Washington Law Review

Volume 9 | Issue 4

12-1-1934

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Recommended Citation
Edward F. Medley, *The Status of Mining Locations in Washington*, 9 Wash. L. & Rev. 208 (1934).
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THE STATUS OF MINING LOCATIONS IN WASHINGTON

By EDWARD F MEDLEY*

The growing importance of the mining industry in the State of Washington calls for a consideration of the decisions of the Supreme Court of the State as to the status of mining locations in the State. Are mining locations on unpatented land, the fee of which remains in the Federal government, real or personal property?

The questions involved in considering the problem are many and various. Would property descend as real estate or be distributed as personal property in the case of the death of the owner? Does our statute requiring brokers' agreements for the sale of real estate to be in writing apply to mining locations? What is the proper form of transfer of a mining location? Do mining claims come within the terms "lands, tenements and hereditaments"? What is the status of buildings and other structures on mining claims, which on ordinary land would become fixtures? Should the interest of the owner of a mining claim be attached as real or personal property?

Before entering upon a discussion of the law in this state it might be well to say that the general rule is that such an interest is real property Judge Lindley says, "as between the locator and everyone else save the proprietor, the estate acquired by a perfected mining location possesses all the attributes of a title in fee, and so long as the requirements of law with reference to continued development are satisfied, the character of the tenure remains that of a fee" The proprietor referred to is the United States.

Various decisions of the mining states are collected in support of the following statement appearing in Corpus Juris[2] "A mining location perfected under the law is property in the highest sense of that term, it may be bought and sold or otherwise disposed of, and which passes by descent, is subject to taxation, and to sale on execution, and may be mortgaged. It is real property, and as such is subject to a judgment lien, but no dower right attaches thereto" The cases cited in support of the proposition come from the highest courts of the following jurisdictions United States, Alaska, California, Colorado, Dakota, Idaho, Montana, Nevada, New Mexico, Utah, and British Columbia. It should be noted here that no Washington cases are cited.

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[1] Lindley on Mines (3rd Ed. 1914), § 539.

[2] 40 Corpus Juris, Mines and Minerals, p. 815, § 236.

In Corpus Juris[3] the statement is made, "but after the location has in fact been made and the mining claim has been perfected, it is real property and an oral agreement for the sale or conveyance of it, or interest therein, is not binding" Also it says, "a mine itself is real estate and an interest therein can be transferred only by compliance with the Statute of Frauds."

It should be noted that for the purpose of this discussion we are referring only to mining claims which are located on the public domain, the fee in which is in the United States. It is significant, therefore, that the Supreme Court of the United States has uniformly adopted the general rule that the interest of a mining locator, before patent issued to his location, is real property[4] It would seem that in view of the underlying fee in the Federal government the decisions of the Supreme Court of the United States would be the ones which a state supreme court would consider more than any others in passing on this question.

Our own court in the early case of *Phoenix Mining and Milling Company v. Scott*[5] followed a course diametrically opposed to the majority view, holding that the possessory right which the locator of a mining claim has is not such an interest as will support the lien of a general judgment under our judgment lien law,[6] making such judgment a lien upon "the real estate of any judgment debtor" No cases from the Supreme Court of the United States are cited in support of the conclusion reached by the court, but an Iowa case is cited, the following language of which is apparently adopted as the reason for the decision. "by the language, 'real estate of the person,' we understand that the fee simple or estate of inheritance must be in the person in order to have the judgment against him operate as a lien upon the land"

The *Phoenix* case is cited as authority for the decision in *Huffman v. Ellen Mining Company*[7] which holds that the sale of an unpatented mining location under execution as personal property is valid. The court says, referring to the *Phoenix* case "In that case we held that the possessory right which the person acquired by the location of a mining claim under the statutes of the United States, is not such an interest as will support the lien of a general

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[3] 27 Corpus Juris, Frauds, Statute of, p. 203.

[4] *Bradford v. Morrison*, 212 U. S. 389, 29 Sup. Ct. 349, 53 L. Ed. 564 (1909).

[5] 20 Wash. 48, 54 Pac. 777 (1898).

[6] Rem. Rev. Stat., § 445.

[7] 118 Wash. 546, 204 Pac. 197 (1922).

judgment within the meaning of our code, making such a judgment a lien upon 'the real estate of the judgment debtor' If this be the rule, it would seem necessarily to follow that the interest acquired is personal rather than real, and being personal, it could be sold'' The court goes on to state that it was not necessary to base its judgment on the theory that the mining claim was personal property and finds justification for its decision on another theory so that the force of the ruling is weakened somewhat.

These are the only two cases which seem to hold directly that a mining location is personal property It is the theory of this article that the effect of these decisions is greatly weakened by numerous other decisions of our Supreme Court which can be construed only as holding that the interest of a mining locator in his claim is real property There are a number of cases where conflicting interests in unpatented mining claims are settled in actions to quiet title. While it is true that under our statutes one can bring an action to quiet title to personal property, yet, in the cases cited, nearly every sentence and paragraph employs language indicating that the court, in reaching its decision, considers the action one to quiet title to real estate. It talks about deeds to the property, conveyances, and throughout uses language which irresistably leads one to the conclusion that while not so holding directly, it is basing its judgment on the theory that the interest of the mining locator is real property For example, in *Fisher v. Jackson*,[8] the court says. "Appellant claimed the right to possession of the land under a mining location. This action was brought under § 785, Remington's Compiled Statutes, relating to actions for the possession and quieting of title to real property "[9]

In five cases[10] the action is one in the nature of ejectment, which would lie where real estate is involved. The case of *State v. Praul*[11]

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[8] 120 Wash. 107, 206 Pac. 929 (1922).

[9] *Cedar Canyon v. Yarwood*, 27 Wash. 271, 67 Pac. 749, 91 Am. St. Rep. 841 (1902) *Prospectors Dev. Co. v. Brook*, 32 Wash. 315, 73 Pac. 376 (1903) *Lauman v. Hoofer* 37 Wash. 382, 79 Pac. 953 (1905) *Protective Min Co. v. Forest, et al*, 51 Wash. 743, 99 Pac. 1033 (1909) *Quilp, et al, v. Republic Mines*, 96 Wash. 439, 176 Pac. 57 (1917) *Oroville, et al, v. Rayburn*, 104 Wash. 137, 176 Pac. 14 (1918) *Kirkpatrick v. Curtiss*, 138 Wash. 333, 244 Pac. 571 (1926) *Karnes v. Flint*, 153 Wash. 225, 279 Pac. 728 (1929) and *Olympic Mang. M. Co. v. Downing*, 156 Wash. 686, 287 Pac. 872 (1930).

[10] *Davis v. Dennis*, 43 Wash. 54, 85 Pac. 1079 (1906) *National M. & M. Co. v. Piciolo*, 54 Wash. 617, 104 Pac. 128 (1909) *Sexton v. Wash. M. & M. Co.*, 55 Wash. 380, 104 Pac. 614 (1909) *Spokane, Portland v. Larson*, 71 Wash. 301, 128 Pac. 641 (1912) and *Gold Creek, et al, v. Perry*, 94 Wash. 624, 162 Pac. 996 (1917).

[11] 57 Wash. 198, 106 Pac. 763 (1910).

is a criminal action for trespass to land, involving trespassing on a mining location and no question was raised that a mining location might be personal property

The case of *Croup v. DeMoss*[12] was an action to establish a resulting trust in favor of the plaintiff in certain mining claims. The action was based on an oral agreement and in finding for the defendant the court said: "The evidence as to whether there was any agreement between the appellant and the respondent DeMoss touching the taking up of the option, was in sharp conflict. If there was any, it was an oral agreement and relating to an interest to be acquired in real estate. Standing alone, it was, therefore, unenforceable under the Statute of Frauds." This would seem to be a direct holding that the interest of the mining locator in his claim is real property It is perhaps unfortunate that the court made no reference to the Phoenix case in its decision, but the court's ruling has the support of the overwhelming weight of authority in the courts of last resort in the mining states and also in the Federal courts. Our court also has ruled that the title to a mining claim may be established under the doctrine of adverse possession.[13] It certainly must be admitted that under our laws the doctrine of adverse possession is one which applies to real estate disputes, and in ruling as it has, the court has called the interest of the mining locator in his claim real property as effectively as if it had used that exact term in describing it.

In the two cases of *Rayburn v. Stewart-Calvert Company*,[14] the court discusses a lease of an unpatented mining claim using language which makes it apparent that it considers the interest of the locator to be real property The second of these cases is a real action and no point is raised by the court that the action would not lie because mining claims are personal property

Our statutes have classified the interests of the locator in mining claims for the purpose of taxation as personal property[15] Judge Lindley in his standard work on Mines[16] says. "Each state may determine for itself the nature or character of actions which may be maintained in its courts for the redress of private wrongs, and

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[12] 78 Wash. 128, 138 Pac. 671 (1914).

[13] 110 Wash. 120, 188 Pac. 27 (1920).

[14] 105 Wash. 570, 178 Pac. 454 (1919) and 105 Wash. 575, 178 Pac. 455 (1919).

[15] Rem. Rev. Stat., § 11109, which defines personal property for the purpose of taxation as including all improvements upon lands, the fee of which is still vested in the United States.

[16] Lindley on Mines (3rd Ed. 1914), 1205, § 539.

may in this behalf, and perhaps others, classify interests in real property as chattels or chattels real, or declare that a given privilege exercised with reference to land shall not be classified as an interest in real estate for the purpose of either litigation or taxation. But this does not, as we understand it, militate against the dignity of the estate in unpatented mining claims accorded by the decisions of all the courts, state and federal, from the beginning." On this subject of classification attention might be called to our statute,[17] "the term 'real property' shall include every estate, interest and right in lands, tenements, hereditaments, corporeal or incorporeal." While this is a criminal statute, it illustrates what Judge Lindley has been quoted as saying regarding classification in affecting the real character of the property We see in this state the same thing classified as personal property for another purpose in a different statute. It would be conceded that under the definition of real property in the criminal statute quoted, a mining claim would be real property and this is supported by the case of *State v. Praul.*[18]

Attacking the view of the *Phoenix* case that a judgment lien does not attach to a mining claim, attention is called to the case of *Bradford v. Morrison*[19] construing an Arizona statute similar to the Washington judgment lien statute wherein the Supreme Court of the United States distinctly holds that the interest of a mining locator in an unpatented mining claim is subject to the lien of a docketed judgment. It is of interest in this connection to note that the appellant, who lost in the Supreme Court, cited the *Phoenix* case from this state in his brief. As was said heretofore, the decisions of the Supreme Court of the United States in a matter such as this should be of controlling force as the fee is in the United States.

In this connection it is pertinent to remark that the interest of a mining locator in his claim is a higher title under the decisions of our court than that of a conditional vendee in land under a forfeitable contract. Yet in *State ex rel. Oatey Orchard Company v. Superior Court*[20] it was distinctly held that although a conditional vendee had no title either legal or equitable in the land subject to a contract of sale, yet the interest of a purchaser under a forfeitable executory contract for the purchase of land was real property

[17] Rem. Rev. Stat., § 2303 (10).
[18] *Supra*, note 11.
[19] *Supra*, note 4.
[20] 154 Wash. 10, 280 Pac. 350 (1929).

A fortiori, the interest of a mining locator in his claim would be real property

To summarize, it is clear that our Supreme Court is out of line with the great weight of authority in holding that the interest of a mining locator in his claim is personal property The *Phoenix* case, cited as so holding, decided in 1898, appears to have been poorly considered and without any reference to the prevailing law of the United State Courts on the subject. All the cases cited by the court in the *Phoenix* case in support of its proposition are rulings in their respective jurisdictions that a judgment lien does not attach to an equitable title in land. This may be the law although it is open to some question in this jurisdiction, but it certainly does not follow than an equitable title to land is personal property There is a *non sequitur* here which is the basis of the court's ruling in the Huffman case. This latter case, decided in 1922, cites the *Phoenix* without other authority and without discussion of the law in support of its ruling that the interest of a mining locator in his land is personal property

On the ther hand, we have decisions in this state indicating that mining claims have been treated as real property in various forms of action. It is reasonable to conclude that if the matter were again before the Supreme Court with the law properly digested and briefed for its consideration, the court might reverse itself. Otherwise, the legislature, in order to further the development of a great mining industry in this state, should remove all uncertainty by passing an act adopting the reasonable and logical rule that the interest of a mining locator in his claim before patent is real property