alexander Ramsay of Minnesota, describing the principles of "free mining" on the public domain as it had developed in the Far West. Stewart's arguments here had no bearing on the issues in *Sparrow v. Strong*.³² Why did Chief Justice Chase produce this dictum, incidental to the immediate issue before the Court?

There is a hypothetical, but obvious, explanation for this venture by the chief justice into the embryonic field of mining law when there was no judicial necessity to engage in such gratuitous activity. At almost exactly that same time, a movement had begun

²⁹ Elliott, *Servant of Power*, supra note 24 at 52, 186 n.21.

³⁰ *Sparrow v. Strong*, 70 U.S. (3 Wall.) 97-105 (1865). The Territorial Court files on *Sparrow v. Strong* are available in the Nevada State Archives, Carson City, Territorial Supreme Court Judgment No. 23.

³¹ *Sparrow v. Strong*, 71 U.S. (4 Wall.) 598 (1866).

³² Appendix No. 1, 70 U.S. (3 Wall.) 777-80 (1865). This letter is reprinted in Effie Mona Mack, "William Morris Stewart," *Nevada Historical Society Quarterly* 7 (1964) 43-47, but the author does not address the broader political implications.

in Congress, led by Representative George W. Julian of Indiana, chairman of the House Committee on Public Lands, to survey and sell gold and silver properties on the public domain. The Julian bill had the support of the administration of President Andrew Johnson, and the debate had begun at the opening of the session of Congress in December 1865 — one month earlier than Chase's ruling. Stewart and his western allies saw a formidable threat to mining as it was then being practiced in the Far West. Eventually they won their battle with the Conness-Stewart law (the National Mining Law of 1866), but that was several months later.³³

The National Mining Law of 1866 confirmed the principle that had already been enacted in the "Courts Bill" and endorsed by Chief Justice Chase in the Appendix. It recognized the right of western miners to "free mining" on the public domain and to generous use of its waters by preemption.³⁴

There is no concrete evidence of any contact between the chief justice and the senator from Nevada on this matter, but the publication of the letter in this context can hardly have been accidental. An excellent recent biography of Chase has identified him as "a very political chief justice," who often visited Congress and the White House and "rarely kept his views to himself."³⁵ Stewart and Chase were obviously well acquainted, and the latter had run for president three times — and was to seek that office once again in 1868.

Senator Stewart had an eventful career in the United States Senate for more than ten years and then retired to return to the private practice of law. He was busy with mining-related litigation in California, Arizona and central Nevada, and presumably he did nothing extraordinary to shape the legislative or case law in those years. In 1887, however, his friends in Nevada called him back to politics and arranged for the Nevada legislature to send him to Washington once again. Thus he began a second senatorial career — which lasted for another eighteen years, until 1905 — for a total of twenty-eight years in the upper house between 1865 until 1905.

In the first forty years of Nevada statehood, there were four appointments to the federal district and circuit court bench in Nevada, and Stewart had a direct hand in three of them.

Stewart's first nomination for the bench after he reached Washington in 1865 was his law partner, Alexander W. Baldwin, who was only about twenty-four years old at the time he received

³³ Beulah Hershisier, "The Influence of Nevada on the National Mining Legislation of 1866," *Third Biennial Report of the Nevada Historical Society: 1911-1912* (Carson City, 1913) 160-63.

³⁴ Act of July 26, 1866, ch.262, 14 Stat. 251-53 [1866]. Hershisier, "The Influence of Nevada," *supra* note 33 at 159-63; Elliott, *Servant of Power*, *supra* note 24 at 54-55.

³⁵ Frederick J. Blue, *Salmon P. Chase: A Life in Politics* (Kent, OH, 1987) 248.

his commission as federal judge. Baldwin had been an adversary of Stewart in some early territorial affairs, but they became partners in 1862. Baldwin had been elected to the Territorial Council in 1863 and had been one of the Republican presidential electors for Lincoln in 1864.

Fate gave Baldwin little time to establish a record on the bench, because he died in a railroad accident in Alameda, California on November 15, 1869.³⁶ His precocious legal talents were widely recognized by the time of his death. In retrospect, there is no doubt that he was selected for the first assignment to the federal bench in Nevada because he suited Stewart's agenda. The historical record yields little on the judicial achievements of Judge Baldwin. The evidence of his activities on the bench is thin; perhaps further historical or juridical inquiry will revive the record of his service. In his own time, after the respectable six months of silence following his death, the *Reno Crescent* affirmed that the officers of the federal court had "prospered exceedingly," had lived at Virginia City without holding court regularly, and had received handsome *per diem* compensation, without doing the court's business. The *Crescent* applauded the appearance of a new judge.³⁷

JUDGE EDGAR W. HILLYER, 1869-1882

The attorney who got the nod from Stewart to serve as Judge Baldwin's replacement was Edgar W. Hillyer, a native of Ohio who had joined the gold rush to California as a young man, had arrived in Nevada in about 1866, and had become District Attorney of Storey County (i.e., Virginia City) in 1868.

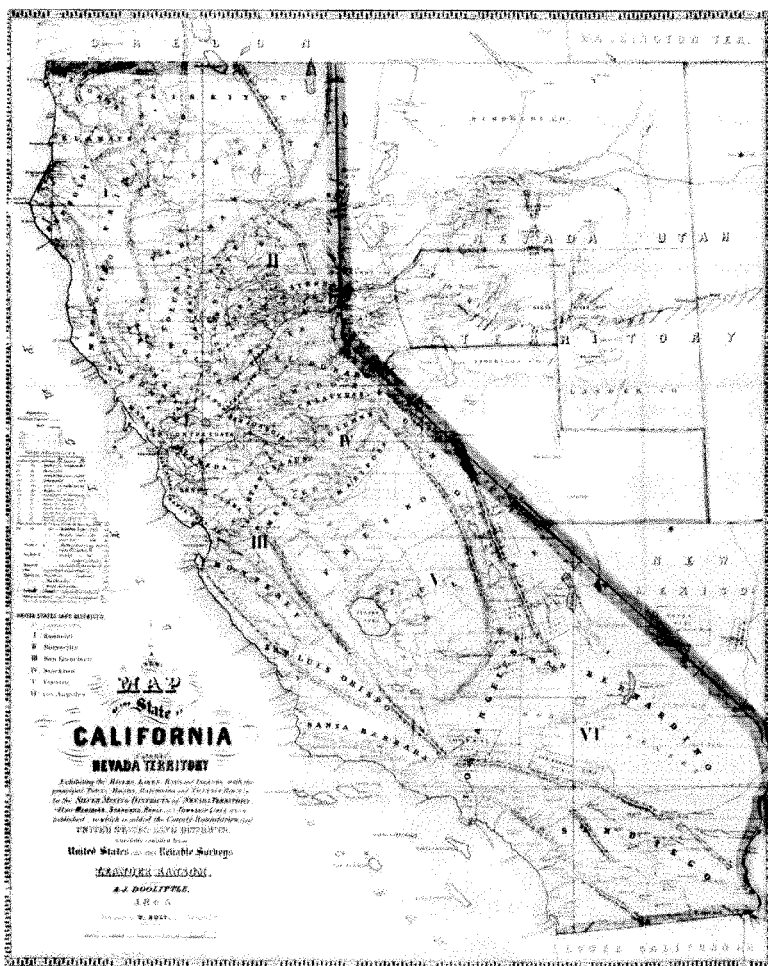
Judge Hillyer served on the district and circuit bench for twelve years, until his death on May 10, 1882 (although he was incapacitated as the result of an accident during the last few months of his life). His tenure extended through the richest period of Comstock silver and gold production and during the expansion of the mining frontier into the central and eastern parts of Nevada. More than fifty published decisions were recorded to his credit, many of

³⁶ There is some uncertainty about Baldwin's age when he was commissioned in 1856 and when he died in 1869. Oscar T. Shuck, *History of the Bench and Bar of California* (Los Angeles, 1901) 559-61, gives his age at twenty-eight at the time of death. This appears in a biographical sketch of his father, Justice Joseph Baldwin of the California Supreme Court. The biographical sketch in 30 F. Cas. 1361 [biographical notes of federal judges, including a brief account of the public career of all of the federal judges appointed prior to January 25, 1894] is much more vague and seems to indicate that Alexander Baldwin's age at death was thirty-four years.

³⁷ *Reno Crescent*, May 7, 1870.

which he heard and decided in cooperation with Circuit Judge Lorenzo Sawyer of San Francisco. Some of these decisions explored the boundaries of existing case law on the mining frontier.

There were two central issues around which most of the litigation involving the federal court revolved in the early statehood period. The old question of the miners' titles, rights, and privileges continued to command the greatest attention. The second persistent source of legal conflict concerned water rights. When these two types of questions met in the same cluster of cases, both the federal and state courts had a most tricky category of jurisprudence with which to deal.



1865 land district map of California illustrating major roads, railroads, and transit routes to the silver mining districts of Nevada Territory. (Huntington Library)

One of the most difficult suits to come before the court in Judge Hillyer's time was *Union Mill and Mining Co. v. Dangberg*.³⁸ This 1873 case involved the rights of the mill owners on the lower Carson River — the refiners of the precious Comstock gold and silver — to have a guaranteed flow of water for their mills as against the rights of the upstream ranchers, who required sufficient water to supply their homes, irrigate their fields, and serve their livestock. This corner of Nevada had only two industries — ranching and mining/milling — and in a drought year such as 1871, there was insufficient water for all users.

Judge Hillyer had very little reliable authority to assist him in deciding this case. The Nevada constitution had said nothing about water rights, so presumably the common law provided the guidelines for resolving the disputes. The Union Mill and Mining Co. invoked the doctrine of riparian rights which was common in England and the eastern states, and sued eleven Carson Valley ranchers — who had irrigated farms and livestock upstream from the mills — and sought to restrain them from diverting water from the river for agricultural use. Judge Hillyer tried to ascertain whether unreasonable use had been made of the limited water by the ranchers, but he could not find any way in which a dependable standard regarding reasonable use could be formulated in law in the Nevada context. Under the riparian doctrine, the upstream users were entitled at all times to sufficient water for household and domestic purposes and for watering stock, but they had no right to waste the water. On the other hand, Judge Hillyer concluded, the Union Mill had a riparian right as well, which there was no adequate means of quantifying. Within his lengthy, almost plaintive, judgment Judge Hillyer wrote:

When we come to consider the terms of the decree, we find it impossible, however desirable such certainty may be, to measure out to the defendants a specific quantity of water in cubic inches flowing under a given pressure as reasonable, or to designate a certain number of acres of land which a defendant may at all times reasonably irrigate, and restrict him to that quantity of water or number of acres... The changes in the volume of the Carson river during the summer season, which naturally occur, are such that the quantity of water which a proprietor may reasonably consume varies continually...³⁹

Judge Hillyer thus abandoned this early effort to apply the standard of "reasonable use" within the riparian doctrine. For all

³⁸ *Union Mill and Mining Co. v. Dangberg*, 24 F. Cas. 590 [C.C.D.Nev. 1873] [No. 14,370].

³⁹ *Ibid.* at 593.

practical purposes, he left unresolved the issue of the distribution of water in scarce years.

The judge had greater success in the field of mining law when he rendered an important decision in *Forbes v. Gracey*.⁴⁰ The record does not indicate what his former patron, the erstwhile Senator Stewart, may have thought of this case, but it matters little. Stewart was gone from the Senate, and Hillyer was still judge.

Charles Forbes was a stockholder in one of the large mining firms of the Comstock — the famous California Mining Company which was controlled by the “Bonanza crowd” including John Mackay and James G. Fair, who became bonanza millionaires. He filed suit to seek an injunction against Thomas Gracey, the assessor of Storey County, to restrain him from imposing taxes on the rich California mine, and also to enjoin Mackay, Fair, and other stockholders from paying taxes.

This case required Judge Hillyer to engage in a delicate balancing of federal, state, and individual rights in the area of mining property and taxation. The suit challenged the authority of the state of Nevada to impose and collect taxes on such a mine, in view of provisions in the Nevada Enabling Act. This act and the state constitution denied the right of the state to collect taxes on federal lands. In a sensitive ruling, Judge Hillyer held that Nevada was not attempting to tax the land or the mines, but only the proceeds. The state had a basic right to do that, and the prohibitions against taxing federal lands did not apply. In this regard, Judge Hillyer wrote a trenchant sentence:

A moment's inspection of the mining laws will show that congress, while retaining the naked legal title in the United States, has in fact parted with all that is valuable in the mines...⁴¹

Judge Hillyer followed the ruling with a logical demonstration that the only value that could be assessed and taxed was that which had been extracted from the mines, as the Nevada constitution and its court had provided:

...It seems to me indubitable that the ore extracted by a miner or his assigns is his property, as absolutely as if the government had clothed him with a perfect legal title to the mine; and it is impossible for me to see how a tax on this ore so granted to the miner is a tax upon the lands or properties of the United States.⁴²

⁴⁰ *Forbes v. Gracey*, 9 F. Cas. 401 (C.C.D.Nev. 1877) [No. 4,924].

⁴¹ *Ibid.* at 403.

⁴² *Ibid.* at 404.

Thus Judge Hillyer had effectively confirmed a Nevada frontier doctrine — the doctrine that had been enunciated by Stewart in the 1863 constitutional convention — that the value to a mine existed only in the *profitable* results of the *labors and investment* that had been expended thereon. In this case, Judge Hillyer had followed the logic of the original mining practices, as enunciated by Stewart in the constitutional convention and in Congress, to the point at which it was appropriate to tax a successful and profitable mine. The U. S. Supreme Court subsequently sustained his ruling.⁴³

Judge Hillyer's death in 1882 allowed Nevada's other United States senator, the usually silent John P. Jones, to make a nomination to the court. Jones's nominee, George M. Sabin, was, like Edgar Hillyer, a native of Ohio. He had come west after the Civil War and had reached the eastern Nevada mining frontier in the late 1860s. He practiced law in Hamilton, Pioche, and Eureka — the leading boom towns of eastern Nevada — from 1868-1872, but he had not shared in the making of the state or the fashioning of its early law. Sabin's tenure as a judge coincided with a quiet time on the bench in Nevada. With the large mines having been stripped of their wealth, the population of the state fell, as did the court's business and lawyers' fees.

JUDGE THOMAS P. HAWLEY, 1890-1906

By the time of Judge Sabin's death in 1890, attorney Stewart had been recalled to the United States Senate seat which had been originally his. Stewart's personal correspondence⁴⁴ shows that he actively supported the nomination of frontier lawyer and longtime judge of the Nevada Supreme Court, Thomas P. Hawley. A native of Indiana who had arrived in the California gold fields in 1852, when he was twenty-one years of age,⁴⁵ Hawley mined for a few years, then studied law in the County Clerk's office in Nevada City (California) and was admitted to the California bar in 1857. Stewart may have been on the committee that passed on his admission.

Hawley climbed the political ladder into judicial prominence; he became district attorney of Nevada County, California in 1863. When the California mining law business encountered a slump, he followed the rush to the White Pine District of eastern Nevada in 1868. There he resumed the practice of law, and within four

⁴³ *Forbes v. Gracey*, 94 U.S. 762-67 (1877).

⁴⁴ Stewart to Hannah K. Clapp, September 23, 1890. William M. Stewart Papers, Nevada Historical Society, Reno, NC 5, Box 10, Letter Book 4, at 593 [hereinafter cited as "Stewart Papers"].

⁴⁵ Angel, *History of Nevada*, supra note 5 at 333 [facing].



Judge Thomas P. Hawley, 1890. [Nevada Historical Society]

years he was a successful Republican candidate for the Nevada Supreme Court. He was elected to three successive six-year terms, which ran through the richest years of the Big Bonanza — the golden age of Nevada production and litigation — and into the long depression of the 1880s. Early in his judicial career, he was proposed by friends for a seat in the U. S. Senate; in 1875, he received four votes as U. S. Senator in the legislative session which had largely been rigged for William Sharon, the wealthy Nevada agent of the Bank of California.

Judge Hawley was commissioned on September 14, 1890 and he resigned from the Nevada Supreme Court two weeks later. He brought to the federal bench not only much judicial experience

but also a philosophy which had been strengthened by his experience in the mining camps and courts of Nevada. Shortly after Judge Hawley assumed his new duties, Congress passed the Evarts Act, which reformed the federal judiciary by creating intermediary courts of appeals separate from the district courts.⁴⁶ Almost immediately after the bill became law, William Stewart got in touch with William F. Herrin, another former law partner who was now counsel for the Southern Pacific Railroad, to promote Hawley's name for a nomination. He also alerted Judge Hawley to stand ready to promote his own candidacy.⁴⁷ Hawley was unsuccessful in this quest, but his close association with Stewart continued until the end of his life.

Like the late Chief Justice Salmon P. Chase, Judge Hawley lived in a grey zone between political activism and dedicated judicial service, which are not incompatible, but invite close historical scrutiny. In his own right, Judge Hawley fashioned a way in law in which Nevada could escape from the inconclusive cul-de-sac of the riparian doctrine. It involved an acceptance of the utilitarian principles that had been insinuated into the mining law, possibly an attempt to apply common sense principles against the common law doctrine.

Nevada's judiciary had dutifully followed the common law riparian doctrine to the extent of adopting the principle that water belonged with the contiguous land, regardless of the priority or date of the water use.⁴⁸ This went against the grain of arid-land practice, and it provoked a storm of democratic protest across the West. There was a flurry of legislative activity against this doctrine, but as the authority on that front was obscure — given the constitutional silence — the state supreme court had another chance to consider the matter.

The opportunity came in *Jones v. Adams* in 1878, when it became possible to apply the Conness-Stewart mining law of 1866 to a local dispute. In this case Justice Hawley noted that his court and others had approved the doctrines:

that the government, by its silent acquiescence, had assented to and encouraged the occupation of the public lands for mining purposes; that he who first connected his labor with the property open to general exploration, in natural justice acquired a better right to its use and enjoyment than others who had not given such labor; that the miners on the public lands and throughout the Pacific

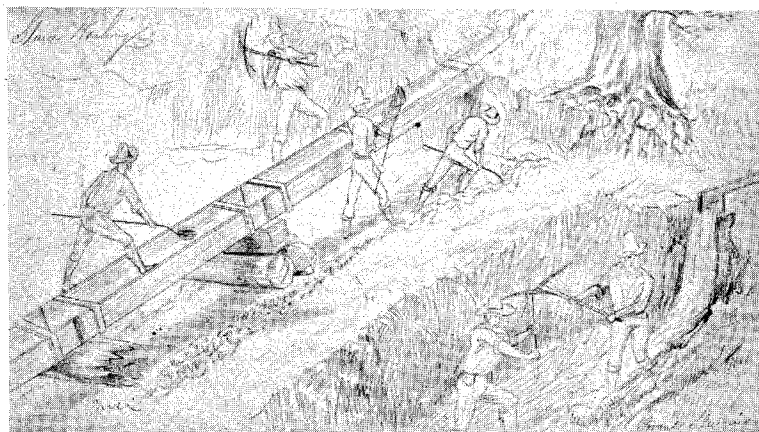
⁴⁶ Act of March 3, 1891, ch. 517, 26 Stat. 826 [1891]. This is discussed in Richard A. Posner, *The Federal Courts: Crisis and Reform* (Cambridge, MA, 1985) 24.

⁴⁷ Stewart to Judge Hawley, February 26, 1891 and March 7, 1891. "Stewart Papers," supra note 44, Letter Box 6.

⁴⁸ *Van Sickle v. Haines*, 7 Nev. 249 [1872].

states and territories, by their customs, usages, and regulations, had recognized the inherent justice of this principle, and that it had been recognized by legislation, and enforced by the courts, and finally approved by the the legislation of congress in 1866; that *this principle was equally applicable to the use of water on the public lands for purposes of irrigation...*⁴⁹ (Emphasis added).

It was a happy decision for the struggling small ranchers of Nevada, because it separated land and water rights and made the latter more readily available to the squatters and homesteaders. Stewart had pleaded for the interests of the small, industrious miner in almost Jeffersonian tones in his early rhetoric — even as he represented the rich corporate institutions. Fortuitously, however, his doctrines did come to the aid of the long term, tenacious husbandmen on the land by virtue of the transfer of the “possessory right” of the miners to the “right of prior appropriation” in water.



Unidentified artist's sketch of sluice washing by wooden flume and of ground sluicing, ca. 1860. (Huntington Library)

Eventually, on the federal bench, Judge Hawley had the opportunity to deal again with the matter of water rights, because, during another dry season, *Union Mill v. Dangberg* arrived once more before the court.⁵⁰ Judge Hawley was able to determine that *res judicata* applied in the matter of riparian rights, but that there were new issues because the facts and issues were different, and the case law in Nevada had changed since the previous consider-

⁴⁹ *Jones v. Adams*, 19 Nev. 86 (1878).

⁵⁰ *Union Mill v. Dangberg*, 81 F. 73 (C.C.D.Nev. 1897).

ation of this controversy before Judge Hillyer. The refining mills were much less profitable for lack of ore, ranchers were less prosperous, and the riparian guidelines were even less helpful than they had been earlier. Judge Hawley basically accepted the doctrine of prior appropriation and produced an imaginative formula for meeting the crisis during the driest years.

Judge Hawley fashioned a solution, apparently largely of his own devising, which granted to the upstream agricultural water users "an economic, beneficial, and reasonable use of the water, without any waste" of the river's flow from July 1 to October 1 during the year. The mill owners were to be entitled to an identical pattern of use at other times of the year, with the caveat that agricultural users were always entitled to sufficient water for household, domestic and livestock use.⁵¹ In effect the decree accepted the doctrine of prior appropriation within the federal law, without totally rejecting the riparian alternative, and it took into account the needs of differing industries in different seasons.

One of the most important rulings of Judge Hawley's long career on the bench related to the authority of the Nevada county assessors to increase the property taxes of the Central Pacific Railroad, which he heard and decided on behalf of the Ninth Circuit. The Nevada legislature, long frustrated in its efforts to obtain what it believed to be equitable freight rates and fair tax payments from the giant railroad firm, had enacted a statute in 1901 giving the Board of County Assessors — a new legal entity composed of the locally-elected assessors — power to "establish throughout the State a uniform valuation of all classes of property, which by their character, will admit of such uniform evaluation."⁵² The fourteen assessors quickly doubled the assessed valuation of the railroad company and provoked a suit in federal court, initiated by the Central Pacific.⁵³

After hearing arguments, Judge Hawley ruled that the Board of County Assessors had exceeded its authority in focusing attention and reassessment only upon the Central Pacific. He implied that if all railroad companies had been re-valued, the legislative act might have been constitutional, but as that had not been done, the Central Pacific was entitled to injunctive relief.⁵⁴ Thus the judge found in favor of the railroad company's position without totally rejecting the premise and objectives of the legislative act.

At that time, Stewart was in the middle of a political struggle with Francis G. Newlands, a five-term Democratic congressman

⁵¹ Ibid. at 121-22.

⁵² 1901 Nev. Stat. 50, 61-64, approved March 16, 1901.

⁵³ See Mary Ellen Glass, *Silver and Politics in Nevada: 1892-1902* (Reno, 1969) 198-99.

⁵⁴ *Central Pacific Railway Company v. Alphonso A. Evans*, 111 F. 71-81 [C.C.D.Nev. 1901].

from Nevada and heir to the Sharon property interests in Nevada and California. Newlands had had the audacity to run against Stewart for the Senate in the 1899 session of the legislature, and now he was preparing himself to replace Stewart's senatorial colleague, John P. Jones — who was ending a thirty-year career. Stewart did not want such a rival in the other Senate seat, and he reasoned that Judge Hawley, who had responsible judicial experience as well as the trust of the railroad interests, would be acceptable. As one scholar has written:

Immediately, William Stewart began to work in the judge's behalf. He visited with the railroad representatives in New York and reported that they were pleased with the candidate. He reminded William F. Herrin, the railroad's legal representative, that Newlands' victory would make the corporation "a great deal of trouble." On the other hand, "The election of Hawley would bury the opposition and secure exemption from annoyance for many years to come."⁵⁵

But it was not to be. Stewart's antics were by this time highly resented in Nevada, even by members of his own party. After a brief foray, he absented himself from the state for the duration of the campaign. Hawley won the nomination, but the Republicans failed miserably in their efforts to control the legislature. Newlands had fashioned a political alliance between leaders of the Democratic and Silver parties that won nearly every major office and all but three seats in the legislature. Stewart's hated rival, Congressman Newlands, moved over to the Senate.

Hawley remained on the bench during this late-life venture into partisan politics. He was seventy-two years old at the time of his race for the Senate, but when the question of his age became a political issue, Stewart affirmed that Hawley had the stamina of a man thirty years younger. Soon after the election, it was reported that Hawley was seriously ill, and the head of the Nevada Republican party promptly wrote to recommend another long-standing Stewart friend, E. S. Farrington of Elko, if a replacement should be needed.⁵⁶ The next day Farrington wrote Stewart announcing his availability.⁵⁷

Judge Hawley served on the Nevada bench for four more years, so Farrington's quest was delayed. Stewart — who had by this time become an octogenarian — was encouraged by his political "friends"

⁵⁵ Glass, *Silver and Politics in Nevada: 1892-1902*, supra note 53 at 204-05.

⁵⁶ George T. Mills to Stewart, December 9, 1902, "Stewart Papers," supra note 44, Letter Box 6.

⁵⁷ E.S. Farrington to Stewart, December 10, 1902, "Stewart Papers," supra note 44, Letter Box 6.

to retire from the Senate in 1905. Farrington did gain the seat on the Nevada federal district bench in 1907 upon the nomination of President Theodore Roosevelt. We may be allowed to speculate whether the lingering influence of Stewart had a role in this selection, or whether Farrington's professional qualifications — which were considerable — were decisive in this case. Judge Farrington served the bench with distinction for more than twenty years.

The courts had undergone a testing time in the Great Basin. With the passing of Judge Hawley and Senator Stewart from the scene, the end of the judicial frontier era may be designated. The kind of casual, or *ex post facto*, procedure for establishing a judiciary which had allowed Brigham Young to erect the Judiciary of Utah Territory, until he ran afoul of President Buchanan, also enabled Governor James W. Nye to establish the original federal judiciary of Nevada Territory. After statehood had been thrust upon Nevada, the election of Stewart to the U. S. Senate assured that the mining interests and attitudes which he personified would be strongly heard in Washington, both in the legislative and in the judicial branches.

For all the political cronyism which appears in the record, there were better federal and state courts than might have been expected for an outpost as remote, as rich, and as potentially violent as Nevada. William H. Stewart did have great influence on politics and case law on the mining frontier, but the judicial record suggests that he did not tower over it to the extent that his memoirs indicate. His own testimony is not conclusive on this point. That he was politically persuasive and intellectually able cannot be denied; that he used strong-armed tactics as attorney and senator to try to influence the bench seems obvious. Despite Stewart's machinations, most of the men who exercised judicial authority, from Judge Cradlebaugh to and including Judge Farrington, gave the courts of the United States commendable service, and when they made law from the bench it was often broader and better law than Stewart intended.

THE SHAKY BEGINNINGS OF ALASKA'S JUDICIAL SYSTEM

BY CLAU-M. NASKE

Yankees love a good bargain, and therefore the acquisition of Alaska in 1867 pleased most everyone. Alaska's 586,400 square miles added considerably to the land domain of the United States. Problems, however, soon arose, for the far North did not readily fit into the traditional American frontier. Alaska was noncontiguous, a maritime rather than an agricultural frontier, and perhaps most importantly, it was subarctic, arctic, and subcontinental in proportion.

Congress and the presidents clearly were at a loss as how to deal with the new possession, and therefore the early years of the American era were not marked by aggressive moves in assuming administrative responsibilities. Perhaps there was no hurry in doing so, because the 1880 census estimated Alaska's population at 33,426, with only 430 Caucasians, excluding military personnel. The Natives included the Tlingits and Haidas of the southeastern region, the Inupiaq Eskimos of the arctic and the Yupik Eskimos of the Bering Sea and Pacific coasts, the Aleuts of the Aleutian Islands, and the Athapaskan Indians of the interior.¹

The first boom in Sitka accompanying the American take-over soon collapsed, and the second was attributable to the discovery of gold on Gastineau Channel which led to the founding of Juneau in 1880-1881. Juneau soon became the most important town in the district of Alaska, and its prosperity was a magnet which lured other adventurers to the North. From Juneau, many prospectors drifted over the Chilkoot Pass into the interior and discovered gold along the Yukon River.

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¹ Phyllis D. Carlson, "Alaska's First Census: 1880," *The Alaska Journal* [Winter 1971] 48-53.

THE ORGANIC ACT OF 1884

From time to time Congress had devoted some attention to Alaska's governmental needs, but the approximately two dozen civil government bills introduced between 1867 to 1883 had aroused scant interest and were stillborn. Dr. Sheldon Jackson, a Presbyterian home-mission organizer, finally served as the catalyst to prompt congressional action. Jackson had first come to Alaska in 1877. He had escorted the widow Amanda McFarland to a missionary assignment in Wrangell in southeastern Alaska. Historian Ted C. Hinckley has stated that Jackson's 1877 action "established the Protestant church in Alaska." Jackson subsequently became an effective spokesman for Alaska, and he persuaded the General Assembly of the Presbyterian Church, in session at Saratoga Springs in May 1883, to draft a memorial to Congress to be presented to the president and the secretary of the interior by a committee of eight. This group urged that a civil government be conferred upon the district and that industrial schools be established.²

In the meantime, Jackson and his Presbyterian missionaries had established several mission schools in the north, numbering six in 1880. Jackson was very ambitious, however, and undertook a campaign of lecturing, publishing, and lobbying in the United States on behalf of the district. He became a popular speaker, maintained extensive contacts with federal officials in Washington, D.C., and corresponded with the key leaders in Congress. He intended to gain public support for more adequate legislation for Alaska. In these efforts he eventually won the backing of Republican Benjamin Harrison, whom Indiana citizens had elected to the U.S. Senate in 1880. The two may have met as early as 1874 when they attended the General Assembly of the Presbyterians at St. Louis, Missouri. By 1882 Alaska bills were introduced in both houses of Congress, but, as before, they died in committees. Representative J. T. Updegraff introduced a measure to provide schools for Alaska. Jackson, who appeared before the Committee on Education, was greatly encouraged by this gesture. He immediately attempted to organize the Protestant churches in support of the bill. Presbyterian leaders reminded Senator Harrison that they depended on his help in that body, and he promised to aid. Lawmakers, however, again defeated the legislation.³

Harrison, nevertheless, had developed an interest in Alaska's problems. As a member of the Committee on Territories he

² Ted C. Hinckley, *The Americanization of Alaska, 1867-1897* (Palo Alto, 1967) 114; Ted C. Hinckley, "Sheldon Jackson and Benjamin Harrison: Presbyterians and the Administration of Alaska," *Pacific Northwest Quarterly* 54 [1963] 66-67.

³ *Ibid.* at 67-68.

had become acutely aware of Alaska's legal and governmental deficiencies. Jackson quickly recognized the senator's interest, and linked to it his own proposals for an educational system. Consequently, the measures calling for federal support for education in the district became closely related to those calling for an adequate civil government for the district.⁴

Between 1883 and 1884 there was much popular interest in Alaska. Jackson worked hard to take advantage of it by approaching all the leading Protestant denominations and by soliciting the



The Reverend Sheldon Jackson, Presbyterian home-mission organizer, 1880. (The Andrews Collection, Stratton Library, Sheldon Jackson College)

⁴ Ibid. at 68.

support of the National Education Association and other teachers' organizations. When Congress convened in December 1883, the lawmakers were swamped with petitions from more than twenty-five states. Prospects for Alaska legislation, therefore, were bright, and by December 11 representatives had introduced four civil government measures in the House. On December 4, 1884 Harrison introduced his own measure (Senate Bill 153) and after extended debate, both houses passed the senator's measure and President Chester A. Arthur signed it into law on May 17, 1884.

Senator Harrison perhaps best stated the intent of his committee when drafting the measure. When asked by a colleague whether or not the constitution and laws of the United States were operative in the North without having been specifically extended by legislation, he replied that his committee had been able "to devise this simple frame of government for Alaska without meeting any constitutional stumps. We provided for the extension of such laws as we thought the few inhabitants, the scattered population, of that Territory needed."⁵

During the debate on the measure many questions arose. One senator wanted to know if any provisions had been made for the assessment and collection of taxes. Harrison replied negatively, stating that Alaska had too few people and settlements, not enough property, and no legislature to perform these tasks. In fact, his committee had decided to deny "a full Territorial organization" to Alaska because of its small and scattered population.⁶

Although far from perfect, a beginning had been made in bringing civil government to Alaska, albeit in a very primitive form. The Organic Act of 1884 ended Alaska's uncertain status and made it a civil and judicial district with the capital city located at Sitka. The act contained fourteen sections. It provided for a governor, judge, attorney, clerk of court, a marshal, four deputy marshals, and four commissioners who were to function as justices of the peace. These officers were to be appointed by the president and confirmed by the Senate for four-year terms of office. It also declared 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."⁷

Those who have analyzed the act have found it wanting⁸

⁵ 14 Cong. Rec., 47th Cong., 2d Sess., 531 (1882).

⁶ Ibid. at 565-66.

⁷ Organic Act of 1884, ch. 53, 23 Stat. 24 (1884).

⁸ Jeannette P. Nichols, *Alaska: A History of its Administration, Exploitation, and Industrial Development During Its First Half Century Under the Rule of the United States* (New York, 1963) 72; *Annual Report of the Secretary of the Interior, in The Executive Documents of the House of Representatives for the First Session of the Fiftieth Congress, 1887-1888*, vol. I (Washington, D.C., 1889) 64-65.

In his 1887-1888 annual report to the Congress, the secretary of the interior described Alaska's conditions in its civil relations as "anomalous and exceptional." He referred to the Organic Act as "an imperfect and crude piece of legislation" because it provided only "the shadow of civil government, without the right to legislate or raise revenue." It had not extended the general land laws of the United States to Alaska, but declared the mining laws to be fully operational. There was no mechanism to incorporate towns and villages, and this deprived district residents of the benefits and protection of municipal law. It had created a single tribunal "with many of the powers of a Federal and State court, having a more extensive territorial jurisdiction than any similar court in the United States, but without providing the means of serving its process or enforcing its decrees." In fact, the Organic Act has been well described as a "legislative fungus, without precedent or parallel in the history of American legislation." Historian Jeannette P. Nichols has stated that Alaska's Organic Act of 1884 "evolved from a composite of honest intentions, ignorance, stupidity, indifference, and quasi-expediency."

Dr. Sheldon Jackson presumably was satisfied with the Organic Act of 1884. He found Alaska to be exciting and challenging, and moved to Washington, D.C. in 1883 to begin his lobbying activities to communicate to Congress the district's peculiarities and needs. Above all, he desired the "Christian elevation" of Alaska's population, and since the majority of the district's residents were aboriginals, this then meant primarily the conversion of the Natives.⁹

As Jackson soon realized, unless the aborigines first acquired a rudimentary grasp of white "civilization," Christianity must fail. Such a rudimentary grasp included sanitary living habits, the mutual obligations of wedlock, and the dignity of the individual. Therefore, as was happening in similar circumstances in Africa and Polynesia, primary education had to accompany Christian conversion. Jackson, therefore, campaigned to educate and convert Indians, Aleuts, and Eskimos. Within a decade, Jackson bound his denomination to Alaska, convinced thousands of his fellow countrymen of the northern frontier's promise, and importuned a wide range of public officials on the district's behalf. He used many magazines to tell the Great Land's story, and wrote a propagandistic book entitled *Alaska and Missions on the North Pacific Coast*, published in 1880. In addition, he delivered lectures on the North all over the northeastern parts of the United States.¹⁰

Jackson realized that Alaska contained considerable natural resources but that Congress and the federal government neglected this sub-arctic region. This federal apathy soon brought avaricious merchants, prostitutes, and saloonkeepers, real estate speculators

⁹ Hinckley, *The Americanization of Alaska*, supra note 2 at 114-15.

¹⁰ Ibid. at 115-19.

and bunko artists north. Jackson despised these groups and considered them social lepers. What Alaska needed to assure its long-range future were resident home builders. Jackson was determined to encourage the latter, and in April 1885 he had gained such wide recognition that Congress appointed him as the district's first General Agent of Education with his office located in Washington, D.C.¹¹

OFFICERS, OFFICIALS, AND THE DISTRICT COURTS

While Jackson built his power base, various aspirants for the administrative positions created under the Organic Act of 1884 vied for appointment. The Reverend S. Hall Young, a Jackson protege, wanted his mentor to block the appointment of a Catholic, miner, or trader to one of these positions, while other citizens advised Jackson whom he should or should not recommend to President Arthur for the district's first governor, judge, attorney, marshal, clerk, and four commissioners. As historian Hinckley has observed, "their importunings were wasted; senatorial patronage had to be served." It is probable that Nevada's senators named John H. Kinkead, a veteran Far West politician, as the district's first governor. Kinkead was no stranger to Alaska, having served as Sitka's first postmaster in 1868. Later he moved back to Nevada, and advanced from businessman to that state's governor.¹²

As early as December 8, 1883, Judge Ogden Hoffman of the Northern District of California urged Senator John F. Miller to nominate Ward McAllister, Jr. for the yet-to-be-created office of federal district court judge for Alaska. The judge considered McAllister to be "a man of ability and good professional attainment," and one whose "integrity was beyond question." Ward McAllister, Jr. was the son of Ward McAllister, Sr. who, together with his brother Hall and their father Matthew Hall, had established a prestigious law firm in San Francisco. In addition, Matthew Hall McAllister had served as the west's first federal circuit judge.¹³ Judge Hoffman mentioned that McAllister's age (he was merely thirty years old) had been held against him. The judge found that argument without merit because he himself had been nearly a year younger when appointed to the bench. Furthermore, Judge Hoffman expected "that at first there will be little business before

¹¹ Ibid. at 119-20.

¹² Ted C. Hinckley, *Alaskan John G. Brady: Missionary, Businessman, Judge, and Governor, 1878-1918* (Columbus, 1982) 89-90 [hereinafter cited as Hinckley, *John G. Brady*].

¹³ Dumas Malone, ed., *Dictionary of American Biography* (New York, 1933) 945-47.

the court. Mr. McAllister will have abundant opportunity, as it grows, to grow up with it."¹⁴

The McAllister family had spared no expenses in educating young Ward. He attended Princeton College and from there went to the Albany Law School, and finally studied for three years at the Harvard Law School before returning to California. He passed the bar examination, and gained appointment as assistant United States attorney. Within weeks several California newspapers announced that it was understood that the young man "will probably be appointed the U.S. District Judge of Alaska." California's senators as well as others supported him, and it was "settled that with the passage of the bill providing for a territorial government the commission as Judge will issue to Mr. McAllister," to be met with universal approval. The *San Francisco Morning Call* stated that his friends believed that his appointment to the judgeship was certain.¹⁵

Many members of the San Francisco Bar supported the young man's appointment, as did Attorney General Benjamin H. Brewster.¹⁶ It was no surprise that McAllister received the appointment as Alaska's first U.S. district court judge on July 15, 1884. Unfortunately, however, his distinguished family background failed to give the young judge either wisdom or strength of character, and instead may have given him the impression that his Alaska duties offered no serious challenges. Although a federal judgeship is a coveted prize beyond the attainment of most young attorneys, his assignment to primitive Sitka probably appeared as a hardship to McAllister. He may have longed to return to the civilized pleasures of his hometown when he stepped ashore and surveyed the raw little town and its motley inhabitants he was to serve. In addition, the inexperienced judge did not enjoy a strong supporting cast.

E. W. Haskett, an Iowa Republican, became the district's first United States attorney. Historian Hinckley has described the man as "not so much callow as dreary, inadequately educated, banal, and often boorish." Manson C. Hillyer, a former San Francisco flour merchant, accepted appointment as Alaska's first federal marshal,

¹⁴ Ogden Hoffman to John F. Miller, General Records of the Department of Justice, Records Relating to the Appointment of Federal Judges, Marshals and Attorneys, 1853-1901, Alaska 1885-1889, Abbot-Kincaid, Box 18, R.G. 60, National Archives.

¹⁵ *Daily Alta California*, January 14, 1884; *Daily Evening Post*, January 11, 1884; *Morning Call*, January 13, 1884.

¹⁶ San Francisco Bar to His Excellence, the President of the United States, January 14, 1884; Benjamin H. Brewster to President, May 17, 1884; John F. Miller to Benjamin H. Brewster, May 23, 1884; Ward McAllister to Benjamin H. Brewster, August 25, 1884; General Records of the Department of Justice, Records Relating to the Appointment of Federal Judges, Marshals and Attorneys, 1853-1901, Alaska 1885-1889, Abbot-Kincaid, Box 18, R.G. 60, National Archives.

and Andrew T. Lewis of Illinois became the clerk of the court. John G. Brady, Presbyterian minister and another Jackson protege, became one of Alaska's four commissioners stationed in Sitka, the capital, while the other three were located in Wrangell, Juneau, and Unalaska in the Aleutians. The position of commissioner was a familiar one across the Far West. Brady and his fellow commissioners quickly learned that they were to be probate judge, justice of the peace, land office registrar, notary public, and much more. The Federal Blue Book was not of much help. This 1884 publication, entitled *Compilation of the Laws of the United States Applicable to the Duties of the Governor, Attorney, Judge, Clerk, Marshall, and Commissioners of the District of Alaska*, contained only eight pages on the laws which applied to commissioners. It contained twenty specific instructions detailing the duties of commissioners. They could, for example, administer oaths, take bail and affidavits,



The District of Alaska's first governor, John H. Kinkead, ca. 1860.
(Purchase Centennial Album Collection, Alaska and Polar Regions
Archives, Elmer E. Rasmuson Library, University of Alaska)

imprison or bail offenders of the law, issue search and arrest warrants, and discharge poor convicts.¹⁷

The new officials took several months to travel to Sitka. The first to arrive was Governor Kinkead. He quickly realized that the civil government would face formidable obstacles created by the district's small, fluid settlements scattered over a huge area together with a very difficult terrain and climate. It has been stated that the governor and his fellow public servants inherited many administrative headaches. For example, Sitka's jail was unfit, and a recent fire in the Customs House had eliminated an adequate courtroom. Further, there were no funds to pay for the subsistence or transportation of prisoners. In fact, the governor remarked, the district did not even have a tax system.¹⁸

While the judge and several other judicial officials were delayed in San Francisco, Kinkead reinstated the Indian police force created by Navy Commander L. A. Beardslee at a monthly salary of \$25 each to assist in controlling the Native population. When the officials finally arrived, they organized the United States District Court established by the Organic Act on November 4, 1884 in a room set apart for court use in the old military barracks building at Sitka. Later that same day, the new court admitted John F. McLean, an officer with the U.S. Signal Service, Major M. P. Berry, a veteran of the Mexican and Civil Wars, and E. W. Haskett to the Alaska bar. These three individuals comprised the Alaska bar until June 20, 1885 when John G. Heid gained admission. In October the number of attorneys practicing in Alaska increased when the district court admitted four more attorneys to practice.¹⁹

In the meantime, the judge tried various cases and on December 2, 1885 detained Michael Travers on a liquor violation in lieu of \$1,000 bail. Where to jail Travers, however, presented a problem. The Organic Act had provided \$1,000 for the repair and alteration of the old army guardhouse to convert it into a jail. The naval commander, however, had the authority to determine which buildings to turn over to the collector of customs. Captain H. E. Nichols decided to use the army guardhouse for naval prisoners rather than to use the facilities aboard ship. When Judge McAllister appealed to Nichols for aid, the latter replied that he felt obliged to assist Alaska's civil authorities in the execution of the laws, but could not accommodate the judge. McAllister noted that lack of a prison was not the only problem. He also had no funds to feed

¹⁷ Hinckley, *The Americanization of Alaska*, supra note 2 at 164; Hinckley, *John G. Brady*, supra note 12 at 90-91.

¹⁸ Hinckley, *John G. Brady*, supra note 12 at 92.

¹⁹ Arthur K. Delaney, *Alaska Bar Association and Sketch of Judiciary Anno Domini 1901* (San Francisco, 1901) 21; Tom Murton, "The Administration of Criminal Justice in Alaska, 1867 to 1902" (Unpublished dissertation, University of California, Berkeley, 1965) 58.

prisoners, and the court was not to convene again until May, 1885.²⁰ This necessitated, if a jail could be found, the long-term detention of prisoners.

These and other difficulties made officials wonder if the new civil government would operate at all. It would be difficult to impanel juries given the small resident population of Americans in Sitka. The town's lawyers doubted that a jury was even legal in Alaska, for the Oregon Code required that, in order to be a member of a grand or petit jury in a civil or criminal case, one had to be a taxpayer. Neither Congress nor Alaska's residents, however, had been able to levy a tax. The U.S. attorney general took his time in replying to queries, and his answers did not clearly answer the questions. Although there was a commissioner at Unalaska, an Aleutian litigant taking his case to the district court at Sitka had to travel a considerably longer distance than the twelve hundred miles separating the two points, for no direct transportation existed. He had to go and come via San Francisco, a distance totalling almost four thousand miles.²¹

Judge McAllister probably was surprised when he learned that, although Alaska was legally dry, breweries operated in both Sitka and Juneau and it was not difficult to purchase liquor. Governor Kinkead, a "good Christian," recommended that Congress recognize reality and abolish prohibition and in its place substitute a system of licensed liquor distributors. This would provide the district with some badly needed revenue, he argued, and would also exclude irresponsible traders who bartered "fire water" to the Natives. The governor's proposal soon became known as "high license," supported by many but rejected as dangerous by Sheldon Jackson and his followers.²²

What seems apparent is that Kinkead, McAllister, and Haskett misjudged Jackson's influence and determination. The missionary championed Native rights, and there were few members of the Panhandle's floating population who could identify themselves with a minister who insisted that Indians also possessed rights. Most empathized with the governor's realistic and earthy attitudes.²³

Kinkead certainly did not desire to fight with Jackson. The latter's Sitka Training School, however, soon sparked a bitter controversy. Creoles (offspring of Native women and Russian men) had become upset as newer arrivals encroached on their property and status. They became envious of the attractive, Presbyterian subsidized houses built adjacent to the training school, believing

²⁰ Hinckley, *John G. Brady*, *supra* note 12 at 92; Murton, "The Administration of Criminal Justice in Alaska, 1867 to 1902," *supra* note 19 at 59-60.

²¹ Hinckley, *John G. Brady*, *supra* note 12 at 92-93.

²² *Ibid.*

²³ *Ibid.* at 93.

them to be on their land. They complained to U.S. Attorney Haskett. He checked the boundary claims of the Sitka Training School in January 1885 and found them to be extensive. Earlier, Commissioner Brady had laid out and cleared this tract with Native help. Haskett wrote to the U.S. attorney general that this was the only land adjoining the city of Sitka which was suitable for constructing residential buildings. He complained that the missionaries had taken over the entire tract and "fenced up the road to the grave yard" and had assumed control of all of the improvements on the land.²⁴

For the next few months, U.S. Attorney Haskett apparently encouraged Creole jealousies at several public meetings by drawing comparisons between them and the local Indians. Haskett created racial hatred, and at one meeting, when Jackson attempted to be heard, the latter was shouted down. At another meeting Brady tried to speak and ended up in a fist fight, while Jackson fled to the woods for safety. After some disgruntled individuals invaded his office, Jackson boarded the steamer south.²⁵

Judge McAllister decided to go south to enjoy some of the amenities of civilized life since the court was not in session during March of 1885 at either Sitka or Wrangell. When the judge returned after a brief absence, he discovered that Haskett had created a nasty controversy with Jackson. Haskett told McAllister that the people disliked the missionaries. Clearly, there was no love lost between Jackson and most of the officials.

During McAllister's absence, Haskett had been summoned to appear before Commissioner Brady on charges of assault and battery. Although the case was settled, it seemed impossible to divert the U.S. attorney's anger at the missionaries. The judge then agreed with Haskett that the Sitka Training School's boarding public contract was close to indentured servitude. Haskett called it slavery, and refused to accept Brady's explanation of the contract — namely, that unless the Native children were removed from their parents for five years it would be impossible to implant American values. United States Attorney Haskett convinced two Sitka Indian parents to withdraw their child. When he asked Brady to begin legal action to free the Indian girl, the commissioner refused to act. A. J. Davis, the director of the training school, wrote Jackson that the school had lost more than half of its children. Haskett had been violent and promised to cause further troubles. Judge McAllister dissolved the injunction when it came before him, probably because he was told that it was dangerous to stir up the Tlingits, who six years earlier had threatened to burn the capital.²⁶

²⁴ Ibid.

²⁵ Ibid. at 93-94.

²⁶ Ibid. at 94-95.

In an angry letter to the Reverend William M. Cleveland, the new Democratic president's brother, Jackson recounted the Presbyterian missionary activities among the Natives designed to bring education and civilization to these people. Out of the approximately 34,000 inhabitants of Alaska in 1886, no more than 1,200 were Caucasians. Therefore, the government was mainly dealing with Natives, and government officials should be men who, through "their temperance, virtue and upright conduct" set a good example. Furthermore, these men should "make it a study how best to lead this native population in their efforts to emerge from barbarism to the higher plane of American civilization..." These officials, most importantly, should be "in full sympathy with the efforts of all the Missionary Societies." Jackson continued that leading U.S. senators had urged President Arthur to appoint "exceptionally good men to these offices." Unfortunately, however, it was just before the Republican Convention at Chicago, and "it was feared that President Arthur traded the offices for votes."²⁷

Dr. Jackson then lit into the district's civil governmental officials. Kinkead, from Nevada, was "a broken down politician. He gets drunk and is said to gamble. He is a man of no intellectual or executive force & accomplishes nothing for the country or the people." Smooth in words and profuse in his expressions of friendship "to your face" he was "treacherous behind your back." Jackson reasoned that Kinkead had obviously neglected his duties as governor because he had spent only two out of his eleven months' term in Alaska. The remaining nine months he had been in Nevada and Washington. Worse yet, the governor was hostile at heart to the school's work and cared "nothing for the elevation of the people, although in public he makes great pretension in that direction." The marshal and the clerk of court were considered acceptable to Jackson.²⁸

Dr. Jackson reserved his most vitriolic criticisms for U.S. Attorney Haskett and Judge McAllister. The former he characterized as "an uneducated man — rowdy in his manner — vulgar & obscene in his conversation — low in his tastes, — spending much of his time in saloons — a gambler and habitual drunkard with but a smattering of legal knowledge." Jackson failed to understand how such an individual could have been appointed to office unless it had been as a reward for political service. The judge was but a young man, "not long admitted to the bar," with little legal experience and "still less knowledge." Jackson observed

²⁷ Jackson to William M. Cleveland, May 5, 1885, General Records of the Department of Justice, Records Relating to the Appointment of Federal Judges, Marshals and Attorneys, 1853-1901, Alaska 1885-1889, Abbot-Kincaid, Box 18, R.G. 60, National Archives.

²⁸ *Ibid.*

that Judge McAllister "gets drunk & is a fast young man in every sense of the word. It is reported that his family had him sent out here to keep him from ruin in New York & San Francisco." He accused McAllister of having left Alaska in the fall of 1884 and not having returned until the middle of March 1885 although this was patently untrue because McAllister had only taken a few weeks off in March.²⁹



Cityscape of Sitka, Alaska, ca. 1900. (Huntington Library)

Jackson further related that upon McAllister's return to Sitka in the middle of March, McAllister held court at eight o'clock that night. Here was the rub: the judge took "a Christian Indian girl of about 16 years of age an orphan from our school & gave her over into the keeping of an Indian woman of bad character, who wanted her for prostitution at Victoria British Columbia." Jackson wrote that "rumor says that the judge slept with this woman on the steamer on their way to Alaska together. Rumor has it that several of the Govt. officials are in the constant habit of cohabiting with Indian women." If this were not outrageous enough, another incident occurred a few days later. Jackson remarked that the previous winter an "Indian Sorcerer & his wife brought their daughter a girl of about 12 years of age to the school, asking the superintendent to take & bring her up as his own daughter in the white man's ways — giving her up for a period of five years." A few

²⁹ Ibid.; Hinckley, *John G. Brady*, *supra* note 12 at 94.

weeks afterward the Indians "hearing an opportunity to sell the girl [for Indian parents in Alaska sell their children into slavery or to miners & others for prostitution] the parents came & wanted to get her out of the school." The superintendent refused the request. The parents then offered to replace the girl with a boy, and even offered the school official ten dollars. This plan failed. The parents thereupon hired two Indians to steal the girl. The two prowled around the school buildings for a week before they were discovered and caught. When all had failed, the U.S. attorney encouraged the parents "to get out a writ of habeas corpus." Judge McAllister then ruled that the verbal contract of the parents giving up the child for five years was not binding; that the superintendent, a Caucasian, "could not make a written contract with a native parent;" and if "the superintendent should use restraint in preventing the children from running away or leaving school when they chose he would be liable to both fine & imprisonment."³⁰

As a result of these actions, throughout March and April of 1885, Jackson stated, "the combined efforts and malice of the Judge, District Attorney, & Government Interpreter George Kastrimintinoff" caused the removal of "47 of the 103 children gathered in the Government & Mission Boarding School..." They were "taken out from under Christian care & industrial training & remanded back to the filth, degradation & vice of their native homes."³¹

For seven long years, Jackson mourned "our teachers have toiled amid privation & hardship, and both the Church & Government expended thousands of dollars to bring the school to its present size & efficiency." In one month, the judge, U.S. attorney, and the interpreter had destroyed half of that work. Jackson told the Reverend Cleveland that he already had appealed to his sister to prevail upon the president "to suspend the Judge & Dist. Attorney at once before they do still further mischief." The situation was urgent. "We feel desperate to sit still & see these drunken officials destroy the work of years & know that by one word your brother can suspend them, & thus stop their work of destruction."³²

Jackson ally Commissioner John G. Brady held a similarly low opinion of the judge. The *Chicago Tribune* quoted Brady as having stated that McAllister "was destitute on almost every attribute

³⁰ Jackson to Cleveland, May 5, 1885; Jackson to Cleveland, April 1885; General Records of the Department of Justice, Records Relating to the Appointment of Federal Judges, Marshals and Attorneys, 1853-1901, Alaska 1885-1889, Abbot-Kincaid, Box 18, R.G. 60, National Archives.

³¹ Jackson to Cleveland, May 5, 1885, General Records of the Department of Justice, Records Relating to the Appointment of Federal Judges, Marshals and Attorneys, 1853-1901, Alaska 1885-1889, Abbot-Kincaid, Box 18, R.G. 60, National Archives.

³² Ibid.

which would entitle him to the supreme control of the judicial... affairs of a great, half-civilized Territory." Brady's dislike for McAllister may have been personal as well as professional; the commissioner jested that "with his little velvet jacket, high collar, gloves and dandy cane... [McAllister] was a rare curiosity in Sitka."³³

Lieutenant T. Dix Bolles, the executive officer of the *Pinta*, had observed the Haskett-McAllister assault on the school. He made a sworn statement that Haskett was an intemperate man who had "incited the Russians and Indians to overt acts of violence and arson." When McAllister had allowed a woman, who was not the mother of the child, "to take the child away from the school where its parents had placed it," this quickly "led to a loss of almost one-half of the scholars, many of them young girls, who represented to their parents just so much coin by the sale of their virtue." The effects were felt by the missionary who worked among the Chilkats at Haines. These Natives heard that the government officials reported that the teachers were not good, that they mistreated the children under their care, and "starved, beat and witched them to death." The Chilkats became insolent, unteachable, suspicious, and contemptuous toward the missionary. For the first time they openly brewed *hoochinoo*, and men, women, and children became drunk. The situation worsened to such a degree that the work of the Haines mission had to be suspended.³⁴

The climax to this whole affair came in May of 1885 when a grand jury, composed of many Creoles, indicted Jackson on numerous charges. Alaska's general agent for education found himself imprisoned for a few hours. By that time, the new president, Grover Cleveland, had received a number of pleas to remove Alaska's officials. The Women's Executive Committee of the Home Missions of the Presbyterian Church petitioned the president to remove the attorney, judge, and marshal because they persistently had "used the powers and privileges of their office to the great injury of these schools [Presbyterian mission schools] and the distress of the teachers." Worse yet, these same officials were attempting "to secure the displacement of... Dr. Sheldon Jackson, a man who has the perfect confidence of all the prominent religious denominations by whom he was recommended for appointment."³⁵

Others supported Jackson's plea for the removal of the officials. Lieutenant Bolles refuted complaints Creoles had made against Dr. Jackson, and stated that "certain members of the Civil Government have spent their energies & time in striving to break up this

³³ Hinckley, *John G. Brady*, *supra* note 12 at 94-95.

³⁴ *Ibid.* at 96.

³⁵ The Women's Executive Committee of Home Missions of the Presbyterian Church to President Cleveland, 1885.

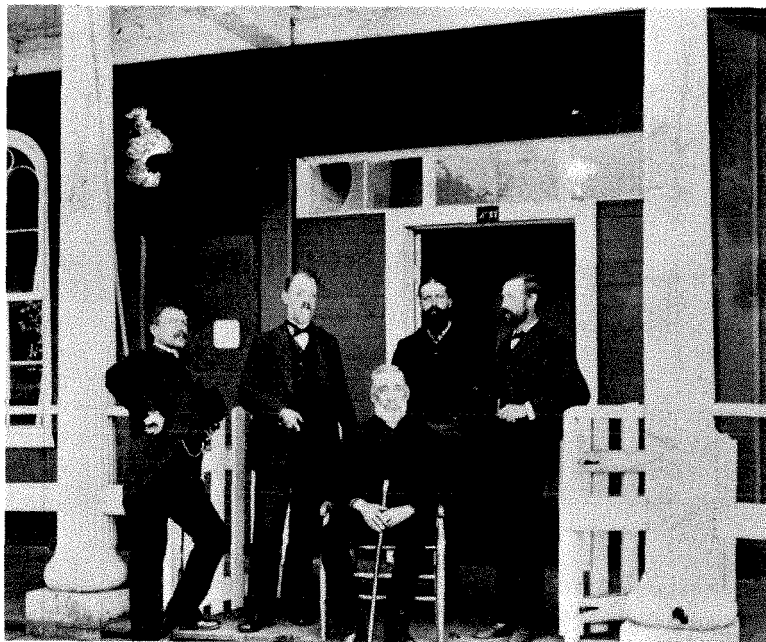
Indian School, instead of attending to flagrant breaches of the law which took place daily under their eyes & into which they joined." Bolles particularly blamed U.S. Attorney Haskett for many of the troubles, a sentiment echoed by Commissioner Brady who stated that Haskett was a drunkard. In fact, the keeper of the largest saloon in town had told him that Haskett "owed him a large sum for drinks at the bar & that he did not expect to get a cent out of him." Brady was also highly critical of Governor Kinkead, who had "been drunk most of the time & spends his intervals in cursing Jackson." An Indian woman had told Brady that the marshal, Manson Hillyer, "is her current sweetheart & I have every reason to believe that she told the truth." In short, the behavior of these officials toward the mission school and Jackson was "without excuse."³⁶

While most critics condemned Haskett and Hillyer, some had kind words for Judge McAllister. J. B. Metcalfe of the Sitka Agency of the Pacific Coast Steamship Company had found the judge to be "a very pleasant gentleman...and a very agreeable Judge before whom to try a case." Metcalfe recognized that McAllister had gotten into hot water by issuing the writs of habeas corpus freeing school children. He speculated that the Presbyterians had become upset about the loss of children because the larger number of students reported in attendance, the more money the Sitka Training School would receive from the Home Board. Metcalfe stated that he would regard it "as unfortunate, at this time to have the Judge removed as he has been here just long enough to know the wants of the Territory" and had tried very hard "to make fit the crude and at best clumsy act creating the civil government of Alaska." In fact, Metcalfe believed, McAllister served the interests of the government well and should be retained. On June 16, 1885 Jackson apparently had a change of heart and told the new U.S. attorney general, A. H. Garland, that the first term of the U.S. district court at Sitka had just ended and that it gave him "great pleasure to write you that I have been pleased with Judge McAllister's conduct on the Bench." Jackson explained that he was even more pleased because a month earlier he had telegraphed the Commissioner of Indian Affairs an unfavorable report about the judge in connection with his rulings on the Indian School cases.³⁷

³⁶ Bolles to Commissioner of Indian Affairs, June 16, 1885; Brady to Commissioner of Indian Affairs, June 17, 1885; General Records of the Department of Justice, Records Relating to the Appointment of Federal Judges, Marshals and Attorneys, 1853-1901, Alaska 1885-1889, Abbot-Kincaid, Box 18, R.G. 60, National Archives.

³⁷ J. B. Metcalfe to Stephen J. Field, May 18, 1885; Jackson to A. H. Garland, June 16, 1885; Jackson to A. J. Garland, June 16, 1885; General Records of the Department of Justice, Records Relating to the Appointment of Federal Judges, Marshals and Attorneys, 1853-1901, Alaska 1885-1889, Abbot-Kincaid, Box 18, R.G. 60, National Archives.

Jackson did not mention the critical letters about McAllister he had recently sent to the president's brother and to the chief executive himself. In any event, it was too late by then, because President Grover Cleveland had decided to fire all of the officials with the exception of Jackson, Brady, and Lewis.



May 1885 group photograph taken in front of the Customs House in Sitka, Alaska. Left to right: U.S. Attorney Edwin W. Haskett; U.S. Marshal Munson C. Hillyer; Governor John H. Kinhead (seated); U.S. District Court Judge Ward McAllister, Jr.; and U.S. District Court Clerk Andrew T. Lewis. (Alaska Historical Library, Juneau)

Shortly after the removal of the officials in late 1885, Jackson thanked President Cleveland, stating that he had lived in frontier territories for the last twenty-six years, "and I have never, not even in Arizona, which had some hard cases, seen a more worthless set of public officials than" the Alaska group. He was grateful for the retention of Brady and Lewis "who have soberly & honestly tried to do their duty." He was convinced that once the president's new appointees reached Alaska to "assume the reins of Government, law-abiding citizens will breathe freer."³⁸

³⁸ Jackson to Cleveland, August 20, 1885, General Records of the Department of Justice, Records Relating to the Appointment of Federal Judges, Marshals and Attorneys, 1853-1901, Alaska 1885-1889, Abbot-Kincaid, Box 18. R.G. 60, National Archives.

Dr. Jackson and his followers breathed easier, but at least two of the removed officials were profoundly unhappy. Kinkead, although acknowledging the right of the president to dismiss him, complained that he was not informed of any cause for the removal. "My resignation," he continued, was at "any moment" at the president's disposal, and he "would have been gratified had the resignation been asked for, and thus saved the necessity for the order of suspension." Kinkead continued that he had been "only too glad to be relieved from an unsatisfactory and thankless position" which had to continue so for his successors under "the present crude and ineffective Organic Act creating the District of Alaska." Kinkead had learned from Ward McAllister, Sr., who had talked with the president, that Cleveland "had been informed by the most estimable and reliable" citizens of Alaska that the government officials there were "unworthy and hence you removed them." Kinkead reminded the president that he had been in Alaska on and off since the cession of the territory by Russia in 1867. He knew nearly every white resident and it was, therefore, not difficult to determine who these "reliable estimable and trustworthy" citizens had been, namely, Dr. Jackson and a few others controlled by him. Kinkead assured Cleveland that this group had misrepresented the federal officials, and in no way represented the wishes and opinions of Alaska's people. In fact, Alaskans would find it unpleasant to discover that the government was unable to find any trustworthy citizens except Jackson and his small group. Kinkead did not care about his job at all, but felt obliged to protest against the removal of Judge McAllister, who had "been falsely and malignantly misrepresented" to the president. Jackson's accusation that McAllister was a scoundrel, drunkard, and dishonest man was a "willful and malicious" lie without any foundation. In fact, he continued, these accusations "could only have emanated from the diseased brain of a lunatic which I in charity believe Jackson to be." As for his own character, Kinkead simply referred the president to Nevada's and California's congressional delegations for references.³⁹

Kinkead maintained that Jackson had disgraced the highly respected Presbyterians whom he represented "by his ill-judged and unwarrantable disregard of the rights of citizens and his expressed contempt for the law." He had "antagonized the entire people against himself and the cause he so fearfully misrepresents has paved the way for the advent of the Church of Rome" whose representatives would control the Natives. Kinkead told the president that Jackson was "an Archhypocrite, a liar and a

³⁹ Kinkead to Cleveland, January 5, 1886, General Records of the Department of Justice, Records Relating to the Appointment of Federal Judges, Marshals and Attorneys, 1853-1901, Alaska 1885-1889, Abbot-Kincaid, Box 18, R.G. 60, National Archives.

dishonest man, a malicious libeler and defamer of honest men." Jackson repeatedly had threatened the court and juries "with the power and displeasure of the Sister of the President." He had boasted publicly that eighteen U.S. senators would vote as he directed them upon any proposition, and read to Kinkead an extract of a letter from Miss Cleveland which stated that "hereafter the President will look to you [Jackson] for all truthful information in regard to matters in Alaska."⁴⁰ In short, Cleveland had been taken in by a clever, ruthless, and dishonest man.

The McAllisters, father and son, also were extremely unhappy with Cleveland's decision and attempted, albeit unsuccessfully, to persuade the president to review his decision.⁴¹ Jackson was not a magnanimous man, and apparently took a personal delight in kicking a foe when he already was down. He was certainly ambitious and resourceful, yet relentless and impatient with anyone who resisted him. He was also a petty, vindictive individual who often damned opponents by broadcasting unconfirmed slanders. Crusading for Alaska's Natives, Jackson spared no charity, or even basic justice, for his enemies.

"A GENTLEMAN POSSESSED OF EXCELLENT
LITERACY AND LEGAL ATTAINMENTS"

With the change in administration, the department of justice had received applications for appointment to various offices even before Cleveland had dismissed most of the Alaska slate of officials. As early as March of 1885, supporters of Edward J. Dawne of Salem, Oregon recommended him for the Alaska judgeship. Dawne, an attorney and counselor practicing before "all the courts" of Oregon, appeared to be "a gentleman possessed of excellent literacy and legal attainments...well fitted and qualified to perform the duties of any Judicial position which it may please President Cleveland to bestow upon him." The man seemed to fit the position. E. J. Jeffery, the chairman of the Democratic State Central Committee of Oregon, strongly recommended Dawne, and so did scores of other worthy citizens. Those endorsing the applicant variously referred to him as a "lawyer and counselor," a "colonel," or even "Dr. E. J. Dawne," hinting at an eventful past. On March 17, 1885 Dawne sent his application together with a petition, signed by 123 prominent citizens and another thirteen nationally-known

⁴⁰ Ibid.

⁴¹ Mayor of Albany to Cleveland, September 28, 1885; Henry Clews to Cleveland, September 9, 1885; Henry States to Jackson, November 29, 1885; Jackson to Cleveland, December 16, 1885; General Records of the Department of Justice, Records Relating to the Appointment of Federal Judges, Marshals and Attorneys, 1853-1901, Alaska 1885-1889, Abbot-Kincaid, Box 18, R.G. 60, National Archives.

individuals, to the president. He stated that he was forty-two years old, had been a resident of Salem, Oregon for thirteen years, and was a member of the Oregon bar. Dawne considered himself fully qualified for the job, "having made the administration of the Oregon Code, which is extended to Alaska, a special study." Three days later he also mailed his application for the Alaska district court judgeship to Attorney General Garland. He stated that he applied at "the urgent request of my friends." He assured Garland that he neither claimed nor asked for any reward for party services. For an ex-Confederate, Cleveland's victory was all he had desired. If appointed he promised to honestly fulfill the duties of the position.⁴²

Jackson had heard of Dawne. He considered him to be "a Christian man with a Christian wife, & while I would not have chosen him," he admitted that "he is well spoken of in Oregon & I think will make an efficient acceptable Judge." On July 21, 1885 Cleveland appointed Dawne district court judge. The new official took the oath of office on August 20 of that year and traveled to Alaska to assume his duties.⁴³

The news of Dawne's appointment stunned the citizens of Salem. Why, they asked, would the president give a judgeship to a notorious charlatan, liar, braggart, and crook? Several of those who had recommended the candidate now felt remorse and wrote the president retracting their recommendations and apologizing for their thoughtless support of Dawne's petition. No one had assumed that the administration would take his bid seriously. In fact, one of his petition signers had once described Dawne in a public speech as "a preacher without a pulpit; or doctor without a diploma; a broker without a dollar; and an attorney without a brief."⁴⁴ As details of Dawne's astounding career unfolded, the department of justice acted to add the distinction of "a judge without a bench" to his long list of credit. What was clear was that a man with nerve could make his way in Oregon. Dawne apparently had come to Salem from somewhere in Arkansas around 1872. "Through the most barefaced falsehood and misrepresentation [he] obtained a

⁴² T. B. Odeneal to A. H. Garland, March 7, 1885; Edward Hirsch to Garland, March 12, 1885; Rufus Mallory to Attorney General, March 11, 1885; La Fayette Lane to Garland, March 11, 1885; E. J. Jeffery to Cleveland, March 18, 1885; Dawne to Cleveland, March 17, 1885; Governor of Oregon to Attorney General, March 17, 1885; General Records of the Department of Justice, Records Relating to the Appointment of Federal Judges, Marshals and Attorneys, 1853-1901, Alaska 1885-1889, Abbot-Kincaid, Box 18, R.G. 60, National Archives.

⁴³ Jackson to Cleveland, May 5, 1885, General Records of the Department of Justice, Records Relating to the Appointment of Federal Judges, Marshals and Attorneys, 1853-1901, Alaska 1885-1889, Abbot-Kincaid, Box 18, R.G. 60, National Archives; Delaney, *Alaska Bar Association*, supra note 19 at 21.

⁴⁴ Samuel Ramp to President Grover Cleveland, August 11, 1885; R. W. Thompson to President Grover Cleveland, August 18, 1885; Department of Justice Correspondence, copies at Alaska State Library, Juneau, Alaska.



Sitka Courthouse, ca. 1905. (Photograph Collection, Alaska and Polar Regions Archives, Elmer E. Rasmusson Library, University of Alaska)

chair as professor [sic] in the Medical Department of the Willamette University." Within a year the administration of the University discovered that Dawne "never had a Diploma of Medicine nor even a Medical Education," whereupon the faculty summarily dismissed him, probably with red faces. Thereupon Dawne, a very resourceful fellow, insinuated himself into the Methodist Church South and worked as a preacher. In 1874 at the annual conference at Dixie in Oregon, Dawne was "tried, silenced and suspended from the Church until such time as he would clear himself of the charges then and there preferred [sic] against him." He never did. Thereafter, Dawne and his wife, "a very fine lady [sic]," taught school for several years, after which he became a broker and finally was admitted to the bar. His colleagues, however, did not consider him a lawyer but rather looked upon him "as what is usually called a shyster by the profession."⁴⁵

In early November, criticism of Dawne's performance as district court judge reached the department of justice. The U.S. attorney, Mottrom D. Ball, wrote that Dawne had been involved in two cases in Sitka, dealing with a hearing and decision of a motion and a demurrer. Dawne reached the correct conclusion, "yet his want of depth as a lawyer was shown in the prolixity & irrelevancy of some of his dicta." Still, there was hope that he might make a fair judge — but that hope disappeared as his professional and personal weaknesses further revealed themselves. Dawne was supposed to

⁴⁵ R. W. Thompson to Cleveland, August 28, 1885; G. W. Goucher to Cleveland, September 6, 1885; General Records of the Department of Justice, Records Relating to the Appointment of Federal Judges, Marshals and Attorneys, 1853-1901, Alaska 1885-1889, Abbot-Kincaid, Box 17, R.G. 60, National Archives.

be in Wrangell on the first Monday in November to open court, as required by law. On October 26 Dawne left Wrangell in a canoe manned by three Indians bound for Tongass, about 150 miles distant. Tongass contained a small settlement of Indians and only a few whites. Before departing, the judge stated to some that he intended to break up the sale of liquor, and to others that he had instruction to assist the Canadian authorities in finding the murderers of a certain shipowner found slain about his craft in British Columbia waters. The U.S. attorney suspected that Dawne had "gone a little daft, from trouble at the publications against him out here, & I fear he had not far to go." Furthermore, Dawne appointed several commissioners in various communities without authorization. Since his departure by canoe, nobody had heard from him. Apparently, he had instructed the marshal to adjourn court from day to day until his return. But Dawne did not return, and on November 17 Governor A. P. Swineford informed the attorney general that Judge Dawne "is missing, with every evidence of having fled the district to evade threatened arrest on charges of forgery and embezzlement." Dawne apparently had intended to return from Tongass via the mail steamer in time to hold a term of court ordered to have started on November 2, 1885. He knew, however, that the steamer was not due at Wrangell before November 12. His failure to return greatly alarmed his wife, "who received and opened his letters, thinking they might throw some light on his mysterious actions." On November 16 she called the governor and read letters to him which proved conclusively that Dawne "is both a forger and embezzler, and leaves no doubt in [my] mind that he has fled to British Columbia." Swineford concluded that "while no judge at all is better than such a one as Dawne, his disappearance nevertheless completely blocks the wheels of justice in the Territory." On December 1, 1885 James Carroll, the captain of the Alaska mail steamer, wired Cleveland that Dawne had "left the territory and gone to British Columbia for reasons best known to himself." Alaska's judicial system was in disarray, and its citizens asked for an honest and reliable individual to fill the position.⁴⁶ Dawne eventually made his way to Montreal and then sailed to Europe. He left his wife and family at Sitka to find their own way back to Salem.

⁴⁶ M. D. Ball to A. H. Garland, November 9, 1885; James Carroll to Cleveland, n.d.; General Records of the Department of Justice, Records Relating to the Appointment of Federal Judges, Marshals and Attorneys, 1853-1901, Alaska 1885-1889, Abbot-Kincaid, Box 17, R.G. 60, National Archives; *The Alaskan*, November 7, 21, 28, 1885 and February 6, 1886.

JUDGE LAFAYETTE DAWSON

The other replacement officers performed better than Dawne. U.S. Attorney Ball worked diligently until ill health forced his resignation in 1887. Barton Atkins, the new U.S. marshal, served until 1889. Although Sheldon Jackson demanded Atkins' removal in March 1889 charging that he did not treat prisoners well, that he used them "for his personal gain," and that his accounts were "in great confusion," a later examination found all to be in good order after Atkins left office in 1889.⁴⁷ It is unclear whether or not Jackson forced the marshal's resignation, but neither he nor any other officer ever again interfered with the Sitka Industrial Training School which today functions as Sheldon Jackson College.

It was not until 1888 that the Justice Department sent its examiner, J. W. Nightingale, to Sitka to unravel the financial snarls created by Marshal Hillyer. Nightingale was annoyed to find no records of Hillyer's ten months in office, except a few expense vouchers. Apparently fearing scrutiny of his administration, the marshal had destroyed his files, leaving his successor in the dark and the examiner perplexed. None of Hillyer's deputies or former deputies was around to shed any light on his administration.⁴⁸

President Cleveland appointed as Alaska's third judge Lafayette Dawson, who was to serve until 1888 — a record incumbency at that point. Dawson established justice and order. In his grand jury charges the new judge stated his views of the priorities of law enforcement. There were two murder cases in 1887, one involving an Indian charged with killing his wife. Dawson instructed the jurors not to consider the question of what tradition or custom might have prevailed among the Natives. In 1885 Congress had made all Indians answerable to the criminal laws of the United States. Dawson's ruling on the legal status of the Natives convinced the grand jurors but subsequent trials challenged it.⁴⁹

Judge Dawson considered other charges jurors would have to consider: liquor sales; the manufacture of liquor; smuggling to evade customs duties; and the prohibition on the sale of breech-loading rifles to Natives, a restriction dating back to Russian days and often protested by officials who explained that the aborigines needed the modern arms to hunt game which had become scarce.

⁴⁷ Jackson to Attorney General, March 27, 1889, Department of Justice Correspondence, copy in Alaska Historical Library, Juneau, Alaska.

⁴⁸ Nightingale's report, November 23, 1888, Letters Received, R.G. 60, National Archives; Hinckley, *The Americanization of Alaska*, supra note 2 at 116; *The Alaskan*, November 21, 1885.

⁴⁹ Henry E. Haydon, *List of Cases Reported From the District Court of Alaska By Lafayette Dawson, Judge, Covering the Period of Time from March 13, 1886 to August 25, 1888* [Maryville, MO, 1888] 113.

Dawson also criticized a Juneau municipal arrangement which required Indian men "to retire at an early hour in the evening while Indian women are invited, enticed and persuaded into the dance halls, where they partake of the hilarity of the dance, drink deep of the rude vulgarity of such places, where modesty has no resting place and where the licentious machinations of the libertine leads them to debauchery and ruin."⁵⁰

The judge disapproved of defamation of character "by words spoken or by writing." He considered this to be "libelous and... a crime at common law, and also under the criminal laws of Oregon, which I shall hold to be applicable here." He also inveighed against the cohabitation of unmarried men "with Indian or Russian women," because "every precept of morality, every incentive to good society, every thought and desire for elevated morals, and every rational idea of the proprieties of life, cry out unmistakably for the suppression of this heathenish, immoral, practice of illicit cohabitation and abiding together of sexes." If a couple lived together, they "must marry and satisfy the law" and "show a regard for the moral sentiment of the community..."⁵¹

Judge Dawson repeated these sentiments in other forms to many other grand juries over the years. It was not perhaps a puritanical aversion to unsanctioned sex, but a desire to help the solid citizens of Alaska's towns build stable communities against the tendency of many single males to acquire Native partners who could be discarded in time. Those who brought their wives north or wished to do so urged the court to deal severely with the footloose males who used communities but made no commitments in return.

Judge Dawson concluded his charges to jurors with an appeal to enforce the law. He urged jurors to be "vigilant, cautious, and to exercise your best judgment in the investigation of these important questions." He urged them to "remember the history of the past. You, gentlemen, know something of the confusion that prevailed here for long years before the establishment of a civil government." Shirk your responsibility "and abandon the law, you will find yourself at once adrift, cast upon the great ocean of chance, confusion and uncertainty, driven by the waves of individual passion and interest against each other." The law, he stated, was "the ark of safety to all. Without it life itself is a mere negative birthright and particularly here in our present condition emerging from a chaos of seventeen years' growth, attempting to establish and uphold a civilized society..." Do your duty and stand by the law. "Let it crush whom it may crush, save whom it may save. It is the only bulwark against the return of licentiousness, brute violence, unspeakable cruelty and revolting barbarism."⁵² Thus inspired, the

⁵⁰ Ibid. at 115-16.

⁵¹ Ibid. at 116-17, 119.

⁵² Ibid. at 120-21.

grand jurors usually worked with determination. Trial jurors, however, had to complete the task and sometimes lacked the virtues the judge appealed to.

Other judges followed Dawson. John H. Reatley served from 1888 to 1889, John S. Bugbee from 1889 to 1892, Warren D. Truitt from 1892 to 1895, Arthur K. Delaney from 1895 to 1897, and Charles S. Johnson from 1897 to 1900.

"MAKING FURTHER PROVISION FOR
A CIVIL GOVERNMENT FOR ALASKA"

As one gold discovery followed another, the judges soon realized that the establishment of various mining camps necessitated holding court in the new settlements. The great gold discovery on the Seward Peninsula on Anvil Creek in September of 1898 soon resulted in a rush to the region. In the summer of 1899, C. S. Johnson, the judge for the district court of Alaska headquartered in Sitka, left Juneau accompanied by A. J. Daly, the U.S. attorney, and Governor John G. Brady. The party went to the city of Dawson and from there traveled down the Yukon River, holding terms of court at settlements along the river. They stopped at St. Michael, went to Nome, and then returned by way of Dutch Harbor, stopping at various places on the return trip to administer the laws of the land. It was a long circuit, spanning approximately 7,000 miles and taking almost all summer to complete. In Nome, when asked if aliens had the right to locate mineral lands, Judge Johnson replied that only the United States government had the right to question the validity of such locations. He denied the many applications for injunctions and the appointment of receivers on mining property. There just was no time to deal with the many complicated cases. Johnson appointed Alonzo Rawson as U.S. commissioner, and told him not to try any title cases because his jurisdiction did not extend to this sort of litigation. The judge, decked out in long rubber boots and a yellow rain slicker, held court in a leaky but spacious tent. Historian Edward S. Harrison described the first session of the court as follows:

...the judge instructed a bailiff to convene court, and the 'Hear ye! Hear ye!' was punctuated by the patter of rain on the roof. The litigants and attorneys sat upon improvised chairs and boxes and the spectators uncovered and remained standing, and for the first time in Nome the Federal Court of the District of Alaska was in session.⁵³

⁵³ Edward S. Harrison, *Nome and Seward Peninsula* (Seattle, 1905) 54.

In response to the gold discoveries, Congress passed, and President William McKinley signed into law on June 6, 1900, a measure "making further provision for a civil government for Alaska..." Section 4 of the act divided Alaska into three judicial districts and provided for the appointment of three district court judges each presiding over a court "of general jurisdiction in civil, criminal, equity, and admiralty cases" in the "district to which they may be respectively assigned by the President."⁵⁴

President McKinley appointed James Wickersham, an attorney from Tacoma, Washington to fill the bench at Eagle on the Yukon



Judge James Wickersham. (Huntington Library)

⁵⁴ Act of June 6, 1900, ch. 786, 32 Stat. 321 (1900).

River in the third judicial division; Arthur H. Noyes, a lawyer who had practiced in Grand Forks, North Dakota and Minneapolis, Minnesota to the judgeship in the second judicial division at Nome; and Melville C. Brown of Wyoming to the bench in the first judicial division headquartered in Juneau. In Seattle, Wickersham met Noyes. The department of justice had requested that the two meet in Seattle to jointly determine the boundary between the second and third divisions. That was the only meeting between the two men. Recalling the event years later, Wickersham was impressed with the Nome group when comparing it to his own. He described Noyes as "an agreeable man, though he seemed to be immoderately fond of the bottle." The Eagle City group seemed to be rather unimportant while the Nome party appeared to be alert, aggressive, and engaged in planning large mining ventures. The Seattle crowds watching the departure were not interested in Wickersham's party but "stood open-mouthed about those bound for Nome." Under the circumstances, members of Wickersham's "modest party felt that they were being shunted to an obscure place in the Yukon wilderness."⁵⁵

On July 2, 1900 they sailed on the steamer *City of Seattle* bound for Skagway with stops at Ketchikan, Wrangell, Treadwell, Juneau, and Haines. On July 6 the steamer tied up at the White Pass and Yukon Railway dock at Skagway. A hack took them to the sprawling Fifth Avenue Hotel. Wickersham observed that construction on the railroad continued night and day, an army of men blasting cuts and tunnels in solid mountain walls over the pass and along Lake Bennett. Wickersham met Judge Melville C. Brown who was conducting court in Skagway. The two talked and agreed on a temporary boundary between the first and third judicial divisions, deciding to postpone determination of the permanent boundary until they had learned more about the geography of the region.⁵⁶

Soon thereafter, Wickersham and his party left Skagway for Dawson. Since no boats went down river to Eagle City for several days, Wickersham had the opportunity to visit the city and the Klondike mines. Dawson was then in its heyday as the richest mining camp in the Yukon basin. Its buildings had been hastily constructed from green lumber, "its streets were quagmires; its waterfront was filled with hundreds of small boats and scows which had brought its inhabitants from Lindeman and Bennett through the dangers of the Whitehorse rapids." Wickersham and his party visited the El Dorado and Bonanza gulches, explored the mining operations and washed some gravel, and were treated in a

⁵⁵ Evangeline Atwood, *Frontier Politics: Alaska's James Wickersham* (Portland, OR., n.d.) 59.

⁵⁶ *Ibid.* at 60; James Wickersham, *Old Yukon, Tales — Trails — and Trials* (Washington, D.C., 1938) 3-4.



Judge James Wickersham's courthouse at Eagle, Alaska, 1900.
(Guilbert Thomas Collection, Alaska and Polar Regions Archives,
Elmer E. Rasmuson Library, University of Alaska)

royal fashion. They took the *John Cudahy* to Eagle City where they arrived on July 15, met by the entire population.⁵⁷

Judge Wickersham wasted no time in building quarters for himself and organizing the court. The third judicial division was sparsely settled with fewer than 1,500 Caucasians according to the newly completed census. It was enormous in extent, however, containing approximately 300,000 square miles. In this vast area there was no courthouse, jail, or other public building. Congress had neither appropriated nor promised funds for any of these purposes, except that the district court judge had the authority to reserve two town lots and to build a courthouse and a jail, financed by receipts from license funds. Personal finances were in even worse shape, because paychecks for the period from June to November were not received until the following February, and thereafter were always three to four months late. Another financial handicap involved the use in the Yukon basin of Canadian currency which was heavily discounted in the United States and therefore did not circulate there; the federal bureaucracy refused to accept it as part of the official remittances to be made quarterly by the clerk of the court. The latter had to accept Canadian money

⁵⁷ Wickersham, *Old Yukon*, supra note 56 at 5, 10-11, 24-26; Wickersham Diary, July 11 and 15, 1900, University of Alaska, Fairbanks Archives.

or stop public business. Therefore, at the close of the quarter the clerk had to ask mercantile companies and businesses to exchange the currency for American money because there was not a single bank in the region. Wickersham recalled that it took five years to get enough American gold coins and currency into the district to carry on the public business with the proper money. Despite these handicaps and others, Wickersham instructed the clerk of the court to collect license fees from the saloons and mercantile establishments, and soon there was enough money to build a courthouse and a jail. On August 20, the judge held a special term of court at Rampart on the Yukon to collect license fees and to enable officials to become acquainted with the country. He had determined that it was not necessary to call a special term at Circle since the court officials had to pass it on their way to Rampart. While in Circle City, "a bleak, log-cabin town" which prior to the Klondike gold discovery had been a busy port of entry but had since been all but abandoned, the clerk and the marshal visited the saloons and stores to collect the license fees. They had some success, but several businessmen were short on cash and promised to pay on the officials' return from Rampart.⁵⁸

Judge Wickersham convened the court in one of the warehouses of the North American Trading and Transportation Company. He sat behind a rough lumber counter while the clerk had a table. The clerk and marshal collected license fees, and Wickersham signed the orders. There was little business to report: a prisoner was charged with stealing a dog and food supplies from a trapper's cache and was bound over to the grand jury term at Circle City in September; and "two or three miners were trying to get into a lawsuit, but fortunately for them there were no lawyers in Rampart to prepare their cases for trial, so they settled it." Litigants also filed some papers in a civil suit with the clerk, after which the judge adjourned the court. Thereafter, while waiting for transportation, the court officials talked with "businessmen, prospectors and Indians about general conditions in the Rampart district and found them not bad."⁵⁹

The first jury term ever held by the district court in the third division convened at Circle City on September 3, 1900. The court met in the Episcopal log church and hospital rented from the mission for that purpose. A grand jury was impanelled and it returned three indictments, one for murder, another for rape, and a third for larceny of a dog and supplies from a trapper's cache. Judge Wickersham had a trial jury called, and had the accused arraigned and tried. The jury found the man charged with murder guilty of the lesser offense of manslaughter and the judge

⁵⁸ Wickersham, *Old Yukon*, supra note 56 at 36-46.

⁵⁹ *Ibid.* at 47.

sentenced him to ten years in the penitentiary; the jury acquitted the man charged with rape, and the larcenist pleaded guilty and received a sentence of two years. After only seven days the court concluded all of its business and adjourned. Wickersham, the U.S. attorney, marshal, clerk, and the public accountant had to remain at Circle to write up and sign the records and prepare and settle the accounts for the term. On September 22, in the midst of an early blizzard, two stern-wheelers arrived and the crew hurriedly exchanged the mailbags, unloaded the Circle freight, and took the new passengers on board. Then they hauled in the gangplank and steamed upriver, having to reach Dawson before the river froze. Once in Eagle, the court officials prepared for the winter, splitting and piling wood and banking the walls of the cabins to keep the cold from getting beneath the floor. After having attended to these chores, Wickersham joined Captain Charles S. Farnsworth, the commander of Fort Egbert, in a hunt.⁶⁰

In midwinter of 1900 Wickersham received urgent requests to come to Rampart to settle problems which had arisen with claim jumping. The court officials answered the call, and using a dog team, mushed to Rampart, where the judge convened a special term of court on March 4, 1901. By March 11 the judge was on his way home and reached Eagle on March 27 after some very demanding travel over rough trails and after braving a vicious snowstorm. He had traveled more than 1,000 miles and spent a total of \$705.00 for the dog team, driver, roadhouse expenses, meals, and beds. The judge took the receipts and noted in his diary that "these I must send to Washington, D.C. & I trust to luck to be reimbursed."⁶¹

At the close of 1900 Judge Wickersham reported to the department of justice on his first year's efforts. The judge was of the opinion that the routine business in Eagle was small and not likely to increase. He suggested that since the courts in the first and second divisions were swamped with litigation, he was willing to help out by holding special terms of court for them. On March 28, 1901 the attorney general directed Wickersham to hold a "special term of court at Unalaska-Dutch Harbor in Judge Noyes' district, providing he makes no objection." On April 29 Wickersham contacted Judges Noyes and Brown and offered to enlarge his district so as to include the Copper River country and the Aleutian Islands, thereby relieving "both their courts to that extent." On May 13 Judge Wickersham received clippings from the *San Francisco Call* which stated that Noyes had "been cited to appear before the Circuit Court of Appeals at San Francisco for contempt in relation to the difficulties at Nome, and that I had been directed by the President to go to Nome in his place —

⁶⁰ Ibid. at 48-51.

⁶¹ Ibid. at 57, 72, 77.



Nome courthouse, ca. 1910. (Nome Collection, Alaska and Polar Regions Archives, Elmer E. Rasmuson Library, University of Alaska)

temporarily at least." Wickersham thought that the contempt citation was "unprecedented — the whole matter to date is that!"

Steamers for Nome did not leave Seattle before the end of June because of ice in the Bering Sea. Judge Wickersham knew he could not reach Unalaska before the return trip of one of these steamers so he called a general term of the district court to be held at Eagle starting July 1. This, he hoped, would enable him to clear up the work in his own division in case his services at Unalaska were extended to Nome. The work in Eagle, however, was greatly delayed because of the late break-up of the Yukon River, and it was not until July 24 that the stern-wheeler *Susie* reached Eagle with the officers, prisoners, and witnesses from Rampart, Fort Yukon, and Circle. Thereafter, the work went quickly and smoothly, and the judge was able to adjourn the court on August 1, "leaving a clear docket in that division." On August 3, 1901 Wickersham boarded the Alaska Commercial steamer *Leah* bound for St. Michael, en route to Unalaska via Nome. While briefly in that city, U.S. marshal Frank H. Richards told Wickersham that he would be unable to summon enough jurors from among the small population at Unalaska. Since Wickersham knew that a couple of murder cases had to be investigated, he ordered that grand and trial juries be drawn in Nome. The marshal complied and summoned sixteen grand and eighteen trial jurors who boarded the *St. Paul* to accompany the judge to the Aleutians, as did the marshal and various other court officials.⁶²

⁶² Ibid. at 321; Wickersham Diary, March 28 and May 13, 1901, University of Alaska, Fairbanks Archives; Wickersham, *Old Yukon*, supra note 56 at 322-24; Wickersham Diary, August 16, 1901, University of Alaska, Fairbanks Archives.

"AN OUTRAGEOUS AND
COLD BLOODED MURDER & PERPETRATOR"

When Judge Wickersham awoke early on the morning of August 19 to the sounds of a bellowing cow and a crowing rooster, the *St. Paul* had docked at Unalaska. The judge was delighted with the scenery which greeted him when he came on deck: "high, round, grass covered mountainous islands, bays" and "a clean, bright town along the waters [sic] edge, with schools, churches, stores, docks and several small vessels at anchor; the sun light struggling through the clouds and a general...mist such as we have on Puget Sound gave me a feeling of being in a familiar climate — near home — I am much pleased with Unalaska. It is an attractive spot, historic and interesting." He was to hold court in a large room above the Alaska Commercial Company bath house and laundry. He convened the court at eleven o'clock in the morning. The grand jury was impanelled and sworn in and ready to consider two murder charges. One Fred Hardy stood accused of having slain famous Idaho miner Con Sullivan, Sullivan's brother Florance, and their partner, P. J. Rooney, on Unimak Island. The other case involved an Aleut who was charged with killing his wife. Since the U.S. attorney was not yet familiar with the evidence in these cases, Wickersham expected that it would take the grand jury some time to get to work.⁶³

The grand jury indicted Fred Hardy on August 22, 1901 for the murder and robbery of three men on June 7 of that year. The three, together with Owen Jackson, had been prospecting on Unimak Island. They left their camp, and the murderer crept up, stole their rifles, and shot and killed the prospectors upon their return. Only Owen Jackson escaped after incredible hardships and finally reached Unalaska where he reported to the authorities. Thereupon, the U.S. revenue cutter *Manning* went to Unimak, and Jackson and several officers found and buried the three slain men whose bones, by this time, the foxes had picked clean. They also arrested Hardy. Wickersham considered it an "outrageous and cold blooded murder & [the] perpetrator ought to suffer death."⁶⁴

During Hardy's trial, the following facts emerged. Fred Hardy was a Tennessee drifter who came north during the gold rushes intent on seeking his fortune. Hardy was a thoroughly unscrupulous and depraved character who earned the nickname "Dimond Dick" for his voracious reading of dime novels while confined

⁶³ Wickersham Diary, August 19, 1901, University of Alaska, Fairbanks Archives; *U.S. v. Fred Hardy*, trial record, case No. 109, R.G. 21, Federal Records Center, Seattle, Washington.

⁶⁴ Wickersham Diary, August 22, 1901, University of Alaska, Fairbanks Archives.



The convicted murderer Fred Hardy. Sketch by C. Boundy for the *Nome Nugget* of Friday, September 9, 1902. (Alaska and Polar Regions Archives, Elmer E. Rasmuson Library, University of Alaska)

years before in Alcatraz.⁶⁵ Con Sullivan was a hard-working prospector and miner. He was lucky to be involved in the original staking of Idaho's Bunker Hill and Sullivan mine, a mountain producing vast amounts of silver from 1885 to 1892. Sullivan sold his share to Simeon G. Reed of Oregon for \$75,000 but continued prospecting with moderate success. His luck ran out, however, for

⁶⁵ *U.S. v. Fred Hardy*, No. 109, United States District Court for the District of Alaska, Second Division, R.G. 21, National Archives, Seattle Branch.

when he came north to investigate the mineral potential of Unimak Island he met Hardy.⁶⁶

Fred Hardy had deserted a fishing schooner on Unimak Island and subsequently observed the activities of the well-equipped Sullivan party. On June 6-7 the prospectors relocated their camp to the vicinity of Cape Lapin. Jackson and Rooney, who were returning in the party's dory with a final load of supplies, heard four rifle shots. In sight of the tent they saw Florance fall and Con run for the dory hoping to escape. The rifle fire continued and Rooney was hit as the men boarded the dory. At this point Con and Jackson decided to make for the shelter of a nearby bluff, but before the two got very far, a bullet in the back felled Con. Jackson then kicked off his heavy rubber boots and ran toward the old campsite. He hid that night and started out for False Pass the next morning, resting along the way in an abandoned trapper's cabin. On the way, he saw men he assumed to be Natives. Since Jackson thought that the assailants had been Natives, he changed his route and headed for Unimak Pass on the island's west side, traveling high in the hills. On June 24 he reached Scotch Cape near Unimak Pass, weak from exhaustion. Except for a little flour and water and a few beans, he had not eaten since the shooting. Finding a dory on the beach, he crawled under it for protection and passed out. Luckily, a prospecting party found him before he died. Near starvation, he was without coat, blanket, or shoes, although he wore a pair of rubber boot soles he had tied to his feet. After resting a few weeks, Jackson regained his strength. The party then hailed the mail steamer *Newport* moving through the narrow pass and reached Dutch Harbor on July 17, 1901. Nome's U.S. marshal, Frank Richards, took Jackson's statement at Dutch Harbor. Soon the marshal, U.S. Commissioner R. E. Whipple, and a coroner's jury departed for Unimak Island.⁶⁷

Fred Hardy apparently felt secure enough to remain on Unimak Island. The search party found him with a large sum of money and the property of the Sullivan party. The Unalaska grand jury indicted him, and U.S. Attorney John L. McGinn prosecuted while Nome attorney C. P. Sullivan and John W. Corson defended the accused. Judge Wickersham and jurors from Nome listened as witnesses refuted Hardy's testimony as well as his attempts to blame the murders on George Aston, who had been arrested with him. One dramatic incidence in the trial occurred as prosecutor McGinn tried to determine an important date in the sequence of events, namely that Aston, the man Hardy accused of the murder, had been at the fish camp of an old Aleut chief on the date of the murder, fifty or more miles from the scene of the massacre. The old Aleut, according to Wickersham, cut a pitiful figure, dressed in

⁶⁶ Ibid.

⁶⁷ Ibid.

ragged skin clothing, smelling like an Aleut fish camp on a summer day. His general facial expression was that "of an decrepid idiot. When asked a question he would smile in a senile way and gaze about the court room" until finally prompted to answer by the judge. He finally said that he knew Aston who had come to his camp in his fishing dory about June 2 and was there on June 7, the day of the murder. He knew because "me lote (wrote) it in me log." McGinn then turned his pivotal witness over for cross-examination to two of Alaska's best lawyers. Apparently everyone in the courtroom thought that the man's testimony would be utterly discredited under cross-examination, especially on the matter of the crucial date. Sure enough, the defense attorneys asked the old man how he was so certain about the date. The chief repeated that "me lote (wrote) it in me log." Immediately, one of the defense lawyers gave the witness a piece of paper, a pen and ink and asked him to sit at a small desk in front of the jury and demonstrate his writing skills. It was a tense moment, Wickersham recalled, as the witness "shuffled his ill-smelling clothes for a moment, gave us all a childlike smile...and wrote his name in a clear and legible script — in Russian!" The defense attorney took one look and said, "That will do." The cross-examination was over.⁶⁸

On September 7 Judge Wickersham wrote that "after a long, hard trial," lasting usually from nine o'clock in the morning until past nine o'clock in the evening, the jury brought in a verdict of guilty of murder in the first degree. Wickersham sentenced Fred Hardy to hang. After the sentencing, Hardy was taken to Nome where his fate created a sensation among the residents. Hardy provided plenty of copy for journalists with his speculations about the forthcoming hanging.⁶⁹

In June of 1902 the Ninth Circuit Court of Appeals in San Francisco rejected the condemned murderer's appeal for a new trial. Hardy, however, was not resigned to his fate and planned an escape with fellow inmate John Priess. The scheme involved killing the guards and fleeing to Dutch Harbor where Hardy knew an individual who had \$30,000 and a schooner. The potential fugitives planned to rob and kill the Dutch Harbor man, take his schooner and sail to South America where they planned to sell whiskey to the Indians. Guards, however, discovered Hardy's letters in Priess' possession, and as a precaution, put Hardy in irons. In the meantime the appeals process moved Hardy's hanging date from December 1901 to September 1902. On schedule, Hardy died on the gallows on September 19, 1902 at age 28, protesting his innocence to the very last.⁷⁰

⁶⁸ Ibid.; Wickersham, *Old Yukon*, supra note 56 at 334-35.

⁶⁹ Wickersham Diary, September 7, 1901, University of Alaska, Fairbanks Archives; *Nome Nugget*, September 14, 1901.

⁷⁰ *Nome Nugget*, August 23, 1902.



Unalaska in the Aleutians, site of Alaska's "floating court."
(Huntington Library)

Judge Wickersham was proud of having conducted the first court ever convened in the Aleutian Islands. While at Unalaska Wickersham received a letter from the U.S. attorney general, ordering him to go back to Nome to conduct court in the absence of Judge Arthur Noyes. The judge was disappointed because he had planned to visit Tacoma for a short time. He suspected that he would probably have to spend a winter in Nome, a prospect he did not relish. "My visit home is gone," he complained, "hard work — thankless task, too, at Nome. Hope the wolf won't [sic] rend my bones asunder as he has poor Judge Noyes." Judicial affairs in Nome were troubled as a scandal rent the community involving the court and other officers of the law. Wickersham was to restore the reputation of the judicial system. His journey to the Aleutians set a precedent which in time evolved into the famous "floating court," where the court moved along Alaska's coasts during the summers in revenue cutters, stopping where needed to hold court.

THE NOME GOLD "CONSPIRACY"

Much has been written about the famous Nome gold rush, the last major placer stampede in the history of the American West, as Nome was one of the last great gold rush boom towns. The stampede lasted only for the short summer of 1900. Although others had found gold on the Seward Peninsula, the men generally credited with the 1898 discovery of the Nome gold fields are Jafet Lindeberg, Eric Lindblom, and John Brynteson, known as the "three

lucky Swedes," though Lindeberg was a Norwegian. Two stampedes followed, one in 1899 by those already in the north and the other in 1900 by outsiders expecting to gain quick fortunes.

While the argonauts were heading for Nome in great numbers, the United States Senate debated a civil code for Alaska, partially designed to remedy the Nome situation. A few years earlier, on June 1, 1898, Congress had adopted a concurrent resolution directing the commission appointed in 1897 to revise and codify the criminal and penal laws of the United States and to draft a civil code for the district of Alaska. The commissioners submitted the fruits of their labor to Congress on December 20, 1898. This document gave lawmakers a basis for deliberation.⁷¹

The Nome gold rush figured prominently in the congressional debates about the civil code and dominated discussions in the Senate. What few senators seemingly realized was that the 1900 civil code was put together in the middle of a conspiracy designed to steal the richest claims in the Nome district. In fact, framing the civil code was part of the contemplated fraud.

The individual behind the Nome gold conspiracy was Alexander McKenzie, a member of the Republican National Committee from North Dakota for twenty-one years. McKenzie was sentenced on a contempt of court charge to a year in prison for his part in the scheme. President William McKinley, one of McKenzie's personal friends, pardoned him after he had served only a few months in jail. The president justified his action by declaring that McKenzie was in poor health and probably would die in prison. Instead, McKenzie died some twenty years later in 1922 and took most of the secrets of the gold conspiracy to his grave. Neither McKenzie nor anybody else was ever charged with conspiracy, because, it has been suggested, top officials in the department of justice had participated in the plot.⁷²

The thousands of pages of documents gathered in the various contempt proceedings still do not answer the question of whether or not there was a conspiracy, but Judge William Morrow of the Ninth Circuit Court of Appeals stated that the evidence showed "beyond any reasonable doubt" that a conspiracy did exist.⁷³ McKenzie almost succeeded in pulling off one of the most spectacular frauds in American legal history. He started by

⁷¹ *Laws Other Than Criminal Relating to Alaska*, H.R. Doc. No. 99, 55th Cong., 3d Sess. (1898); for an excellent discussion of the origin of the Alaska and Oregon Codes, see Frederick E. Brown, "The Sources of the Alaska and Oregon Codes: Part I, New York and Oregon," and "The Sources of the Alaska and Oregon Codes: Part II, The Codes and Alaska, 1867-1901," 2 *UCLA-Alaska Law Review* [1972] 15-33 and 3 *UCLA-Alaska Law Review* [1973] 87-112.

⁷² Terrence Michael Cole, "A History of the Nome Gold Rush: The Poor Man's Paradise" (Unpublished dissertation, University of Washington, 1983) 161-62.

⁷³ *In re Noyes*, 121 F. 209 (9th Cir. 1902).

manipulating the Alaska civil code in Congress. The basis for his scheme was the uncertainty over whether or not aliens could legally stake mining claims; that was the issue which had agitated the miners in the Nome district since Lindeberg, Lindblom, and Brynteson had made their rich strike on Anvil Creek and Snow Gulch. Many prospectors believed, or wanted to believe, that it was legal to re-stake any claim located by an alien. This, however, was contrary to the mining laws of the United States. Claim jumpers, nevertheless, continued to insist that they were in the right. By 1900 many of the original alien claimants had sold their property, mostly to American citizens who now incurred the anger of the claim jumpers. Charles D. Lane, a mining entrepreneur who early on had realized the mineral potential of the Nome region, had organized the Wild Goose Mining and Trading Company in 1899 with a capital of \$1,000,000. Much of this money he spent in purchasing mining claims from the Lapp reindeer herders and the Scandinavians.⁷⁴



Mining camp on the beach at Nome, Alaska, 1900. (Lomen Family Collection, Alaska and Polar Regions Archives, Elmer E. Rasmuson Library, University of Alaska)

Among the claims Lane had purchased was No. 10 Above Discovery on Anvil Creek, which John S. Tornanses, a Lapp reindeer herder, had staked on October 19, 1898. In the spring of 1899 a miner jumped the Tornanses claim because he alleged that the reindeer herder was an alien and therefore could not locate a

⁷⁴Harrison, *Nome and Seward Peninsula*, *supra* note 74 at 197-201.

mining claim. Lieutenant Oliver Spaulding of the U.S. Army had arrested the claim jumper and kept him in confinement at St. Michael for three weeks when the angry prospector had refused to drop his claim. The miner's arrest and confinement brought about the organization of the Council City Law and Order League in April 1899, which claimed to protect the rights of American citizens against the aliens. The discovery of gold on Nome's beaches in the summer of 1899 had temporarily relieved the claim jumping issue, but it had not died. The claim jumper continued to maintain that he and his two companions were the lawful owners of the No. 10 Above. Since Tornanses, as an alien, had no right to stake the claim in the first place, he could not sell it to Charles D. Lane, and the three men decided to contest Lane's title in court. They hired as their attorneys Oliver P. Hubbard and William T. Hume of the law firm of Hubbard, Beeman and Hume, which represented many of the claim jumpers in Nome.⁷⁵

Oliver P. Hubbard hailed from Chicago where he had clerked in the attorney general's office when Grover Cleveland had been president. This experience had given him good connections in both New York and Washington, D.C. Hubbard came to Alaska in the spring of 1898 and, together with his partners Edwin Beeman and William Hume, agreed to represent anyone with a jumper's title in exchange for contingency interest in the contested claim. Thus the attorneys became partners with their clients and, eventually, the three attorneys gained an interest in approximately one hundred jumpers' titles. The attorneys and their clients had much to gain if the claims of the original locators could be nullified.⁷⁶

During the winter of 1899-1900 Hubbard attempted to gain the interest of investors in Chicago, New York, Washington, D.C., and London who were willing to gamble that the alien claims in Nome would be invalidated. In January 1900 Hubbard arrived in New York City where he met Alexander McKenzie, who was most adept in the art of bribery and influence buying. From North Dakota's admission to statehood in 1889 until the Progressive "Revolution of 1906," the McKenzie ring controlled most of the elected officials in the state, and influenced the election of nearly every senator during North Dakota's first twenty-four years in the Union. When Hubbard and McKenzie met, the North Dakota political boss recognized a chance to make a fortune out of the turbulent conditions in Nome. With the help of several key senators he could influence, McKenzie planned to attach an amendment to the Alaska Code which would have retroactively nullified any mining claims in Alaska staked by aliens. If successful, the jumpers' titles could be worth millions of dollars. McKenzie and Hubbard apparently agreed upon a strategy to

⁷⁵ Cole, "A History of the Nome Gold Rush," *supra* note 72 at 164-66.

⁷⁶ *Ibid.* at 166.

follow and McKenzie formed the Alaska Gold Mining Company, a phony syndicate with a paper capitalization of fifteen million dollars. McKenzie exchanged stock in his paper corporations for jumpers' titles to alien claims in the Nome district and other areas in Alaska as well. He paid Hubbard, Beeman and Hume \$750,000 in Alaska Gold Mining Company stock for their interest in the approximately one hundred titles, and made Hubbard secretary of the company. McKenzie hoped to gain control of the richest mines in Nome for a season, enabling his company to take out millions of dollars worth of gold. At freeze-up, he hoped to sell the company's fifteen million dollars of worthless stock on Wall Street, bilking an unwary public.⁷⁷

Alexander McKenzie did not put anything in writing and, therefore, it has been impossible to identify all of his backers. The Ninth Circuit Court of Appeals perceptively observed that McKenzie obviously put the stock of his company in the hands of those who could help him the most. U.S. Senators Thomas H. Carter of Montana, the sponsor of the Alaska Civil Code, and Henry C. Hansbrough of North Dakota helped the Alaska Gold Mining Company a great deal in the spring of 1900. Carter was a lawyer and an expert in the incredibly complex mining laws of the United States. He had tried many mining cases as an attorney, and in 1900 he chaired the Senate Committee on Territories and steered the Alaska Civil Code to passage. It subsequently became known as the "Carter Code." On March 5, 1900 Carter reported the measure out of his committee. It was basically a modification of the Oregon Code, in force in Alaska since 1884. Very little was controversial in the bill, and the senator urged his colleagues to pass it quickly in order to give Alaskans a system of law and order, made necessary by the gold rush population boom. Carter disavowed any personal interest in the measure, but told his colleagues that it was their duty to pass the bill.⁷⁸

Circumstantial evidence and Carter's clever maneuvers on the Senate floor suggest that the chairman and Hansbrough were in collusion with McKenzie, although there is no evidence that they expected to share in McKenzie's Nome booty. Perhaps they believed that if they helped the North Dakota boss get millions they eventually would benefit as well. In the later contempt trials, witnesses testified that they had observed Senators Carter and Hansbrough in McKenzie's hotel rooms in New York City and Washington, D.C. The record of the debates, however, still contains the most incriminating evidence. For as it emerged from Carter's committee, the Alaska Civil Code contained sections taken directly from the Oregon Code which clearly stated that aliens had the right to acquire mining property, and that a title "shall not be

⁷⁷ Ibid. at 166-69.

⁷⁸ Ibid. at 169-71.

questioned nor in any manner affected by reason of the alienage of any person from or through whom such title may have been derived." This provision obviously protected the rights of those aliens who had staked claims, and others who had bought mining ground from them. On the floor of the Senate, Carter had the nerve to argue that the alien provision had "crept into this compilation" and had to be stricken to prevent the confirmation of "shady, or doubtful titles" and bestow "rights where none existed under the law." Senator Carter shared the patriotic interests of the Nome claim jumpers. He told his colleagues that numerous aliens had illegally and immorally taken the richest claims in Nome, and therefore, the Alaska Civil Code had to be amended to protect the rights of American citizens. Carter also provided the Senate with a version of the discovery of gold at Nome written by H. L. Blake which distorted the priorities of discovery and the actions of the military in breaking up the meeting of the claim jumpers. The chairman warned that "it will be a dark and evil day for this country when the badge of American citizenship will not be at least as good a cloak for protection as the ancient citizenship of Rome was in the days of that Republic."⁷⁹

Carter clearly got carried away with his own rhetoric, and he certainly ignored the rights of Americans who had bought property from the aliens. Carter offered a solution to the dilemma. Senator Hansbrough just happened to have drafted an amendment to the original code, "moved by a high sense of duty to a distant body of his fellow-countrymen, men on an ice-bound coast 8,000 miles away," which would have invalidated the title to any claims purchased from an alien locator and would have given courts the right to inquire into a locator's citizenship. According to American law and Supreme Court rulings, only the government, unlike the litigant in a lawsuit, had the right to raise the question of alienage at the time the claim came up for patent. Another proviso in Hansbrough's amendment stated that unless an alien had filed his declaration of becoming a U.S. citizen before staking his claim, the title would not be valid. This particular part of the amendment was directed at Jafet Lindeberg and other former reindeer herders who had filed their declarations of intention before the U.S. commissioner at St. Michael, not realizing that a U.S. commissioner could not legally receive such a document.⁸⁰

Senator Carter warned of dire consequences to the nation if the Hansbrough amendment failed to be adopted. He claimed that the aliens he feared most were not the Swedes and Lapps, but rather those from China, Russia, Korea, and Japan. Should the government notify the Japanese people that they "may proceed to Cape Nome and Cape York and on the whole of that Alaskan coast and there

⁷⁹ 33 Cong. Rec. 56th Cong., 1st Sess., 4418 [1900].

⁸⁰ *Ibid.* at 4418, 3739.



View of the frozen harbor at Nome, 1907, "an ice-bound coast 8,000 miles away." (Lomen Family Collection, Alaska and Polar Regions Archives, Elmer E. Rasmuson Library, University of Alaska)

participate like our own citizens in the benefits which accrue to the locator of mining claims," what would happen then? He answered his own question by stating that this "would be equivalent to turning Alaska over to the aliens who might desire to come there from all over the world."⁸¹

Despite the valiant efforts of Senators Hansbrough and Carter, and McKenzie's other friends in Washington, D.C., the "Hansbrough amendment" to the Alaska Code was defeated, thanks in part to the opposition of Charles D. Lane and others. McKenzie, however, did not give up easily, and decided to have a friendly judge appointed in Nome. Using his connections with financiers and leading Republican politicians, he pushed through the appointment of Arthur H. Noyes, an undistinguished Minnesota attorney and longtime McKenzie friend as judge for the new second judicial division of Alaska which included the Nome gold fields.⁸²

Judge Noyes and his party together with McKenzie arrived at Nome in mid-July 1900, and the new judge fooled all his supporters for he did nothing to establish law and order in that city. In fact,

⁸¹ Ibid. at 4310.

⁸² Cole, "A History of the Nome Gold Rush," *supra* note 72 at 177; 33 Cong. Rec., 56th Cong., 1 Sess., 3928, 3934, 4471 (1900); Cole, "A History of the Nome Gold Rush," *supra* note 72 at 178-79; Petition to President William McKinley, n.d. (1900); D.E. Morgan to President of the United States, March 21, 1900, Appointments, Alaska, R.G. 60, National Archives; List of Endorsements for Arthur H. Noyes, n.d.; D.E. Morgan to President McKinley, April 19, 1900, Appointments, Alaska, R.G. 60, National Archives.

his arrival in Nome marked the beginning of the reign of "the Spoilers," as novelist Rex Beach called the judge and his gang in a book by the same name.

Within four days after their arrival, Alexander McKenzie controlled the richest placer mining claims of Nome. Judge Noyes had appointed his friend as receiver to administer the mining claims while they were in litigation. Customarily, a receiver holds such disputed property in trust so that its value cannot be dissipated before judicial determination has been made. The best way to preserve the value of the claims was to leave the gold in the ground. Instead, McKenzie hired every able-bodied male he could find before the winter put an end to mining activities. McKenzie was not shy in carrying out his scheme. William T. Hume later testified that his partner, Oliver P. Hubbard, came to Nome on July 21 and told him that McKenzie had succeeded in getting his men appointed to the positions of judge and U.S. attorney. A few hours later McKenzie visited Hume's office and advised Hume and Beeman to cooperate with him as Hubbard had done. In that case, they would make a "large and ample fortune." If they did not cooperate, McKenzie threatened to ruin them and make certain that they would win "no suits in the District Court for the District of Alaska, Second Division, as he controlled the Judge" of that court.⁸³

McKenzie also demanded that he and U.S. Attorney Joseph Wood receive a one-quarter interest in the profits of the law firm. Hume understood that McKenzie would hold his one-quarter share of the business "in trust" for Judge Noyes. The new partners signed the agreement on July 22, 1900. McKenzie thereupon instructed his partners immediately to prepare applications for the appointment of receivers for the contested claims on Anvil Creek. Speed was of the essence, because the Anvil claim owners were taking out thousands of dollars each day, an obvious loss to the Alaska Gold Mining Company. While McKenzie paced the floor of the office urging them to hurry up, Hume and his secretaries worked two days straight producing the necessary complaints, motions, affidavits, summons, and writs for Noyes' signature. Hume took the legal documents to the judge's private quarters where he signed them without even reading them, enabling McKenzie to take over five of the richest placer mining claims, including four on Anvil Creek.⁸⁴

McKenzie waited with two horse-drawn wagons and a deputy U.S. marshal when Hume returned with the signed orders. He

⁸³ United States Ninth Circuit Court of Appeals, "In the Matter of Arthur H. Noyes, et. al.," *Transcript of Proceedings and Testimony*, section titled "Statement of W.T. Hume," 2:394, 391. Records of the Department of Justice, R.G. 60, National Archives.

⁸⁴ *Ibid.* at 400-04; *In re Noyes*, 121 F. 209 (9th Cir. 1902).

immediately rushed out to Anvil Creek with the court orders forcing the owners to give him "immediate possession, control, and management." The miners obviously were caught off guard by these bizarre events or they might have resisted by force. Most of Nome's citizens assumed that everything was in order because the judge had approved it, and because they did not understand that the claim jumpers' suits depended on the alien ownership argument, and that they only had very weak cases, at best. Additionally, the military forces in Nome were prepared to back up the receiver's authority and the orders of the district court. When the Ninth Circuit Court of Appeals in San Francisco reviewed the matter later, it stated that a review of the law would have found that the allegations of the claim jumpers were insufficient grounds to support any legal action, much less the appointment of a receiver.⁸⁵

The attorneys for Charles D. Lane and Jafet Lindeberg, the chief opponents of the McKenzie forces, protested the receivership to Judge Noyes but got no response. When McKenzie complained to Noyes that Lindeberg's employees were interfering with him, Noyes signed an order authorizing the receiver to confiscate all property, equipment and gold on the claims. Later the Circuit Court of Appeals observed that this order was "so arbitrary and unwarranted in law as to baffle the mind in its efforts to comprehend how it could have been issued from a court of justice."⁸⁶

The judge halted the defendants until August 10, when he denied the motions to remove McKenzie, who, in the meantime, was working the properties at a frenzied pace taking out thousands of dollars in gold each day. McKenzie's bond was only \$5,000 for each claim, perhaps equal to one day's production, thus the defendants realized that they would have no protection or legal recourse if the receiver gutted the mines. On August 15 Lane's and Lindeberg's attorneys asked Judge Noyes to allow them to appeal their case to the Circuit Court of Appeals in San Francisco. The judge denied the motion, thus leaving the defendants no choice but to appeal directly to San Francisco.⁸⁷

In the meantime C.S.A. Frost, the investigator for the attorney general in Nome in 1900, summed up his impressions for his chief on August 16. He gave Judge Noyes a clean bill of health and criticized the defendants who "have undertaken to force an appeal to the appellate court in San Francisco." In conclusion, Frost observed that law officials who came into the Nome area took "their lives in their hands. An upright Judge needs...the encouragement that your confidence can furnish, and Judge Noyes merits it."⁸⁸

⁸⁵ Cole, "A History of the Nome Gold Rush," supra note 72 at 198-201.

⁸⁶ *In re Noyes*, 121 F. 209 (9th Cir. 1902).

⁸⁷ Cole, "A History of the Nome Gold Rush," supra note 72 at 203.

⁸⁸ C.S.A. Frost to Attorney General John W. Griggs, August 16, 1900, Records of the Department of Justice, File 10000/1900, Box 1215, R.G. 60, National Archives.

Judge Noyes reported to the attorney general personally, telling him that the court business was "almost overwhelming." He doubted that it could be disposed of even by holding a continuous term of court through the entire winter. Nome's population was in excess of 20,000 people and all seemed "to be engaged in contests over lots or mining properties..." and others arising "from business misunderstandings and...each and all of them feel that their matter is most urgent and of first importance." Noyes explained that in mining cases he had made it a rule to appoint a receiver and continue the extraction of gold where a property had been opened and was being worked, "believing that that was the proper thing to do inasmuch as this whole camp is depending upon the output of the mines and it would be greatly against the community to...shut down the work." His decisions had "met the serious opposition and harsh criticism of some" as was to be expected. No other judge in the United States confronted the amount of work and the difficulties and trying circumstances accompanying it with which he had to deal, Noyes complained, "however, I am here and will do the best in my power and hope that within a year's time matters may be much improved."⁸⁹

While Judge Noyes justified his actions to the attorney general, the attorneys for Charles Lane's Wild Goose Mining and Trading Company and the Pioneer Mining Company traveled by steamship the nearly 3,000 miles to San Francisco to deliver their petitions and applications for appeal to Judge William Morrow of the Ninth Circuit Court of Appeals. The judge reviewed the applications in late August and ruled that Judge Noyes "had grossly abused the judgment and discretion vested in him by law" and allowed the appeals. He issued a writ of *supersedeas* ordering the judge to halt his proceedings and McKenzie "to forthwith turn back and deliver to the defendants all the property of every kind and character taken by him" under the order appointing him receiver. Morrow also directed the defendants to furnish a *supersedeas* bond of \$35,000. This they did.⁹⁰

On September 14, 1900 Morrow's orders were served upon Judge Noyes, the plaintiff and Alexander McKenzie. Anticipating the decision, McKenzie had sent James L. Galen, Senator Thomas H. Carter's brother-in-law, south to notify the senator of the danger and to have him take care of it. As it turned out, McKenzie's friends in Washington, D.C. could not influence the judges on the Ninth Circuit Court of Appeals. Nome's citizens welcomed the

⁸⁹ Noyes to Attorney General, August 29, 1900, Records of the Department of Justice, File 10000/1900, Box 1215, R.G. 60, National Archives.

⁹⁰ William W. Morrow, "The Spoilers," 4 *California Law Review* (1916) 108; *In re Alexander McKenzie*, 180 U.S. 536-51 (1901); William H. Metson to Attorney General, October 8, 1900, Records of the Department of Justice, File 10000/1900, Box 1215, R.G. 60, National Archives.

news that Noyes and McKenzie had been overruled, but jubilations were premature because the receiver decided to ignore the orders of the Circuit Court, claiming they were invalid. Judge Noyes stayed out of sight, pretending to be sick, and stated that he was powerless to make the receiver return property because the Ninth Circuit Court of Appeals had usurped his jurisdiction in the case. Once more lawyers traveled to San Francisco to complain. At this point, armed men from the Pioneer Mining Company chased McKenzie's men from several claims on Anvil Creek. The receiver complained, and both sides asked the army for help. Major Van Orsdale, the officer in command and a North Dakotan friendly to McKenzie, arranged a conference between the receiver and William H. Metson, the principal attorney for the Pioneer Mining Company. At the meeting the two men almost shot each other but were disarmed by soldiers before any harm had been done. Judge Noyes came out of seclusion long enough to order the army to ignore the writs from California.⁹¹

There were those in Nome who feared that Alexander McKenzie, who had deposited about a quarter of a million dollars in Anvil Creek gold in the Alaska Banking and Safe Deposit company, would grab the fortune and head outside. After a nearly violent encounter at the bank between McKenzie and the armed men representing the defendants, the receiver agreed that the gold should stay at the bank and nobody should take it out. Armed soldiers thereafter guarded the fortune, and both sides waited for the arrival of new instructions from the Ninth Circuit Court of Appeals. Finally, on October 15, 1900, two deputy U.S. marshals from California landed in Nome with orders to enforce the writs of the Circuit Court. They also carried a warrant for the arrest of Alexander McKenzie, who was sentenced to one year in the Oakland, California jail. The marshals took the receiver back to California for trial where he was convicted of contempt of court in February of 1901. On the day of McKenzie's arrest, the mine owners and operators at Anvil Creek fired their guns in the air celebrating the end of the receiver's three months' rule.⁹²

President McKinley pardoned McKenzie after only three months because of the latter's allegedly poor health. McKenzie's debility did not prevent him from sprinting from the jail door to the railroad depot trying to catch the first train out of Oakland, nor from continuing to exercise his political power for twenty more years before he died.⁹³

Judge Arthur Noyes never went to prison. His work in

⁹¹ Cole, "A History of the Nome Gold Rush," *supra* note 72 at 204-05.

⁹² *Ibid.* at 206-08.

⁹³ *Ibid.* at 209.



ARTHUR H. NOYES.

United States District Court Judge Arthur H. Noyes. (Historical Photograph Collection, Alaska and Polar Regions Archives, Elmer E. Rasmuson Library, University of Alaska)

clearing the crowded criminal and civil dockets was ineffective and infuriated attorneys and their clients. When the navigation season opened in 1901, Noyes left to stand trial for contempt of the Ninth Circuit Court of Appeals. He remained judge of the second judicial division until convicted of contempt and fined \$1,000, after which President Theodore Roosevelt removed him from office. U.S. Attorney Joseph K. Wood, also convicted of contempt of court, was sentenced to four months in jail. C.S.A. Frost, the investigator for the department of justice was found to have

"grossly betrayed the interests of the United States which were intrusted to his care." He received a one year jail sentence for his contempt conviction.⁹⁴

Many were annoyed that the "Spoilers" got off so easily and conspiracy charges were never brought against the chief actors. The attorney general or the president could have ordered a prosecution, but they probably believed that the gain would not be worth the certain embarrassment to the government, the courts, and numerous leading politicians. This failure perhaps was not a cover-up, for even Judge James Wickersham, sent to clean up the judicial mess in Nome, resisted efforts to get a grand jury indictment, arguing that "the quicker the people of Nome and the court forgot those black days the better it would be for the administration of justice in that district."⁹⁵

⁹⁴ *In re Noyes*, 121 F. 209 (9th Cir. 1902).

⁹⁵ James Wickersham, *Old Yukon*, *supra* note 56 at 371.

AMERICAN MINING LAW AND THE ENVIRONMENT: THE WESTERN EXPERIENCE

BY GORDON MORRIS BAKKEN

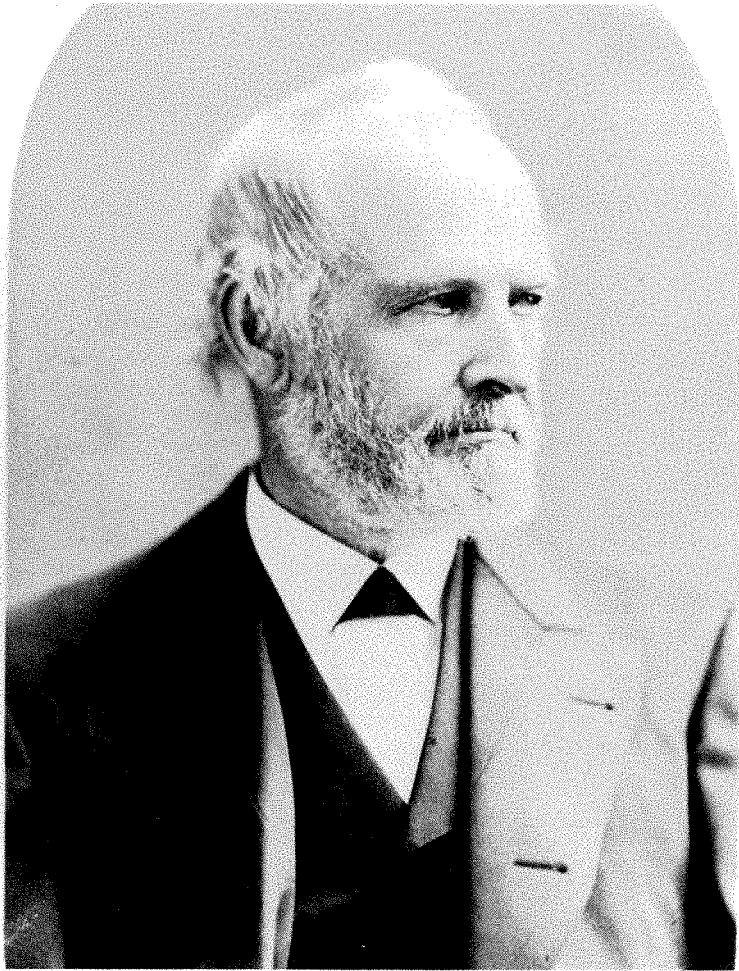
On March 24, 1987 a divided United States Supreme Court announced that the California Coastal Commission could regulate the mining activities of an unpatented mining claimant in a National Forest. The Court concluded that neither the Mining Law of 1872, the Multiple Use Zone Mining Act of 1955, U.S. Forest Service regulations, nor the Coastal Zone Management Act preempted the California Coastal Commission's imposition of permit requirements on the operation of the Granite Rock Company's contemplated mining of chemical grade limestone in the Big Sur region of the Los Padres National Forest. Justice O'Connor, writing for the majority, noted that the Mining Law of 1872 "expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation."¹ Justice Powell, dissenting, focused upon the majority's conclusion that Congress intended to allow California to require a state permit, and started his analysis with the acknowledgment that "the basic source of federal mining law is the Mining Law of 1872."² The case involved a "hardrock" mineral governed by the Mining Law of 1872. Much of the historical and legal background of that statute and its interpretation was hammered out in the Rocky Mountain states in the nineteenth century, as well as in California.

The California Supreme Court's struggle with the newness of mining and water law in *The Bear River and Auburn Water and Mining Co. v. The New York Mining Co.* demonstrated the

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¹ *California Coastal Commission v. Granite Rock*, 107 S. Ct. 1419, 1426 (1987).

² *Ibid.* at 1432.



California Supreme Court Justice Peter H. Burnett. [Oregon Historical Society]

dimensions of early adjudication.³ Justice Peter Burnett speaking for the court found the state's tribunal in a unique position. As he saw it, "the judiciary of the State, has had thrown upon it, responsibilities not incurred by the Courts of any other State in the Union."⁴ What was facing the court, in addition to the duty to put a new constitution and a new code of laws into "practical operation," was "a large class of cases unknown in the jurisprudence of our

³ *The Bear River and Auburn Water and Mining Co. v. New York Mining Co.*, 8 Cal. 327 (1857).

⁴ *Ibid.* at 332.

sister States." The court, as a result of the newness of mining and its demands, was without "any direct precedent" and any statutory language. The court had to turn to "the analogies of the common law, and the more expanded principles of equitable justice."⁵ Burnett acknowledged that the parties were in exactly the same position and they had to understand that their actions had made it "impossible to render any decision that [would] not produce great injury." He also wrung his hands because "no class of cases can arise more difficult of a just solution, or more distressing in practical result. And the present is one of the most difficult of that most perplexing class of cases."⁶ The subject matter was clearly one of first impression.

The problem of newness was compounded by the facts of mining. Justice Burnett noted that "there are intrinsic difficulties in the subject itself, that it is almost impossible to settle satisfactorily, even by the application to them of the abstract principles of justice."⁷ The difficulty was that "in our mineral region we have a novel use of water" that "deteriorates the quality of the element itself, when wanted a second time for the same purposes."⁸ The impact of the mining use of water was the legal difficulty in the case.

To resolve the difficulty, Burnett turned to the public policy of the federal government for guidance. He noted that the miners were on the public domain of the federal government. The policy of the national government was "to distribute the bounty of the government among the greatest number of persons, so as most rapidly to develop the hidden resources of this region; while at the same time, the prior substantial rights of individuals should be preserved."⁹

Justice Burnett believed that California's law should be in harmony with this policy, and he found that the benefits to the state and its people were manifest. Looking at the diversions of water for mining purposes, Burnett found that "it may be very safely assumed, that as much good, if not more, is accomplished by the diversion, as could have been attained, had such diversion never occurred." This assumption naturally led to the conclusion that "the water is taken to higher mining localities, where it is more needed, and therefore, the diversion of the stream promotes this leading interest of the State."¹⁰ Burnett found upon further inquiry and upon his reading of expert testimony that the sedi-

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid. at 333.

⁹ Ibid. at 334.

¹⁰ Ibid.

ments created by the use would have a negative impact upon downstream users.

Justice Burnett concluded that the solution was to adopt "the nearest practical approach to a fair and equitable adjustment."¹¹ That judicial adjustment of interests was to give the ditch owner the flow of the natural channel and the fair use of the water. The quantity allowed was to be the amount in the ditch at the time of the appropriation above ground. Burnett reasoned that "if we lay down the rule that the subsequent locators above may so use the water as to diminish the quantity, it would be difficult to set any practical limits to such diminution, and the ditch-property might be rendered entirely worthless."¹² Any deterioration in the quality of the water was to be regarded as injury without consequent damage.

The *Bear Valley* case, as one of first impression, was also contemporary in its language. Dominant values were involved in developing the natural resources of this country with little regard for the environment. The language of law was property values and enterprise. The features of the case would reappear in later legal language, and the courts of other jurisdictions would give more light to law and policy as the century unfolded in light of the great mining booms east of the Rockies.

The Rocky Mountain territorial experience significantly influenced the making of nineteenth century mining law by providing statutory and judicial guidance for federal lawmakers. The territorial legislatures codified the local mining district customs which became the foundation for federal law. The territorial supreme courts authored authoritative opinions on territorial and federal mining statutes which were favorably received by the United States Supreme Court. Moreover, the Court continued to use territorial opinion as the complexity of mining law increased. More pervasively, the direction of mining law as interpreted by the territorial and federal courts had significant impact upon public and legal attitudes toward the industry. This public policy attitude was influential in the future deliberations of lawmakers, particularly in Rocky Mountain constitutional conventions.

The mining frontier in American history was a short and turbulent era in which fortunes were made and lost. The famous gold rush to California in the late 1840s gave impetus to dreams of riches in other areas. The fabulous strikes brought with them the merchants, teamsters, and express companies which served the miners. The speculator and promoter provided publicity and capital for the boom. Overriding this exploitation of earth and man was the mining law. Its origins were with its earliest pioneers

¹¹ Ibid. at 336.

¹² Ibid.



A westward bound prospector, 1850. Drawing by Warren S. Clough.
(Huntington Library)

who found themselves without guidelines for the allocation of resources. The miners drew up codes for their respective areas or districts, and members of the district administered these codes. When the dimension of the resources dictated and the need arose, territorial legislatures gave uniform guidelines in statute while allowing local custom to dictate a general policy. Federal statute gave final uniformity and directed resource allocation from a legal framework developed in, and interpreted by, the Rocky Mountain West. This federal supersession of the resource allocating function did not alter the growth and influence of the miners as a political interest group or diminish the local importance of the mines. The

federal law did accept the legal direction of territorial lawmakers and this influence illustrated aspects of their concepts of resource allocation. These same concepts were prevalent when the respective constitutional conventions met.

Legal problems posed by mining were derivative from its physical nature. Minerals were deposited in times of violent change in the earth's crust forming "veins." These veins varied in innumerable ways. Some could extend for miles yielding vast and easily attainable riches; others could extend only for a matter of feet to be lost along a fault line.

When enough gold, silver, or other mineral was found which could be exploited at a profit, it was termed "ore." When veins were found in a unit, they were termed a "lode," but "lode" and "vein" were commonly used interchangeably. Gold and silver were also found in "replacement deposits." These were formed when the molten metal replaced another deposit by dissolving it. Gold was first found and most rapidly exploited as a "placer." Erosion loosened the gold and deposited it in the gravel beds of streams awaiting the miner's pan. Silver was almost exclusively found as an ore. Gold is chemically inert which prevents the erosion process from dissolving it. Silver, on the other hand, is soluble and is readily carried off by erosion. Both gold and silver were found in the mountainous regions of the West where the violence which created the deposits exposed them to the elements. Mineral veins were exposed in outcroppings and the eroding forces of wind, water, ice, and solar heating worked to form the placer deposits. Again, as with irrigation, territorial lawmakers confronted the problems of the environment in a marketplace context.

When valuable minerals were discovered, miners devised regulations to prevent chaotic exploitation of these scarce resources. Miners adopted customary practice as law for their mining district and regulated individual allocation based on discovery. They required that discovery be with knowledge of the deposit's nature. The marking out of the "claim" was by "staking." The ground was identified and other prospectors were put on notice of the discoverer's intent to appropriate the mineral. This staking constituted a "location." The location was then recorded with the clerk of the local mining district. To maintain this location against subsequent locators, the district laws required a specified amount of work to be done on the claim. Failure to comply constituted an abandonment, opening the claim to another individual. These mining district rules followed the familiar pattern of the law of "finders" embedded in the American law of property since colonial times.

Mining district regulations also covered the use of water for mining purposes. Water usage rules were similarly based on a priority of appropriation (analogous to discovery) and abandonment on disuse. The mineral wealth and the water needed to

develop it were covered by regulations demanding immediate exploitation and continued usage. These regulations contained numerous provisions for various usages. As technology complicated the exploitation of minerals, mining districts produced mountains of local mining law.¹³

The creation of territorial government brought the first attempts at regional codification, but local law generally prevailed. Territorial law provided a basis for the future appropriation of mineral wealth, which allowed local mining district holdings to stand under local rules. The Mining Law of 1866 put the federal government in the same position of legitimizing local law. Congress provided national standards in 1872, but it remained the province of the courts to interpret and implement the statute. Territorial law played a decisive part in this process that incorporated local regulations into a national legal system.

Local mining district regulations in the Rocky Mountain West resembled those in California. New conditions and different authors, however, modified the "California common law" of miners.¹⁴ This California common-law system was a legislative recognition of local mining district regulations. It recognized the law of each district as controlling in litigation. This provided a security of interest in each district, but discontinuity on the state level. The Comstock Lode indicated a significant shift of emphasis in local law. While mining in California was predominately placer mining, hard rock or quartz mining dominated in the Rockies. The complexity of the technology involved in extracting the earth's riches was evident in the Comstock.¹⁵ Local regulations began to reflect this growing complexity. Early California contributions to quartz mining regulations were soon dwarfed by new codes.¹⁶

¹³ T.M. Marshall, "The Miners' Laws of Colorado," *The American Historical Review* 25 (1920) 428. Colorado mining law before territorial statute comprised hundreds of volumes.

¹⁴ Rodman W. Paul, *Mining Frontiers of the Far West* (New York, 1963) 169 [hereinafter cited as Paul, *Mining Frontiers*].

¹⁵ *Ibid.* at 56-108.

¹⁶ Charles Howard Shinn, *Mining Camps* [1884; reprint, New York, 1965] 239, 246, 248. The conception of a tunnel was extremely simplistic extending through a mountain from base to base with little reference to the course of a vein or the surface rights acquired. Compare these regulations to the statutory provisions in *General laws, joint resolutions, memorials, and private acts, passed at the first session of the legislative assembly of the Territory of Colorado* (Denver, 1861) 166 [hereinafter sessions laws will be cited as Laws of [state], session, page [year]] and the related case, *Rico-Aspen Consolidated Mining Co. v. Enterprise Mining Co.*, 53 F. 321 (C.C.D. Colo. 1892). The sophistication of tunnel rights was primarily a function of increased technological knowledge coupled with the theory of priority rights in the acquisition of mineral wealth. Notably Colorado tunnel interests obtained federal legislation protecting their rights. Cong. Globe, 41st Cong., 3d Sess. 978-79 (1871).

Mining district regulations were private government in action, giving legal direction to marketplace functions. Territorial law withdrew the legislative function, while continuing to provide the uniformity the miners desired.

Though increasing in complexity and volume, local district regulations retained a uniformity of purpose. Priority was constantly maintained and rapid exploitation was encouraged. General provisions for location, tunneling, water usage, and other aspects of mining reflected these ideals. Local law dealt with specific physical situations and provided regulation for them. In that way, local peculiarities arose, but the spirit of priority and progress were retained in principle.

The acceptance of local mining law by territorial government was uniformly affirmative. This acceptance was subject to customary amendment and codification just as the English common law had been. Miners' customs were controlling in litigation when not in conflict with the laws of the territory.¹⁷ The territories adopted the California common law concept where it applied in mining districts, but quickly proceeded to supersede it with legislation.

Colorado's territorial legislature passed a comprehensive lode claims statute in its first session. It defined a claim, regulated its size, provided for recording, and defined miners' respective rights to lodes and mining instrumentalities such as water.¹⁸ The statute lent uniformity to mining regulation while protecting claims previously acquired under local law.¹⁹ It also supplied the territory with uniform substantive law and deprived the localities of any further legislative power. The Colorado territorial legislature continued to function as law-giver when conditions dictated.²⁰ Local diversity and legislation were eliminated and replaced by a code of conduct.

The other Rocky Mountain territories, except for Nevada, eliminated local diversity by providing uniform law. Montana's

¹⁷ Paul, *Mining Frontiers*, supra note 14 at 169. For a list of the statutes legalizing the local district regulations in the territories see W.W. Blume and E.G. Brown, *Digests and Lists Pertaining to the Development of Law* (Ann Arbor, 1965), digest 1, part 2, section 8, "Laws of Local and De Facto Governments" [hereinafter cited as Blume and Brown, *Digests*]. Also see *Laws of Colorado*, 2d Sess., 98 (1862).

¹⁸ *Laws of Colorado*, 1st Sess., 166 (1861).

¹⁹ *Ibid.* The 1861 statute protected claims held under local regulations under section one of the law. In "An Act to Confirm and Legalize Certain Acts of the People Prior to the Organization of Colorado Territory," the legislature legalized the actions of "so-called miners' courts, or miners' clubs, or claim clubs, or people's courts, or Kansas courts;" thus confirming the legality of mining claims held in 1861 under local regulations. *Laws of Colorado*, 2d Sess., 98 (1862).

²⁰ *Laws of Colorado*, 3d Sess., 120 (1864); *Ibid.*, 5th Sess., 72 (1866); *Ibid.*, 8th Sess., 84 (1867-68); *Ibid.*, 10th Sess., 185 (1870).

code rejected California concepts in favor of the Colorado model.²¹ Idaho's and Wyoming's territorial legislatures adopted comprehensive mining laws in their first legislative sessions.²² Arizona's Howell Code furnished uniform law, but these mining sections were repealed in 1866.²³ New Mexico and Utah legislated for their mining industries, but did so due to motives unrelated to statutory uniformity.²⁴

Utah legislators sought to suppress the mining industry to prevent a rapid influx of non-Mormons. The Civil War brought federal troops and the discovery of silver. The Latter-day Saints Church saw this discovery as an event which would increase the territory's non-Mormon population and envisioned a subsequent defeat of the Mormons at the polls.²⁵ The Mormons reacted with the mining law of 1864. The act created the office of superintendent of mines empowered to supervise all aspects of mining. These duties included that of assessing the mines for taxation at twenty percent per year.²⁶ This bill was a mere enactment of the Church policy of suppression, which gave the assessment procedure destructive power. On the grounds of undue delegation of legislative power and due process, the governor vetoed the bill. Later legislation for mines only recognized non-Mormon mining district regulations. Territorial mining law in Utah again emphasized the gap which existed between Mormon and "Gentile."

New Mexico legislation for mines legitimated the political and economic ambitions of the Santa Fe Ring. The Ring manipulated statutory provisions to gain favorable status for company claims in which they had a vested interest.²⁷ Though not motivated by a desire for uniformity as were other territorial legislatures, Utah and New Mexico did legislate for mining. The local mining district regulations did not prevail, as the territorial legislatures functioned positively to provide guidelines for mining rather than

²¹ Paul, *Mining Frontiers*, supra note 14 at 171. Laws of Montana, 1st Sess., 327 (1864-65).

²² Laws of Idaho, 1st Sess., 577 (1863). Laws of Wyoming, 1st Sess., ch. 22 (1869).

²³ Laws of Arizona, 3d Sess., 31 (1866). Also see *Ibid.*, 2d Sess., 41 (1867) on hydraulic mining in Yuma County, and *Ibid.*, 11th Sess., 167 (1881) on the right of way for roads over mining claims. The 1866 act provided for the making of mining regulations at the local level with the deposit of local records with the county recorder. The act applied only to "veins, or load mines."

²⁴ Laws of New Mexico, 20th Sess., 52 (1871-72); *Ibid.*, 22d Sess., 116 (1875-76); *Ibid.*, 25th Sess., 96 (1882) was on coal mines. Blume and Brown, *Digests*, digest 1, part 2, section 8.

²⁵ Howard R. Lamar, *The Far Southwest* (New Haven, 1966) 361.

²⁶ *Ibid.*

²⁷ Laws of New Mexico, 20th Sess., 52 (1871-72); *Ibid.*, 22d Sess., 116 (1875-76). See Lamar, *The Far Southwest*, supra note 25 at 111-12, 141, 163.



Chinese Miners in Alder Gulch, Montana, ca.1870. (Montana Historical Society)

allowing localism to prevail in diverse district regulations.

Continuing legislation at the territorial level was the rule in Montana, Idaho, and Wyoming although each had comprehensive codes.²⁸ Mining regulation was not left to local districts. The territorial governments legislated to supersede local rules and assumed a uniform administrative role by so doing. The "California common law," where accepted, existed only as long as

²⁸ Laws of Montana, 3d Sess., 81 (1866) on placer mining; *Ibid.*, Extraordinary Sess., 83 (1873) on location and recording of claims; *Ibid.*, 11th Sess., 65 (1879) on taxation; *Ibid.*, 14th Sess., 110 (1885) on the procedure for filing an affidavit of

the local districts retained autonomy. This period in most of the Rockies was short.

Nevada's mining law illustrated the use of overt political pressure to gain economic advantage for specific interests and the crucial position of mining interests in the territory. The Nevada miners wrote local regulations as did other mining districts throughout the West, but their rules were not uniform and misconstrued the geologic nature of the Comstock Lode.²⁹ As claims came into increasing conflict, the need for authoritative decision became evident. William M. Stewart, an able and unscrupulous lawyer representing California interests, argued for the supremacy of certain local laws, but the territorial courts rejected his pleas. Unable to secure favorable court decisions, Stewart assaulted the institution and its judges. Through political coercion and actual physical assault on one judge, Stewart destroyed the Nevada court by forcing resignations. In 1863 Stewart was chairman of the judiciary committee in the constitutional convention. He wrote restrictive sections into the judiciary article and fought passage of a mine tax. The mine tax and the voters' distrust of Stewart proved fatal to the constitution as the voters rejected it. As a result, another convention was called in 1864. With statehood in 1864, the then-Senator Stewart went to Washington to plead his client's case before Congress.³⁰

In Congress Senator Stewart secured the passage of the Mining Law of 1866. By convincing a Congress which knew little of the industry that his bill did no more than validate democratically derived local law, Stewart achieved in Congress what he could not at home. The national legislature was willing to help the bereft miner in his time of need. Besides, they were all "good Republican

work done to comply with federal law. Laws of Idaho, 2d Sess., 70 (1876-77) on the right of way to and from a claim, and for water ditches; *Ibid.*, 10th Sess., 29 (1879) in confirmation of the Act of Congress, May 10, 1872 (Mining Act of 1872). Laws of Wyoming, 6th Sess., 115 (1879) on the preservation of records; *Ibid.*, 7th Sess., 156 (1882) including placer mines under the provisions of previous legislation; *Ibid.*, 9th Sess., 44 (1886) regulating coal mines and creating the office of territorial inspector of mines empowered to shut down any dangerous mine; *Ibid.*, 9th Sess., 439 (1886) for general regulation of claims.

²⁹ See Gilman M. Ostrander, *Nevada, the Great Rotten Borough* (New York, 1966) 17-34 on which this paragraph is based unless otherwise noted.

³⁰ Hubert Howe Bancroft, *History of Nevada, Colorado, and Wyoming* (San Francisco, 1890) 159, 161, 172-174; Thomas Wren, *A History of The State of Nevada* (Chicago, 1904) 66; Effie Mona Mack, *Nevada* (Glendale, 1936) 248. Each author told of a corrupt judiciary, but neglected the corruption of the bar. Ostrander was the only author to give the situation a balanced treatment. Also see Eliot Lord, *Comstock Mining and Miners* (Washington, D.C., 1883) 97-108 for the story of Nevada's mining litigation. David A. Johnson, "A Case of Mistaken Identity: William M. Stewart and the Rejection of Nevada's First Constitution," *Nevada Historical Society Quarterly* 22 (1974) 186-98.

voters," and the act did nothing but legitimize local law.³¹ Local mining district regulations thus received the force of federal law.

This basic statute was amended in the 1870s, but the diversity of local law encouraged litigation. One California senator characterized the 1866 law as "a bill to promote litigation, create controversy, and occasion difficulties."³² The notable absence of provisions for placer and tunnel claims also encouraged litigation.³³ Placer claims were covered by an 1870 amendment and tunnel claims by the Mining Law of 1872.³⁴

The Mining Law of 1872 attempted to provide a uniform system for the location, recording, and working of claims.³⁵ Though setting uniform national standards, the act failed to define numerous mining terms. The job of interpretation and implementation fell to the courts. In this realm the territorial courts and judges played a central part as masses of litigation arose in their jurisdictions. In interpreting statute and offering their opinions to the United States Supreme Court, they served an educational function at first, and an authoritative one throughout. The "wise judicial decisions" of the California courts on mining law so often cited³⁶ proved to be of little weight when national mining law was interpreted.

Mining litigation involved the application of statutory provisions to geological realities and the construction of specific

³¹ Cong. Globe, 39th Cong., 1st Sess., 3225-29 (1866). Also see Ostrander, *Nevada*, supra note 29 at 93; Paul, *Mining Frontiers*, supra note 14 at 172-73.

³² Cong. Globe, 39th Cong., 1st Sess., 3236 (1866).

³³ Ibid. at 3232-36, 3451; Paul, *Mining Frontiers*, supra note 14 at 173.

³⁴ Paul, *Mining Frontiers*, supra note 14 at 173.

³⁵ 17 Stat. 91-96 (1872). The Mining Law of 1866 may be found at 14 Stat., ch. 262, 251-53 (1866).

³⁶ Stewart in debate in 1866: "A series of wise judicial decisions molded these regulations and customs into a comprehensive system of common law, embracing not only mining law, [properly speaking,] but also regulating the use of water for mining purposes." Cong. Globe, 39th Cong., 1st Sess., 3226 (1866). Shinn, *Mining Camps*, supra note 16 at 286 reads: "Slowly, through a long series of years, a multitude of wise judicial decisions moulded scattered customs...into an apt, terse, strong, useful, and comprehensive system of common law, regulating not only the rights of miners over mineral ground, but also their riparian rights." Paul, *Mining Frontiers*, supra note 14 at 169 reads: "This acceptance of miners' code by the legislature was confirmed by successive court decisions in California. The local rules of the various district thereby became a kind of common law, based upon universal use and consent." In *Sparrow v. Strong*, 70 U.S. (3 Wall.) 97 (1865), Chief Justice Salmon P. Chase totally accepted William Stewart's argument that "a special kind of law — a sort of Common Law of the miners...had sprung up on our Pacific coast..." Appendix one to that volume contained Stewart's speech to Congress on July 19, 1865 on the same subject. Persons citing the wisdom of California mining decisions failed both to cite the decisions and to establish the criteria on which they based the wisdom of their judgment.

statutory terms. Claim size was regulated by local district law where applicable, and by federal statute. The 1872 law specified quartz claim size of 1,500 feet along the length of the lode and from between twenty-five to three hundred feet across its width. Placer claims were limited to twenty acres.³⁷ The demarcation of a placer claim included only the drawing of physical boundaries like any other land claim. Quartz claims presented questions outside of physical boundaries.

Quartz location involved not only physical lines of demarcation but also the specific nature of the vein or lode. The end lines of the quartz location had to be parallel, and the apex of the vein had to be within the location. The right to follow the vein outside the



A QUESTION OF TITLE

"A Question of Title": An out-of-court settlement of a California mining claim dispute depicted in *Harper's Monthly* 22 (June 1861) 154. (Oregon Historical Society)

³⁷ Shinn, *Mining Camps*, *supra* note 16 at 255; also, 17 Stat. 91 (1872).

sidelines (the vertical plane of location extending downward) was retained from California law. The right to follow the vein in all its spurs, dips, angles, and variations had plagued counsel, courts, and miners since the Comstock.³⁸ Millions of dollars often rested on the judicial application of statute to the particular geological situation. Resolution of the complexities came in the highest court of the land, but Supreme Court doctrines often were derived from the decisions of Rocky Mountain jurists.

The problem of securing peaceful acquisition and transfer of mining property was a major concern of the courts. Title to mining claims under local regulations and the Mining Law of 1866 was possessory, but the 1872 law allowed purchase. The protection of the prior appropriator became a prevalent theme in mining jurisprudence. The Supreme Court in passing upon a Montana decision, *Belk v. Meagher*, decided that actual possession was not necessary where a valid location was obtained. Similarly, in *Haws v. Victoria Copper Mining Co.*, a case from the Utah court, the Supreme Court held that possession alone was adequate against a mere trespasser especially where violence was used to gain entry. The prior appropriator was assured of peaceful possession and use. The purpose of locations as construed by the highest tribunal in *Erhardt v. Boaro*, a Colorado case, was to secure this peaceful exploitation and to discourage violence.³⁹

Discovery, appropriation, and development were the heart of mining law, and decisions on each sought to preserve the prior peaceable possessor. Justice Field in *Erhardt v. Boaro* found the discovery and appropriation central to title. Continued possession was predicated on working the claim. This work allowed the claimant to discover the nature of the lode or, if work was discontinued, allowed another to make excavatory inquiry. To deny these principles would allow "force and violence" to "determine the rights of claimants."⁴⁰ But the loss of any one of the ingredients negated the whole. Chief Justice Waite in *Gwillim v. Donnellan* contended that "the loss of the discovery was the loss of the location."⁴¹ This location could be circumscribed by stakes as was decided in *Hammer v. Garfield Mining and Milling Co.* In rendering this decision Justice Field, the most eminent mining authority on the supreme bench at the time, reviewed specific

³⁸ See Lord, *Comstock Miners and Mining*, supra note 30 at 131-80.

³⁹ This case originated in the Colorado district court and was on circuit in 1881; 8 F. 692 [C.C.D. Colo. 1881]. The U.S. Supreme Court reversed the circuit. *Belk v. Meagher* may be found at 104 U.S. 279 (1881), 3 Mont. 65 (1881) and *Haws* at 160 U.S. 303 (1895).

⁴⁰ *Erhardt v. Boaro*, 113 U.S. 527, 535-36 (1884).

⁴¹ *Gwillim v. Donnellan*, 115 U.S. 45, 51 (1885). This was a case coming from the Eighth Circuit Court for the Colorado district and was affirmed.

opinions of the Montana court and found no error in them.⁴²

The claim size under statute and the work requirements on a claim presented additional problems. In resolving the claim size problem, the Supreme Court followed territorial supreme court interpretations. Similarly, the court used territorial precedents in construing the work requirement of statute.⁴³ On this point, Justice Field stated that the expenditure for multiple claims should be for the benefit of all. This reasoning maintained the ability of possessors to concentrate their efforts on a single claim while allowing others to remain dormant. In a similar case from the Utah Supreme Court, Justice Miller followed Field's analysis. The work requirement ended with the purchase of the claim from the government.⁴⁴ With purchase and patenting, the assumption that mining law was to encourage exploitation ceased in reality. The minimal requirements of discovery, location, and development at least necessitated steps toward exploitation, but patenting removed mineral lands from the public domain and placed them at private discretion as federal law gave way to private right.

⁴² *Hammer v. Garfield Mining and Milling Co.*, 130 U.S. 291, 300-1 (1888).

⁴³ This case, *Jackson v. Roby*, came from the Eighth Circuit for the Colorado district; Moses Hallett was district judge, 109 U.S. 440 (1883). *Parley v. Kerr* 130 U.S. 256 (1888).

⁴⁴ *Chambers v. Harrington*, 111 U.S. 350 (1883) at 353, Justice Miller for the court: "These mineral lands being thus open to the occupation of all discoverers, one of the first necessities of a mining neighborhood was to make rules by which this right of occupation should be governed as among themselves; and it soon discovered that the same person would mark out many claims of discovery and then leave them for an indefinite length of time without further development, and without actual possession, and seek in this matter to exclude others from availing themselves of the abandoned mine. To remedy this evil a mining regulation was adopted that some work should be done on each claim in every year, or it would be treated as abandoned.

In the statute we are considering, Congress, when it came to regulate these matters and provide for granting a title to claimants, adopted the prevalent rule as to claims asserted prior to the statute, and as to those made afterwards it required one hundred dollars' worth of labor or improvement to be made in each year on every claim. Clearly the purpose was the same as in the matter of similar regulations by the miners, namely, to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it as evidence of his good faith, and to show that he was not acting on the principle of the dog in the manger.

When several claims are held in common, it is in the line of this policy to allow the necessary work to keep them all alive, to be done on one of them. But obviously on this one the expenditure of money or labor must equal in value that which would be required on all the claims if they were separate or independent. It is equally clear in such case the claim must be contiguous, so that each claim thus associated may in some way be benefited by the work done on one of them." See also *Benson v. Alta*, 145 U.S. 428 (1891).

Mineral land patents often ran afoul of townsite patents. Mining camps were usually established near the diggings and before long a general store and saloon graced the rude landscape. The miners in their pursuit of elusive veins often undermined the towns erected to serve them. Structural damage and violent collapses were the results. But it was the stated policy of government to encourage mining. This conflict reached the United States Supreme Court in *Steel v. Smelting Co.*⁴⁵ Justice Field reviewed the history of mining within townsites citing Virginia City, Nevada as a notable example. He then decided to hold that mineral lands belonging to the federal government were subject to location and sale even within townsites. The policy of exploitation was maintained even at the expense of probable damage to structures. In *Davis's Administrator v. Weibbold* Field distinguished several cases commenting on the "very able and learned opinions"⁴⁶ of the Montana court and again maintained the miners' priority. The policy of rapid mineral development was furthered, but the surface proprietors still had recourse to the doctrines of lateral and subjacent support when miners' zeal exceeded their engineering wisdom.

The Mining Law of 1872 required that the applicant for a patent have knowledge of the existence of a lode to obtain fee ownership. A placer patentee with knowledge of a lode which he did not claim lost all possessory rights, opening the claim to location by another.⁴⁷ What constituted "knowledge" was extensively debated and early cases yielded only confusion. In *Noyes v. Mantle* Justice Field adopted the opinion of the Montana territorial supreme court as basic doctrine.⁴⁸ Field's position was that when a lode claim location had been properly made and recorded, a vein or lode was "known" to exist for mining law purposes. This did not include personal knowledge of the factual existence of a lode when applying for a placer claim patent. The United States Supreme Court, however, was split on the issue. In 1885 Chief Justice Waite registered the first dissent in a major mining case, *Reynolds v. Iron Silver Mining Co.*⁴⁹ By 1889 Brewer and Chief Justice Fuller were

⁴⁵ *Steel v. Smelting Co.*, 106 U.S. 447 (1882).

⁴⁶ *Davis's Administrator v. Weibbold*, 139 U.S. 507, 530 (1890).

⁴⁷ *Sullivan v. Iron Silver Mining Co.*, 109 U.S. 550 (1883) and *Reynolds v. Iron Silver Mining Co.*, 116 U.S. 687 (1885). Also see *Iron Silver Mining Co. v. Reynolds*, 124 U.S. 374 (1887) for Field's liberal interpretation of "knowledge" of the lode.

⁴⁸ *Noyes v. Mantle*, 127 U.S. 348, 352-3 (1887).

⁴⁹ *United States v. Iron Silver Mining Co.*, 128 U.S. 673 (1888) especially at 675-76 was interesting in Field's review of the liberal spirit of mining law. The court held the litigants to strict compliance with statute. In *Dahl v. Raunheim*, 132 U.S. 260 (1889), Field, speaking for the court, upheld a Montana Territorial Supreme Court decision which held that a placer claimee without patent was able to maintain a suit against a lode claimee to quiet title. The existence of the lode was matter for the jury to decide. *Reynolds* may be found at 116 U.S. 687 (1885).

dissenting, and in 1891, in *Iron Silver Mining Co. v. Mike and Starr*, Field was in the minority.⁵⁰

Field registered a powerful dissent in *Mike and Starr* against the majority's position that a finding of fact by a jury on the knowledge of a lode was controlling. Field declared that only after discovery and location could a lode be "known." Joined by Harlan and Brown, he saw a general weakening of the security of patents. "Mere surmises, notions, and loose gossip of the neighborhood" would control, he continued, and interfere with the rights of property. Field called upon the majority to adopt a reasonable consensus doctrine based upon the practice of practical miners and the definition of a "known lode." This definition was one formulated by Field and Moses Hallett, former Chief Justice of Colorado's territorial supreme court. Field's position was significant because the certainty of patents and millions of dollars were at stake. His formula demanded a more positive identification of the discovered lode than did the majority's. With this doctrine, a more orderly development, in all of the West, could be maintained.⁵¹

Justice Field's victory came in *Sullivan v. Iron Mining Co.* Justice Brewer, speaking for the majority, adopted Field's interpretation that a lode must actually be discovered and located to be known. Field joined in concurrence adding that the protection of the prior locator, in this case the placer patentee, was to be protected against subsequent locators.⁵² This legitimized the subterfuge by which placer patentees acquired large areas and hoped-for lodes. At the same time it allowed these possessors to exploit their lands undisturbed. The provision of California district law and federal statute allowing a locator to follow a vein outside the subterranean planes of his claim resulted in disastrous litigation on the mining frontier. The Mining Law of 1872 responded to the problem by ruling that henceforth a locator had to fix his boundaries to include the apex of the vein in order to follow it outside the sidelines. If he failed to include the apex, he lost the right to pursue it outside of the sidelines.⁵³

The courts, aware of previous conflicts, used a strict interpretation of the provisions of the statute in an attempt to eliminate this disastrous feature of quartz mining. In *Mining Co. v. Tarbet*, affirming a decision of the Utah territorial supreme court, Justice Bradley laid out strict criteria for pursuit outside the

⁵⁰ *Iron Silver Mining Co., v. Campbell*, 135 U.S. 286 (1889). *Iron Silver Mining Co. v. Mike and Starr Gold and Silver Mining Co.*, 143 U.S. 394 (1891).

⁵¹ *Mike and Starr*, 143 U.S. 394, 407.

⁵² *Ibid.* at 412, 420-21, 424. *Sullivan* may be found at 143 U.S. 431 (1891).

⁵³ Paul, *Mining Frontiers*, *supra* note 14 at 173. The amount of disastrous litigation involving the subterraneous pursuit into another's claim was examined by Lord, *Comstock Mining and Miners*, *supra* note 30 at 97-108, 131-80.

vertical plane of the sideline. The location had to be along the lengthwise course of the vein's apex. If otherwise laid, the location would only secure as much of the lode as was actually covered. The location also had to conform to the geometric requirements of the statute. The end lines had to be across the "strike" or course of the vein and the sidelines parallel to it.⁵⁴ The rule allowed a locator to appropriate only a portion of the whole, but to have a right to the lateral extensions of the vein.

The problem of defining a vein or lode also perplexed the courts. In *Iron Silver Mining Co. v. Cheesman* Colorado Federal District Court Judge Moses Hallett sought "a rule which [would] reach everyone and apply to all." He defined a vein as "a body of mineral or mineral bearing rock within defined boundaries in the general mass of the mountain."⁵⁵ When the case reached the Supreme Court, Justice Miller noted that a vein was "no easy thing to define."⁵⁶ He surveyed the circuit decisions, Field's definition in the *Eureka* case, and Hallett's in *Stevens v. Williams*. In conclusion, he praised Hallett's delicate handling of the case and adopted his definition.⁵⁷ The territorial bench produced not only authoritative mining law opinion, but also, in the case of Hallett, good judges. The national recognition given to territorial judges enhanced the reputation of the territorial bench. Constitutional convention delegates maintained or expanded judicial power for their new states based on this territorial experience.

The legal definition of the apex was derived from a modification of a Montana territorial supreme court decision. In *Larkin v. Upton* Justice Brewer held that "the apex of a vein or lode [was] the highest point thereof, and may be at the surface of the ground or at any point below the surface." It was "not necessarily a point, but often a line of great length."⁵⁸ This definition recognized geologic fact, and provided the clarity and credibility of interpretation miners desired.

The judicial definition of statutory terms corresponded to increased geologic knowledge and allowed a stricter interpretation of extralateral rights. Moses Hallett, on circuit in *Elgin Mining and Smelting Co. v. Iron Silver Mining Co.*, held locators to strict compliance with federal statute. On review, Justice Field affirmed Hallett's requirement that end lines be parallel to gain extralateral rights. Field further restricted locators in *Argentine Mining Co. v. Terrible Mining Co.* The combination of apex and claim lines

⁵⁴ *Mining Co. v. Tarbet*, 98 U.S. 463, 467-68 [1878].

⁵⁵ *Iron Silver Mining Co. v. Cheesman*, 8 F. 297, 299, 301 [C.C.D. Colo. 1881].

⁵⁶ *Iron Silver Mining Co. v. Cheesman*, 116 U.S. 529, 533 [1885].

⁵⁷ *Ibid.* at 534-38.

⁵⁸ *Larkin v. Upton*, 144 U.S. 19, 23 [1891].

requirements were used as devices to limit litigation and forced locators to proceed with great care.⁵⁹ This direction of legal interpretation recognized the environmental conditions and maintained the ability of miners to more effectively participate in the marketplace.

Mining law suits reaching the Supreme Court demonstrated the viability of territorial decision. The territorial courts of the Rocky Mountain states were the natural source of litigation as they were within the maelstrom of gold fever. The opinions they produced were well written and fact-oriented. Their decisions generally were accepted as authoritative by the United States Supreme Court, which was anxious for guidance in a field of first impression.

Other mining cases reached the Supreme Court from the territories as well as the states. Minor issues were handled along with important cases.⁶⁰ Cases from the states came largely from Colorado.⁶¹ Moses Hallett as district judge for Colorado penned many important decisions as a result. His most famous, *Del Monte*

⁵⁹ *Iron Silver Mining Co. v. Elgin Mining and Smelting Co.*, 117 U.S. 196 (1885). On improved technological knowledge see Rodman Paul, "Colorado as a Pioneer of Science in the Mining West," *Miss. Valley Hist. Rev.* 47 (1960-61) 34, 50. The circuit opinion may be found at 14 F. 377 [C.C.D. Colo. 1882]. *Argentine* may be found at 122 U.S. 478 (1886).

⁶⁰ *Atchison v. Peterson*, 87 U.S. (20 Wall.) 507 (1874) was from the Montana Territorial Supreme Court involving the prior appropriation doctrine and the deposition of tailings. The Montana decision was affirmed. *Basey v. Gallagher*, 87 U.S. (20 Wall.) 670 (1874) was from the Montana Territorial Supreme Court involving prior appropriation and was affirmed. *Campbell v. Rankin*, 99 U.S. 261 (1878) was from the Montana Territorial Supreme Court involving mining district records. A new trial was ordered due to a question of evidence. *Glacier Mountain Silver Mining Co. v. Willis*, 127 U.S. 471 (1887) was from the Eighth Circuit for the Colorado district involving locations under local rules. The decision on circuit was reversed. Justice Miller at 127 U.S. 482 (1867) notably cited *Jackson v. Roby*, 109 U.S. 440, 441 (1883) and *Chambers v. Harrington*, 111 U.S. 350, 352 (1883) as precedent. *Rico-Aspen Consolidated Mining Co. v. Enterprise Mining Co.*, 53 F. 321 [C.C.D. Colo. 1892] was one of Hallett's decisions on tunnel claims affirmed by the U.S. Supreme Court in *Enterprise Mining Co. v. Rico-Aspen Consolidated Mining Co.*, 167 U.S. 108 (1896).

⁶¹ These were the major mining cases originating in places other than the territories of the arid frontier of the Eighth Circuit Court for the Colorado district. From Nevada were: *Forbes v. Gracey*, 94 U.S. 762 (1876); *Mining Co. v. Taylor*, 100 U.S. 37 (1879); *Richmond Mining Co. v. Eureka Mining Co.*, 103 U.S. 839 (1880) [also see Paul, *Mining Frontiers*, supra note 14 at 173 for comment on this case]; *Richmond Mining Co. v. Rose*, 114 U.S. 576 (1884). From California were: *Jennison v. Kirk*, 98 U.S. 453 (1878); *Western Pacific R.R. Co. v. U.S.*, 108 U.S. 510 (1882); *Dower v. Richards*, 151 U.S. 658 (1893) which at 663 cited *Deffenback v. Hawke*, 115 U.S. 392 (1884) and *Davis v. Weibbold*, 130 U.S. 507 (1890) as precedent. From the Ninth Circuit came *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U.S. 683 (1894) which used *Mining Co. v. Tarbet*, 98 U.S. 463 (1878), *Argentine Mining Co. v. Terrible Mining Co.*, 122 U.S. 478 (1886), and *King v. Amy Mining Co.*, 152 U.S. 22 (1893) as precedent. From the Ninth Circuit Court of Appeals came *Walrath v. Champion Mining Co.*, 171 U.S. 293 (1897) which relied upon *Mining Co. v. Tarbet*, 98 U.S. 463 (1878) and *Del Monte Mining and Milling*

Mining and Milling Co. v. Last Chance Mining and Milling Co. has been more frequently cited and followed than any other mining decision.⁶² Hallett's influence on the interpretation of mining law was significant and continuing during his tenure on the federal bench.⁶³

The territorial supreme courts built up a body of law which never reached the Supreme Court, but nevertheless was good law.⁶⁴ In 1879 the Montana territorial supreme court commented that "the American common law of mining" was gone.⁶⁵ Authoritative federal and territorial judicial decision and statute had replaced local mining district regulations. The territorial legal process replaced the mining district as law-giver and thereby provided unity and certainty for the system.

More than establishing their authoritative position in mining law, the territorial courts shed some of their judicial heritage. In treating statutory interpretation in the nineteenth century, courts relied on age-old rules of construction. The abstract nature of law was emphasized and construed. Mining as a technological problem of first impression forced the courts out of this attitude. They moved away from a horizontal approach to law which categorized legal principle and provided clear-cut rules for construction. The multiplicity of technological problems and the burst of geological knowledge in relation to statute eroded the logic of the nineteenth century. The territorial courts construed federal statute in light of this new knowledge in order to maintain the vitality of the law. This reception and construction was, in turn, reflected in federal court decisions. In this way, the court systems allowed statute to operate in a practical way.

The nineteenth century legal decisions focused upon the value of development with little regard for the environmental costs. Most of mining's damage was undetected in its time or lost in the bigger picture of rapid economic expansion so prevalent in the

Co. v. Last Chance Mining and Milling Co., 171 U.S. 55 (1897), to which Moses Hallett contributed. The Dakota Territorial Supreme Court contributed *Noonan v. Caledonia Mining Co.*, 121 U.S. 393 (1886). As cited above, other courts drew upon the Rocky Mountain court decisions for authority.

⁶² James H. Baker, *History of Colorado*, 3 volumes, [Denver, 1927] iii: 1030. *Del Monte* may be found at 171 U.S. 55 (1897).

⁶³ *Van Zandt v. The Argentine Mining Co.*, 8 F. 725 [C.C.D. Colo. 1881]. *Harris v. The Equator Mining and Smelting Co.*, 8 F. 863 [C.C.D. Colo. 1881]. *Johnstone v. Robinson*, 16 F. 903 [C.C.D. Colo. 1881]. *Little Pittsburgh Consolidated Mining Co. v. Amie Mining Co.*, 17 F. 57 [C.C.D. Colo. 1883]. *Croesus Mining, Milling and Smelting Co.*, 36 F. 25 [C.C.D. Colo. 1888]. *Johnston v. Standard Mining Co.*, 39 F. 304 [C.C.D. Colo. 1889]. These cases are representative of Hallett's opinions and charges to juries.

⁶⁴ See Appendix at the end of this article.

⁶⁵ *Gonu v. Russell*, 3 Mont. 385 (1879). It should be noted that both Field and Brewer were westerners with previous experience in mining cases before they came to the Supreme Court bench.



Hydraulic mining. (Oregon Historical Society)

nineteenth-century mind.⁶⁶ That bigger picture was that mineral exploration and exploitation held a preference over other uses of land because it represented the highest economic use of public property.⁶⁷ This development-at-all-costs attitude resulted in vast water pollution and the destruction of rich agricultural lands, particularly in California.⁶⁸ Mining also had a devastating impact upon the land. Mining destroyed the vegetation of many river valleys and denuded hillsides of timber. It altered terrain, changed stream beds, destroyed fish life, polluted the air and created extreme noise pollution.⁶⁹ Viewing the devastation and the judicial opinions of the nineteenth century, litigants seldom sued to stop the carnage. As Duane A. Smith has observed, "only rarely did one mining company sue another over stream pollution; seldom did a mining community charge a company with violating a water ordinance."⁷⁰ In the twentieth century, the victims of mining

⁶⁶ Duane A. Smith, *Mining America, The Industry and the Environment 1800-1980* (Lawrence, KS, 1987) 9, 23.

⁶⁷ *Ibid.* at 47.

⁶⁸ Robert L. Kelley, *Gold vs. Grain: The Hydraulic Mining Controversy in California's Sacramento Valley* (Glendale, 1959).

⁶⁹ Randall Rohe, "Man and the Land: Minings Impact in the Far West," *Arizona and the West* 28 (1986) 299-338.

⁷⁰ Smith, *Mining America, The Industry and the Environment 1800-1980*, *supra* note 66 at 63.

pollution started going to court, and increasingly mining was the loser.⁷¹ Mining companies found that the federal government was playing a larger role in regulating their industry. In the West, mining companies complained about federal control, sought local regulation, and participated in the "sage brush rebellion."⁷² This searching for friendly regulation was swept away by the environmental whirlwind of the 1960s. The 1960s witnessed the greatest national effort to right the environmental wrongs of the nineteenth century through legislation and regulation. Congress passed the Clean Air Act in 1963, the Water Quality Act in 1965, the Air Quality Act of 1967, and the National Environmental Policy Act of 1969. The states similarly passed numerous statutes, created regulatory agencies, and joined the movement to forestall the further destruction of the environment. In the 1960s the state laws were "the first line of defense" against surface mining.⁷³ By the 1970s "state and federal regulations forced mining to defer to the environment." One mining engineer in the mid-1970s had to obtain a permit to have a tailings pond, another permit not to have a tailings pond, and was required to deal with several agencies in the process.⁷⁴

In the 1980s the voice of James Watt gave mining interests solice and environmentalists concern. That often translated into a legal question of whether it was more advantageous to have the federal government, in the hands of Ronald Reagan, regulate mining or to seek the state regulation more often in the hands of environmentally-sensitive people. This dichotomy put the preferences of the industry in the 1980s on its head. Further, it demonstrated the incredible reversal of public policy fields from the nineteenth-century dominance of local regulatory agencies by the mining interests and industry to a modern preference for their regulatory favor. In legal terms in the 1980s, the environmentalists do not want federal preemption of state regulation in areas where there is a perceived lack of federal zeal in regulatory enforcement. This, of course, is a change from the 1960s and the heady days of federal legislative action, agency rulemaking, and resounding federal court victories.

In this context, *California Coastal Commission v. Granite Rock* is very much a decision of its times. It puts the industry in the regulatory position of being subject to state and federal agencies. Hopefully, the regulations of both will substantively protect the environment.

⁷¹ Ibid. at 113-19, 127-28.

⁷² Ibid. at 132-35.

⁷³ Ibid. at 146.

⁷⁴ Ibid. at 152.

APPENDIX

The territorial supreme court mining decisions offer many insights into mining and the concepts of it in the respective courts. In *Lincoln v. Rogers*, 1 Mont. 217 (1870) the court moved unhesitatingly to strike down a custom or regulation of a local mining district which by the Mining Law of 1866 had received federal sanction. Justice Symes speaking for the court invalidated a tailings regulation because "such customs must not be inconsistent with the full and rapid development of all the mining resources of the country." 1 Mont. 284 (1870). In *King v. Edwards*, 1 Mont. 235 (1870) the court accepted the validity of local customs for placer mining under the Mining Act of 1866. *Carrhart v. Montana Mineral Land and Mining Co.*, 1 Mont. 245 (1870) similarly accepted local custom for quartz mining. In *Robertson v. Smith*, 1 Mont. 410, 413 (1871) Chief Justice Hiram Knowles speaking for the court explained the attitude developing toward the individual's relation to his government: "The proper construction of the law upon these subjects is, I think, that miners have the right to occupy and explore unappropriated public mineral lands; that the public have a right to an easement for a highway over the unoccupied public domain, and that whichever is prior in time is prior in right. It is inconsistent for the public to claim a right of way over an appropriated mining claim without giving the owner thereof a just compensation for mining purposes a portion of the public domain which had been devoted to the use of a public highway." The court wanted to protect prior rights while maintaining the power of eminent domain for the government. It demanded responsible action by both the individual and the government in the exercise of their rights.

Other Montana mining cases were *Parder v. Murray*, 4 Mont. 234 (1882) involving the apex clause of the 1872 Mining Law; *Hauswirth v. Butcher*, 4 Mont. 299 (1882) involving the size of a location under federal law; *Gropper v. King*, 4 Mont. 367 (1882) involving a location under the Mining Law of 1866; *McKinstry v. Clark and Cameron*, 4 Mont. 370 (1882) holding that the right of possession came only from a valid location; *Novse v. Black*, 4 Mont. 527 (1883) similarly holding possession as following and deriving its right from a valid location; *Tibbitts v. Ah Tong*, 4 Mont. 536 (1883) declaring an alien unable to locate a claim; *Hopkins v. Novse*, 4 Mont. 550 (1883) following the principle of *McKinstry* and *Novse*; *Silver Bow Mining and Milling Co. v. Clark*, 5 Mont. 378 (1885) reaffirming the right of possession and location under federal law; *Remington v. Baudit*, 6 Mont. 138 (1886) holding that a dwelling built outside the boundaries of a claim did not satisfy the work requirements of the Mining Law of 1872; *Butte City Smoke-House Lode Cases*, 6 Mont. 397 (1887) stating that mining

claims were not voided by junior townsite patents [followed in *King v. Thomas*, 6 Mont. 409 (1887)].

The Utah territorial supreme court also passed on a variety of cases: *Houtz v. Gisborn*, 1 Utah 173 (1874) holding mining claims to be real property and able to be passed by deed; *Roberts v. Wilson*, 1 Utah 292 (1876) involving the validity of local records; *Blake v. Butte Silver Mining Co.*, 2 Utah 174 (1877) defining patent and location rights and obligations; *McCormick v. Varnes*, 2 Utah 355 (1877) involving extralateral pursuit of a vein a precedent used by Justice Brewer in *Del Monte v. Last Chance*, 171 U.S. 55 at 65 (1897); *Eilers v. Boatman*, 3 Utah 159 (1881) passing on markers, location, and the apex clauses of the 1872 Mining Law; *Bullion, Beck and Champion Mining Co. v. Eureka Hill Mining Co.*, 5 Utah 3 (1886) involving the pursuit of a vein outside of the claim; *People v. Monk*, 8 Utah 35 (1892) asserting the primacy of territorial statute when in conflict with mining district regulations; *Darger v. LeSieur*, 8 Utah 160 (1892) determining the sufficiency of a claim description under statute; *Darger v. LeSieur*, 9 Utah 192 (1893) affirming *Darger* (1892); *Mammoth Mining Co. v. Juab County*, 10 Utah 232 (1894) exempting mining claims and fixtures from taxation; *Hansen v. Fletcher*, 10 Utah 266 (1894) construing markers and location under federal statute; *Warnock v. DeWitt*, 11 Utah 324 (1895) passing on the work requirements of the Mining Law of 1872.

Colorado had only two major mining cases at the territorial supreme court level largely due to the immediate action of the territorial legislation in establishing a uniform mining law in 1861. *Sullivan v. Hense*, 2 Colo. 424 (1874) recognized the validity of local mining regulations under federal statute and the method of introducing them as proof of existing regulation from California statutory provision and local practice. In *Murley v. Ennis*, 2 Colo. 300 (1874) the court held that the discoverer by his uncovering of a mineral body merely became entitled to a reasonable length of time to perfect his claim according to local law.

The work of the New Mexico territorial supreme court in mining cases almost entirely involved the application of statutory law: *Zeckendorf v. Hutchinson*, 1 N.M. 476 (1871); *Baxter Mountain Gold Mining Co. v. Patterson*, 3 N.M. 179 (1884); *Seidler v. La Fave*, 5 N.M. 44 (1889) (overruled *Baxter* on sufficiency of markers in location); *Wills v. Blain*, 5 N.M. 238 (1889); *Bell v. Skillcorn*, 6 N.M. 399 (1892); *Illinois Silver Mining and Milling Co. v. Raff*, 7 N.M. 336 (1893) held the existence of a vein and of its apex a matter of fact for the jury to decide; *Eberle v. Carmichael*, 8 N.M. 169 (1895).

The nature of the decisions of the Idaho court was similar to that of Montana's. In *Kramer v. Settle*, 1 Idaho 485 (1873) the court held that the failure to perform the work required by law amounted to abandonment opening the claim to relocation. The

court in *Ralston and West v. Plowman*, 1 Idaho 595 (1875) held that in the absence of any agreement, regulation, or custom running tailings onto another claim was illegal. Other cases involved the application of federal statute: *Rosenthal v. Ives*, 2 Idaho 265 (1887); *Back v. Sierra Nevada Consolidated Mining Co.*, 2 Idaho 420 (1890); *Gilpin v. Sierra Nevada Consolidated Mining Co.*, 2 Idaho 696 (1890). In *Lockhart v. Rollins*, 2 Idaho 540 (1889) the court construed the labor of a watchman or custodian as labor done on the claim to comply with the Mining Act of 1866. In *Stemwinder Mining Co. v. Emma and Last Chance Consolidated Mining Co.*, 2 Idaho 456 (1889) the court decided a claim in excess of law void in its excess. In *Burke v. McDonald*, 2 Idaho 679 (1890) the court took cognizance of the complicated nature of mining cases requiring special jury verdicts if complicated issues were presented. In *Schultz v. Keeler*, 2 Idaho 333 (1887) the court displayed a group of contemporary precedents, all from territorial courts, to uphold claim location by agents. The court cited *Rush v. French*, 1 Ariz. 99 (1874); *Boucher v. Mulverhill*, 1 Mont. 306 (1871); and *Murley v. Ennis*, 2 Colo. 300 (1874) as precedent holding local law not in conflict with federal law valid. Other cases of some interest were *Bohanon v. Howe*, 2 Idaho 453 (1888) and *Riborado v. Quant Pang Mining Co.*, 2 Idaho 144 (1885) involving the issue of Chinese workers in the mining camps.

Arizona's leading case, *Rush v. French*, 1 Ariz. 99 (1874) indicated the attitude of the court. A failure to comply with the local rules and customs of the miners of a district was held not to work a forfeiture of a mining claim unless those rules and customs expressly declared that instead of being *liberally* construed to establish such forfeiture, those rules were to be *strictly* construed against the validity of a location. Property rights were jealously guarded by the court, especially since Arizona was so lax in providing statutory guidelines for mining. In *Field v. Grey*, 1 Ariz. 404 (1881) the court maintained that a party in possession of a mining claim could hold the surface of it while he was "continuously and industriously" seeking a vein or lode believed to exist there, as against all parties having a better right to it, and could eject them from it if they intruded. The court hedged on its conservative tendency in *Tombstone Mining Co. v. Way Up Mining Co.*, 1 Ariz. 426 (1883) being reluctant to grant extralateral pursuit of a vein. In *Johnson v. McLaughlin*, 1 Ariz. 493 (1884) the court recognized federal law as paramount, but followed *Rush v. French* on work requirements. In *Reilly v. Berry*, 2 Ariz. 272 (1887) markers were required to "be sufficiently clear to designate the ground claimed." *Alexander v. Sherman*, 2 Ariz. 326 (1887) recognized a mining claim as property. In *Jantzen v. Arizona Copper Co.*, 3 Ariz. 6 (1889) the court held that where it appeared that a locator, at or near the time of location, recorded his location, reciting all the facts essential to a valid location, such cases

involved application of federal statute. *Watervale Mining Co. v. Leach*, 4 Ariz. 34 (1893) and *Allyn v. Schultz*, 5 Ariz. 152 (1897) involved application of federal statute.

The Nevada territorial mining cases are summarized in Lord, *Comstock Mining and Miners*, supra note 30 at 97-108, 131-80. The opinions of the Nevada territorial supreme court are in manuscript, but are all per curiams. *Sparrow v. Strong*, 70 U.S. (3 Wall.) 97 (1865) was the most famous case to reach the U.S. Supreme Court from the Nevada court. Chief Justice Salmon P. Chase accepted the "common law of miners" argument in the case and looked forward to the Mining Law of 1866 then in the Congress.

The central point to be made concerning these territorial court decisions is that they covered the whole spectrum of mining legislation and were not overruled by the U.S. Supreme Court. These decisions stood as law in their respective territories and the mining industry in each developed under their scrutiny. Their main themes were those of the frontier: priority and exploitation. The priority of time was established as a priority of right always looking to the most rapid exploitation of the mineral wealth.

THE IMAGERY OF INJUSTICE AT MUSSEL SLOUGH: RAILROAD LAND GRANTS, CORPORATION LAW, AND THE "GREAT CONGLOMERATE WEST"

BY DAVID J. BEDERMAN

The "battle" of Mussel Slough, California, was the single most dramatic incident in the prolonged American conflict between great railroad builders and small land-seekers.¹

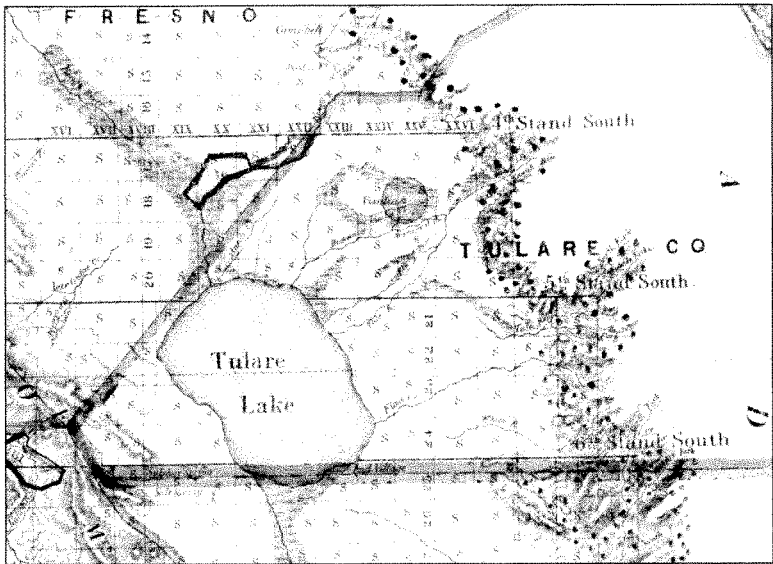
The pitched gunfight of May 11, 1880 between local settlers and railroad agents, accompanied by a federal marshal, was the only important armed clash to occur in this seething national "war" of competing claims to the public domain.² The incident was used as a rallying cry against overweening corporate monopolies, as a plea for land reform, as a nostalgic remembrance of an open frontier of limitless land, and as a metaphor of injustice. This article focuses these distinct images of social and economic life against a silhouette of economic conflict in late nineteenth-century America, and relates how three sorts of contemporary commentators — legislators, judges, and novelists — explained an acutely violent episode of signal legal importance, reverberating consequences, and extraordinary pathos.

Stories like the battle at Mussel Slough are retold in a variety of ways. It is this variation which later becomes of interest to the historian. A look at the legal dimensions of this dispute offers a

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¹ Irving McKee, "Notable Memorials to Mussel Slough," *Pacific Hist. Rev.* 17 (1948) 19.

² William W. Robinson, *Land in California* (Berkeley, 1948) 159.



Land grant map of Tulare County, ca. 1865. The "battle" of Mussel Slough between settlers and agents of the Southern Pacific Railroad took place approximately seven miles from Visalia. (Huntington Library)

particularly rich vision of the contemporary role of law in resolving social conflict. It is a look uncolored by outcomes and uninfluenced by the stark visitation of failure, the reality of hatred, homelessness, and violent death.

There appears something peculiarly American in the connection between social conflict and law. The late nineteenth century and first decades of the twentieth were replete with events which marked the limits of law in defusing disputes: the Haymarket riots, the Gastonia labor troubles, the trial of Scopes, and the condemnation of Sacco and Vanzetti. Each featured a distinctive and, ultimately, futile role for law-makers, lawyers, and judges. Each of these incidents truly changed social attitudes, preferences, and priorities. They all have remained powerful symbols for social injustice. Mussel Slough was merely the first of these moments. Being a rural drama it was also the first to recede into memory as the tempo of modernization and industrialization, arguably the motive forces for the event, quickened. It is time to retell the story.

Californians of the 1870s were struggling with the certain knowledge that the frontier was receding from them. Social conditions in California at that time have been described as a "cauldron of hostility, prejudice, and litigation, racial as well as corporate."³ Social grievances tended to merge with economic ones:

³ Howard J. Graham, *Everyman's Constitution* (Madison, 1968) 14-15.

railroads were the subject of intense criticism for being powerful monopolies in their own right, and for also being responsible for a large influx of Chinese contract laborers. "Hostility and antagonism to the Chinese and hostility and antagonism to the corporations — to the railroads ... had merged, fused, and flared into incandescence."⁴

In the backwater areas of California's Central, or San Joaquin, Valley tempers against the railroad had run high for other reasons. Railroad circulars had drawn settlers from the East to the rich but arid land in Fresno and Tulare Counties and the "unattractively named Mussel Slough district, known now more glamorously as Lucerne Valley," near present-day Hanford.⁵ The Mussel Slough settlers' efforts in making the valley a productive agricultural area have been described as "one of the most remarkable struggles for existence in the history of the pioneer West [It is reflective of] the American farmer's instinct to hold onto his unproductive acres up to the point of actual starvation."⁶ Extraordinary irrigation efforts were launched and the settlers' themselves estimated they had invested millions of dollars in improvements.⁷

The settlers' claims to these lands were, however, premised on a very thin tissue of promises made by the Southern Pacific Railroad, the holder of the federal land grants for these tracts. The corporation could not have sold the lands to the settlers when they originally entered, because the railroad itself had not yet received the patents from the government. The railroad did, however, allow the settlers to enter the lands and promised them options to buy at prices ranging from \$2.50 to \$10 an acre, with \$5 being the stated expected average.⁸ There was also substantial uncertainty about the expected route of the railroad between Hollister in Monterey County and Goshen in Tulare County.⁹ This confusion would later be the decisive legal issue in determining the settlers' rights.

⁴ Ibid.

⁵ Edna Monch Parker, "The Southern Pacific Railroad and Settlement in Southern California," *Pacific Hist. Rev.* 6 (1937) 103. Parker notes that the population of this region increased by two hundred and fifty percent between 1880 and 1890, largely owing to the Southern Pacific's promotion.

⁶ Oscar Lewis, *The Big Four* (New York and London, 1941) 386.

⁷ See *Petition of the California Settlers*, S. Misc. Doc. No. 87, 44th Cong., 1st Sess. 2 (1875). See also Settler's Committee, "The Struggle of the Mussel Slough Settlers for their Homes," 14-18 (1880) [a defense of the farmer's position against the railroad] [hereinafter cited as "Settlers' Struggle"].

⁸ The railroad guarantees read, in part: "In ascertaining the value, any improvement that a settler or any other person may have on the lands will not be taken into consideration: neither will the price be increased in consequence thereof. Settlers are assured that in addition to being accorded the first privilege of purchase, they will be protected in their improvements." See "Settlers' Struggle," supra note 7 at 12.

⁹ *Petition*, supra note 7 at 1.

By 1877 the lean years for the settlers in the Valley had come to an end, but it was also a time of severe financial crisis for the Southern Pacific. Desiring to increase revenues to maintain construction on the Oregon branch-line, the company adopted a policy of selling its granted lands.¹⁰ Predictably, the railroad reneged on its guarantees to the settlers of Mussel Slough and placed the tracts on the open market at sale prices ranging from \$25 to \$40, values which obviously reflected the improvements dedicated to the land.¹¹ The current inhabitants responded in a fashion typical of the time: they formed a Settlers' League, dispatched memorials to Congress, and opened negotiations with the corporation.¹² Talks with the railroad's president, Leland Stanford, proved fruitless. Even after the settlers' position had been defeated in the Ninth Circuit Court of Appeals,¹³ the League sought unsuccessfully to prevent their being ejected, pending an appeal to the U.S. Supreme Court.¹⁴

On the morning of May 11, 1880, Federal Marshal Alonzo Poole arrived in Hanford with writs of possession in favor of two railroad nominees, Mills Hart and Walter Crow. The three men had succeeded in dispossessing two tenants before encountering a delegation of settlers. In the ensuing confrontation, Marshal Poole agreed to discontinue the evictions. Hart and Crow then apparently drew their weapons and the firing began. When it was over, seven men were killed, including the railroad agents and five settlers.¹⁵

The battle caused an immediate sensation in California. Owing to railroad-imposed censorship and the Southern Pacific's influence over the media, however, the settlers were denied the public sympathy they desperately needed to continue their cause.¹⁶ The ejectments continued. The appeal to the Supreme Court was dropped and all serious resistance to the railroad dissipated. The Southern Pacific did later make a concession by reducing the asking price of the land by one-eighth, and many of the settlers did purchase at this rate.¹⁷ While the settlers may have capitulated to the railroad, the incident continued to exert

¹⁰ Lewis, *The Big Four*, supra note 6 at 388-89.

¹¹ See "Settlers' Struggle," supra note 7 at 18-23.

¹² Ibid. at 23-29.

¹³ *Southern Pacific R.R. v. Orton*, 32 F. 457 (C.C.D. Cal. 1879). This was the settlers' test case.

¹⁴ "Settlers' Struggle," supra note 7 at 26-29. The case was never heard by the Court nor even considered for *certiorari*.

¹⁵ The incident is summarized in a number of secondary sources, all based on the report of the *Visalia Delta*, May 12, 1880. See McKee, "Notable Memorials to Mussel Slough," supra note 1 at 21-22; Lewis, *The Big Four*, supra note 6 at 392-97.

¹⁶ Lewis, *The Big Four*, supra note 6 at 396-97.

¹⁷ Robinson, *Land in California*, supra note 2 at 159-60.

substantial influence. The eleventh of May was often commemorated.¹⁸ Major McQuiddy, president of the Settlers' League, won the Greenback Party's nomination for governor in 1882, although he only drew 1,020 of the some 160,000 votes cast in that election.¹⁹ So it was that Mussel Slough continued to be a potent rallying cry for anti-railroad agitation in California and antitrust activities elsewhere, well into the twentieth century.

RAILROAD LAND GRANTS AND THE SOUTHERN PACIFIC COMPANY

The story of the Mussel Slough incident is foremost the chronicle of ambivalent public policy-making. In this instance, the policy in question was that of granting large tracts of the public domain to railroads as an inducement and means of financing their construction. While this article will not resurvey the vast landscape of the political and economic rationales for this policy, it is important that the broad contours at least are explored and marked. Only in this way will the social context of the Mussel Slough incident have any real meaning, and the contrasting legislative, juridical, and literary visions of this social dispute have any relevance.

The total amounts of land territory encompassed in the grants to the western railroads were vast. The General Land Office estimated in 1878 that nearly 187 million acres had been relinquished to railroad control west of the Mississippi River.²⁰ While potentially vast tracts of land were, as a consequence, withdrawn from the public domain, as of 1880 only thirty-four million acres of land had been definitely located.²¹ This great discrepancy between total land grants offered to railroads and those actually surveyed, patented, and received by them in the course of the actual construction of the roads, was owing to a variety of factors.

One explanation was the actual delays encountered by the railroads in completing the required mileage construction which entitled them to receive the grants. The railroad land grants enacted by Congress typically required that lands be patented to railroads only with the successful completion of a certain amount

¹⁸ Wallace Smith, *Garden of the Sun* (1939) 287-89.

¹⁹ McKee, "Notable Memorials to Mussel Slough," *supra* note 1 at 2.

²⁰ Roy M. Robbins, *Our Landed Heritage: The Public Domain, 1776-1970* (2d ed., Lincoln, 1976) 223.

²¹ *Ibid.* at 255.

of track.²² The confused patterns of land grants to railroads also contributed to delays in surveys and subsequent patenting to the roads. Most of the land grants anticipated a primary or original limit ranging out from either side of the right of way. Primary limits variously extended up to six, ten, twenty, and, more rarely in territories, forty miles.²³ These land grants also provided for a contiguous zone of "indemnity" or "lieu" lands so as to offer the railroads additional tracts to choose from in case lands within the primary zone were already occupied as of the date of the grant.²⁴ Contemporary maps which depicted wide swaths of territory, up to the limits of the lieu lands, were grossly distorted in representing the total amount of land the railroad would ultimately receive.²⁵ Nevertheless, until the lands were finally surveyed, patented, and conveyed to the railroad, the government was compelled to withdraw all of them from the public domain and to render them, in effect, under railroad control.

In cases where the route of the planned railroad was through the territories of the United States, grants were made directly by Congress to the corporations. Conversely, where railroads were planned in areas that had been admitted to the Union, the grants were made to the states. It was in this fashion that the Southern Pacific Railroad received its original grant. While this railroad was chartered under the laws of California,²⁶ the conditional grant of land was controlled by a federal statute.²⁷ This distinction did not hold in later grants when the relaxation of the states' rights doctrine caused Congress to make grants directly to railroad corporations, even where the roads ran entirely through states.

²² For the Atlantic and Pacific Railroad, for example, the requirement was the construction of twenty-five consecutive miles of track. See *Atlantic and Pacific R.R. Act*, ch. 278, section 4, 14 Stat. 292 (1866).

²³ Robert S. Henry, "The Railroad Land Grant Legend in American History Texts," *Miss. Valley Hist. Rev.* 33 (1945) 171, 174.

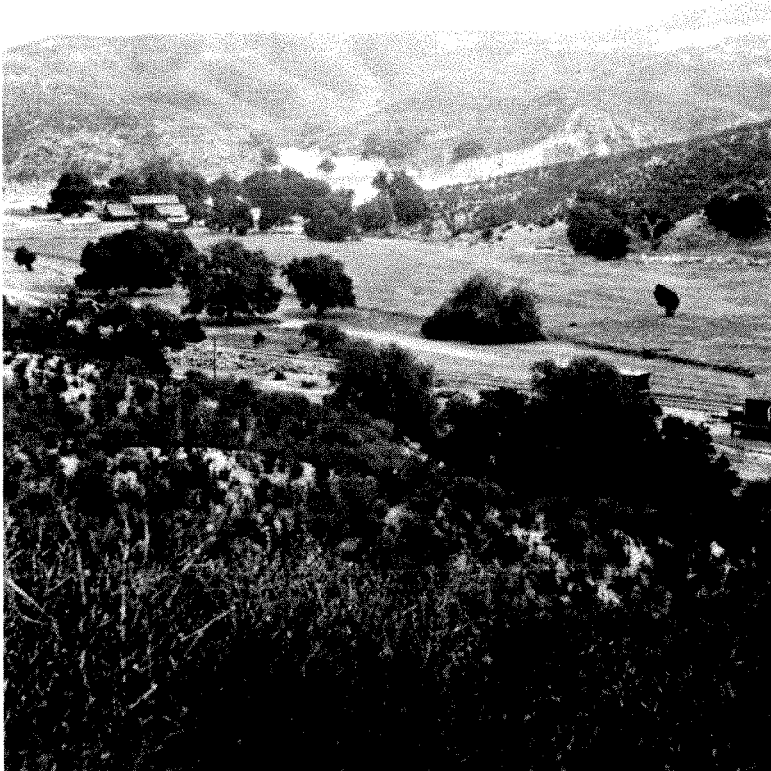
²⁴ *Ibid.* at 175. The indemnity limits could extend up to fifty or even sixty miles from the railroad. In the case of the Atlantic and Pacific Railroad, the lieu lands extended ten miles from the primary grant. See *Atlantic & Pacific R.R. Charter*, *supra* note 22, at section 3. This was also the case with the Texas Pacific Grant of 1871. See *Texas Pacific R.R. Act*, ch. 122, section 9, 16 Stat. 573 (1871). All of these lands had to be set aside in order to be available for the railroad, at its election of lands, to replace occupied areas in the primary grant.

²⁵ Henry, "The Railroad Land Grant Legend in American History Texts," *supra* note 23 at 175.

²⁶ See *Act for the Incorporation of Railroad Companies*, ch. 532, 1861 Cal. Stat. 607.

²⁷ See *Atlantic & Pacific R.R. Act*, *supra* note 22, at section 18: "[The Southern Pacific] shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

The California Act of May 20, 1861 provided the statutory basis for the Southern Pacific Railroad Company.²⁸ It was, in effect, a general enabling act for the incorporation of any railroad company within the state, and was not limited in scope to the planned Southern Pacific line. The act specified that the route of the road be described in the articles of association,²⁹ and that the entity would be a body politic and corporate with the power to "make all contracts, acquire real and personal property, purchase, hold, convey, any and all real personal property whatever."³⁰ The Southern Pacific Railroad Co. was incorporated under these terms on December 2, 1865. It was fully under the control of the "Big Four" who were directors of the Central Pacific Railroad: Collis P. Huntington, Mark Hopkins, Leland Stanford, and Charles Crocker.



View along the Southern Pacific R.R. route, Tehachapi Loop, ca. 1890.
(Huntington Library)

²⁸ See Incorporation Act, *supra* note 26.

²⁹ *Ibid.* at section 2.

³⁰ *Ibid.* at section 3.

Southern Pacific officials were already a power in California and were also extraordinarily successful as lobbyists in Washington, D.C.³¹ In 1866, just one year after incorporation, the railroad received a grant of land in a clause added to the statute creating the Atlantic and Pacific Line.³² In this way, the owners of the Central Pacific were making a bid to construct a second transcontinental line, to capture all of this transportation market, and so head off Tom Scott's and Jay Gould's Texas Pacific railroad moving toward California through the Southwest.³³ The land grant provided that every odd section of public land, up to twenty alternate sections in territories and ten alternate sections in states, would be given to the railroad.³⁴

This grant was transferred in October of 1870 to a consolidated Southern Pacific Railroad Corporation, which included the San Francisco and San Jose Railroad, the Santa Clara and Pajaro Valley Railroad, and the California Southern (organized on paper only).³⁵ In 1871, "an additional grant of the same nature was made to the Southern Pacific for construction of a railway from Tehachapi Pass, by way of Los Angeles, to meet the Texas Pacific railroad at or near the Colorado River."³⁶ When the Texas Pacific folded, the Southern Pacific was in a position to acquire control of both transcontinental railroads with termini in California, but did not fully succeed to that line's land grant.³⁷ The final consolidation between the Central Pacific and Southern Pacific occurred in 1885. Prior to that date the Central Pacific had leased the Southern Pacific, except for its northern division running south from San Francisco.³⁸ In 1885 the Southern Pacific Company was formed and proceeded to lease

³¹ Paul Gates, *History of Public Land Law Development* (1986) 375.

³² See Atlantic & Pacific R.R. Act, *supra* note 22 at section 18.

³³ Graham, *Everyman's Constitution*, *supra* note 3 at 14.

³⁴ Atlantic & Pacific R.R. Act, *supra* note 22, at section 3. The full text of this very controversial clause ran: "[The grant includes] every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad when it passes through any State, and whenever, on the line thereof, the United States has full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office." (Emphasis added.)

³⁵ S. Daggett, *Chapters on the History of the Southern Pacific* (1922) 123.

³⁶ Parker, "The Southern Pacific Railroad and Settlement in Southern California," *supra* note 5 at 104. This was the Act of March 3, 1871, ch. 122, 16 Stat. 579 (1871).

³⁷ Gates, *History of Public Land Law Development*, *supra* note 31 at 377. For the forfeiture of the Texas Pacific land grant, see 23 Stat. 337 (1885).

³⁸ Lloyd J. Mercer, *Railroads and Land Grant Policy: A Study in Governmental Intervention* (1982) 8-15.



Southern Pacific engine about to enter the No. 10 tunnel at Tehachapi Pass, ca. 1890. (Huntington Library)

the Central Pacific.³⁹ This enabled the Big Four to perpetuate their control over the whole system with the closely-held Southern Pacific as the flagship line, and the more diffuse shareholders of the Central Pacific as a subsidiary.⁴⁰

The Southern Pacific's convoluted organizational structure was complicated further by numerous changes in its intended route. These alterations were motivated both by economic concerns in serving an established market and also by the railroad's desire to acquire valuable land grants. As a matter of law, this issue provided one of the essential grounds of dispute in the conflict between the railroad and settlers in the San Joaquin Valley. The main line of the Southern Pacific was contemplated to run

³⁹ Parker, "The Southern Pacific Railroad and Settlement in Southern California," *supra* note 5 at 106 n. 16.

⁴⁰ S. Daggett, *Chapters on the History of the Southern Pacific*, *supra* note 35 at 146-49.

down the coast from San Francisco to San Diego. This would have carried the road through the "rancho lands," tracts which had been previously disposed of by Mexican land grants, and so were outside the public domain.⁴¹ The railroad would thus have received no land grants by adopting this route.

Accordingly, the Southern Pacific petitioned the California legislature and secured a change of its line on January 3, 1867.⁴² The new route took the road through the Central or San Joaquin Valley, potentially the richest agricultural area in the state. Connections with Los Angeles and San Diego became spurs off of the main line. The whole system in California was completed in September of 1876.⁴³ An 1870 Joint Resolution of Congress confirmed the route change and extended the 1866 grant to these new lands. The resolution did, however, expressly save and reserve all the rights of "actual settlers" along the new route.⁴⁴ This statutory language would provide another ground of attack by the Mussel Slough settlers against the railroad's claims to their land.

The Southern Pacific railroad system operated as a virtual transportation monopoly in California until the very end of the nineteenth century. It was rightly regarded as "one of the most powerful corporations in the land."⁴⁵ The Southern Pacific was also one of the state's largest landowners. In 1882 the corporation reported that it had received over 10.4 million acres of land, the larger portion of which lay in the southern part of California. At a government minimum price of \$2.50 per acre, the value of these grants totalled over \$26 million.⁴⁶ The Southern Pacific's success was in large part attributable to its activities as a landowner. The railroad had very skillfully captured its market by promoting land settlement along its right of way. Of the corporations which dominated the "great conglomerate West,"⁴⁷ the Southern Pacific

⁴¹ Robinson, *Land in California*, supra note 2, at 155. The primary case holding that rancho lands were not subject to inclusion in railroad land grants was *Schulenberg v. Harriman*, 88 U.S. [21 Wall.] 44, 59 (1874) [construing the statute as precluding already granted land and also noting that lands will not be patented until the road is constructed]. See also *Southern Pacific R.R. v. Dull*, 22 F. 489 (C.C.D. Cal. 1884).

⁴² This was actually the date that the revised plat was filed in the General Land Office branch in California, as noted in *Joint Resolution Concerning the Southern Pacific Railroad*, Res. 87, 16 Stat. 382 [1870].

⁴³ Mercer, *Railroads and Land Grant Policy*, supra note 38 at 36.

⁴⁴ *Joint Resolution*, supra note 42.

⁴⁵ "Settlers' Struggle," supra note 7 at 3-5.

⁴⁶ Southern Pacific Railroad Company, *Annual Report of the Board of Directors* (1882) 43, reprinted in H.R. Rep. No. 2670, 48th Cong., 2d Sess. 6 (1885).

⁴⁷ This phrase is from a review essay by Frank Norris, "The Literature of the West: a Reply to W.R. Lighton," *Boston Evening Transcript*, Jan. 8, 1902, at 7, reprinted in Donald Pizer, *Literary Criticism of Frank Norris* (1964) 104-07.

Railroad was surely one of the most economically aggressive monopolies as well as a wielder of almost unsurpassed political power in Sacramento and Washington, D.C.

CONGRESSIONAL ATTEMPTS TO MEDIATE RAILROAD/SETTLER DISPUTES

All of these factors almost inevitably brought the settlers into conflict with the railroad in areas of development. In this sense, the Mussel Slough incident was a tragedy in the making for ten years. While the land grant policies of the government might have been decisive in forming the conditions of this social conflict, it is also important to note the steps that Congress attempted in order to mediate these disputes and to provide protection for settlers.

The struggle between the farmers and the railroad monopoly typified the most far-reaching and important social conflict in nineteenth-century America, that between the middle class and an industrial plutocracy. Some historians have rather self-consciously characterized this conflict as class warfare.⁴⁸ This description seems both to trivialize the actors by neatly homogenizing their actions according to their economic interests, while also ascribing to the settlers an unlikely class consciousness. Rather, this conflict might be more usefully described as a competition between different economic ways of life. The railroad was foremost an engine of industrial development. While it relied on the carriage of agricultural goods to market, the transport of durable items was contemplated as being the chief contribution to profits. High fixed costs, extraordinary construction expenses, and limited markets all plagued the roads. The Pacific railroads, in particular, were risky enterprises precisely because they provided transportation ahead of settlement.⁴⁹

Most settlers on railroad lands were preemptors. Preemption, unlike homesteading, involved actual settlement on unsurveyed lands in the public domain. Homesteaders often lost their claims to preemptors because of the time delay in performing surveys.⁵⁰ This same delay could also mean that the lands were actually

⁴⁸ Walter E. Taylor, *The Economic Novel in America* (1942) 296.

⁴⁹ Mercer, *Railroads and Land Grant Policy*, *supra* note 38 at 9.

⁵⁰ Robbins, *Our Landed Heritage: The Public Domain, 1776-1970*, *supra* note 20 at 237-38. One contemporary legislator neatly characterized the differences between the homesteader and preemptor: "I am not overly in love with [the preemptor]. I do not think he is the *beau ideal* of human perfection. But still, the honest pre-emptor has the same rights as the honest homesteader has. [The homesteader] goes upon the land, and by five year's actual and continuous occupation and improvement of the land acquires a title. [The preemptor] does so by actual improvement and occupation for one year. The pre-emptor pays the

encompassed in a railroad land grant but had not yet been patented to the corporations. Settlers with an actual patent to a tract of land were unaffected by a grant to the railroads; homesteaders and preemptors with no final title were not so protected.⁵¹

Preemption was originally intended as a means to promote settlement in areas unlikely to be surveyed along the main routes of westward expansion into the "Great American Desert" of the Great Plains. The original Preemption Act⁵² permitted claims to be registered for all lands except those within Indian reservations, town limits, mineral lands, or "lands actually settled and occupied for purposes of trade and business, and not for agriculture."⁵³ Preemption was limited to one hundred and sixty acres and the claim was perfected upon filing with the local land office and paying the minimum price of \$1.25, later doubled to \$2.50, per acre.⁵⁴ Further restrictions were added during and after the Civil War requiring timely filing of notices and payments.⁵⁵ All preemption rights were finally repealed in 1891.⁵⁶

These preemption grants generally reflected Congress's prevailing attitudes on the correct policy for allocating the public domain. In the early years of the railroad land grants the sentiment was that there was enough land for both actual settlement and for aid in promoting development. This view was particularly espoused by representatives from western areas.⁵⁷ The assumption was that since the lands granted to the railroad had been previously available to preemptors at \$1.25 an acre later settlers should be willing to pay a premium of double the price (\$2.50) to have access to the railroad.⁵⁸ In that way the previous policy of not selling public lands for less than \$1.25 per acre⁵⁹ gave way to a "double-minimum" price.

price of the Government at the end of one year...; the homestead settler remains five years and takes the title without payment of a dollar. This is the only real difference between them; but I suppose their rights are the same if they have complied with the law." 1876 Cong. Rec., 44th Cong., 2d Sess. 687 (statement of Sen. Oglesby).

⁵¹ Benjamin Hibbard, *A History of the Public Land Policies* (1939) 251.

⁵² Preemption Act, ch. 16, 5 Stat. 455 (1841).

⁵³ *Ibid.*

⁵⁴ See also Preemption Act of March 3, 1843, ch. 86, 5 Stat. 620 (1843).

⁵⁵ See Acts of May 30, 1862, ch. 86, 12 Stat. 410 (1862); June 2, 1862, ch. 94, 12 Stat. 413 (1862); July 14, 1870, ch. 272, 16 Stat. 279 (1870); March 3, 1871, Res. 52, 16 Stat. 604 (1871).

⁵⁶ Act of March 3, 1891, ch. 561, section 4, 26 Stat. 1097 (1891).

⁵⁷ Cong. Globe, 32d Cong., 1st Sess. 482 (1851).

⁵⁸ *Ibid.* at 273.

⁵⁹ This policy was intended to enhance government revenues from land sales. See Acts of February 28, 1823, ch. 16, 3 Stat. 728 (1823); July 3, 1832, ch. 155, 4 Stat. 538 (1832); September 4, 1841, ch. 16, 5 Stat. 455 (1841).

Under this policy, preemptors who had claimed land within the limits of a railroad land grant were compelled to meet the \$2.50 price. This was because the Preemption Act of 1843,⁶⁰ which extended preemption rights to settlers on government-reserved lands within the primary grant areas for the railroads, was interpreted as requiring for all future as well as past grants that the alternate reserved sections within the primary area be doubled.⁶¹ In an 1869 act,⁶² Congress confirmed that lands would not be sold to settlers for more than \$2.50 per acre. This represented a shift in policy which favored settlers' rights over those of the railroads. Indeed, Representative Julian of Indiana noted in debate on this legislation that the bill "conform[ed] to the views of the House in regard to the rights of settlers."⁶³

If by the 1870s Congress came to the conclusion that the public domain was not inexhaustible and that actual settlement should be promoted, administrative procedures to implement these policies were sorely lacking. Since several years might elapse between a grant to the railroad and its construction, or between establishing and building the route, it was almost inevitable that settlers would come onto the land and would be unaware that they were occupying an alternate tract given to a corporation.⁶⁴ Inconsistent and ever-changing land office procedures and rules often delayed surveys, allowed the railroads to postpone selections of land, and so rendered settlement claims invalid. The commissioner of the Public Land Office had the power to "decide upon principles of equity and justice ... all cases of suspended entries of public lands and of suspended preemption land claims, and to adjudge in what cases patents shall issue upon the same."⁶⁵

The problem of competing railroad and settlers' claims was particularly acute in the indemnity land areas, as the government had withdrawn these lands from settlement while railroads made their decisions regarding their routes. This vastly complicated matters, since lands as far as fifty miles from the right of way could potentially be claimed by the railroad. Until the primary limits had been fully surveyed and the railroads had made their selections, the lieu lands could not be restored to the public domain. It was thus in the railroads' interest to delay surveys in the primary grant in order to have the pick of the indemnity

⁶⁰ See Act of March 3, 1843, *supra* note 54.

⁶¹ Gates, *History of Public Land Law Development*, *supra* note 31 at 366.

⁶² Act of April 10, 1869, ch. 24, 16 Stat. 46 [1869].

⁶³ Cong. Globe, 41st Cong., 1st Sess. 588 [1869].

⁶⁴ Robinson, *Land in California*, *supra* note 2 at 159.

⁶⁵ Robbins, *Our Landed Heritage: The Public Domain, 1776-1970*, *supra* note 20 at 257.

areas.⁶⁶ Their prerogative to have these areas unencumbered and unsettled was upheld by both the secretary of the interior⁶⁷ and the courts.⁶⁸ It was only with President Grover Cleveland's 1888 Executive Order⁶⁹ that twenty-one million acres from the contingent indemnity limits were reopened for settlement.



Leland Stanford



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Leland Stanford. (Huntington Library)

⁶⁶ Hibbard, *A History of the Public Land Policies*, supra note 51 at 249.

⁶⁷ Department of the Interior, *Annual Report* (1887) 9-10.

⁶⁸ See, e.g., *Southern Pacific R.R. v. Wiggs*, 43 F. 333 (C.C.N.D. Cal. 1890), where Judge Sawyer noted: "Manifestly, I think, congress intended to withdraw from

Intensive railroad lobbying, led by the indomitable Leland Stanford, could not prevent this partial compromise of their grants. In testimony before the Pacific Railroad Commission in 1887 Stanford explained the policy of the Southern Pacific to invite settlers to apply for, occupy, and improve lands before the patents were issued to the company:

We have not, [however], sold our lands in advance of obtaining patents from the Government, as we did not think it wise. We have not been able to obtain patents for the land as we applied for them, and that has been a very serious disadvantage to us, because if we had the patents we might have sold the lands and obtained the money from them. The land also would very likely be settled up and furnish business to the road.⁷⁰

This somewhat disingenuous comment failed to note the railroad's interest in delaying the acceptance of patents. Not only would acceptance of grants in the primary area limit the acquisition of more valuable tracts in indemnity areas, but the railroad was also compelled to pay taxes on the accepted lands.⁷¹ Stanford did acknowledge that settlers on the land would be given "preference at the graded price, not taking into consideration their improvements."⁷²

The congressional correspondence docket of the late 1860s and 1870s is virtually littered with memorials and specific bills which seemed to dispute Stanford's placid view of railroad/settler relations. Accordingly there were measures to relieve homesteaders whose certificates had been cancelled by the government because of conflicts with land grants to various railroads,⁷³ or to confirm titles to *bona fide* homesteaders whose rights conflicted with railroad claims.⁷⁴ There was also legislation enacted to aid settlers upon whom the land department had served notice that unless an additional \$1.25 per acre was made to reach the double-minimum

sale, entry or preemption, by parties other than the company, all those lands set apart within fixed limits, as well those authorized to be selected as lieu lands, and thereby preserve the right of selection, till selection was possible to be made, as those absolutely granted in which title itself presently vested." *Ibid.* at 337.

⁶⁹ Department of the Interior, General Land Office, *Report of the Commissioner* (1888) 41.

⁷⁰ *Hearings, U.S. Pacific Railroad Commission*, S. Exec. Doc., 50th Cong., 1st Sess. 2934 (1887) (testimony by Leland Stanford).

⁷¹ Parker, "The Southern Pacific Railroad and Settlement in Southern California," *supra* note 5 at 115.

⁷² *Hearings, U.S. Pacific Railroad Commission*, *supra* note 70 at 2934.

⁷³ H.R. Misc. Doc. No. 242, 43d Cong., 2d Sess. (1874).

⁷⁴ H.R. Misc. Doc. No. 165, 43d Cong., 1st Sess. (1873).

price, their entries within the limits of the railroad grants would be cancelled.⁷⁵

Memorials to Congress described instances where homesteaders or preemptors improved their holdings with the railroads' consent, and with a change in management the settlers' titles would be defeated in the courts.⁷⁶ Individuals would often settle areas with the assurance of the railroad company (for which the lands were withdrawn) that they would not be disturbed pending the patenting of the land; they would be given the privilege of purchasing first. Then, in the final adjustment and location of the grant, large bodies of land would be restored to the public domain and the settlers would find that they had no title.⁷⁷

Missives from the California legislature rang with particular urgency and desperation. A memorial dated January 11, 1870 asserted that the "holding of or claim to such large tracts of land, by a few persons, have proved disastrous to the interests of our citizens, by preventing the development of our resources and the settlement of our state."⁷⁸ This was in specific reference to the Southern Pacific land grant, a portion of which the secretary of the interior had ordered to be returned to the public domain, a decision the railroad vigorously protested.⁷⁹ The California legislature had some years before proposed to Congress an amendment of the Central Pacific charter which would have completely recognized the claims of preemptors on the lands and prevented their eviction.⁸⁰ Since the Southern Pacific was a creature of California

⁷⁵ H.R. Misc. Doc. No. 73, 44th Cong., 1st Sess. [1875].

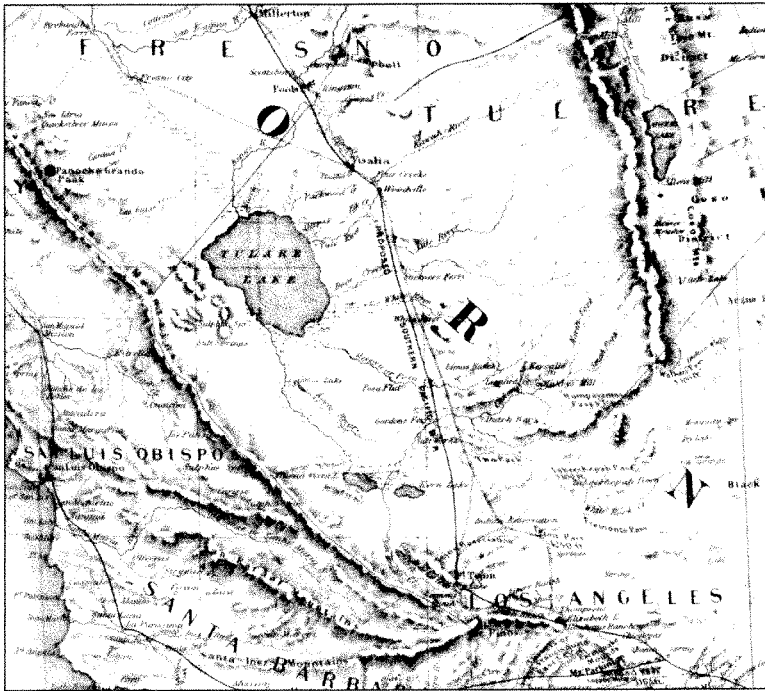
⁷⁶ See, e.g., H.R. Rep. No. 1939, 47th Cong., 2d Sess. [1882].

⁷⁷ H.R. Rep. No. 1512, 46th Cong., 1st Sess. [1879].

⁷⁸ *Resolution of the California Legislature on the Return of the Southern Pacific R.R. Lands to the Public Domain*, S. Misc. Doc. No. 21, 41st Cong., 2d Sess. [1870]. In a resolution of March 2, 1872 the California legislature urged that all public lands in the state be reserved for actual settlement only and noted that the "monopoly of many large tracts in advance of settlement by speculators, who hold them without improvement, retard[s] the development of this State, increas[es] the cost of settlement, and diminish[es] the inducement to immigration." See S. Misc. Doc. No. 127, 42d Cong., 2d Sess. [1872].

⁷⁹ *Ibid.* See supra notes 69-70 and accompanying text.

⁸⁰ See S. Misc. Doc. No. 68, 39th Cong., 1st Sess. [1865]. The proposal offered to amend section 4 of the Central Pacific Railroad Act of July 1, 1862, adding that: "the improvements of any *bona fide* settler shall be deemed to include such improved lands as now are and were at the date of the location of said line of road actually occupied and improved by *bona fide* settlers, in accordance with the laws of California, and such other lands as have for said period been and still are peaceably and actually occupied and possessed for any and every beneficial purpose, to the extent of one hundred and sixty acres to each occupant — [the] amendment shall enable such settlers to purchase such lands from said railroad company by paying said company therefore the government price of one dollar and twenty five cents per acre."



Map of California with proposed Southern Pacific routes through Fresno and Tulare Counties, ca. 1880. (Huntington Library)

law, the state legislature would have been free to impose this restriction on their corporate charter, were it not for the fact that the land grant was directly from the federal government. Due to the Southern Pacific's peculiar organization, it could successfully play off and counterbalance federal and state regulation.⁸¹

This process of regulatory evasion was illustrated in Congress's first attempt in the 1870s to affirmatively mediate railroad/settler disputes through legislation. The Act of June 28, 1870⁸² reserved the rights of actual settlers as it permitted the Southern Pacific to alter its planned right of way through the San Joaquin Valley. Congress ordered the secretary of the interior to issue the land patents for the area. This is precisely what Secretary Cox, along with his predecessor in the Grant Administration, Secretary Browning, had steadfastly refused to do, believing that the railroads' claim was unlawful.⁸³

⁸¹ John Bell Sanborn, *Congressional Grants of Land in Aid of Railways* (1899) 81.

⁸² *Joint Resolution Concerning the Southern Pacific Railroad*, *supra* note 42.

⁸³ "Settlers' Struggle," *supra* note 7 at 5-11 (detailing the correspondence between the settlers and the interior secretaries).

If Congress intended the "reserve" clause of the 1870 act to fully protect the interests of the San Joaquin settlers, this motivation was obscured by their language. The attorney general did note in 1876 that in drafting the clause, "Congress must necessarily have been aware that, during the difference of opinion and conflict of orders which had been given in regard to these lands, much injury might be done to *actual settlers* upon them, and it is to be inferred that this clause was intended to protect those who had actually made settlement, and thus necessarily made improvements upon the land."⁸⁴ Attorney General Devans went on to note that "actual settlers, in addition to those who were rightfully preemptors and homesteaders, should have *equitable rights respected*, a[nd] should be allowed, upon making proper proof of their actual settlement, to obtain title to their lands."⁸⁵ This hinted at a wider definition of "settler," a construction of the act that was resolutely denied by the court which ultimately adjudicated and rejected the Mussel Slough settlers' claims.⁸⁶

If the 1870 act was ambiguous in its effect, the statute of June 22, 1874 for the relief of settlers on railroad lands⁸⁷ was almost opaque in meaning and intent. It entitled the railroads to select equal amounts of land elsewhere in the primary land grant in order to compensate for lands in the possession of actual settlers. This essentially augmented the indemnity lands.⁸⁸ The final clause of the act was most curious. It disclaimed any interpretation that would confirm or legalize Interior Department rulings certifying land to railroads which had been entered by preemptors or homesteaders after the location of the line had been set and before the notice of withdrawal.⁸⁹

This provision was apparently in response to Secretary of the Interior Delano's decision of March 15, 1873 which reversed the long-standing General Land Office practice allowing preemptors to retain lands they had entered *after* a railroad plat had been filed but *before* the local land office had withdrawn the tracts.⁹⁰ That decision "rendered many homeless, or at least t[ook] away their

⁸⁴ Opinion of Attorney General Devans to Interior Secretary Schurz, 15 Op. Att'y Gen. 583 (1876), reprinted in "Settlers' Struggle," supra note 7 at 9-10 (original emphasis).

⁸⁵ *Ibid.* (original emphasis).

⁸⁶ Orton, 32 F. at 479-80 (C.C.D. Cal. 1879).

⁸⁷ Act of June 22, 1874, ch. 400, 18 Stat. 194 (1874).

⁸⁸ Gates, *History of Public Land Law Development*, supra note 31 at 367 n. 78; Lewis Henry Haney, *Congressional History of Railways in the United States, 1850-87* (1910) 31.

⁸⁹ Act of June 22, 1874, ch. 400, 18 Stat. 194 (1874).

⁹⁰ For an abstract of this decision, see 1876 Cong. Rec., 44th Cong., 2d Sess. 613-14, 685.

lands when, under the former ruling, they were entitled to them."⁹¹ If Congress had desired to overrule this new Interior Department practice, stronger language would have been required. The 1874 act merely anticipated future action.

In the same way, an 1875 act⁹² offered a refund of the preemption price to settlers who had purchased double-minimum lands which were originally located within the limits of railroad grants but were thrown outside the primary area when the route changed.⁹³ A later statute⁹⁴ likewise established an expectation interest for landowners in proximity to a planned railroad. Only in this way could a settler who had expected to purchase a tract from a railroad be guaranteed title when the right of way was altered and the lands were restored to the public domain. In cases where the corporations themselves abandoned a grant, the railroads were ambivalent about the rights of extant settlers against the claims of newcomers. They were, however, anything but neutral when they claimed the freedom to dispose of lands actually within their grant, even if preemptors had come onto the land with the companies' assurance that they would be given the first option to purchase at prices which did not reflect improvements. This was the essential issue at Mussel Slough, and the subject of the 1876 act to confirm preemption and homestead entries in railroad lands.⁹⁵

The 1876 act was aimed at two chief evils. The first was that early settlers on lands later granted to the railroads could not transmit a valid title to a vendee, but rather had to abandon their property. The question was whether the grant would revert back to the government, and so allow the second preemptor to take possession, or if the tract would enter the railroad domain. The provision of the bill treating this problem⁹⁶ was criticized on the Senate floor as being ineffective. The language did not truly protect the right of preemptors to transfer their status to future landowners, thus perpetually keeping the lands outside of a railroad grant.⁹⁷

⁹¹ 4 Cong. Rec. 685 (1876) [statement of Sen. Kelly].

⁹² Act of March 3, 1875, ch. 196, 18 Stat. 519 (1875).

⁹³ See S. Rep. No. 254, 45th Cong., 2d Sess. (1878).

⁹⁴ Act of Jan. 13, 1881, ch. 19, 21 Stat. 315 (1881).

⁹⁵ Act of April 21, 1876, ch. 72, 19 Stat. 35 (1876).

⁹⁶ Section 2 of the bill, originally offered by Sen. Harvey of Kansas, read: "That when at the time of such withdrawal as aforesaid valid preemption or homestead claims existed upon any lands within the limits of such grants which afterward were abandoned, and under the decisions and rulings of the Land Department were re-entered by preemption and homestead claims who have complied with the laws governing pre-emption or homestead entries, or shall make the proper proofs required under such laws, such entries shall be deemed valid, and patents shall issue therefore to the person entitled thereto." 4 Cong. Rec. 613 (1876).

⁹⁷ 4 Cong. Rec. 614 (1876) [remarks by Sen. Bogy]. In a colloquy with Sen. Sargent from California, Bogy was skeptical that the bill allowed a succeeding preemptor

The second issue, already alluded to, was the perceived need to overturn the Interior Department's 1873 decision⁹⁸ immediately passing title to railroads upon a plat-filing and before patenting or local notice. The bill's first section confirmed entries made within railroad grants before the companies notified the local land offices that the tracts were withdrawn.⁹⁹ The senators sponsoring the act maintained that homestead and preemption laws were general, while land-grant acts were special. It was thus necessary that the general laws should be fully respected until the definite boundaries, within which the special laws were operative, were determined.¹⁰⁰ Secretary Delano's ruling ignored the fact that the railroad grants required the lands to be withdrawn from the market after the plat was filed and that that action marked the first official delimitation and segregation of the grant.¹⁰¹

Congressional attempts at protecting settlers' rights were unjustifiably tardy, textually inconsistent, and woefully incomplete. If the developing conflict at Mussel Slough had made an impression on the legislative process, there is no indication in the congressional history. Aside from the receipt of memorials from settlers in the San Joaquin Valley, no action was taken for specific relief in that region. In an 1876 petition,¹⁰² two thousand preemptors prayed that the Southern Pacific grants be forfeited and the land returned to the public domain. The rhetoric of this missive was in stark contrast with the measured tones of congressional debate and decision. There were no references to vested rights. Litigation, which was seen by Congress as a way to vindicate a settler's title, was regarded by these same preemptors as vexatious, full of hardship, and probably futile.¹⁰³ While Congress may have contemplated railroad development proceeding in concert

to come into a land "full armed and equipped, and his title ... as perfect as if he had held it a thousand years." *Ibid.* at 616.

⁹⁸ See *supra* note 90.

⁹⁹ Act of April 21, 1876, ch. 72, 19 Stat. 35 (1876). Section 1 read: "That all preemption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land-office of the district in which the lands are situated, or after their restoration to market by order of the General Land Office, and where the preemption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto."

¹⁰⁰ 4 Cong. Rec. 616 (1876) [statement by Sen. Sargent].

¹⁰¹ *Ibid.* at 687 [speech by Sen. Oglesby].

¹⁰² See *Petition*, *supra* note 7.

¹⁰³ *Ibid.* at 1.

with settlement, preemptors saw the railroads only as "soulless incorporations," antithetical to the public's interest and to theirs.¹⁰⁴

THE ORTON DECISION AND THE
JURISPRUDENCE OF LORENZO SAWYER

The Mussel Slough settlers did not, of course, rely on congressional intervention alone to prevail in their claims. Litigation against the railroad was soon resorted to when it was manifest that the Southern Pacific intended to openly auction the lands at prices vastly in excess of what the company had promised the original inhabitants.¹⁰⁵ The Southern Pacific obliged by filing twenty-four suits for damages and ejectment against the settlers.¹⁰⁶ The cases made their way to the United States Circuit Court for the Ninth Circuit¹⁰⁷ by a Southern Pacific appeal against an Interior Department decision to grant a patent to a particular preemptor named Orton.¹⁰⁸ This became the test case for the settlers' cause.

The case was heard before Judge Lorenzo Sawyer of the Ninth Circuit. Sawyer, originally from New York, lived and practiced law in Ohio before he migrated to California in 1850.¹⁰⁹ He was elected as a judge of the California Supreme Court in 1863, and from 1868 to 1870 served as its chief justice.¹¹⁰ President Ulysses S. Grant nominated Sawyer for the newly organized United States Circuit Court for the Ninth Circuit on December 8, 1869 and he was confirmed without dissent by the Senate in the following month.¹¹¹ In this capacity, Sawyer arguably had competence over the largest expanse of original jurisdiction in the nation's history.¹¹²

Sawyer was politically conservative. Originally a Whig, then a member of the American Party, he was a Republican for most of his life.¹¹³ He was first elected to the Supreme Court on a

¹⁰⁴ *Ibid.* at 2.

¹⁰⁵ See *supra* notes 8-14 with accompanying text.

¹⁰⁶ McKee, "Notable Memorials to Mussel Slough," *supra* note 1 at 20.

¹⁰⁷ The style of the *Orton* case, 32 F. 457 (C.C.D. Cal. 1879), is confusing since the opinion was filed before commencement of the Federal Reporter and was published in connection with another case, *Southern Pacific R.R. v. Poole*, 32 F. 451 (C.C.N.D. Cal. 1887).

¹⁰⁸ *Orton*, 32 F. at 464 (C.C.D. Cal. 1879).

¹⁰⁹ Oscar T. Shuck, *Bench and Bar in California* (Los Angeles, 1901) 569.

¹¹⁰ 3 *The Green Bag* 448 (1891).

¹¹¹ *Dictionary of American Biography*, Vol. 16 (New York, 1935).

¹¹² 24 *Chicago Legal News* 12 (1891).

¹¹³ *Dictionary of American Biography*, *supra* note 111 at 396.

Republican slate.¹¹⁴ Like United States Supreme Court Justice Stephen Field, Sawyer was closely connected with California's corporate elite.¹¹⁵ He was apparently a shareholder of the Big Four's Central Pacific Railroad and the first president of the board of trustees of Leland Stanford, Jr. University.¹¹⁶ He left an estate of \$300,000.¹¹⁷

Sawyer was uniquely placed to expand the rights and prerogatives of corporations. It was not surprising then that the Ninth Circuit of the 1870s and 1880s, with its activist sitting judge and the indefatigable Justice Field riding circuit, built a reputation for permissive grants of power to corporations.¹¹⁸ Ninth Circuit innovation in this field was often reflected in opinions encompassing corporations within the meaning of "persons" under the fourteenth amendment.¹¹⁹ The *Orton* decision contained a distinctive element of balancing the goal of economic efficiency and certainty of expectation for the railroad with the powerful equities commanded by the Mussel Slough settlers.

Orton was undoubtedly a personally difficult decision for Sawyer. He had taken over the family farm after his father's death and later was a miner in Nevada on government land before finally settling in San Francisco.¹²⁰ He was often quoted as "having the greatest love and respect for the honest tiller of the soil."¹²¹ This was traditional rhetoric by a judge well-schooled in the politics of a state still very agricultural in character. It was consonant with the created mythology of the yeoman farmer, the heroic homesteader, the persistent preemptor, conquerors of the Great American Desert, the last frontiersman. Legislators did not really believe this,¹²² and so it was not surprising that Judge Sawyer did not truly profess this romantic vision.

What is extraordinary is the extent to which Sawyer used

¹¹⁴ Shuck, *Bench and Bar*, supra note 109 at 569.

¹¹⁵ Graham, *Everyman's Constitution*, supra note 3 at 573.

¹¹⁶ Shuck, *Bench and Bar*, supra note 109 at 569.

¹¹⁷ *Ibid.* at 570.

¹¹⁸ Sawyer would write to a friend in 1885, after the Supreme Court's withdrawal of Circuit jurisdiction in *Robb v. Connolly*, 111 U.S. 624 (1884), that "... we judges on this coast have been 'elevating our horns' a little too high of late, and will have to take them down." See Graham, *Everyman's Constitution*, supra note 3 at 575-76.

¹¹⁹ The most important of these decisions was *The Railroad Tax Case: County of San Mateo v. Southern Pacific R.R.*, 13 F. 722 (C.C.D. Cal. 1882). Here Sawyer directly equated corporations as persons, while Justice Field took the more oblique approach of looking behind corporations to individual shareholders. The court held that the Southern Pacific could not be levied against without due process of law. See generally Graham, *Everyman's Constitution*, supra note 3.

¹²⁰ Shuck, *Bench and Bar*, supra note 109 at 569.

¹²¹ 24 *Chicago Legal News* 12 (1891).

¹²² See supra note 50.

unorthodox techniques of statutory interpretation and judicial review in granting the corporation additional powers. Orton marked a significant moment in the progressive dominance given to the federal general law of corporations over state regulation of charters. Sawyer accordingly defeated the settlers' chief arguments:¹²³ (1) that the original route of the railroad was binding since it was fixed by the articles of association under the laws of California;¹²⁴ (2) that any state authorization for the change of route was unconstitutional; and, (3) assuming the route change was valid, that the 1870 Congressional recognition¹²⁵ expressly reserved the rights of the settlers.

Sawyer's first exercise in divining legislative intent involved the original congressional land grant to the Southern Pacific.¹²⁶ Here the court justifiably held that Congress intended that the grant be made to a corporation, "not to the road, or the line of road to be built by the company."¹²⁷ The Southern Pacific was free, in principle, to change the route of the road, provided it complied with the stated congressional goal of connecting San Francisco and San Diego with the terminus of the Atlantic and Pacific line at the eastern border of the state.¹²⁸ Then the court made a critical point, almost in passing, that the railroad lands were withdrawn when the company filed its plats with the land office. "Instantly upon the filing of the plat, the odd sections within the prescribed limits on each side of the line indicated became affected by these provisions; and the statute *proprio vigore*, withdrew them from sale, entry, or preemption except by the company."¹²⁹ This, it seems, violated the 1876 act, which provided that railroad claims would operate only when notice was given at the local land office that the tracts had been withdrawn.¹³⁰ While Mr. Orton had entered the tract two years after the 1867 filing of the plat, it is not certain that the land had actually been withdrawn at that time.¹³¹

The court's treatment of the settlers' third argument, concerning the effect of the 1870 act's saving clause,¹³² was likewise ambiguous. Here Sawyer ruled that "the saving clause was [not] intended to refer to any other settlers than those who were actually settlers

¹²³ Orton, 32 F. at 465 [C.C.D. Cal. 1879].

¹²⁴ See supra notes 28-31 and accompanying text.

¹²⁵ See supra notes 82-86 with accompanying text.

¹²⁶ Supra note 22 at section 18.

¹²⁷ Orton, 32 F. at 466 [C.C.D. Cal. 1879] [original emphasis].

¹²⁸ Ibid. at 467.

¹²⁹ Ibid. at 468 [original emphasis].

¹³⁰ See supra notes 95, 98-101 and accompanying text.

¹³¹ Orton, 32 F. at 464 [C.C.D. Cal. 1879].

¹³² Act of June 28, 1870, Res. No. 87, 16 Stat. 382 (1870).

before and at the time of the filing of the plat. Those settling subsequently could acquire no rights."¹³³ The court confidently relied on the line of decisions holding that the railroad land grants were *in praesenti*, vesting at the time of the relevant congressional act.¹³⁴ Judge Sawyer went on to comment on congressional uncertainty in vesting rights through the railroad grants.¹³⁵ He seemed to believe that legislative attempts to provide for settlers' rights against the railroads were mere expressions of "congressional opinion" and could not have limited the rights of the railroad, even if Congress had desired that action.¹³⁶ The court thus rejected any possibility that railroad land grants could later be modified or forfeited, even in the face of manifest failure of the corporations in abiding by their terms and conditions.

Sawyer was limiting the federal power of control over the railroad land grants while also severely restricting state remedies against the *ultra vires* acts of the corporations (i.e., those acts beyond the powers of the corporations). This latter development was *Orton's* chief contribution to the case law and also reflects Judge Sawyer's most expansive use of the federal general common law to overturn state precedent. Sawyer first found solace in *Schulenburg*¹³⁷ that whether a corporation had committed *ultra vires* acts "is a question between it and the state alone, to be inquired into on a direct proceeding for that purpose."¹³⁸ Judge Sawyer realized, however, that he could not reject the settlers' case on that ground. He had to proceed to the merits: "Considering the vast interests involved, and the number of persons who must have become interested as purchasers from the plaintiff [the Southern Pacific], and in the securities resting on the plaintiff's title, I do not feel at liberty to leave the case on that point alone."¹³⁹ This desire to reach a planned result was reflected in the very first passage of the decision where the extensive economic reliance of many parties on the validity of the grants is cited.¹⁴⁰

¹³³ *Orton*, 32 F. at 479 [C.C.D. Cal. 1879].

¹³⁴ See *Schulenberg v. Harriman*, 88 U.S. at 60 [1874]; *Van Wyck v. Knevals*, 106 U.S. 360, 365 [1882].

¹³⁵ See *supra* notes 82-104 with text.

¹³⁶ See Sawyer's later decision in *Wiggs*, 43 F. at 338 [C.C.D. Cal. 1890]. In *Orton*, Sawyer notes: "The object of the resolution seems to have been to relieve the doubts of the secretary of the interior — a formal expression of congressional opinion. But if the clause be regarded as prescribed by law, its omission does not affect the patent so far as it is otherwise valid. The most that can be said is, that its omission does not vitiate any rights that ought to have been protected by its insertion. Those, like the defendant, who have no rights to protect, cannot complain of the omission." 32 F. 479.

¹³⁷ *Schulenberg v. Harriman*, 88 U.S. at 62 [1874].

¹³⁸ *Orton*, 32 F. at 471 [C.C.D. Cal. 1879].

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.* at 465.

The precise issue in question was whether the provision of the California constitution,¹⁴¹ prohibiting the creation of all but municipal corporations by special acts, prevented the California legislature from approving the change in the Southern Pacific's route through the San Joaquin Valley.¹⁴² Sawyer noted that California had already liberalized its general incorporation act by allowing companies to freely amend their articles of incorporation.¹⁴³ This general grant of freedoms to corporations was unprecedented¹⁴⁴ but was also immediately the subject of extensive interpretation by the California Supreme Court. In *San Francisco v. Waterworks*¹⁴⁵ that court ruled that corporations could hold no powers except such as were conferred by the general laws under which they were formed, and that the legislature cannot confer on such corporations any powers, or grant them any privileges, by special act.¹⁴⁶ Coming after the 1870 act, this decision would have seemed to prevent the Southern Pacific from changing the route of its road and from claiming the land grants in question at Mussel Slough.

Judge Sawyer did not accept the binding authority of the *Waterworks* case in interpreting the California constitution. Citing to an earlier contrary holding¹⁴⁷ and exploiting his knowledge of the personalities on the California Supreme Court, he ruled that in actuality the opinions of the court had split on the issue. He was thus free to adopt his own views.¹⁴⁸ This was a wholly perverse use of the federal general common law. Not only did Sawyer explicitly renounce any use of *stare decisis* in giving conclusive authority to the last decision of the competent court, he also critiqued the rule in *Waterworks* as containing "numerous and manifest inconveniences."¹⁴⁹

Sawyer was acting upon his pro-corporation views in *Orton* and offered an analysis that would be repeated in *The Railroad Tax Cases*. Corporations, he believed, should be given full scope to carry out their functions. Granting them the right to change their articles of incorporation and to secure the protections afforded to "persons" under the fourteenth amendment was part and parcel of

¹⁴¹ Cal. Const. of 1849, art. IV, section 31 (1849).

¹⁴² This approval was noted at *Orton*, 32 F. at 463 [C.C.D. Cal. 1879].

¹⁴³ Act of March 1, 1870, 1869-70 Cal. Stat. 107.

¹⁴⁴ *Orton*, 32 F. at 478 [C.C.D. Cal. 1879].

¹⁴⁵ *City and County of San Francisco v. Spring Valley Water Works*, 48 Cal. 493 (1874).

¹⁴⁶ *Ibid.* at 512-13.

¹⁴⁷ *California State Telegraph Co. v. Alta Telegraph Co.*, 22 Cal. 398 (1863).

¹⁴⁸ *Orton*, 32 F. at 477 [C.C.D. Cal. 1879].

¹⁴⁹ *Ibid.*

the same trend toward the liberalization of corporation law. There were, moreover, no seeming qualifications or caveats in Judge Sawyer's solicitude to corporations. Individuals apparently had no role in economic life, according to this version of events at Mussel Slough. We merely have the story of Mr. Orton, a metaphorical Everyman in this test case, caught in a bewildering web of grants, statutes, plat filings, article amendments, and railroad construction schedules. It was almost as if Mr. Orton's situation was described and considered as an afterthought.¹⁵⁰

Important issues were indeed at stake in the *Orton* case. Judge Sawyer's later statement that "vast interests were involved and the litigation was by no means conducted without acrimony,"¹⁵¹ was quite an understatement in light of the ensuing tragedy. The "vast interests" that were mentioned here were necessarily those of the railroads. Their rights had to be vindicated in order to ensure a consistent expectation of investment in the great Pacific railroads. This seemed to be very much out of step with the prevailing legislation and congressional goals of the time. Yet the issue of how to properly vest rights was effectively forsaken by Congress; legislators could only wax philosophical on the expected effectiveness of the protections they proposed for settlers on railroad lands. As a consequence, it fell to the courts to apply vested rights theory. In Lorenzo Sawyer's jurisprudence this served as an avenue for the expansion of a corporate construction of economic life, the judicial approval of vast aggregations of wealth and power, and the subordination of the public trust under public utilities.

In a fashion, Judge Sawyer and the novelists who later chronicled the Mussel Slough incident, shared the same imagery of the "great conglomerate West." This vision was undoubtedly more realistic than Congress's created mythology of the yeoman farmer who lived in harmony with the carefully husbanded forces of industrialization and mass transportation. Sawyer's jurisprudence and the reconstructed fictional accounts that followed completely disagreed in their rhetorical treatment of the place of monopolies in the national economy, in their reflections on the legal system, and in their assignment of blame for the tragedy.

Later novelists offered a sharp critique of Lorenzo Sawyer's jurisprudence, which arguably indulged in a reductionist approach to law. This is where novelist and judge most fundamentally differed in their respective visions of the moment in American

¹⁵⁰ For example, one issue never referred to was the matter of the railroad's promises to the settlers upon entry to the land. See *supra* note 8 and accompanying text. This seemed to have been a particularly strong argument for the settlers and was given credence in decisions by the California Supreme Court upholding the enforcement of these guarantees. See *Boyd v. Brinckin*, 55 Cal. 427 (1880).

¹⁵¹ See *Poole*, 32 F. at 452 [C.C.D. Cal. 1879].

economic life captured at Mussel Slough. Judge Sawyer felt comfortable in creating the ideal conditions of the great conglomerate West, but the problems of corporate responsibility eluded him. The actors in *Orton* were abstract forces. The only individuals portrayed were obstructors of corporate rights, erectors of "manifest inconveniences" for corporate organization and prerogative.¹⁵² Sawyer was unwilling even to look behind corporations to find a collection of shareholders, officers, and employees since that would have meant also discovering at Mussel Slough a pattern of broken promises, bad faith dealing, and greed.

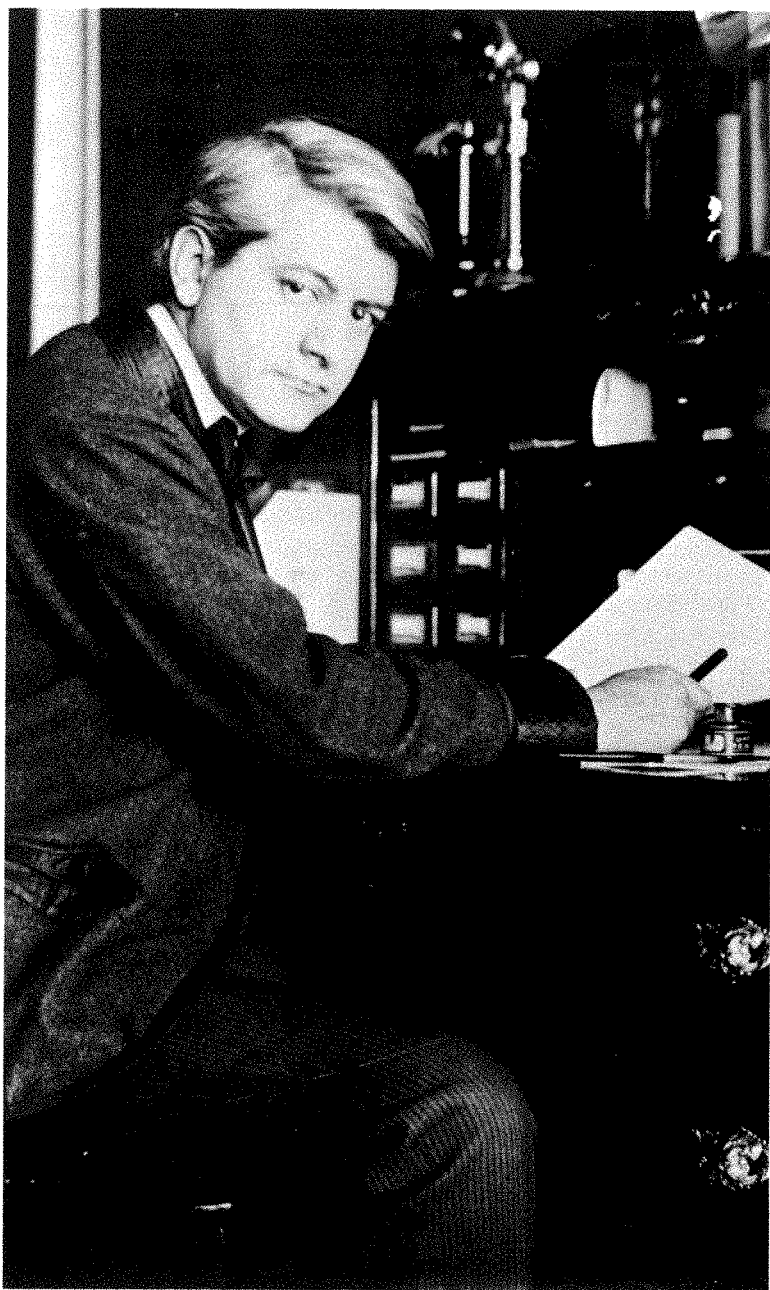
Sawyer's corporation jurisprudence would today be considered by legal pragmatists as artful and realistic. But his decisions, like the legislative enactments of Congress in the 1870s, seemed lacking in a sense of audience, and of place. Once at the center of controversy, neither played a role in resolving it. Both public policy and jurisprudence were unresponsive to the singular social conflict narrated in this article. The legal rhetoric used by Congress and Judge Sawyer were unpersuasive. Only in this retelling of the story of Mussel Slough does the law have a central position. Otherwise, we are left only with Frank Norris' vivid imagery of human tragedy entwined and entangled in the tentacles of the "soulless Force, the iron-hearted Power, the monster, the Colossus, the Octopus."¹⁵³



Judge Lorenzo Sawyer. [Oregon Historical Society].

¹⁵² See *supra* note 149 and accompanying text. The high-water mark for judicial recognition of inexorable economic forces was the Supreme Court's opinion in *Lochner v. New York*, 198 U.S. 45 (1905), ruling unconstitutional a New York statute limiting the hours of work in bakeries.

¹⁵³ Frank Norris, *The Octopus* (Garden City, 1935) 285.



Frank Norris, author of *The Octopus*. (The Bancroft Library)

THE NOVELISTS' RETELLING OF
THE "BATTLE" OF MUSSEL SLOUGH

Five significant works were written between 1882 and 1912 about the events at Mussel Slough.¹⁵⁴ Almost all are today long-forgotten, being of little literary merit. Only Frank Norris' *The Octopus* has endured to become a recognized classic in the naturalistic genre of American writing at the turn of the century. Each of these works did serve, however, to keep the memory of Mussel Slough alive in the minds of later, like-situated, social activists. In California, "the Mussel Slough affair was maintained in the public's imagination as a dramatic and sensational symbol of the railroad's destructive power."¹⁵⁵ These memorials to Mussel Slough thus tended to pursue two distinct social agendas: to espouse the cause of anti-monopolism and to more generally chart the interaction of conflicting economic forces in America.

Charles C. Post's *Driven From Sea to Sea* was, for example, purely intended as an anti-trust tract. Of all the Mussel Slough novels, its plot most closely parallels the actual events of the tragedy. Writing just four years after the shootings, Post saw the novel as a powerful supplement to his activities as the editor of the antimonopolistic *Chicago Express* and his work in the Grange movement.¹⁵⁶ Post's San Joaquin characters were beset by the full spectrum of misfortune: thwarted by the weather, evicted by land syndicates, frustrated by a competing mining operation, only to then be challenged by the Southern Pacific.¹⁵⁷ This account, however, may not be called true "economic fiction" as the farmers' woes were only generalized, and the railroad's final actions were almost trivialized.

Post does, nonetheless, correctly account for some of the conditions which contributed to the conflict. He "was certainly aware that free land and preemption were about at an end, and he realized that settlers would soon find that there was no more land available."¹⁵⁸ Post saw the disappearance of the frontier as a severe

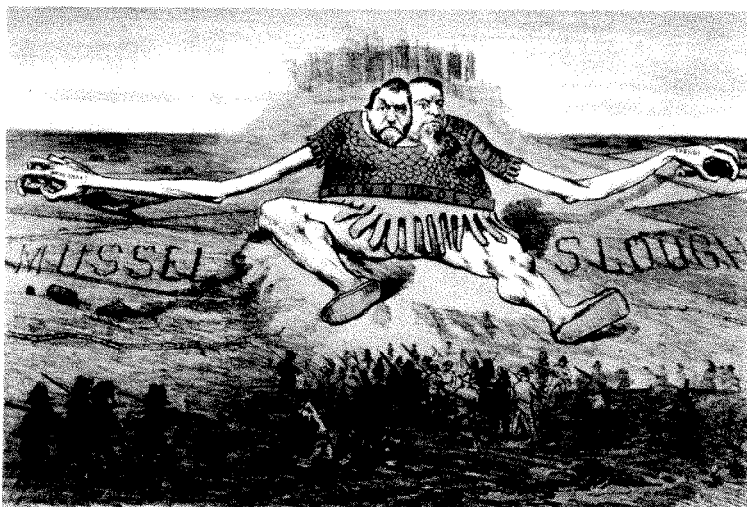
¹⁵⁴ See William Chambers Morrow, *Blood Money* (San Francisco, 1882); Charles Cyrel Post, *Driven From Sea to Sea, or Just a Campin'* (Chicago, 1884); Josiah Royce, *The Feud of Oakfield Creek* (Boston, 1887); Frank Norris, *The Octopus* (Garden City, 1901); Charles Edward Russell, *Stories of the Great Railroads* (1912). For a later novel, see May Merrill Miller, *First the Blade* (New York, 1938). For more on the works by Morrow and Miller, see J. L. Brown, "More Memorials to Mussel Slough," *Pac. Hist. Rev.* 26 (1957) 373.

¹⁵⁵ See Donald Pizer, *The Novels of Frank Norris* (1966) 119.

¹⁵⁶ Gordon W. Clarke, "A Significant Memorial to Mussel Slough," *Pacific Hist. Rev.* 18 (1949) 501, 502.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.* at 502.



THE FEUD OF MUSSEL SLOUGH

Cartoon by Keller in *The Wasp*, San Francisco, March 12, 1881. The two heads are Stanford and Crocker. (Bancroft Library)

psychological blow to land-seekers who could no longer be assuaged, after eviction, by the prospect of better land to the West. His contemporary vision of the root causes of the settler discontent made the congressional goal of emphasizing actual settlement over railroad development¹⁵⁹ seem even more disingenuous and lame. With the integration of a national economy, legislation of the 1870s was undoubtedly a decade late in operation. Americans could be "driven from sea to sea" without finding a tract of open land, thus denying the mythology of the open frontier.

As a treatment of the social and economic conflicts typified by Mussel Slough, Harvard philosopher Josiah Royce's *The Feud of Oakfield Creek*, is considered a notable failure.¹⁶⁰ Aside from Royce's manifold disguises of the incident,¹⁶¹ he allowed the domestic drama of the characters to overshadow the larger issues of the social consequences of their actions.¹⁶² The characters do, however, bear some resemblance to historical figures. Alonzo Eldon, the wealthy financier and antagonist of the settlers, is a fictional Leland Stanford.¹⁶³ Royce criticized the evil in a system

¹⁵⁹ See, generally, *supra* notes 62-63 with accompanying text.

¹⁶⁰ McKee, "Notable Memorials to Mussel Slough," *supra* note 1 at 24.

¹⁶¹ The scene is Oakfield Creek, some distance from Mussel Slough, and the date is May 12, 1883. The "villain" is a land company rather than a railroad.

¹⁶² McKee, "Notable Memorials to Mussel Slough," *supra* note 1 at 24.

¹⁶³ Clendenning introduction in Josiah Royce, *The Feud of Oakfield Creek* (1970 ed.) xvi.

that allowed Eldon to attain vast power through great wealth; at the same time he denounced the settlers, acting as a mob, for being a different sort of evil. The chief struggle in the novel, therefore, was between the "robber barons" and the "populists." As a philosopher and intellectual, Royce happened to despise both. By contrast, Frank Norris selected Mussel Slough less as an incident depicting social injustice, than for its literary usefulness. Consequently, *The Octopus* is a more accomplished novel. When writing in 1901, "Norris was scarcely dealing with a new or inflammatory subject by portraying the injustices of monopoly. Trusts had few defenders in nineteenth century America except for a handful of economic theorists and the trust owners themselves, and the Southern Pacific had fewer supporters than most."¹⁶⁴ Attacking a trust in Norris' time represented little more social involvement than attacking communism in the 1950s.¹⁶⁵

In a 1948 article, author Irving McKee commented that Norris altered Mussel Slough by concentrating it around "Bonnevill" (Tulare), flattening out the hills, enlarging the ranches, and installing a Spanish mission. The railroad became the "Pacific and Southwestern," and the author's characterization of it as the "Octopus" was reinforced with evidence of political bribery, far-reaching monopoly, and inequitable freight rates. But the central incident of the story follows the main facts of Mussel Slough.¹⁶⁶ Magnus Derrick (Major McQuiddy) leads the settlers, while Delaney (Crow) is the railroad claim-jumper responsible for a number of the killings. The farmers are defeated in the courts, the shootings follow, and the lands revert to the railroad.¹⁶⁷

Though Norris had hoped *The Octopus* would be received more "as drama than didactics, as art than propaganda,"¹⁶⁸ the novel does contain strong sentiments about the role of law in resolving social conflict. Nowhere is this better illustrated in the story than in its final passages. Here one of the heroes, Presley (a poet who closely represents Norris himself), confronts the almost legendary Shelgrim, president of the Pacific and Southwestern, and asks him to explain his company's actions in evicting the settlers by force. Here is the essence of Shelgrim's response, speaking as a reincarnation of Collis P. Huntington, one of the Big Four:

¹⁶⁴ Pizer, *The Novels of Frank Norris*, supra note 155 at 120. In an earlier Norris novel, *Vandover and the Brute*, one character spoke bitterly of the Southern Pacific as "a ... great monopoly that was ruining both the city [San Francisco] and the state." Frank Norris, *Vandover and the Brute* (Garden City, 1928) 22.

¹⁶⁵ Pizer, supra note 155 at 120.

¹⁶⁶ McKee, "Notable Memorials to Mussel Slough," supra note 1 at 25.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid. at 26.



THE CURSE OF CALIFORNIA.

"The Curse of California." Cartoon by Keller in *The Wasp*, San Francisco, August 19, 1882. (Bancroft Library)

You are dealing with forces, young man, when you speak of wheat and the Railroads, and not with men. There is the Wheat, the Supply. It must be carried to feed the People. There is the demand. The Wheat is one force, the Railroad, another, and there is the law that governs them — supply and demand. Men have only little to do with the whole business.... If you want to fasten blame on the affair at Los Muertos [the fictional Mussel Slough] on any one person, you will be making a mistake. Blame conditions, not men.¹⁶⁹

This passage has been read as a sign of Norris' sympathy for the railroads, some peculiar change of heart he had before drafting the final pages of the work.¹⁷⁰ Norris did indeed subscribe to the notion that since natural law was an omnipotent law of natural life, there must be similar laws in economic and social life.¹⁷¹ Although Norris would have "accepted [the Big Four's] argument that those who grow and ship wheat are parallel agents within the inevitable functioning of the law of supply and demand," he would have denied their plea "that individual farmers and individual railroads [were] not responsible for the way in which they performed their roles."¹⁷² Norris validated the idea that individual evil and its consequences could exist in an inexorable social condition.

Author Donald Pizer comments that Shelgrim's statement was the full expression of a philosophy that combined economic determinism, Social Darwinism, and evolutionary theism.¹⁷³ It was coupled with other rallying cries of unbridled commerce: chants of "all the traffic will bear" to legitimize exorbitant freight rates, the professions of powerlessness by those who commanded extraordinary wealth, and the false sense of inexorability in an age characterized by unparalleled economic dynamism.¹⁷⁴ In this rhetoric, the law became only the calculus of the operation of supply and demand, omnipotent and benevolent, operating without human agency or design. The law made by legislatures, argued by lawyers, and decided by judges had no place in this vision of economic life. It was simply irrelevant.

¹⁶⁹ Norris, *The Octopus*, *supra* note 153 at 285.

¹⁷⁰ McKee, "Notable Memorials to Mussel Slough," *supra* note 1 at 25.

¹⁷¹ Pizer, *The Novels of Frank Norris*, *supra* note 155 at 142-43.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

THE SPOKEN WORD: ORAL HISTORY IN THE NINTH CIRCUIT

BY CHET ORLOFF AND YVETTE BERTHEL

History is the memory of humankind. It is the tangible story written on paper, stone, metal, and landscape and the intangible fund of recollections that, together, embody the past. The spoken word is history's most fragile evidence, and its most evanescent witness. Through its recorded perspectives and insights, oral history illuminates, supplements, and adds new details to the material, the tangible, record.

Courts and bar associations nationwide are collecting the oral histories of their members at an unprecedented rate, a speed which is accelerating as we approach the 1989 bicentennial of the United States Courts. In the Ninth Circuit, law-related oral history programs have been established by the Ninth Judicial Circuit Historical Society, the United States District Court for the Northern District of California Historical Society, the Bancroft Library, the California Bar Association, the Oregon Historical Society and the District Court of Oregon Historical Society, the Arizona Historical Society, and the District of Idaho Historical Society. Some of these programs employ professional interviewers; others enlist the efforts of members and volunteers. Whatever the staffing, all of these programs share a common goal: to contribute to the collective memory of the western bench and bar.

We address volunteer interviewers who are helping gather the spoken memoirs of the judges and lawyers whose careers have contributed to and shaped the legal history of the West. We present an approach to preparing for and taking an oral history, and for transcribing the resulting interview. Our purpose is to familiarize readers with the basic techniques of oral history and to suggest the topics that should be considered during an interview. We recommend that interviewers associate themselves at the

Editor's note: The authors have used feminine pronouns for interviewers and masculine for interviewees.

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outset with an established historical organization that will ultimately provide a permanent repository for the tapes and transcripts. Such organizations include the Ninth Judicial Circuit's and other court-related historical societies, state and local historical societies, and the Bancroft Library.

PREPARING FOR THE INTERVIEW

Unless the object of an oral history is to obtain information on a specific event or period of time, a major court case or a term in a government office, for example, an oral history should be broad in scope and provide a full life review of the interviewee. Future researchers should be able to learn from the interview tapes and transcript information about the narrator's — the interviewee's — personal and professional life: upbringing and education, career course, important events, vocational and avocational activities and relationships.

Personal acquaintance with the interviewee is not necessary (in fact, unfamiliarity may suggest a more objective approach to the interview). Once both parties have agreed to the interview, it is imperative that the interviewer familiarize herself with the basic details of the narrator's life. This may involve several hours of research through professional directories, newspapers, and

ORAL HISTORY AGREEMENT

I, _____, do hereby grant to the Ninth Judicial Circuit Historical Society copyright to all material related to my oral history memoir listed below. It is agreed that access to the tape recording(s) and edited manuscript shall be available to qualified researchers under Society use policy. I authorize the Society to edit, publish, and license the use of my oral history memoir in any manner that the Society considers appropriate, and I waive claim to royalties that may be received by the Society as a consequence thereof. I impose the exceptions to this agreement that I have initialed on the reverse side.

Description of material:

Tape recordings and transcript resulting from _____ oral history sessions conducted on _____.

Donor _____
Place _____
Date _____

Interviewer _____
Date _____

Society Executive Director _____
Date _____

EXCEPTIONS TO ORAL HISTORY AGREEMENT

Please initial:

_____ The entire tape and transcript shall be closed to all users
until _____
date _____.

_____ The parties hereto agree that the entire tape and transcript
shall not be made available to anyone other than the parties hereto
until _____
date _____.

_____ The interview tape and transcript may not be made available to
anyone without my express permission until _____ after
date _____
which it may be made available to general research.

_____ The parties hereto agree that the entire tape and transcript
shall not be made available to anyone other than the parties hereto
until _____ except with my express permission.
date _____.

_____ The following page(s) and the tape relating thereto shall be
closed to all users until _____ except with my
date _____
express permission.
Transcript page(s): _____.

_____ It is agreed that the Society will not authorize publication of
the transcript or any substantial part thereof during my lifetime
without my permission, but the Society may authorize researchers and
others to make brief quotations therefrom without my permission.

_____ It is agreed that the Society will not authorize publication by
others of the transcript or any part thereof during my lifetime without
my express permission.

_____ I reserve all literary property rights to the interview
until _____ at which time these literary property
date _____
rights shall vest in the Ninth Judicial Circuit Historical Society.

_____ Other: _____

conversations with associates and friends. The interviewee himself may be able to provide files and scrapbooks to help prepare the interviewer.

The interviewer should meet with the narrator prior to the actual interview. At this meeting they can discuss the interview process, the range of topics they will cover, and the ultimate use of the finished interview as a contribution to the history of the western bench and bar. To avoid surprises and to give the interviewee time to reflect and to gather his thoughts, the interviewer can leave him a list of the general topics of the interview. (If the interviewer follows the format of topics suggested below, she may wish to give the narrator a copy of this article.) The parties should establish a timetable for the interview, realizing that it will take a minimum of three or four sessions of approximately one-and-a-half hours each. During this meeting before the interview, the speakers should sign an agreement

assigning rights to access and copyright and, if they wish, restricting use for certain purposes and a set period of time. Although such a document, which is ordinarily provided by the organization sponsoring the interview, can also be signed after the interview, it must be completed before the tapes and transcripts can be used by researchers.

THE INTERVIEW

The essence of oral history is a tape recording of the interview, therefore, a good cassette tape recorder is indispensable. We recommend using thirty-minute tapes because they can best withstand the constant play-forward and reverse necessary for transcribing. Use an external microphone. If the interview is conducted in an office, telephone calls should be held. Prior to the interview and at the beginning of the tapes, record a brief introduction to test the recorder as well as to provide an identification of the speakers. Just before turning on the tape recorder, the parties should "warm up" together by quickly reviewing what will be covered during the session. They are now ready to begin.

From the interviewer's research, she will know and want to concentrate on certain topics that are particularly relevant to the interviewee's life, topics that may or may not be suggested below. Too, the interviewee will likely bring up topics for which the interviewer is unprepared, but to which she should respond and allow for a brief redirection of the interview. She should then, however, guide the interview back to her outline or predetermined list of topics.

Questions should be brief, asked one at a time while proceeding from the general to the specific, and posed generally in a chronological sequence. The interviewer should ask open-ended questions that require more than "yes" or "no" answers. For example, rather than asking "You tried the Smith case, didn't you?" say "Tell me about the Smith case." She should avoid contradicting the narrator and reserve sensitive questions for later in the interview, when rapport has been established. The well-prepared interviewer will be alert for opportunities to take an initial question a step farther and, without interrogating, probe for details: explanations, attitudes, feelings, and reactions.

We suggest the following topics* as a core for the interview:

Name, date, and place of birth, family origins.
Early memories of childhood — school, family, friends.
College and law school experiences.
Military or other service.
Intellectual interests and extracurricular activities.
Bar examination.
First jobs after law school — colleagues, cases.
Strong influences during early career.
Involvement in local, state, and national politics.
Involvement in bar associations.
Major cases tried.
Reflections on outstanding attorneys and judges known.

For judges:

First judicial experience — appointment, early cases.
Appointment to the federal bench — political and professional factors, nomination, confirmation.
Association with other judges, attorneys.
Procedures and policies for administering own court.
Pre-trial/pre-hearing preparation for cases.
Memorable as well as most difficult cases.
Inter- and intracircuit assignments — value of visiting judgeships.
Law clerks — qualities looked for, association with, and influence upon.
Approach to writing opinions.
Qualities of a good judge, lawyer, court administrator.
Outstanding judges and attorneys known.
Collegiality of court, relationship of judges, influence upon one another. If district judge, relationship with court of appeals, U.S. Attorney, Public Defender, Circuit Executive, and circuit organization. If circuit judge, relationship with district courts, Supreme Court, Circuit Executive and circuit organization.
Change in the demands on court since appointment — workload, types of cases, quality of attorneys' work.
Problems facing court, administration of justice, practice of law.
Influence of court's decision on public policy.

*These are broad topics and the interviewer should be familiar enough with many of them to be able to draw out substantial details during the interview. For those topics about which she does not have information, she should be prepared to encourage discussion. No matter how much background material she has gathered, however, the interviewer must give the narrator the opportunity to tell his story.

Effectiveness of punishment and possibilities of reform in criminal cases.

Incidences of personal conflict between rule of law and conscience.

Role, effectiveness, and competence of juries.

Conception of the judge's role in society and society's perception of that role.

Attitude toward "judicial activism" and "judicial legislation."

Evolution of judicial philosophy since appointment and its relationship to personal, social, and political philosophy.

Thoughts regarding appointment of judges.

Personal life during judgeship — family, friendships, relationship with attorneys, organizations.

TRANSCRIBING THE INTERVIEW

Oral history tapes capture and preserve the fundamental elements of personality — the sound of the voice, the words as spoken, the nuances of intonation, the qualities of character manifested through range of pitch, speed of delivery, and laughter, and the use of "crutch" words ("okay," "you know," and the like). Although tapes are a first person narration, they are cumbersome to use and, unless copies exist, there is the risk of erasing part of the interview when listening to them repeatedly. Therefore, for reference purposes, a typed transcript is the preferred source, being the most accessible aid to those interested in what the narrator had to say. We hasten to add, however, that if the oral history is to be used for research and publication, it is essential to return directly to the tapes.

The best person to transcribe the oral history is the interviewer; being familiar with the interview, she can recall words that, on tape, are indistinct and, having access to the narrator, can most comfortably and quickly ask for clarifications. The transcript should replicate, with as few amendments as possible, the taped words. Both the interviewer and interviewee must resist the temptation to "rewrite" history, in this case, the oral history; the narrator's choice of words, word order, and grammar should stand. The written transcript's historical value rests in direct proportion to its faithfulness to the words captured on tape.

Once the tapes have been transcribed, the interviewer and narrator will want to review the transcript to correct or fill-in missing names, words, and dates. This review session provides an excellent opportunity to request a photograph of the narrator and, if possible, notes, letters, files, and related materials which would complement the oral record.

ORAL HISTORIES OF THE FEDERAL COURTS: THE OREGON EXPERIENCE

BY RICK HARMON

Recent work in oral history at the Oregon Historical Society has included an interview project, begun in 1984, on the federal court system in the state of Oregon. I am pleased to share some reflections on the organization, execution, and results of that project with readers of *Western Legal History* participating in other law and court-related oral history programs.

When representatives of the District Court of Oregon Historical Society requested assistance from our institution in 1984, an oral history project was one among several ideas they were considering in their approach to the history of Oregon's federal court system. As the Oregon Historical Society's oral historian at that time, I worked with the District Court Historical Society's organizing committee in designing an interview project that would complement their full range of efforts to collect material and produce information on the history of the federal courts in Oregon. Early in our initial planning discussions, we decided that *people* who have served the court, more than the *institution* of the court itself, would be the focus for our work. Because of their advanced age and the breadth of their legal-judicial experience, committee members identified three judges — Circuit Court Judge John F. Kilkenny, District Court Judge Gus J. Solomon, and District Court Judge William G. East — as the project's initial interview subjects.

The committee's decision to begin the project with a series of judicial interviews coincided well with my own judgment of how such a project might develop over several years. A set of thorough, well-researched interviews with Oregon's most senior judges (and, in one case, with a judge's widow), it seemed, would provide a solid foundation for an eventually wider oral history project that might include a variety of other employees of the federal judiciary in the state, Department of Justice personnel, attorneys with significant federal court experience, and perhaps others. Furthermore, with only a single interviewer working part time, such a series of judicial interviews offered a finite and manageable goal for the project's first stage.

As the interviewer for at least the first several of the project's interviews, I was heartened that the sponsoring District Court

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Historical Society agreed to support full biographical interviews, rather than interviews probing only the subject's federal court experiences. Such an approach, we knew, would be more time-consuming, and thus more expensive; but the yield promised to be, and has been, far richer. With this approach a subject's federal judicial career can be viewed and interpreted in the light of his family history, education, preceding professional experience, and myriad other factors, large and small, revealed in the interview. Likewise, several such life-history interviews can be compared along the common lines of family history, education, professional experience, and so on, as a way of determining patterns in the formation and character of the state's federal judges. If such patterns can be discerned, using testimony from interviews in conjunction with other forms of historical evidence, surely we will have discovered something of vital importance about the institution of the federal judiciary in our state, as well as about our state and its citizens in general.

As we begin to examine the spectrum of evidence compiled in six judicial interviews in our Oregon project, oral testimony seems nowhere more valuable than in its illumination of the appointment process to federal judicial office. The merits of a fully biographical approach to the interview are especially clear in relation to the appointment process. A contrary interview approach, focusing primarily on "the institution" of the federal judiciary, might well begin with questioning about a judge's appointment. But can there be any doubt that the meaning and significance of responses to questions about the appointment process (leaving aside the question of a subject's willingness to confide fully such sensitive information at the beginning of an interview) are enhanced many times over in the context of the candidate's personal life history? (The actions of the Department of Justice and the FBI, important players in the appointment process, surely support this observation.) At the juncture of nomination and confirmation, on the threshold of a virtual life appointment, a judicial candidate's character and formation vitally condition his or her response to an often ambiguous and elusive sequence of events.

The appointment process in recent decades has been described more openly as an essentially political complex of judgments and decisions. Once that observation is granted, however (whether posed in the form of accusation, concession, or matter-of-fact acknowledgment), much more remains to be said. In what sense are federal judicial appointments "political?" An executive cabinet appointment is "political," a U.S. Supreme Court appointment is "political," but the calculations, procedures, and protocols that accompany both are more dissimilar than similar to those that accompany appointments to federal judgeships. (And, in fact, the appointment process for U.S. District Court judgeships differs notably from that for U.S. Appeals Court judgeships.)

It is in the interplay between the executive and legislative branches, state political party officials, the judicial candidate's professional peers, and even, most subtly, the judiciary itself that appointment to the U.S. District Court must be viewed. Much that informs (and reflects) the judgments of the "players" in this intricate "drama" lies in the realm of opinions, attitudes, feelings, and reactions. These "categories of mind" usually remain undocumented (particularly with the eclipse of the personal diary and the expansive personal letter in the later twentieth century), and so it falls upon alternative forms of historical reconnaissance, namely oral history, to document them, and thereby to illuminate "larger" historical issues. The judicial candidate himself, standing at the center of this maelstrom of initiatives and responses, can testify authoritatively and compellingly to his own actions and feelings throughout the process, from the first suggestion of his "candidacy" to the phone call. The judicial candidate can also usually describe interestingly the actions and feelings of other "players," from the state party chair to the Justice Department "point man," whether that testimony is rooted in speculation or the confidences of others.

In the end, though, the judicial candidate (now judge) can describe only part of the elephant, albeit an essential part. A fuller understanding of the appointment process would be only one of many areas of enhanced understanding resulting from such an expanded program.

We have begun, in our Oregon project, to extend our program of interviews beyond the state's senior federal judges. The Ninth Judicial Circuit Historical Society, with a far larger geographical scope, begins with the necessity of an "expanded" program. Just as we found it necessary to call upon volunteer help from our legal-judicial community in fashioning our enlarged program, the Ninth Judicial Circuit Historical Society begins with the requirement of involving its legal-judicial community in its program of interviews.

I hope this essay will help generate some interest, within the Ninth Circuit community, in volunteer interviewing for the Ninth Judicial Circuit Historical Society's commendable oral history project. I have chosen to emphasize here the benefits obtainable from full biographical interviews, partly because of what we have learned in our own efforts to guide volunteer interviewers. Participants from the legal-judicial community obviously come equipped with backgrounds advantageous to conducting legal-judicial interviews. However, the pitfalls attendant to such congruence in perspectives should also be noted. Without the necessary awareness and attention of the interviewer, two "legal minds" might otherwise be drawn to and enmeshed in complex discussions of "the trade," cut off from the illumination of the subject's personal life history.

JUDGE GUS J. SOLOMON ON THE VIETNAM WAR-ERA DRAFT

Gus J. Solomon was born in Portland, Oregon on August 29, 1906. He attended Reed College and the University of Chicago, and Columbia University Law School and Stanford Law School, from which he graduated in 1929. He practiced law by himself in Portland from 1929 until 1949, being a strong advocate of civil rights and public power. Judge Solomon was appointed to the U.S. District Court for Oregon by President Harry Truman in 1949.

The following excerpts are from a 1984 oral history interview of Judge Solomon conducted by Rick Harmon of the Oregon Historical Society. Permission to quote from the interview has been kindly granted by the Oregon Historical Society.

S: I handled several Selective Service cases, at one time probably more cases than anyone else in the federal system. I handled a number of cases in San Francisco. I went down there with Judge Robert Belloni to handle their calendar of Selective Service cases.

We tried many of those cases. I was supposed to be a lenient sentencer. In fact, the *New York Times* had a little squib, "If you don't want to go to jail, go west young man, go west to Oregon." But I was not as lenient as the San Francisco judges. In later years, they didn't send anybody to jail.

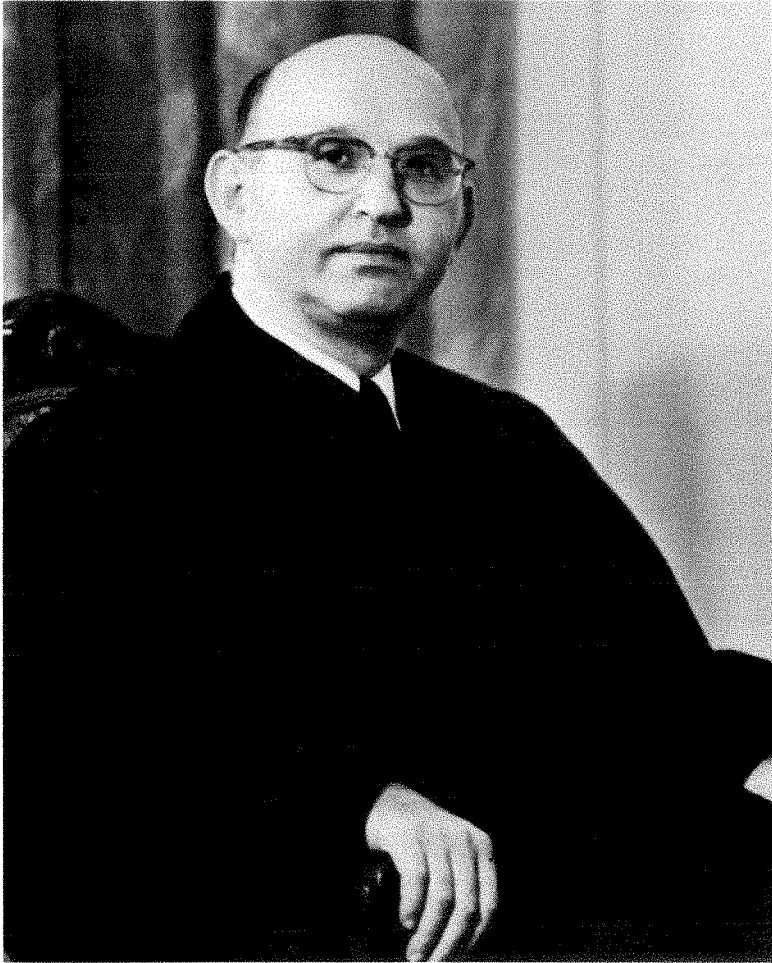
There was one young man who was about eighteen years old who had refused to register. He had gotten some publicity because of a march in which he had participated. His mother didn't want him to register. But, he was pleased at the publicity he was getting, and he got a lawyer who was a real radical.

When the case came up, the attorney said that it would take around five days to try. I said, "What are the issues?" He began to talk, and I said, "Well, let's pick a jury and we'll start in. Where are your witnesses?" He said, "Well, I thought the case would take five days, and so I didn't tell anyone to be here today." I don't know what they would have testified about, and I am sure he didn't either. The jury found him guilty, and I sentenced him under the Youth Correction Act.

A couple of weeks later, he wrote me and said that he realized he had made a terrible mistake. He then told me the circumstances under which he refused to register, and he had some remarks about his mother. I decided to hold a hearing. In the meantime, he had gotten new attorneys. I let him out, and he entered college. I heard later that he had made a very good record in college. He did register, and that got quite a bit of publicity.

H: What year did you go to San Francisco to handle that calendar of Selective Service cases?

S: I think that was 1969.



United States District Judge Gus Solomon, 1906-1987. [Courtesy of Mrs. Gus Solomon]

H: So, right in the midst really of the Vietnam War and a lot of the conflict about it.

S: Yes. There was a tremendous amount of conflict. We tried a number of the cases, and I remember we had a number of prominent people testify. Among them, I think, Jane Fonda and her husband both testified — or one of them testified. They had arranged to have some people from Stanford come, but I don't think they ever came.

H: Did you have an emotional response to these cases completely aside from your legalistic approach to them?

S: No. I thought that the draft was proper, but I was not enthusiastic about the war. But, I thought as long as the law was on

the books, it was up to everyone to abide by the law. Now, I wasn't the toughest sentencer. As far as the Jehovah Witnesses were concerned, I didn't send them to jail. I did not give these young men the sentences that other judges gave them. I sentenced them to about a year, eighteen months, two years maximum, but other judges were giving them five years. I later discovered that it didn't make any difference whether you got a year or two or five, you would serve about the same time.

H: Why was it that this whole group of cases or this whole calendar of cases was there waiting for you to come down and try?

S: They didn't wait for me specifically. The Northern District of California had many cases, different kinds of cases, and I think they believed that some of those cases were more important than others. They knew that I had a great deal of experience in Selective Service cases, and they had many of them piled up. They asked me if I wouldn't come down, and when I heard the number of cases that they had, I said, "Yes, but I will have to bring somebody with me." Judge Belloni came with me at that time. He was a newly appointed judge.

We went there, and we tried a number of them. I think we disposed of some cases by trial and many of the people pleaded guilty.

I tried a number of Jehovah Witnesses, and I was not happy with the fact that some of them were indicted and others went to jail when I didn't think they should go to jail. For example, there are many young men who don't meet the minimum standards for being in Armed Services. They could neither read nor write. Even though they graduated from grade school, and some from high school, they couldn't read nor write. After a while, I would conduct my own examination to learn whether the defendant could read or write, and if he couldn't, I would dismiss the case.

There were others who could read and write and who refused to perform work of national importance under civilian direction as required of conscientious objectors. In other words, their status as conscientious objectors was recognized, but they refused to go to the hospitals and other institutions where they were ordered to perform noncombatant service. This happened many times.

One day a young man appeared before me. He had a Bible in his hand. I asked him if he was willing to work in the hospitals where he was ordered to report, and he said, "No." And I said, "Suppose that the warden of the penitentiary tells you to cut the lawn; will you cut the lawn?" He said, "Yes." And I said, "If he tells you to work in the infirmary, will you work in the infirmary?" He said, "Yes, I will." I said, "Why?" He said, "Romans 13 and I Peter 2 verses (blank to blank)." So, I said, "Just a moment." I took a recess, and I called the minister of the Unitarian Church whom I knew. I said, "What is Romans 13?" He said, "Don't you know?" And I said, "No." He said, "Romans 13 says that the orders of civilian authorities must be

obeyed and the word of the civilian authorities is the word of God."

I returned to the courtroom and I said to this young man, "Now I want you to know that I am not part of the military. I am a civilian employee, and I work for the United States government. I am ordering you and I am directing you to go to the hospital in Kansas City, Missouri and stay there for a period of two years." For the purposes of carrying out this order, I placed the defendant on probation for a period of two years.

He said, "Do I have to go?" And I said, "You certainly do have to go. You are required to go by law and also by the very section of the Bible that you referred me to — Romans 13." He was satisfied and agreed to go. My ruling received a great deal of publicity. Within a few days, I began getting letters and calls from all parts of the United States from judges. "How did you do it?" they asked. I found that many other judges didn't want to send these people to the penitentiary. I told them what I did, and I sent them a transcript of the proceeding. A number of judges began to use that same procedure.

One day I got a call or a letter from a young man in Seattle, Washington. He was working in the hospital there. He wanted to get married, and one of the elders of the Church told him that he wouldn't perform the ceremony because he didn't have to work in a hospital. He wanted to know if my order required him to do it. I wrote and told him that the elder was wrong, that he had absolutely no choice either under the law or the Bible, and that as a civilian employee, I had ordered him to go and perform that work. I didn't hear from him again.

I used to try to avoid having a conviction on their records. When they came before me, and I would tell them, "I am ordering you to go." One young man said, "Well, I haven't pleaded guilty yet." So, then I had to find him guilty before I sentenced him.

I explained this technique to a group of judges. One of the judges got up and told me that the Thirteenth Amendment abolished slavery. He said what I was doing was making slaves out of these people. I don't think the other judges agreed with him.

H: What puzzles me is that before you sort of beat them at their own game, their own biblical game, in court, why is it that they regarded the instructions of the court or the sentence of the court as instruction from a military authority?

S: They didn't. You see, the people who ordered them to go were the Selective Service, and they regarded the Selective Service as part of the military. They didn't want to comply with what the military told them. They didn't make the distinction between the court and the Selective Service, and I guess they assumed that we were just sentencing them because they didn't comply with the order of the Selective Service, whom they regarded as an arm of the military authorities. I made the distinction, saying, "The Selective Service is one thing, but I am ordering you to go and I am a civilian

employee."

H: Didn't you get some positive response from military authorities, too, on your handling of these cases?

S: Yes, from the Selective Service. I think that the Selective Service leaders were generally pleased with what I was doing. I know that the head of the Selective Service in Oregon was satisfied with my handling of the cases. I enforced the orders of the Selective Services except in those instances where I believed that there was a religious reason for not doing it or where a man was a conscientious objector, and then I required them to perform alternate service. But if a man was a straight out-and-out draft evader, I would impose what I regarded as a reasonable sentence.

H: What sort of response did you get from some of your friends and colleagues on the left, with whom you had had contacts in the '30s and '40s before you became a federal judge, to your active and sort of enthusiastic support of the Selective Service during the Vietnam Years? Did you have any response from those sorts of people or fallings out or anything like that?

S: No. I think I mentioned that some of the religious groups were unhappy. I had spoken at the Rose City Methodist Church, and they were leading a group of conscientious objectors. But I would imagine that most of them were pleased with my views on the sentencing, but I don't know if many knew of my support of the draft.

H: There were a lot of people that opposed the Vietnam War who were involved in the Second World War, and who were not asked this but thought there was something distinct and special about the Vietnam War.

S: I think there is a distinction between those people who were against the war in Vietnam and those people who believed in picketing and violence and violation of the law.

ARTICLES OF RELATED INTEREST

In this section, we list citations to recent articles from other journals relating to western legal history. The editors regret the exclusion of any articles missed in the review of the literature and invite contributions from readers.

James E. Babbitt, ed., "Across the Painted Desert: Nicholas Roosevelt in Northern Arizona, 1913," *Journal of Arizona History* 28 (1987).

Constance Backhouse, "Marriage, Women and Property: A Legal History of Enforced Dependence," *American Bar Foundation Research Journal* 1987 (Spring-Summer) 591-600.

Milner Ball, "Constitution, Court, Indian Tribes," *American Bar Foundation Research Journal* 1987 (Winter) 1-140.

Kerry R. Bensinger, "From Public Charity to Social Justice: The Role of the Court in California's General Relief Program," 21 *Loyola of Los Angeles Law Review* 497-542 (1988).

Bowen Blair, Jr., "The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History," 17 *Environmental Law* [Northwestern School of Law of Lewis and Clark College] 863-970 (1987).

Malcolm Ebright, ed., "Spanish and Mexican Land Grants and the Law," a series of articles in *Journal of the West* 27 (July 1988) 3-84.

Jerome B. Falk, Jr., "The Death Penalty Litigation: *Hill v. Nelson* Remembered," *The Historical Reporter* [U.S. District Court for the Northern District of California Historical Society] 4:3 (1988).

Edmund D. Fenton, Jr. and P. Michael Davis, "The Economic Interest Concept: A Historical and Policy Perspective," *Journal of Mineral Law and Policy* 3 (1987-88) 75-126.

Roger Florio, "Water Rights: Enforcing the Federal - Indian Trust After *Nevada v. United States*," 13 *American Indian Law Review* (Number 1).

Dave Frohnmayer, "The Compact Clause, the Appointments Clause and the New Cooperative Federalism: The Accommodation of Constitutional Values in the Northwest Power Act," 17 *Environmental Law* [Northwestern School of Law of Lewis and Clark College] 767-84 (1987).

David A. Funk, "Introducing World Legal History: Why and How," 18 *University of Toledo Law Review* 723-803 (1987).

Dale D. Goble, "The Compact Clause and Transboundary Problems: 'A Federal Remedy for the Disease Most Incident to a Federal Government,'" 17 *Environmental Law* [Northwestern School of Law of Lewis and Clark College] 785-814 (1987).

Carole Hicke, "A Case of Diversity: Law Practice in San Francisco [selections from an oral history of Pillsbury, Madison & Sutro]," *The Historical Reporter* [U.S. District Court for the Northern District of California Historical Society] 4:3 (1988).

Kevin G. Jones, "Black Gold and the Tlinglit Indian Village of Yakutat, Alaska: A Case Study of the Development of Alaska's Outer Continental Shelf Oil and Gas Resources and the Federal Trust Responsibility to Native Alaskans," 24 *Willamette Law Review* 565-715 (1988).

James Lindgren and William P. Marshall, "The Supreme Court's Extraordinary Power to Grant *Certiorari* Before Judgment in the Court of Appeals," 1986 *Supreme Court Law Review* 259-316.

David A. Logan, "Judicial Federalism in the Court of History," 66 *Oregon Law Review* 453-516 (1987).

Donald D. MacIntyre, "Quantification of Indian Reserved Water Rights in Montana: State ex. rel. Greely in the Footsteps of San Carlos Apache Tribe," 8 *Public Land Law Review* 33-59 (1987).

Neil D. McFeeley, "En Banc Proceedings in the United States Court of Appeals," 24 *Idaho Law Review* 255-74 (1987-88).

Pam McLean, "Judge Browning's Legacy: The Ninth Circuit's Chief Judge is Leaving the Court More Efficient Than He Found It," *California Lawyer* 8:5 (1988) 18-19.

Stephen J. Markman, "*Miranda v. Arizona*: A Historical Perspective," 24 *American Criminal Law Review* 193-242 (1986).

Thurgood Marshall, "Reflections on the Bicentennial of the United States Constitution," 101 *Harvard Law Review* 1-6 (1987).

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REPORT ON THE NINTH JUDICIAL CIRCUIT HISTORICAL SOCIETY

Publications The major program of the Ninth Judicial Circuit Historical Society continues to be the publication of *Western Legal History*. The first issue (Winter/Spring 1988) of this new historical journal, published in May, was sent to 1,200 Society and affiliate members as well as nearly 1,000 scholars, libraries, universities, and prospective members. Its articles and illustrated format were well received, with compliments and valuable suggestions for future issues arriving from reviewers nationwide. Articles contributed to the first issue included "Some Lessons of Western Legal History," by John Phillip Reid; "Judge Ogden Hoffman and the Northern District of California," by Christian G. Fritz; "Judge Lorenzo Sawyer and the Chinese: Civil Rights Decisions in the Ninth Circuit," by Linda C.A. Przybyszewski; "A Post Office That's a Palace: U.S. Court of Appeals and Post Office Building," by Stephen J. Farneth, AIA; and "My Dear Judge: Excerpts from the Letters of Justice Stephen J. Field to Judge Matthew P. Deady," edited and annotated by Malcolm Clark, Jr. The Society will continue its efforts to acquire articles, book reviews, and items of interest to readers, and will move *Western Legal History* from a semi-annual to a quarterly format when support for the Society and the availability of excellent manuscripts allow. The Society invites the submission of articles dealing with the role of law and the courts in all aspects of western American history.

Authorized by No Law, the Ninth Judicial Circuit Historical Society's first book, co-published in 1987 with the U.S. District Court for the Northern District of California Historical Society, will soon be followed by a book-length collection of oral histories of western judges and lawyers. This collection, titled *Lives in the Law*, will be published in 1989 or 1990 and has involved the work of many Society volunteers as well as of professional oral historians.

The Society is planning the publication of a major, illustrated work on courthouses of western America. Publication of this architectural, cultural, and legal history of federal, state, and county courthouses is planned for late 1989 or 1990. The author is Lynn C. Schneider of San Francisco.

Oral History The Ninth Judicial Circuit Historical Society's oral history program — gathering the spoken memoirs of western judges and lawyers — depends almost entirely upon volunteer interviewers. Applying techniques and guidelines prepared by the

Society, volunteers in every state in the circuit have arranged and conducted taped interviews, which are being transcribed and added to the Society's growing Biographical File. *Western Legal History* readers interested in participating in the Society's oral history efforts are encouraged to call or write the director, Chet Orloff. An article reviewing the methods of conducting an oral history appears in this issue of *Western Legal History* under the title "The Spoken Word: Oral History in the Ninth Circuit." The Society is pleased to announce that West Publishing Company has awarded a grant of \$5,000 in support of the Society's oral history program and, specifically, the oral history of Judge James R. Browning.

At the time of publication of this issue of *Western Legal History*, oral histories of the following individuals have been initiated, completed, or are in progress: Joseph A. Ball, Esq. (California); Judge Stanley M. Barnes (California); Harry J. Cavanagh, Esq. (Arizona); Judge Herbert Y. C. Choy (Hawaii); Z. Simpson Cox, Esq. (Arizona); Harvey F. Davis, Esq. (Washington); Morris M. Doyle (California); Judge Jerome Farris (Washington); Judge Roger D. Foley (Nevada); Judge William P. Gray (California); Judge A. Andrew Hauk (California); Judge Sherrill Halbert (California); Judge William J. Jameson (Montana); Orme Lewis, Esq. (Arizona); Judge Thomas J. McBride (California); H. Karl Mangum, Esq. (Arizona); Judge Dorothy W. Nelson (California); Judge Russell E. Smith (Montana); Judge Thomas Tang (Arizona); Judge Fred M. Taylor (Idaho); Judge Bruce R. Thompson (Nevada); Judge Gordon Thompson, Jr. (California); Judge Donald S. Voorhees (Washington); Judge J. Clifford Wallace (California); and Judge Eugene A. Wright (Washington). Alaska historian Claus-M. Naske has sent transcripts of the interviews he has done with Judge James M. Fitzgerald and Judge James A. von der Heydt.

Exhibits Working with the National Archives as well as western state and legal historical societies, the Ninth Judicial Circuit Historical Society is planning a series of exhibits to portray the history of the United States Courts in each of the nine states of the Ninth Circuit. The exhibits, which will illustrate the origin of the nation's courts and survey their growth in the West, will travel from courthouses to libraries, universities, and public buildings. The first exhibits of the series are scheduled for presentation in the fall of 1989.

"The Constitution and the Courts," the Society's exhibit that began its tour in 1987, continues to travel throughout the circuit. To date the richly illustrated display about the development of the Ninth Circuit has visited Honolulu, Pasadena, Los Angeles, San Diego, San Francisco, Sacramento, Fresno, Tucson, Phoenix, Reno, Portland, Seattle, Anchorage, and Fairbanks.

Guide to Western Legal History Resources In its efforts to provide members with access to information about western legal

history, the Ninth Judicial Circuit Historical Society has established a project to develop a general inventory to law-related collections held by western libraries and historical agencies. The first step of this long-term program has been to create a list of regional repositories: historical societies, university and law libraries, private and public libraries, and special collections. Society staff have begun contacting colleagues in these institutions, inviting submission of information relating to the papers of judges, lawyers, firms, and courts held in their collections. The Montana Historical Society and the Oregon Historical Society, along with the Los Angeles Branch of the National Archives, have already provided material for the *Guide*.

As a not-for-profit, educational organization, the Ninth Judicial Circuit Historical Society could not function without the involvement and support of volunteers. The Society's executive director, Chet Orloff, acknowledges with appreciation the contributions of the volunteers who have helped the Society accomplish its work during the past year.

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