THE SOURCES OF THE ALASKA AND OREGON CODES

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PART II. THE CODES AND ALASKA, 1867-1901

I. INTRODUCTION

In Part I[1] of this paper, the origins of the Alaska and Oregon codes were examined. It was demonstrated that in large part the laws of Oregon and Alaska derive from those of post-colonial New York. After a flirtation with the statutes of Iowa, territorial Oregon settled upon a code copied in large measure from the Revised Statutes of New York, originally codified by the "Butler" New York Law Revision Commission of 1826-1828. The major borrowing took place in Oregon in 1853-1854, when a commission headed by J. K. Kelly adopted much of the New York statutory law for the new territory, retaining of the older Oregon law only the laws relating to wills that had been taken from the Missouri statutes by the 1859 Oregon Legislative Assembly, and a few provisions of a local character.[2] Oregon's celebrated Judge Matthew P. Deady and others reworked the Oregon law in 1862-1864, using as their major sources the 1854 codes and the draft codes prepared for New York by a commission headed by David Dudley Field. The Field commission had also relied heavily on the older New York statutes originating with Butler's commission in 1826-1828. Although it appears from their correspondence that Field and Deady did not meet until long after the publication of the Deady Codes,[3] Deady and his associates appear to have used copies of the Field Commission's reports even before they were published and delivered to the New York legislature.[4]

The basic structure of the Oregon statutes did not change

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1 Brown, *The Sources of the Alaska and Oregon Codes, Part I: New York and Oregon*, 2 U.C.L.A.-ALASKA L. REV. 15 (1972) [hereinafter cited as *Part I*].

2 *Part I* at 26-29. Laws relating to municipalities and counties, and most of the political codes remained without much change, and a chapter on dower was taken from the Michigan laws of the time. *Part I* at 28 n.63.

3 The correspondence is in the Deady collections at the Library of the Oregon Historical Society in Portland. *Part I* at 30, 32.

4 *Part I* at 24 n.45, 32-33.

materially after the Deady Codes were adopted in 1862-1864, and the history of that state's law thereafter is well known to her historians and practicing attorneys, and was therefore not treated in Part I of this article.

Congress brought laws based upon Oregon's to Alaska in slow and stuttering stages between 1884 and 1900, after a neglectful period following the purchase of Alaska from Imperial Russia. This period will be extensively examined, for it is the least known and understood.

II. Alaska Without Law, 1867-1884

Some believe that the purchase of Alaska was a payoff to Imperial Russia for a show of force by that nation's navy in behalf of the Union at a crucial moment during America's Civil War. The more common notion is that William H. Seward, Secretary of State under Lincoln and Andrew Johnson, was a visionary acting to guarantee the consummation of this country's "manifest destiny." At any rate, the territorial limits of the United States were drastically extended as a result of Seward's negotiations with Baron Edouard Stoeckel, Russian Minister to the United States, in 1867. The bargaining took three weeks, after which the treaty was signed at four in the morning, March 30, 1867.[5]

Seward persuaded Senator Charles Sumner to work for ratification, which was secured only by extending the date for the adjournment of Congress for that year. But then Congress turned to other matters, and for the first seventeen years under the American flag, no provision was made for any sort of civil government for Alaska. The major Alaska-related law passed by Congress was a customs act subjecting foreign goods to the same duties upon entry into Alaska as into other parts of the country.[6] Violators of this law were subject to prosecution in the nearest federal district courts, which were then in Oregon and California.

Other early laws for Alaska forbade the sale of liquor to Indians in the District and made the Pribilof Islands a game reservation, giving to the Secretary of the Treasury the power to grant a seal fishery monopoly there in return for royalties.[7] No provision for any

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[5] Gruening, The State of Alaska 23 (2d ed. 1968), [hereinafter cited as Gruening]. Much of the discussion *infra* relating to the period before 1884 is derived from Gruening.

[6] Act of July 27, 1868, ch. 273, § 1, 15 Stat. 240.

[7] *Id.*, §§ 4, 6, 15 Stat. 241, 246; Act of July 1, 1870, ch. 189, 16 Stat. 180-82; Act of March 5, 1872, ch. 31, 17 Stat. 35. The seal-fishery monopoly was won by a San Francisco firm, the Alaska Commercial Company, a corporate ancestor of the Northern Commercial Company, which now operates department stores in Alaska's major cities and towns.

governor or any civil government was made. The Treasury Department assumed what little authority the customs law had given it, but unofficially relinquished hegemony over Alaska to the Navy after only two years.

> During that period [before 1884] in Alaska, no hopeful settler could acquire a title to land; no pioneer could clear a bit of the forested wilderness and count on the fruits of his toil, or build a log cabin with the assurance that it was his; no prospector could stake a mining claim with security for his enterprise; property could not be deeded or transferred; no will was valid; marriage could not be celebrated; no injured party could secure redress for grievances except through his own acts; crime could not be punished.[8]

An Act of Congress passed in 1872 provided that mining camps could abide by the customs of the miners, and that such legal administration would have the force of law if not in contradiction to the federal statutes or Constitution.[9] This miners' code became the first law (other than the customs restrictions) actually effective in Alaska.[10] Even after the passage of the Alaska Government Act of 1884, the miners' meetings continued to provide civil remedies as well as administering a vigilante-sort of criminal justice.[11]

Except for the miners' code, there was no law in operation in the District until 1884. Indeed, this was the holding of the District Court of Alaska in a case decided in 1887. Indian parents sued for the return of a child whose custody had been surrendered to Presbyterian missionaries. Judge Lafayette Dawson, sitting in Sitka, held that the Oregon provision forbidding minors to be bound unless by indenture, which presumably had been adopted for Alaska by the vague 1884 Act of Congress,[12] did not operate retrospectively, and the Indians' petition was dismissed.[13] It was the view of several members of Congress in 1899 that the common law had never been "received" into Alaska.[14] This may not be accurate for the period after 1884, but was certainly true for the first seventeen years of American rule.

The neglect by Congress enraged the settlers who had come to the new American frontier after the purchase, and frustrated

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[8] GRUENING at 35-36.

[9] Act of May 10, 1872, ch. 152, 17 Stat. 91.

[10] Wickersham, *Judicial System of Alaska*, 1 ALASKA DIG. vii-viii (1938); GRUENING at 73, 339.

[11] WICKERSHAM, OLD YUKON 127-30 (1938) [hereinafter cited as WICKERSHAM].

[12] *See* subpart III *infra*.

[13] *In re* Petition of Cam-Ah-Conqua, 29 F. 687, 1 Alaska 163 (D. Alaska 1887). 1887).

[14] 32 CONG. REC. 508 (1899) (debates). This entire colloquy is set out in the text accompanying note 51 *infra*.

the miners who rushed in large numbers to the Harrisburg mining district after the first gold strikes in 1880. After a series of meetings in the older settlers' communities and in the newer mining towns, a convention was held at Juneau on August 16, 1881, with representatives from Sitka, Juneau, Wrangell, Klawock and Killisnoo attending. The convention drafted a memorial to the President and to Congress and decided to elect a delegate to seek admission to Congress.

Several weeks after this convention the election was held and Mottrom D. Ball, the collector of customs, was elected "Delegate." He presented the memorials of the convention to Congress and after several unsuccessful attempts at legislation,[15] Congress passed the Alaska Government Act of 1884.[16]

III. A Court and Laws for Alaska, 1884-1899

The Alaska Government Act of 1884 provided for a Governor to be appointed by the President, a District Judge to hold court at Sitka, and created U.S. Commissioners, a Clerk of Court, a U.S. Marshal and four deputies. Section 7 of the Act provided 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.[17]

The new commissioners were to perform the duties required of justices of the peace in Oregon, and the marshals the duties of county sheriffs under the Oregon Code. However, what law was "applicable" and what was not? The Attorney General of the United States made it clear to the new governors that he could not decide the question, so the new Alaskan officials had to decide as best they could until their authority might be challenged in a federal court case.[18]

The Oregon laws had not been recompiled since Judge Deady and Lafayette Lane had updated the Deady Codes in 1874,[19] which

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[15] One bill favorably reported by the Senate Committee on Territories would have provided an elected Delegate to Congress, a complete court system with an appellate supreme court, and a mechanism for a representative legislature, although a Legislative Council would have been made up of appointed officials, including a Governor. S. Rep. No. 457, 47th Cong., 1st Sess. (1882). Alaskans did not gain this much local government until the Organic Act of 1912, and even then no Territorial Supreme Court was established, as had been in other territories: rather, appeals were taken to the Ninth Circuit Court of Appeals until statehood in 1959. Alaska Organic Act of 1912, ch. 387, 37 Stat. 512ff. *See generally*, Blume and Brown, *Territorial Courts and Law*, 61 Mich. L. Rev. 37, 367 (1963).

[16] Ch. 53, 23 Stat. 24 (1884).

[17] Ch. 53, § 7, 23 Stat. 25-26 (1884).

[18] First Report of the Governor of Alaska (1885).

[19] Deady and Lane, General Laws of Oregon (1874).

meant that the laws of Alaska were to be found from the "applicable" provisions of the Deady and Lane Code and from the succeeding five volumes of session laws passed before the effective date of the Alaska Government Act.[20]

Besides the problems of the vagueness of the Oregon "reception" provision, the other parts of the 1884 Act also often proved unworkable:

> When Marshal Barton Atkins at Sitka received word from Deputy Marshal Thomas at Wrangell that he had warrants against three men at Klawock for burglary, and that he was being urged to go there and arrest them, the marshal had to reply that he had no means of transportation at his command, and no means to pay the expenses of arrest and transportation by others . . . .[21]

During this time, juries could not be constituted legally, and every lawyer in the District knew it: the Oregon codes required that members of a grand jury or petit jury be drawn from lists of taxpayers, yet Congress had not levied any taxes on individuals in Alaska, so there were no tax rolls.[22]

Even the choice of Oregon law seems to have been fairly arbitrary. The Senate sponsor of the 1884 Act admitted in a colloquy on the Senate floor that the reporting committee had not "made any careful study of the laws either of the state of Oregon or of the Territory of Washington," but had assumed the Oregon Code to be preferable because the Senators supposed that it was "in a more mature and satisfactory shape."[23] Senator Beck of Kentucky had thought that the laws of the Territory of Washington would have been more applicable, but his view did not prevail.

The 1884 Act expressly applied the mining laws of the United States to the District of Alaska, but did not extend the general land laws to Alaska, and made no provisions for homesteading.

This very unsatisfactory situation continued until the late 1890's. During this period the Alaska governors did seek more action from Congress, but their efforts were continually halted by the lobbyists for the Alaska Commercial Company.[24]

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[20] See the references to this problem in the REPORT OF THE ATTORNEY GENERAL AND THE COMMISSION TO REVISE THE PENAL LAWS OF THE UNITED STATES (1898). As we shall see *infra*, this document would figure importantly in the drafting of the Alaska penal code and criminal procedure code.

[21] GRUENING at 57. The correspondence describing this incident is now available at the archives of the library of the University of Alaska at Fairbanks.

[22] 32 CONG. REC. 1888, 1937-38 (1899) (comments of Senator Carter of Montana).

[23] 25 CONG. REC. 529 (1884) (comments of Senator Benjamin Harris of Indiana).

[24] GRUENING at 68-70.

IV. The Rush for Gold and the Alaska Codes

Gold in the Klondike

In 1896 George Washington Carmack discovered gold on a stream called Rabbit Creek in Canada's Yukon Territory. Rabbit Creek was soon Bonanza Creek, and headlines of a new gold rush rocked the nation. In less than a year strikes would be found on the beaches at Cape Nome on the Bering Sea in Alaska, over six hundred miles to the west. By late 1902 the stampede would be headed for the new mining camp of Fairbanks in the river country of the District's central area. The new Alaskans felt they needed a more effective civil government, and a more realistic body of law. The remedy came not through a direct Congressional response to the petitions of Alaskans, but from a classic exercise in political patronage.

A Commission to Draft a Penal Code

An Act of June 4, 1897,[25] created three new federal jobs, all of which were filled by patronage appointees of the Republican administration of William McKinley. The commissioners were appointed by McKinley with the advice and consent of the Senate, to "revise and codify the criminal and penal laws of the United States." They were David B. Culberson, a former Congressman from Texas and a friend of the President; Alexander C. Botkin, a Montanan who was close to Senator Thomas H. Carter (who would figure importantly in the structuring of the Alaska Codes, and would later become Republican National Chairman), and a David K. Watson. It was probably fortunate for Alaska that Botkin and Carter were cronies: Carter was particularly interested in Alaska and appears to have prevailed upon Botkin and the Commission to begin their work with a penal code and a code of criminal procedure for Alaska.[26]

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[25] Ch. 1, 30 Stat. 58 (1897).

[26] Carter was the author of the Alaska Homestead Act which finally made some provision for acquiring the federally-owned lands in Alaska. Life of Carter, ch. 21 (unpublished *ms.* in Papers of Thomas H. Carter, Library of Congress Manuscript Division). Carter's brother-in-law F.S. Lang went to Alaska to prospect and ended up running a hardware store in Nome. Letter, Lang to Carter, August 22, 1905 (on stationery of "F.S. Lang Company, Hardware, Mining Supplies and Ranges, 310 Front St., Nome, Alaska"). As to Botkin's relation to Carter, *see* Carter, Letter to Mrs. Carter, December 3, 1899 at 7: "the Botkins returned here on Friday and I expect to run down to see them this Eve." *See also* his defense of himself and Botkin in Carter, An Open Letter to Hon. Wilbur F. Sanders 1. 17 (1900) (letter published as a pamphlet in which Carter accuses Sanders, a dissident Montana Republican, of smearing him and several other members of Carter's branch of the party in Montana. The accusations involved Alaska, and may well have involved the Hansbrough amendment and the "Spoilers" scandal. *See The Commissions' Civil Code and Senator Carter's Political Code infra*). For further indication of Carter's relationship with Botkin, *see* Carter, Letter to his Wife (May 31, 1899) (on the stationery of "The Commission to Revise

It is unclear how much of the Alaska penal code and code of criminal procedure was actually considered by the Commission before reporting to the Attorney General and to Congress. Here is one view, from a prohibitionist who opposed the section in the draft bill that would repeal prohibition[27] in Alaska:

> After a long period of drawing rich salary they [the Commission] submitted their work to the then Attorney-General, who approved it and sent it to the House Committee on Codification of Laws, with the intimation that they need not go over it in detail, but might well report it as it was. This bad advice was followed.
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> After a year's delay the bill at last got an assignment for January 4. Debate had not proceeded an hour (see Record) when Mr. Moody made it apparent that the whole job had been turned over to some clerk whose work had been approved by commission, Attorney-General, and committee without reading. That this was probably the case was stated after further exposures, by one of the House committee at one of the hearings, with general consent . . . .[28]

Rev. Crafts' allegations are not directly substantiated by the permanent volumes of the Congressional Record. If Representative Moody "made it apparent that the whole job had been turned over to some clerk," the statements were stricken from the Record between the printing of the daily edition and of the permanent bound volume. However, considering the heat of an exchange on January 5, 1899, between Moody and the floor manager of the bill, Representative Warner of Illinois, in discussing the previous day's disagreements over the bill,[29] such an adjustment of the Record may well have occurred. Warner even suggests that the daily edition is in error.[30]

The Commissioners' report to Congress seems responsible enough, whether written by Commission or clerk. The Attorney General included the report and the draft codes of penal law and of criminal procedure in a message to Congress dated January 12, 1898.[31] The codes in the report are completed drafts with marginal

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and Codify the Criminal and Penal Laws of the United States, Rooms 18023 Kellogg Bldg., 1416 F. St. N.W., Washington, D.C."). The letter was only about personal matters: Carter had an amusing habit of obtaining business stationery from friends in different parts of the country and using it for personal correspondence.

27 The 1884 Act had banned the sale of alcoholic beverages, although this seemed not to be an insurmountable difficulty for the miners in the Juneau area in the late 'eighties, nor for the Klondike-bound goldseekers in Skagway at the time this witness testified before the congressional committee.

28 REMARKS OF REV. WILBUR F. CRAFTS BEFORE THE SENATE COMMITTEE ON TERRITORIES, S. Doc. No. 122, 55th Cong., 3d Sess. 12, 14 (1899).

29 32 CONG. REC. 416 (January 5, 1899) (remarks of Representative Warner of Illinois).

30 *Id.*

31 S. Doc. No. 60, 55th Cong., 2d Sess. (1898).

citations to decisions of courts in the states from which the code sections were drawn. The parent statute of each section is also cited: nearly all the references are to Hill's Annotated Laws of Oregon (2d Ed. 1892). A few sections, principally those defining offenses against the person, are taken from Bates, Annotated and Revised Statutes of Ohio (1897). In the report prefacing the codes, the Commissioners explain some of their deviations from the Oregon laws (presumably the law of Alaska in 1898) and differences from the existing federal statutes dealing with Alaska.[32] They also offer an explanation for their choice of Alaska as the first federal jurisdiction to benefit from their Congressional commission:

> . . . The circumstances that lend importance to this subject are of common notoriety. It was recently estimated from an official source that there will be 200,000 persons within that district during the present calendar year . . . .
>
> In contemplation of these conditions, we have deemed it desirable that the necessary agencies should be provided for the punishment and prevention of crimes by the civil authority, and that a penal code should be supplied adapted to the circumstances that are to be anticipated.[33]

The Commissioners' choice of Alaska may really have turned on considerations of much less "common notoriety" than those offered by them. Implications easily drawn from the Carter manuscripts and papers[34] suggest that Botkin owed his appointment to Senator Carter, who had close personal (and probably financial) interests in Alaska.

The Commissioners' report is a valuable piece of legislative history for the present Alaska penal laws[35] and yet few Alaskan lawyers have ever seen it. The report conclusively demonstrates that, for more than a year, the members of Congress had before them a document that indicated the statutory and jurisdictional origins of the provisions of the Alaska bills. This would also be

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[32] *Id.* at 3-8.

[33] *Id.* at 2.

[34] *See* note 27 *supra.*

[35] AS Title 11 (1962, 1970, Supp. 1972) and Title 12 (1962, Supp. 1972). The present Title 12 and certain of the Alaska Criminal Rules derive from the Code of Criminal Procedure in the Commissioners' report, which in turn are taken from the Oregon enactment of 1862-64, which was really the criminal procedure code drafted by the Field commission for New York. *See Part I* at 21-24, 31-33. Alaska's substantive penal code in the present Title 11 was the heart of the Commissioners' report discussed in the text: its ancestors are a mix of the Butler commission's work for the New York legislature in 1826-28, and the draft penal code for New York prepared by Curtis Noyes (a member of one of the Field commissions). Noyes' code had been reported to the New York legislature in 1864, but was not enacted there until 1881. The Oregon borrowings that were to become Alaskan law were approved by that state's legislature in 1864. *See generally Part I.*

true of the bill providing a civil code for the District drafted by the same Commission at the direction of Congress.[36] Great weight should be given the marginal citations in the Carter Code (generally available to Alaskan lawyers), since Senator Carter quite obviously copied the Commission's citations.

The Penal Codes in House Committee

The House Committee on Revision of the Laws reported the Alaska bill favorably to the House with minor amendments on June 2, 1898. The Committee report quoted extensively from the report of the Commissioners that had accompanied the draft codes.[37]

The House committee may not have given the bill much real consideration before it was reported to the full House. In addition to Rev. Crafts' remarks to this effect, see the colloquy between Representative Warner and Representative Jenkins in the Congressional Record after the bill had become the business of the House on the floor:

> Mr. WARNER. [Floor manager of the bill; after several amendments had been adopted, including the striking of entire sections.] It strikes me, Mr. Speaker, that we are striking out very hurriedly provisions of this bill which have been considered and construed for twenty or thirty years by the courts of Oregon.
>
> Mr. JENKINS. We have not the courts of Oregon here. And let me say to the gentleman, because he seems to be casting a reflection—
>
> Mr. WARNER. I beg the gentleman's pardon; nothing of the kind is intended.
>
> Mr. JENKINS. That I have asked half a dozen members of the committee for information on different parts of this bill, and have been told by them that they had never read it.[38]

Further evidence of nonrigorous committee work can be found in a slip by a committee member who attempted to defend the bill. At 32 Cong. Rec. 388, Representative Smith of Arizona had just offered an amendment to strike language he considered redundant. Representative Gibson, a member of the House Committee on Revision of the Laws, strongly defended the bill but (as will be seen) made a major error in his argument:

> Mr. Henry R. GIBSON. (Tennessee) I will say to the gentleman from Arizona that this bill is in substance simply a codification

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[36] H.R. Doc. No. 99, 55th Cong., 3d Sess. (1898).
[37] H.R. Rep. No. 1482, 55th Cong., 2d Sess. (1898).
[38] 32 Cong. Rec. 548 (1899).

> of the laws of Oregon; and along with those laws will go the construction which the courts of Oregon have for many years applied to these statutes. The committee has not felt justified in making any very grave departure from the phraseology of statutes which have long been upon the statute books, and which have long been the subject of judicial exposition . . . .[39]

This argument sounds viable, and when it really applied it was made with some success during the debates in the House. But Representative Gibson, even though he was a member of the reporting committee, apparently overlooked the Commission's annotation indicating that the section in question was taken from the laws of Ohio.[40] The report of the Commission had been available to members of Congress for more than a year before Gibson's remarks were delivered, and copies were probably on the desks in the House chamber during the debates.[41]

Therefore, the House Committee on the Revision of the Laws probably had not given the Alaska bill much attention when it was reported favorably on June 2, 1898. It suggested only three minor amendments. Representative Warner was to eventually do his committee work on the floor of the House during the debates.

The Penal Codes: House Consideration

Although the Alaska bill was reported in June, 1898, it was not offered for passage on the floor until the pre-Christmas rush. On December 19, Representative Warner attempted to get it passed by a unanimous suspension of the rules, without a reading. Representative Moody of Massachusetts, a prohibitionist, successfully opposed the move, and the bill received a special-order assignment for January 4.[42] When debate began in earnest, the bill won the attention it may not have had from commission or committee. Section after section was dissected and diagnosed.

History and the House: The New York Revisors, Mr. Field, and the Common Law

The hoary ghosts of the first New York Law Revision Commission of 1826-1828[43] hovered in a strange way over the proceedings.

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39 *Id.*

40 ANN. REV. STAT. OHIO § 6818 (1897) (larceny from the person).

41 S. DOC. No. 60, 55th Cong., 2d Sess. (1898).

42 32 CONG. REC. 316-17 (1899).

43 *Part I* at 17-28. No doubt the old New York commission's report, with its detailed scholarship that delved back into the common law of England as practiced in the New York colony, and with its defenses of innovations in its draft penal code, would have been of definite use to the members of the House, but it seems doubtful that any of them knew that the sections they were debating had ever received such

Representative Little of Arkansas offered an amendment that would make aiding the suicide of another punishable as murder rather than manslaughter.[44] This would have changed the Oregon section taken from the Revised Statutes of New York by the Oregon revisors of 1853-1854. This offense *had* been murder at common law in England and in the New York colony, and had been changed by the New York commissioners seventy years before.[45] They had explained to their legislature that punishment as manslaughter was "more appropriate and more likely to be enforced."[46] Representative Little's amendment failed, and the harshness of common-law punishment remained in its coffin.

Often during the debates on the Alaska bill, it appeared that the old feuds over the Field codes[47] were being fought again on the floor of the House. The Alaska bill copied the Oregon Code of Criminal Procedure, which derived from Field's code on that subject:[48] the House's common-law lawyers fought it, and the code lawyers defended it. At one point a member proposed that the entire section on procedure be stricken. This proposal did not gain support. Representative Otjen of Minnesota argued against it:

> . . . The difficulty with us here is that we have common-law lawyers and we have code lawyers, and every man seems to think that this bill should be fixed according to the law of his particular State. Now, this does not profess to be an original bill. It is simply a codification of the laws of Alaska as they exist . . . .[49]

The attempt to strike the entire section on procedure was defeated. Yet the common law won a clear victory during the debate on definitions in the penal law.

The idea of having any definitions at all in the substantive law of crimes seemed abhorrent to the common-law lawyers.[50] After a section of the bill defining willful intent was read by the Clerk,

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careful exposition. 4 REPORT TO THE LEGISLATURE OF NEW YORK BY THE COMMISSION TO REVISE THE LAWS, REVISORS' NOTES TO THE STATUTES (1828). *Part I* at 1-17.

44 Procuring suicide was one of the definitions of crime against the person that Deady had left as the 1853-54 Commissioners had drafted it, and the older provisions were from the New York law drafted in 1826-28. Deady did add sections in 1864 based upon the Noyes-Field draft, but these were on general matters, such as defining principals and accessories (what modern scholars would call "the general part" of the criminal law). Deady continued the older definitions of specific crimes. *See generally Part I.*

45 There appear to have been no major changes in the section in New York between 1829 and 1851, or in Oregon between 1854 and 1892.

46 *See Part I* at 18.

47 *Id.* at 21-24.

48 *See* note 36 *supra.*

49 32 CONG. REC. 515 (1899).

50 The debate was triggered by an amusing argument over the proper definition of larceny at night, considering that it was to apply to the land of the midnight sun. *Id.* at 507-08.

Representative Dayton questioned the advisability of such definitions:

> Mr. DAYTON. Mr. Speaker, I move to strike out section 217.
>
> Mr. WARNER. Mr. Speaker, Alaska has never been under the common law, and unless we have these definitions or some definitions of these words they will have none to be governed by. These definitions are taken from the Oregon code and have been used and applied in Alaska since 1884, and I am of the opinion that they should remain.
>
> Mr. PAYNE. You mean that the common law has not been applied by statute?
>
> Mr. WARNER. It has not been applied by statute, and there is nothing in this code law applying the common law. If we strike this out, we shall have to insert another section having the common law apply where not otherwise provided.
>
> Mr. UNDERWOOD. The gentleman from Illinois does not contend that the common law does not apply to Alaska and has not applied to Alaska at all times since the Territory was taken in?
>
> Mr. WARNER. I understand that it does not apply to acquired territory, or did not at the time this was acquired in 1867.
>
> Mr. MOODY. Where the code uses words known to the common law it would be easy to resort to that source of authority for a definition instead of indicating one which might be incomplete.
>
> Mr. WARNER. These sections defining the meaning of these words have been in force since the Oregon code was placed in force there.
>
> Mr. GIBSON. Mr. Speaker, I suggest that in lieu of section 216 and these other sections we adopt the following:
>
> > "The common law of England, as adopted and understood in the United States, shall be in force in said district, except as modified by this act."
>
> Mr. WARNER. That will do.
>
> . . . .
>
> The SPEAKER. If there be no objection, sections 217 to 223, inclusive, will be considered as before the House, and the motion is to strike them out and to substitute the following which the Clerk will report.
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> [The Clerk read the amendment again.]
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> The amendment was agreed to.[51]

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[51] *Id.* at 508. Representative Warner's view that the common law had not been

The following year a similar provision would be added to the Commission's report on the civil code for Alaska, but there is no reference to it in the Congressional Record:

> So much of the common law as is applicable and not inconsistent with the Constitution of the United States or with any law passed or to be passed by Congress is adopted and declared to be the law within the district of Alaska.[52]

In an extensive work on the courts and law of American territories,[53] the Alaska reception provisions are found to be unique:

> The provision extending to Alaska the common law of England as adopted and understood in the United States was the only one in which Congress indicated what "common law" was intended, and this was accompanied by a more general provision.[54]

The authors of the article offer an interpretation of the Alaska reception provisions:

> . . . Under the acts of Congress the judges of Alaska were to look to the decisions of all the states and territories to see what principles and rules originally English had been found applicable to American conditions. These principles and rules, whether originated by English decision or statute or both, were to serve as the source of Alaska's common law.[55]

To a large extent, this was indeed the method of the Alaskan courts and of the Ninth Circuit in the territorial years,[56] and the

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in effect in Alaska should be questioned. By adopting the laws of Oregon for Alaska in 1884, Congress had necessarily also adopted the interpretations of these laws by the Courts of Oregon. Warner himself cites Oregon cases to explain sections of the codes to his colleagues in the House. *Id.* at 416, 422. The Oregon courts, in turn, had common law powers derived from the first Oregon reception provision, enacted by the provisional government in 1844. LAWS OF OREGON (1843-49) 100, art. III, § 1 (Salem 1853). *See Part I* at 25-26.

52 Act of June 6, 1900, ch. 786, tit. III, § 367, 31 Stat. 552. The two reception provisions (with minor amendments) remained the law of Alaska until statehood. ALASKA COMPILED LAWS ANN. §§ 2-1-2, 65-1-3 (1949, Supp. 1959). Apparently without direct legislative re-enactment, but with exercise of the ministerial powers of the Revisor of Statutes, they were replaced with a single general reception statute in 1962. AS 01.10.010 (1962, 1964). *Cf.* AS 01.05.031(9) (1962).

53 Blume and Brown, *Territorial Courts and Law*, 61 MICH. L. REV. 39, 467 (1963).

54 *Id.* at 519.

55 *Id.* at 515.

56 Cherbonnier v. Rafalovich, 12 Alaska 634, 88 F. Supp. 900 (D. Alaska 1950); Hollman v. Brady, 16 Alaska 308, 233 F.2d 877 (9th Cir. 1956); Bickel v. Polaris Investment Co., 17 Alaska 389, 155 F. Supp. 411 (D. Alaska 1957). Interestingly enough, the *Bickel* case is cited and followed in the leading Oregon "reception" case, Smith v. Chipman, 220 Or. 188, 348 P.2d 441 (1960). The Oregon court allowed the common law landlord's remedy of distraint of chattels for unpaid rent, citing the Oregon reception provision, and noting that the Alaskan court had allowed a similar remedy. The court noted that Oregon's statutory landlord remedies were identical to Alaska's, comparing ALASKA COMPILED LAWS ANN. § 22-1-3 (1949) with ORE. REV. STAT. 91.220(3) (1960).

supreme court of the new state has considered the reception provision (now slightly revised)[57] to be an extensive grant of common law powers to that Court.[58]

The Laws of Oregon Adopted for Alaska

During the drawn out debates on individual sections of the Alaska bill on penal law and criminal procedure, Congressmen favoring it repeatedly argued that Congress was only codifying the existing law of the District (following the 1884 Act), and that the codes had worked in Alaska since 1884 and in Oregon since 1872 and earlier.[59] In support of such arguments, Representatives Warner (Illinois) and Tongue (Oregon) cited and read Oregon cases.[60] When Members continued to criticize individual sections in detail, Representative Knox objected:

> Mr. KNOX. . . . The laws that apply to Alaska are those of Oregon; and when we determine what those laws are, we have to a large degree discharged our duty, and it ought to be embodied in this bill and the bill passed.
>
> Now, you may take the statutes of Massachusetts, the statutes of Maine, or the statutes of New York, and read them to this House, and we should get the same carping criticism of almost every chapter that is read here, and get these amendments offered.
>
> Mr. PAYNE. What does the gentleman think of the Ten Commandments? (Laughter.)
>
> Mr. KNOX. Yes, of the Ten Commandments; we should get the same fine-spun amendments, the same bootless discussion that is taking up the time of the House.
>
> . . . .
>
> I submit that unless there is something unreasonable, inconsistent, or unjust in the provisions of the bill, which is almost entirely a codification of the statutes of Oregon, adapting them to Alaska, we ought to discharge our duty promptly and pass the bill. (Cries of "Vote!" "Vote!")[61]

Similar comments were to occur in the Senate debates and during the consideration of the civil codes by both Houses. Members of

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[57] AS 01.10.010 (1962).

[58] Howard v. Pfeifer, 443 P.2d 39, 44 (Alaska 1968). *Cf.* the orthodox applications of the reception doctrine in Bosel v. State, 398 P.2d 651 (Alaska 1965); and Mahle v. State, 392 P.2d 19 (Alaska 1964).

[59] *See, e.g.*, text accompanying note 38 *supra* (remarks of Representative Warner) and text accompanying note 49 *supra* (remarks of Representative Otjen).

[60] 32 CONG. REC. 416, 422 (1899) (Warner); *Id.* at 511 (Tongue).

[61] *Id.* at 520.

Congress knew whose law they chose for Alaska, and anticipated that older case law from the pre-adoption jurisdictions would follow the statutes to Alaska.

Liquor and Taxes

In addition to defining and punishing crimes and providing a code of criminal procedure, the Alaska bill provided the first systematic scheme of taxation to be laid in the District. This was brought about by a dispute over the provisions relating to intoxicants. The Act of 1884 rendered the sale of intoxicating beverages illegal in Alaska, but the bill based on the Commissioners' report only included the provision (from the Oregon law) making it illegal to sell liquor to Indians "or half-breeds." The Commissioners included a repealer of the old prohibition act at the end of the section.[62] Rev. Crafts, who had spoken against the hasty inattention given the bill by committee,[63] was one of many prohibitionist lobbyists in Washington at the time; and several congressmen had been elected on prohibition platforms. The stage was set for a fight.

After objection to the liquor provision was made on the floor by the prohibitionist Representative Moody, Oregon's Representative Tongue proposed that the Commissioners' section be accepted, but that a high license be levied against sellers of alcoholic beverages. In this way Tongue obtained floor consideration of a bill then buried in the Committee on Territories, providing a lengthy list of license-taxes for Alaska, only one of which was related to liquor.[64] The tax provision was successfully attached to the Alaska criminal-penal bill. The prohibitionists lost, a bow to realism, and the tax won, a bow to financial necessity.[65]

Approval of the Criminal Codes by Congress

Even after the extensive debate, the Alaska bill passed the House in substantially the same form as presented by the Commission: the only major changes were the reception provision and the tax measure.[66] The Senate heard many of the same arguments of the prohibitionists, and the liquor issue was the major one in the

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[62] S. Doc. No. 60, 55th Cong., 2d Sess. 40-41, § 145.

[63] *See* text accompanying note 28 *supra.*

[64] 32 Cong. Rec. 394-95. The amendment provided a complete list of license-taxes to be levied on businesses, only one of which was a liquor tax. It was apparently copied from the laws of the District of Columbia. *See* note 88 *infra.*

[65] With the passage of the civil government bill the next year (which included some amendments to the tax provisions), the three District Judges were able to finance their necessary operations with these tax levies. Judge Wickersham used them to build a courthouse at Eagle City in 1900. Wickersham at 41.

[66] 32 Cong. Rec. 597 (1899).

upper chamber.[67] The bill passed the Senate with minor amendments after debate essentially parallel to that in the House.[68] The conference reports contain no major commentary or legislative history: the final changes were long lists of minor rewordings to maintain uniformity.[69] President McKinley signed the measure in March of 1899.[70]

The Commission's Civil Code and Senator Carter's Political Code

The Congress also directed the Commission to draft "a codification of laws, other than criminal, and a code of procedure thereunder, for the District of Alaska."[71] The Commissioners presented their draft laws with a report on December 21, 1898.[72] The report details most of the changes from the then "existing" Alaskan law. The Commissioners found the Oregon provisions concerning chattel mortgages "deficient" and inserted sections from Montana law in place of them. The mining laws of Oregon were deemed "inapplicable" and in part contrary to existing federal law, and were therefore omitted (although provisions "generally concerning estates in lands" would remain, and cause a major controversy). The provisions of Oregon law relating to insurance companies were too "severe," so the Commission offered substitutes. Sections relating to juries were rewritten enough to allow a proper jury to be constituted, something new to Alaska, and railroads were denied eminent domain. However, the only major addition to the federal and Oregon law "already in effect" was a proposed expansion of the powers of the U.S. Commissioners. The report's summary of these provisions will seem strikingly familiar to present-day Alaskan lawyers: this was the genesis of the present District and Magistrate Courts in Alaska.

> In furtherance of these purposes we have provided that the district court shall divide the district into precincts, for each of which precincts there shall be a resident commissioner. Under the authority of existing laws there are now nine commissioners, and the district court is here empowered to make additional appointments when necessary. These commissioners will exercise the authority—
>
> (1) Of justices of the peace with civil and criminal jurisdiction;
>
> (2) Of coroners;

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67 S. Doc. No. 122, 55th Cong., 3d Sess. (1899).

68 32 Cong. Rec. 2705 (1899).

69 *Id.* at 2818, 2903.

70 Act of March 3, 1899, ch. 429, 30 Stat. 1253.

71 Concurrent Res. of May 31, 1898, 30 Stat. 1800.

72 H.R. Doc. No. 99, 55th Cong., 3d Sess. (1898).

(3) Of judges of probate;

(4) Of recorders of deeds and other instruments authorized by law to be recorded or filed;

(5) Of notaries public with the authority to take acknowledgments and administer oaths within their respective precincts.[73]

There was also pending in the Fifty-fifth Congress another Alaskan bill, Senator Carter's draft political code,[74] which also dealt with the powers of U.S. Commissioners, and proposed to expand the Alaskan judiciary.[75] Carter added his provisions to the draft codes, and introduced the resulting omnibus bill in the Senate of the new Fifty-sixth Congress in February, 1900.[76] It was referred to the Committee on Territories, of which Carter was a member, and he reported it favorably with amendments from the Committee on March 5.[77] Debate on the bill began on March 6.

The Congressional debates on the civil code bill largely involved the attempts by a group of lobbyists, led by Alexander McKenzie,[78] to change the mining laws in order to aid the "jumping" of new gold mining claims at Cape Nome in Alaska. They were to fail, but only after long and sometimes bitter debate on the floor of the Senate. Afterwards, they would continue their struggle through the illegal activities of a federal judge whose appointment McKenzie would secure. This, of course, is the incredible story of the "Spoilers," which would be fictionalized and romanticized in a novel,[79] songs, plays and motion pictures. Yet the historical version is every bit as sensational as any of its fictional and theatrical counterparts. Most Alaskans and Alaskaphiles know what happened after McKenzie and Judge Arthur Noyes arrived in Nome —and the tale is set forth in the appendix to this article—but few of them realize that the "Spoilers" had in effect lost a lawsuit on the floor of the U.S. Senate before their sojourn to Alaska.

Most of the discoverers of the Nome gold fields in September, 1898, had been Scandinavian prospectors and Lapp reindeer herders, many of whom were not yet naturalized citizens of the United States.[80] The mining laws of the United States then provided that

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[73] *Id.* at 3.

[74] Life of Carter, *supra* note 26 at 50.

[75] S. REP. No. 607, 55th Cong., 2d Sess. (1898); H.R. REP. No. 1807, 55th Cong., 3d Sess. (1899).

[76] 33 CONG. REC. 1435 (1900).

[77] *Id.* at 2522. The author has been unable to find the committee report anywhere in the documents of the Fifty-sixth Congress.

[78] Republican National Committeeman from North Dakota. See APPENDIX, *infra.*

[79] BEACH, THE SPOILERS (1906).

[80] Some of the original locators were citizens, and some were not. Of the aliens, some had duly declared their intentions to become citizens in Port Townsend, Wash-

claims could be "located" (filed) by U.S. citizens and by those who had legally declared their intentions to become citizens. If these requirements were not complied with, only the Government could challenge the claims so filed. Often federal judges would allow aliens to "perfect" their locations by declaring their intentions to become citizens in mid-litigation. Clearly the original locations on Anvil Creek should have been upheld upon any attack by lawsuits—unless the lawsuit was tried on the floor of the United States Senate.

The Calm before the Storm

The Nome debates were to concern only two sections of the bill before Congress. It was an extensive proposal, which in slightly altered form would eventually occupy more than half of the volume known to Alaskan lawyers as Carter's Annotated Codes of Alaska (1900).[81] The first week of Senate consideration—if it could be called that—was a continuous reading of the entire bill under rules allowing little debate and no consideration of amendments.[82] Senator Carter, managing the bill, complained of the delaying tactics, apparently instigated by Senator Bate of Tennessee: why, he asked, had the Senate required a complete reading of the lengthy Alaska bill "when the Revised Statutes of the United States were read *pro forma* in about thirty minutes?"[83] Bate was a member of the reporting Committee on Territories and, although he maintained that he was a supporter of the bill,[84] he would eventually vote against the final conference report.[85]

After reading was completed, the Senate proceeded to consider amendments to the bill, most of them minor.[86] However, one amendment of some interest to Alaskan political historians was introduced by Senator Perkins. Juneau and Sitka were then competing to be the seat of government of the District under the new laws. Sitka had been the capital since long before the purchase from Russia,

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ington, and the others had attempted to do so before the U. S. Commissioner at St. Michael, who erroneously believed that he could legally receive their declarations. S. Doc. No. 272, 56th Cong., 1st Sess. 1-2 (1900) (Brief on Behalf of Charles Lane and other American Citizens, Owners of Mining Claims in Alaska).

81 Senator Carter secured publication of the "Carter Code" at Callaghan & Co. of Chicago, but never did gain much from it, according to records of his royalties in the financial records included in his papers at the Library of Congress, *supra* note 26.

82 33 CONG. REC. 2661-960 (1900). Some amendments were offered and tabled. *Id.* at 2701, 2782.

83 *Id.* at 3273-74.

84 *Id.* at 3300.

85 *Id.* at 6640.

86 One changed the period for perfecting a claim of adverse possession from ten to fifteen years (*Id.* at 3120); another added a grant of admiralty jurisdiction to the Alaska courts (*Id.* at 3121). Other Amendments in the early consideration are largely minor changes of wording. The substance of the Oregon law was usually retained.

and the newer boom town of Juneau resented Sitka's predominance. The resourceful Juneau Chamber of Commerce had lobbied extensively for a move of the capital to Juneau, and Senator Carter had sympathetically included provisions for this purpose in the political code. Senator Perkins of California offered an amendment to the Carter provision that would continue the seat of government at Sitka "until suitable grounds and buildings thereon shall be obtained, by purchase or otherwise, at Juneau."[87] To support his amendment Perkins offered a report demonstrating the nature and extent of the Government's physical plant in Sitka. Carter in turn offered a report showing how old and inadequate those buildings were. Perkins continued to speak for a "cautious" transfer, and the Senate agreed to his amendment.[88]

Senator McBride of Oregon obtained quick passage of an amendment that might have been expected to incur the wrath of McKenzie's Senate allies. It provided that

> . . . all records of instruments of writing hitherto made by any U.S. Commissioner in the district of Alaska are hereby declared to be public records of such district, and shall have the same force and effect as if recorded in conformity with the provisions of this act.[89]

This provision might easily have been construed as validating the attempted citizenship declarations made by the Lapps who had located the first claims on Anvil Creek.[90] Yet the McKenzie forces ignored it, and it passed easily. However, there was a colloquy between McBride and Bate in which McBride expressed the view that the provision would not validate "improper claims or deeds."[91]

Just before the Nome case came before the Senate, Senator Stewart of Nevada secured the passage of an amendment denying U.S. Commissioners jurisdiction over mining cases.[92] His comments in support of the amendment displayed his extensive understanding of the mining laws of the United States. He had drafted the Act of 1872[93] that had given miners' customs the force of law, and ap-

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87 *Id.* at 3122.

88 Perkins also offered a minor amendment relating to the business licensing fees passed for Alaska by the Fifty-fifth Congress which he contended were "taken from the laws of the District of Columbia and made applicable to Alaska." 33 CONG. REC. 3301 (1900). His mention of the license-tax provision triggered a debate with the prohibitionist Senator Gallinger from New Hampshire about the effectiveness of the new measures. This colloquy contains a wealth of information on the history of smuggling in Alaska. *Id.* at 3302-04.

89 *Id.* at 3304.

90 *See* note 80 *supra.*

91 33 CONG. REC. 3304 (1900).

92 *Id.* at 3305.

93 Act of May 10, 1872, ch. 152, 17 Stat. 91.

parently had an extensive practice as a mining lawyer. He was to lead the floor fight against Alexander McKenzie and the Hansbrough amendments.

Trying a Lawsuit in the Senate

One of the chapters of Oregon laws borrowed by the Commission and submitted in Carter's expanded bill was entitled "General Provisions Concerning Estates in Lands."[94] Two sections of this short chapter provided in part:

> Sec. 89. Any alien may acquire and hold lands, or any right thereto or interest therein, by purchase, devise, or descent, and he may convey, mortgage, and devise the same . . . .
>
> Sec. 90. The title to any lands heretofore conveyed shall not be questioned, nor in any manner affected, by reason of the alienage of any person from or through whom such title may have been derived.[95]

On March 26, 1900, Senator Hansbrough of North Dakota[96] introduced an amendment that would strike these provisions and require instead that no aliens could hold mining claims.[97] Hansbrough declared that it had "never been the rule in this country that aliens shall have the advantage of our mining laws." Senator Stewart, the mining lawyer, disagreed, insisting that "for many years in the West, when mining was very prosperous, all aliens had the right to work mines."[98] Hansbrough waxed eloquent about the reindeer herders who had "betrayed their trust" by "abandoning" the government-owned herds of reindeer to mine for gold. Senators chose their sides in the debate, which would be protracted. Carter allied himself with the McKenzie Senators,[99] opposing the provisions of his own bill. Carter indeed added to the controversy by offering another amendment that would open the beach areas to mining, allowing the Secretary of War to grant exemptions from

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[94] H.R. Doc. No. 99, 55th Cong., 3d Sess. 19 (1898).

[95] *Id.* at 20.

[96] Recall that McKenzie was Republican National Committeeman from North Dakota.

[97] 33 Cong. Rec. 3307 (1900).

[98] *Id.*

[99] Wickersham at 346 notes that McKenzie "had much political influence, especially in the states of Minnesota, North Dakota, and Montana," gained in part when he was the receiver for the Northern Pacific Railroad. Also, the handpicked marshal and district attorney who accompanied McKenzie to Nome were Montanans. Since Carter supported the claim-jumpers in the Senate, this would seem to build something of a circumstantial case against Carter. It was not missed by his political enemies: allegations of improper financial interests in the Nome case were made against Carter by Wilbur Sanders of Helena in an interview published in the Helena Herald on December 12, 1900. *See* Carter, An Open Letter to Hon. Wilber F. Sanders 1 (1900). Yet the Carter papers in the Library of Congress, *supra* note 26, have no mention of McKenzie, and the compilation there is extensive, with large holdings from 1899-1900.

navigation servitude over sections of shoreline. Such mining operations would follow miners' customs, said Carter's amendment, but would only allow citizens and those who had legally declared intentions to be naturalized to hold the mining claims.[100]

The remainder of the Alaska bill was ignored while discussion focused on these two amendments. Senator Stewart explained again and again the confusing state of the mining law, because Hansbrough's and Carter's arguments sounded very persuasive to the uninitiated. Cases were cited and read on the floor of the Senate. The "lawsuit" even had its "pleadings."[101] On April 9, Senator Stewart introduced into the Record an affidavit of A. N. Kittelsen, the elected recorder of the first mining district at Nome. After recounting the history of the original claims and the activities of the "relocators",[102] Kittelsen notes that

> These relocators, although they did not take possession or work upon the claims they relocated or "jumped," employed Hubbard, Beeman & Hume as their attorneys. Mr. Hubbard, of the firm . . . is in the city of Washington. I met him on the 5th of this month in the committee room of Senator Hansbrough.[103]

Not only did Hansbrough admit that he knew Hubbard, he offered into the Record an affidavit[104] by Hubbard, giving the views of the disgruntled miners (the ones not among the "lucky Swedes") in Nome. The group that had attempted to invalidate the first claims at a miners' meeting on July 10, 1899[105] had formed a so-called Law and Order League, and Hubbard spoke glowingly of its virtues.[106]

Hansbrough offered a substitute amendment in place of his first on April 4. It added the requirement that "it shall be the duty of the court to inquire into . . . the citizenship . . . of the locator."[107] The fight dragged for weeks, and Carter, although allied with Hansbrough, began to fear for his Alaska bill. The debate became bitter and acrimonious.

> [A]ngry charges were hurled back and forth across the Senate floor, personal friendships were sundered, the amendment was

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100 33 CONG. REC. 3346 (1900).

101 At one point, Stewart accused Carter of trying his "cases" outside the "pleadings." *Id.* at 4662.

102 See APPENDIX, *infra.*

103 33 CONG. REC. 3928 (1900).

104 *Id.* at 3930.

105 See APPENDIX, *infra.*

106 More "pleadings" can be found in the Brief on Behalf of Charles Lane (Presented by Senator Stewart) and Statement of the President of the Law and Order League (Presented by Senator Hansbrough), in S. DOC. 272, 56th Cong., 1st Sess. 1, 10 (1899).

107 33 CONG. REC. 3739 (1900).

> attacked as retroactive in its effect, and intended to rob honest Scandinavian miners . . . . One day's Congressional Record was filled with such violent language and recriminations from one Senator to another that after Senators had cooled off it was withdrawn and reprinted so as to exclude the unparliamentary and bitter language.[108]

As a tactical move, it would seem, Hansbrough eventually withdrew his second amendment in favor of one by Carter,[109] but the debates did not stop and angry voices were still heard on the floor.

Finally, to preserve the peace of the Senate and the life of the Alaska bill, Carter, Hansbrough and Stewart agreed to a compromise by which *none* of the provisions would be included in the bill: not Carter's on beach claims; nor Hansbrough's on alien-staked claims; nor the old Oregon law that started the controversy.[110] Stewart knew that the mining law as it then stood would protect the original locators; Carter saved his bill; Hansbrough accepted the view that, with no applicable statute, the judge would write his own law; and McKenzie was already plotting the appointment of Judge Noyes.[111] With the compromise the bill passed the Senate almost immediately, and went to the House.[112]

The Civil Codes: House Consideration

McKenzie either had much less influence in the House, or had given up his attempt to get the mining law changed.[113] The House debates are mostly detailed and routine discussions of the advisability of certain provisions of the draft codes. The bill followed the same course in the House as had the criminal codes in the previous year. Common law lawyers attacked the code of civil procedure, but with little success; defenders of individual provisions or of the entire bill invoked its history as the law of Oregon and of Alaska. It also became fashionable to invoke the "Juneau Committee." Apparently a group of Congressmen (including Vespasian Warner of Illinois, the floor manager of the bill) had attended hearings in Juneau on the civil government bill, and had discovered the opinions of a "committee" of Juneau lawyers:

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108 WICKERSHAM at 344. Wickersham was in Washington, D. C., at the time of these debates.

109 33 CONG. REC. 4662 (1900).

110 *Id.* at 4893-95.

111 WICKERSHAM at 346.

112 33 CONG. REC. 4895 (1900).

113 Representative Dayton of West Virginia did introduce a Carter-Hansbrough sort of mining amendment, but after no more than two hours of debate, it was defeated. *Id.* at 5871-78.

> [T]his bill has been examined by a committee of Alaskan lawyers, and they have suggested to us the changes which they desired. The committee of the House has to a large extent conformed to the suggestions of Alaskan lawyers. It was not the purpose of the committee to go over the laws of Oregon that are applicable to Alaska and entirely recast them. We took them as we found them except so far as the lawyers of Alaska desired to change them.[114]

One amendment offered in the House could have been very significant. Representative William E. Williams proposed a Delegate to Congress for the District of Alaska, and the amendment passed the Committee of the Whole House—and then disappeared from the pages of the Record.[115]

The House consideration was extensive and detailed, and is valuable legislative history.[116] Yet after all the discussion, most of the Commission's draft was approved. The conference reports were unremarkable, as had been the case with the criminal codes. President McKinley signed the bill into law on June 6, 1900.[117]

Conclusion

The narrative ends here. Alaskan lawyers are quite familiar with the legal history of the District, Territory, and State after 1900. The 1899-1900 codes have remained the core of the Alaskan statutory law, some of the sections of which remain nearly intact, and some of which have been extensively amended or repealed by Congress or by the territorial and state legislatures. Yet the structure is still not dissimilar from the Carter Codes. The legacy is also found in the Alaska Rules. Although most of the present rules of practice derive from the Federal Rules of Civil Procedure, those which do not are taken from the codes of procedure in the earlier law, and one can recognize some of the Field Commission's language in those rules. Also, the citations to antecedent statutes in the present edition of Alaska Statutes is not exhaustive. For example, the annotations to Title 9 ("Code of Civil Procedure") and Title 12 ("Code of Criminal Procedure") only show the source law as the re-enactments of these provisions by the Alaska State Legislature in 1962. Yet they clearly derive from the older Alaskan law, back through all of the re-enactments and recompilations, to Carter's Code. Some of the present sections are still nearly word-for-word what Deady borrowed from New York for Oregon in

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114 *Id.* at 5977 (remarks of Representative Gibson of Tennessee). *See also id.* at 6010, 6108 (comments by Representative Warner to the same effect).

115 *Id.* at 5658, 5972-75.

116 *See generally* 33 CONG. REC. 5616-6168 (1900).

117 *Id.* at 6168, 6637, 6710, 6867.

1862-1864, or what the Kelly Commission took from New York's (Field's) code of civil procedure in 1853.

The basic structure of the law of wills in Alaska before the effective date of the Uniform Probate Act[118] was that which the Legislative Assembly of the Territory of Oregon had borrowed from Missouri in 1849, and which had been carried through codifications and re-enactments by the Kelly commission of 1853, Deady in 1862, Deady and Lane in 1873-1874, Congress and the Carter Codes of 1899-1900, and the Territorial and State legislatures in Alaska from 1912 until 1972. The Michigan law on dower borrowed for Oregon by the Kelly commission survived this same chain until its repeal in Alaska in 1963.

There are many other examples throughout the Alaska Statutes, particularly in Title II, the Alaska Penal Code. The references and quotations to the report of the 1826-1828 "Butler" Commission in Part I of this article[119] were chosen because they dealt with particular sections of the 1828 New York report that are still in substance the law of Alaska.

Certainly, there have been amendments and repealers. Yet if every volume and document cited in this article were available to Alaska's bench and bar (few now are), a great amount of support could be found for the developing law of the still new state.

APPENDIX

"The Spoilers"

In September of 1898 a group of Scandinavian prospectors and Lapp reindeer herders discovered gold in the Anvil Creek area about three miles from the beach at Cape Nome.

> They located claims, marked their boundaries, made the necessary discovery of gold, began mining in good faith, organized a recording district, recorded their location notices, and were in peaceable and unchallenged possession of their respective claims in compliance with the United States laws before the outside world heard of the discovery.[120]

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[118] Ch. 78, Sess. Laws of Alaska (1972). The effective date of the new act was January 1, 1973. *Compare* ALASKA COMPILED LAWS ANN. §§ 59-1-2 through -3-2 (1949); ch. 38, §§ 1-3, Sess. Laws of Alaska (1963); ch. 38, § 1, Sess. Laws of Alaska (1967); ch. 215, § 1, Sess. Laws of Alaska (1970) *with* REV. STAT. MO. 556-71 (1845). *See Part I* at 28.

[119] *Part I* at 17-21.

[120] WICKERSHAM at 338. Most of the tale which follows is taken from WICKERSHAM at 337-61, and from Morrow, *The Spoilers*, 4 CAL. L. REV. 89 (1916). *See also* Tornanses v. Melsing, 106 F. 775 (9th Cir. 1901); Anderson v. Comptois, 109 F. 971 (9th Cir. 1901); *In re* Noyes, 121 F. 209 (9th Cir. 1902).

The extent of the gold strike became generally known by the summer of 1899 when hopeful latecomers began streaming into Nome from Dawson and the other camps. By then there were few rich claims left and the disappointed throng of miners grew very bitter toward the "lucky Swedes."

At a miners' meeting on the evening of July 10, 1899, the leaders of the dissidents attempted to pass a resolution declaring the claims illegal and open to relocation. Lookouts, posted on Anvil Mountain near the rich claims, waited for the signal fire from Nome that would chronicle the passage of the resolution. They were to sweep down and "relocate" the claims for themselves and their conspirators. But an alert army officer from Ft. St. Michael attended the meeting with a few of his men, and moved and enforced an adjournment before the resolution could pass.

Shrewd lawyers kept up the assault on the original locators. They retained Alexander McKenzie, Republican National Committeeman from North Dakota, to lead a fight to amend the mining laws that related to Alaska when the civil government bill was brought up for consideration in 1900.

McKenzie led the unsuccessful fight for the Hansbrough amendments to the Alaska bill, which would have granted private parties the right to challenge a locator's citizenship, and would have operated retrospectively.[121] Wickersham[122] paints a vivid picture of this unscrupulous lobbyist:

> McKenzie had much political influence, especially in the states of Minnesota, North Dakota, and Montana. He had been receiver for the Northern Pacific Railroad during its financial troubles in years gone by, and later the chief lobbyist for that and other railroads in the capital. He now determined to use his great power and influence in the Alaska project, which appealed to his imagination and cupidity as worthy of his high rank. He was a large and vigorous man, physically and mentally, and a past master of the art of controlling weaker men in high office.[123]

When McKenzie lost his "lawsuit" in the Senate, he decided to find a friend in court—or rather, to put one there. The new political code for Alaska provided for two more federal judges, one to sit at Nome. McKenzie, through his influence with President McKinley, secured the appointment of Arthur H. Noyes of Minnesota as the District Judge at Nome, and similarly secured appointment of his own men as U.S. Marshal and as District Attorney.

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121 33 CONG. REC. 3307ff. (1900).
122 WICKERSHAM at 346.
123 *Id.*

He then organized a corporation called the Alaska Gold Mining Company and purchased all of the worthless jumpers' "claims," paying the "relocators" with company stock. He and his chosen officials then headed for the beaches near Nome. Their attempts to secure the major gold claims for McKenzie's corporation are an incredible chapter in the history of the federal judiciary.

McKenzie boasted openly in Nome that he controlled the court and its officers and indeed used threats of adverse court treatment to secure more mining claims, both legitimate and "relocated." Noyes on his own motion and without issuance of process to the legitimate owners of the major claims, appointed McKenzie receiver of the claims with instructions to operate them. After several unsuccessful attempts (Noyes kept no records,[124] so there were no papers from which to appeal) the legitimate locators obtained writs of *supersedeas* from Judge Morrow of the Ninth Circuit Court of Appeals in San Francisco, directing Noyes to desist from further proceedings in the matter, and commanding McKenzie to return all properties pending appeal in that court. The writs were ignored, and the Marshal of the appellate court was directed to proceed to Nome and arrest McKenzie, Noyes, and others for contempt. McKenzie was convicted of criminal contempt, but his political influence gained him a pardon from President McKinley. Noyes and the others were fined and removed from office.

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[124] *Id.* at 366.