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# The Courts and Early Bar of Washington Territory

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### THE COURTS AND EARLY BAR OF WASHINGTON TERRITORY

ARTHUR S. BEARDSLEY AND DONALD A. McDONALD

Territorial justice in Washington had its roots in the judicial system of Oregon Territory, where the need for the administration of law and order was the motivating force which initiated the formation of civil authority. The administration of justice, like the civil authority, must expand as the population grows and as the territorial area becomes larger and better organized. Strong men are always needed in the administration of justice; but in the frontier settlement where law and order are often flouted with impunity, even stronger men are needed if the courts are to command the respect which is their due. Law and order is the first essential attribute of a civil society, no less on the frontier than in the densely populated urban community.

The history of the courts of Washington Territory was no exception to this rule. Their organization and development at all times kept pace with the growth of the Territory. At all times its judges were "learned in the law", even if on occasion their moral and social make-up were not above suspicion.

While the influence which the courts exercised in the development of civil authority cannot be minimized, it was largely due to the personal traits, training, and ability of the judges assigned to the Territory, that law was enabled to progress equally with the growth of civil institutions. When it is considered that, for the most part, judges were appointed from without the Territory, that such appointments were often political in character, that the judges often were required to travel several thousand miles to reach their bailiwick, that they were unacquainted with the pioneer life to which they were to be subjected, that they were often separated from their families, sometimes never to see them again, and that their salaries were small, one must fairly conclude that a great portion of good fortune favored the infant Territory. That a number of her best citizens are descended from those judges who remained permanently in the Territory is something of which the present generation may well be proud.

The court room scenes reminiscent of these frontier days are gone forever, but they have left a glamour which has survived. In the early

days the judges were wont to mix with the public and the bar in an atmosphere of social intercourse, but in a manner now changed by time. One never hears, today, of a great ball tendered in the judge's honor when court days are over, nor of a banquet in his honor when the term is ended. Neither do the citizenry turn out to welcome the judge when he comes to town, as they did some years ago. These were common events in the early days. Riding the circuit, as it was done in the three decades following the creation of the Territory, is no longer the practice; nor do the lawyers follow in the train of the Court, accompanying it from courtroom to courtroom.

Doubtless it was of changes such as these that Judge Orange Jacobs was mindful on the occasion of his address before the Washington State Bar Association in 1894, because at that time he said with a conscious feeling of regret, that

"In every new and sparsely-settled country there is always a closer social intercourse between the Bench and the Bar and a greater freedom of utterance than in after years. When population increases to the dignity of a Commonwealth and costly courthouses are built, there is connected with every courtroom a sort of "holy of holies", from which the judge emerges in the morning, and, after the crier performs his duties, into which he retires at night. This may and probably does aid in the dispatch of public business, but it operates as an effectual curtailment of that free and easy social intercourse which once existed. We rarely see the judge now except when he is fully clad with judicial thunder. I do not know that I desire a full return of the customs of the other days, but I would, if I could, check the tendency to social isolation."<sup>1</sup>

Closely tied to the life of a people is the history of its courts; hence the thirty-one years of territorial justice produced many facts of varying interest. It is from these facts that the human side of the courts may be seen; and it is from them also that some day their history will be told.

## I

Early conflicts between the settlers of Oregon and the factors of the Hudson's Bay Company, and disputed jurisdiction over such controversies, to which must be added a need to take care of emergencies which then had arisen, did much to bring about the formation of civil government in Oregon Territory. The Hudson's Bay Company, under the provisions of its charter from the King of England, had broad administrative and judicial powers. These powers extended to the administration and control over estates of its deceased employees and the regulation of the rights and duties of its employees, not excluding punishment for wrongs committed for which, in a few instances, the

<sup>1</sup>WASHINGTON STATE BAR ASSOCIATION, PROCEEDINGS (1894), 132. This statement was made many years before the advent of the famous Lincoln Day banquets, given each year by the Tacoma Bar.

death sentence had been made the penalty.<sup>2</sup> Such prerogatives are generally conceded as belonging to and as being indicia of sovereignty; so, when the Hudson's Bay Company began to claim jurisdiction over controversies arising between its employees and the settlers of the Territory and the disputes over claims and boundaries, the time had arrived for the establishment of a civil government that could protect rights and dispense justice impartially and with impunity. The climax was the formation of the Provisional Government of Oregon on May 2, 1843, at Champoege, which in turn was recognized by the Federal Government on August 14, 1848, as forming the basis for a territorial status.<sup>3</sup> From the date of this Provisional Government, it may be said that law and order had come to Oregon.<sup>4</sup>

## II

It was in 1849 that law came to that part of the broad expanse of the Oregon Territory which stretched north from the Columbia River to latitude 49°, and east from the Pacific Ocean to the summit of the Rocky Mountains. At that time only a handful of settlers had dared to brave the dangers of this wilderness; yet even there law, order and justice must prevail. Hence, when murders of the whites by the Indians began, the arm of the law reached forth in punishment and the first lawful trial in this vast domain was held.

The occasion in question was the trial of the six Indians who had been charged with the murder of Leander C. Wallace at Fort Nisqually some months before. The trial<sup>5</sup> took place at Fort Steilacoom and was presided over by Chief Justice William P. Bryant<sup>6</sup> under authority of a special act of the territorial legislature of Oregon.<sup>7</sup> The trial began on October 1, 1849, and consumed three days,<sup>8</sup> the courtroom and yard being crowded with as many settlers and Indians as could find seats or standing room in or about it.

As this was the first federal court held north of the Columbia River, the comments of Governor Lane of Oregon in regard to it and its

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<sup>2</sup>C. H. Carey, *History of Oregon* (1932), i, 317.

<sup>3</sup>Read the very informative and interesting history of the formation of the Provisional Government as it appears in Chapter XXVII of C. A. Snowden, *History of Washington* (1909), or other reliable histories.

<sup>4</sup>At this time Oregon Territory included the area now included within the states of Oregon, Washington, Idaho, Montana to the summit of the Rocky Mountains, and a corner of Wyoming. Its size can be compared to the combined area of the fourteen states of Maine, Vermont, New Hampshire, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Delaware, Maryland, Pennsylvania, Virginia, West Virginia and Ohio.

<sup>5</sup>The proceedings of this trial are extant and may be found in the original journal of the Court in the county clerk's office in Olympia.

<sup>6</sup>William P. Bryant was born in Kentucky, 1806; practiced law in Indiana; appointed Chief Justice of Supreme Court of Oregon Territory by President Polk, 1850; returned to Indiana about 1854; died, 1860.

<sup>7</sup>September 14, 1849.

<sup>8</sup>Olympia, *Washington Standard*, April 11, 1868.

influence are of historical interest and importance. The Governor alludes to this court and trial as follows:

"For the purpose of affording a fair, impartial and properly conducted trial, I employed Mr. Alonzo Skinner<sup>9</sup> to go with the court to prosecute the criminals, and Mr. David Stone<sup>10</sup> to defend them. The court ordered an allowance of two hundred and fifty dollars to each of them, which I have paid out of the Indian funds in my hands. I have also paid to the Indians who worked the boats for the conveyance of the court and jury, one hundred and eighty dollars; the expense was necessary for the reason there is no other mode of travel, there being no road in the direction of Puget Sound, and consequently, we had to go down the Columbia to the mouth of the Cowlitz, and up that rapid stream to the settlements, and then across the country to the Sound."<sup>11</sup>

Of the six charged with the crime only Kussuss and Quallahworst<sup>12</sup> were found guilty. They were executed on the day following. Very little evidence was produced against three of the remaining Indians and none against the fourth, who probably was a slave. The whole tribe was present at the execution, augmented by a vast gathering of Indians from other tribes. All were made to understand that the law would promptly punish them for every murder committed, and that the Government would have no satisfaction short of the execution of all who participated in the murder of its citizens. The effect produced by this trial was, according to Judge Bryant, very salutary, and in his opinion would long be remembered by the tribes. However, by the following winter this salutary effect had worn off and once more a white man, a soldier from Fort Steilacoom, was killed by the same Indians.

Many of the grand and petit jurors summoned for this first case had come from a distance of two hundred miles, as did Chief Justice Bryant and Attorneys Skinner and Stone. Their journeys were not easy, when compared with present-day transportation. Chief Justice Bryant and the two lawyers traveled together, camping in the woods at night, and journeying by bateaux or canoe by day, until they arrived at Cowlitz Landing where they obtained horses for the overland ride to Fort Steilacoom. The first trial cost the United States \$2,379.54 including the cost of the eighty blankets used as bribes to induce the

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<sup>9</sup>Alonzo A. Skinner was born in Ohio, 1814; admitted to the bar there, 1840; appointed one of circuit judges, which position he held until organization of the Territory; defeated for delegate from Oregon, 1853; appointed to fill vacancy on Supreme Court bench, 1866; appointed collector of customs, 1870; died in California, 1877.

<sup>10</sup>David Stone was born in Vermont, 1812; elected prosecuting attorney for third judicial district of Oregon, 1849; lived at mouth of the Cowlitz River; postmaster at Monticello.

<sup>11</sup>First Annual Report of Governor Lane as Superintendent of Indian Affairs for Oregon Territory, October 22, 1849.

<sup>12</sup>Sometimes spelled "Cussas", and "Quallahwort".

Indians to surrender the guilty persons.<sup>13</sup>

In later years a distinguished lawyer commented on this trial in the following words:

"It will be seen from the records submitted that justice as administered ninety-one years ago in the State of Washington was orderly, prompt and apparently entirely satisfactory, since there seems to have been no appeal from the judgment of the court (apparently no opportunity was given for an appeal) and then sentence was apparently executed by the hanging of the defendants the day following their indictment and trial. How many courts will receive an indictment and put the defendant on trial the same day that the defendant pleads to the indictment? How many lawyers in this day and age will announce their readiness to proceed to trial in a murder case the day of their appointment to represent a defendant? And how many defendants found guilty receive such prompt punishment? It is not intended to suggest that present-day trials should follow the speedy methods used in 1849, but there may be a lesson which can be learned from these old records."<sup>14</sup>

### III

In the year following the Wallace murder trial, Judge William Strong<sup>15</sup> began to hear regular terms of court north of the Columbia River, although he was not definitely assigned to this northern district until 1853. Several of his terms of court were held in the log home of John R. Jackson,<sup>16</sup> but other sessions were held at Vancouver, Olympia, Steilacoom, and Coveland. Since at this time King County was attached to Pierce County for judicial purposes, the litigants of King County traveled to Steilacoom for their day in court, which explains why Judge Strong never held court in Seattle.

His first court was held at Jackson Prairie on November 12, 1850, but the only action taken at that hearing was to enter an order requiring notice of a libel to be published in the *Oregon Spectator* of Oregon City prior to the last Tuesday of that month, when the case was to be heard on its merits at Vancouver.

At the May term, 1851, held at Jackson's prairie home, Judge Thomas

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<sup>13</sup>Hubert H. Bancroft, *Works* (1888), xxx, 80.

<sup>14</sup>Mark H. Wight (state law librarian of Washington), *Jackson Prairie Court House* (1936), 2 STATE BAR REV. 62, 65.

<sup>15</sup>William Strong was born in Vermont, 1817; graduated from Yale University, 1838; admitted to practice in Cleveland, Ohio, 1840; appointed Associate Justice of Supreme Court of Oregon Territory, 1849; member of House of Representatives of Washington Territory, 1856; appointed Associate Justice of Supreme Court of Washington Territory, 1858-61; practiced law in Washington Territory until 1862; moved to Oregon and died at Portland, 1887.

<sup>16</sup>Still standing, as restored, on the east side of the Pacific Highway eleven miles south of Chehalis. It is now a state monument.

Nelson received numerous pleas which were entered upon indictments returned. On the same day, on the motion of Amory Holbrook, Esq., John B. Chapman,<sup>17</sup> "an attorney and counsellor in the state of Indiana, was admitted to practice and his oath received in open court". Chapman thus became the first attorney formally to be admitted to practice law in what is now Washington. Following his admission, Chapman turned to the defense of the numerous persons then charged with various misdemeanors.

When court convened at the same place for the next term (October 30, 1851) the law practice of John B. Chapman was censured by Judge Strong, who had summoned him to appear and show cause why his license to practice law should not be suspended because of "malfeasance in office and obstructing the sheriff in the performance of his duties". In all of these proceedings before the court, Amory Holbrook<sup>18</sup> represented Oregon Territory by obtaining the indictments from the grand jury and by then prosecuting those charged with violations of the laws. He was present at this October term of court to see that Chapman was duly prosecuted for his "malfeasance in office." The difficulty in which Chapman found himself partly grew out of his part in advising the jurors, who had been summoned to appear for attendance upon this term of court, that they should obey the law rather than accept what many of them regarded as the imperious commands of the judge.<sup>19a</sup> The Oregon legislature had previously enacted a law<sup>19</sup> requiring the county commissioners to select a location for the seat of county government and requiring that all business be transacted there. This the commissioners of Lewis County had done, and had fixed the county seat on the farm of Sidney S. Ford on the Chehalis River. It was at the Ford home that Judge Strong should have held his court; and it was to that place that Chapman had urged the jurors to go.

The summons issued from Judge Strong's court fixed the place for holding court at the Highlands, as Jackson's place on the Cowlitz River, some fifteen miles further south, was then called. Those jurors living in the northern part of the district were displeased with this action as it required them to travel that additional distance. They also took exception to the form of the summons which "commanded" them "to appear, and fail not under penalty." This was the usual form of lan-

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<sup>17</sup>John B. Chapman was born in Virginia, 1797; came to Grays Harbor, 1850; elected judge of county court of Lewis County, 1851; started a number of town sites; was instrumental in getting Washington Territory separated from Oregon; died in Indiana, 1878.

<sup>18</sup>Amory Holbrook arrived in Washington Territory as United States Attorney, 1850; conducted prosecution of Whitman Massacre, May, 1850; member of Oregon House of Representatives from Clackamas County, 1859; defeated by Benjamin F. Harding for U. S. Senator, 1863.

<sup>19a</sup>Another reason for Chapman's trouble with Strong was due to Chapman's part in preventing the sheriff from arresting George Slaser, who was under indictment for assault.

<sup>19</sup>ORE. LAWS 1861, p. 76.

guage,<sup>20</sup> employed in the summons, but the jurors were not familiar with it, and were still less familiar with the responsibilities of this type of service to their government. Some threatened not to attend and sent a protest at being treated as "serfs," while others thought that nothing less than impeachment should be a proper rebuke to a judge who had presumed so far upon their rights as free Americans. Much of this action probably was prompted by Chapman's advice. Later, he is said to have supported the federal cause and to have squared himself with Judge Strong by such action.<sup>21</sup> Judge Strong issued warrants for the arrest of those who had been summoned, but who had failed to appear, and they were ordered to show cause why they should not be punished for contempt of court. The records show that some were actually fined and that their fines were duly paid.<sup>22</sup>

#### IV

The following year (1852) Judge Strong held three terms of court. At the first session, held in Olympia, (January 20)<sup>23</sup> five attorneys were admitted to the bar. They were Elwood Evans, Quincy A. Brooks, Isaac N. Ebey, Daniel R. Bigelow, and Simpson P. Moses.<sup>24</sup> At the May term (May 24), Quincy A. Brooks was made a special United States Attorney in order that the Government could be properly represented in matters then pending before the court. At the next term (October

<sup>20</sup>Snowden, *op. cit.*, iii, 198; Bancroft, *op. cit.*, xxxi, 50.

<sup>21</sup>But the (Oregon) *Statesman*, according to Bancroft, *op. cit.*, viii, 163, "ever on the alert to pry into actions and motives, soon made it appear that the reconciliation had not been between the people and Strong, but that W. W. Chapman, who had been dismissed from the roll of attorneys in the second district, had himself written the letter and used means to procure his brother's (John B. Chapman) signature with the object of being admitted to practice in the first district."

<sup>22</sup>Journal of court proceedings, note 4, *supra*.

<sup>23</sup>Snowden, *op. cit.*, iii, 190; Bancroft, *op. cit.*, xxxi, 55.

<sup>24</sup>Elwood Evans was born in Philadelphia, 1828; appointed deputy collector of customs at Olympia, 1851; chief clerk of first territorial legislature; Secretary of Territory, 1862-67; acting Governor of Territory, 1865-66; prosecuting attorney for third judicial district, 1881; member of legislature from Pierce County, 1889; died, 1898.

Quincy A. Brooks was born in Pennsylvania, 1826; came to Oregon, 1851; deputy collector of customs for Puget Sound district, 1851-52; first prosecuting attorney north of Columbia River, 1852; secretary to Superintendent of Indian Affairs of Oregon and Washington, 1856-60; customs collector for Puget Sound district, 1886-89; died, 1908.

Isaac N. Ebey was born in Missouri, 1818; came to Oregon, 1848; took claim on Whidby Island, 1850; elected prosecutor for third judicial district, 1851; only member of Oregon legislature from region north of Columbia River, 1852; appointed collector of customs on Puget Sound, 1853; instrumental in organization of Washington Territory; murdered by Northern Indians on Whidby Island, 1857.

Daniel Bigelow was born in New York, 1824; came to Oregon by ox-team, 1851; settled in Olympia; member of first territorial legislature, first territorial auditor, acting treasurer, probate judge; died, 1905.

Simpson P. Moses was appointed collector of new district of Puget Sound by President Fillmore, 1851; replaced by I. N. Ebey as collector of customs; returned to Ohio.



27), upon motion of Simpson P. Moses, Judge Strong admitted George H. McConaha<sup>25</sup> to practice law, and on the next day he recognized A. Campbell, Esq.<sup>26</sup> as counsel for a George Slaser, who was under indictment for assault, replacing John B. Chapman.

The January (1852) term, however, was marked by important litigation known as the Mary Dare Case. The facts of this controversy are briefly as follows:

A few days after Simpson P. Moses and Elwood Evans had arrived in Olympia (November 10, 1851), as the first collector and assistant collector of customs respectively, the steamer "Beaver" with the brigantine "Mary Dare" appeared in Budd Inlet and dropped anchor about two miles off shore, which was probably as near as Captain Charles E. Stuart felt that he dared to come. Both boats belonged to the Hudson's Bay Company and before going to Olympia had been anchored off Fort Nisqually for fifteen hours. During this time small boats continuously had made trips between the vessels and the shore, and six passengers and their baggage had been landed without permit.<sup>27</sup>

The "Beaver" had reported her arrival as being in ballast, although, except for a little coal, she carried none; but she did have a quantity of goods for trading with the Indians valued at about \$500.00. The "Mary Dare" had unloaded all of her supplies for Fort Nisqually except one 250-pound sack of sugar, which Elwood Evans upon behalf of the Government, seized. Both boats were then placed under bond to await decision of the court on libel actions for violation of the revenue laws. That night the master of the "Beaver" abandoned his ship and fled the jurisdiction of the court, finally arriving in Victoria; and thereafter, he was ever careful not to return to the United States.

The "Beaver" was charged with bringing into the district from a foreign port trading goods not upon any manifest and amounting to the value of \$500. The court after a hearing for the purpose of taking proof held that this boat was not liable for the acts of her master and released her; but issued a warrant for the arrest of Captain Stuart, who, under the law, was liable upon conviction to both fine and imprisonment. While the charges were technical,<sup>28</sup> they were not grievous in degree. However, this seemed to be an appropriate time to impress on the Hudson's Bay Company the fact that it must respect the laws of the United

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<sup>25</sup>George N. McConaha was born in Ohio, 1820; arrived in Seattle, 1852; representative from King and Pierce Counties in territorial legislature at Olympia, 1854; drowned while returning from Olympia to Seattle by canoe at close of legislature, 1854.

<sup>26</sup>No information concerning this attorney has yet been located.

<sup>27</sup>Snowden, *op. cit.* iii 188-191.

<sup>28</sup>Violation of Section 103, Act of Congress, March 3, 1799, which provided that refined sugar in packages of less than 600 pounds should not be brought into any port under penalty of forfeiture of both sugar and vessel.

States; and further, that such laws would henceforth be enforced, now that the machinery had been set up for their enforcement.

The "Beaver" was a small boat which could cruise along the shores of Puget Sound and trade at any point. Her trade was of a retail rather than of a wholesale character. She could easily evade the laws when outside the view of the settlements, and doubtless had been doing so regularly. Because of the scattered nature of the settlements, this illegal trade could not easily be discovered. For such reasons, it was necessary likewise to impress upon her master that the laws of the United States could not be flagrantly violated with impunity.

At the preliminary hearing, held to take testimony in these matters, Dr. William F. Tolmie, chief factor for the Hudson's Bay Company, appeared upon behalf of the "Mary Dare", while David Logan and Simon B. Marye of the Portland bar,<sup>29</sup> whom Judge Strong had brought with him, acted as district attorney and clerk respectively. Alonzo M. Poe,<sup>30</sup> who was later admitted to practice as an attorney, acted as United States Marshal.

Dr. Tolmie presented a petition to the court, addressed to the Secretary of the Treasury, asking that the forfeiture of the "Mary Dare" be remitted, and upon payment of the duties on the goods, by Dr. Tolmie the vessels were released upon their bonds. At the next term of court (April, 1853), on motion of the district attorney, the case against Captain Charles E. Stuart of the "Beaver" was dismissed. The testimony taken in court and Dr. Tolmie's petition were submitted to the Secretary of the Treasury, who later remitted the forfeiture, and thus these famous cases came to an end.

It is interesting to note that, prior to the dismissal of the case against Stuart, the jurisdiction of Oregon Territory north of the Columbia actually had ceased to exist. Judge Strong did not know that he was acting outside of his jurisdiction, nor that the area north of the Columbia was then Washington Territory. It was while he was holding his court at Coveland a few days later that the firing of guns over at Port Townsend attracted his attention. Upon investigation he learned that he had been holding court in Washington Territory. Thus he became *de facto*, if not *de jure*, the first judge of Washington Territory. An interesting question might have arisen if his jurisdiction had later been challenged

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<sup>29</sup>David Logan was born in Springfield, Illinois, 1824; came to Oregon, 1850; member of Oregon legislature, 1854; member of Constitutional Convention; one of greatest jury lawyers of his time; retired in 1871 and died soon afterwards.

Simon B. Marye seems to have been prominent in the early Oregon Bar, but little is known about him. He was mayor of Portland, 1852-1853; prosecuting attorney for Clackamas County, March term, 1852.

<sup>30</sup>Alonzo M. Poe located on Puget Sound, 1846; appointed U. S. marshal at special term of District Court at Olympia, 1852; admitted to bar by Judge Lander at Coveland, 1854; died at Napa, California, 1866.

on an appeal from the decisions rendered after March 2, 1853, but it was not so challenged.

## V

It has been pointed out that the new Territory had a fair supply of lawyers admitted to the practice of law before 1854. Snowden has noted<sup>31</sup> that Colonel Isaac N. Ebey, who came in 1848, was the first to arrive, while John B. Chapman was here in 1850. Daniel R. Bigelow, who had come on the "Exact" with the Dennys, later formed a partnership with Quincy A. Brooks. Their card appeared in the first issue of the *Columbian* (September 11, 1852). In November, 1852, George N. McConaha and J. W. Wiley<sup>32</sup> opened an office in Olympia and published a formal announcement in the *Columbian*, in which they referred their prospective clients, for recommendations as to their ability and reputation, to such notable men as Senators Thomas H. Benton, John B. Miller and Thomas Corwin, and Governor Burnett of California, as well as to all of the California newspapers.

## VI

Washington Territory was carved out of Oregon Territory by Act of Congress, March 2, 1853, and, shortly after his inauguration, President Pierce nominated Edward Lander<sup>33</sup> of Indiana, John K. Miller of Ohio and Victor Monroe<sup>34</sup> of Kentucky as Chief Justice and Associate Justices respectively of the new territory. Mr. Miller, having taken ill shortly after his appointment, did not qualify, and the judgeship was then tendered to Moses Hoagland, also of Ohio, but he declined it. The President then appointed to this place Obidiah B. McFadden<sup>35</sup> of Pennsylvania. The years which have passed since the appointment of Judge McFadden have confirmed the opinion of historians that the unusual circumstances which brought Judge McFadden to Washington Territory was Oregon's loss and Washington's gain.<sup>36</sup> The Territory was indeed

<sup>31</sup>Snowden, *op. cit.*, iii, 156; see also Henry G. Struve, *Address to the Washington Pioneer Association*, Seattle, 1886.

<sup>32</sup>J. W. Wiley was born in Ohio; law partner of George McConaha in Olympia; served three years as a member of Territorial Council; editor of the *Pioneer and Democrat*; public printer in first territorial government; died, 1860.

<sup>33</sup>Edward Lander was born in 1816; admitted to bar in Massachusetts, 1839; appointed Chief Justice of Washington Territory by President Pierce, 1853; declined renomination, 1858; defeated for territorial delegate, 1861; died at Washington, D. C., 1907.

<sup>34</sup>Victor Monroe was born in Kentucky, 1813; appointed Associate Justice of Supreme Court of Washington Territory by President Pierce, 1853; prosecuting attorney for third judicial district, 1856; died at Olympia, 1856.

<sup>35</sup>Obidiah B. McFadden was born November 18, 1814; admitted to bar in Pennsylvania, 1838; appointed Associate Justice of Supreme Court of Oregon Territory, 1853, and of Washington Territory, 1854; resumed law practice in Olympia, 1861-73; delegate to Congress, 1873-75; died in Olympia, 1875.

<sup>36</sup>Through an error, Judge Mathew P. Deady of Oregon had been re-

fortunate to gain such a learned jurist, able public servant and worthy citizen.

Judges Monroe and Lander reached their posts prior to Governor Isaac Stevens and were on hand to greet the Governor upon his arrival.<sup>37</sup> Speaking on behalf of the settlers on this notable occasion, Judge Monroe, in an appropriate address, welcomed the Governor to the theatre of future labors, and "assured him of the confidence of [*sic*] an intelligent and patriotic people placed in him as their Governor".<sup>38</sup>

As one of his first official acts, Governor Stevens fixed the boundaries of the judicial districts, pending later legislative definition.<sup>39</sup> Clarke and Pacific Counties were to compose the first district, Lewis and Thurston Counties the second, and Pierce, King, Island and Jefferson the third. At the same time he fixed the times and places for holding court in these three districts and designated February 27, 1854, as the date for the meeting of the first session of the territorial legislature.

The distinction of holding the first regular term of court in Washington Territory fell to Judge Monroe. This he did on January 2, 1854, at Cowlitz Landing (near the present town of Toledo), which was then the county seat of Lewis County. At this term of court, five more lawyers were admitted to practice. They were Columbia Lancaster, Francis A. Chenoweth, Benjamin F. Stark, Joseph S. Smith and James McCabe.<sup>40</sup> It is interesting to note that eight months later Judge Mon-

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moved and Judge McFadden appointed in his place. Judge McFadden journeyed to Oregon and over the protests of Judge Deady and his friends actually held court there. The error was discovered just at the time that Miller took ill. Hence, President Pierce approved Judge McFadden to fill Miller's place, thereby removing himself from an embarrassing position.

<sup>37</sup>Governor Stevens, an engineer, had been authorized by the Secretary of War, Jefferson Davis, to survey a route from the Mississippi to the Pacific Coast. This required almost eight months. Hence, he did not arrive at his official post until November 25, 1853. For an account of his arrival, see Edmond S. Meany, *History of Washington* (2d ed. 1924), 101.

<sup>38</sup>Olympia, *Pioneer and Democrat*, December 3, 1853.

<sup>39</sup>Proclamation, November 28, 1853, House Journal (1854), 182.

<sup>40</sup>Columbia Lancaster was born in New Milford, Connecticut, 1803; arrived at Oregon City, 1847; appointed Associate Justice of Supreme Court in November and served until Oregon became a territory; elected first Washington delegate to Congress, 1854; died in Vancouver, 1893.

Francis A. Chenoweth was born in Ohio, 1819; settled in Washington, 1850; member of Oregon territorial legislature, 1852; speaker of first Washington territorial legislature, 1854; moved to Corvallis, Oregon, 1863; died in Oregon, 1899.

Benjamin F. Stark was born in New Orleans, 1830; came to Oregon, 1845; member of territorial legislature of Oregon in 1852 and of state legislature in 1860; appointed U. S. senator from Oregon to fill unexpired term of E. D. Baker, 1861; died at New London, Connecticut, 1898.

Joseph S. Smith was born in Pennsylvania, 1824; admitted to bar and practiced law in Oregon City; came to Puget Sound, 1853; served as prosecuting attorney for third judicial district; speaker of House of Representatives in Washington territorial legislature, 1855; returned to Oregon to live, 1858; died, 1884.

James McCabe came to Oregon from Michigan, 1851; admitted to practice, 1851; appointed prosecuting attorney in Amory Holbrook's place;

roe's place on the court was taken by Francis A. Chenoweth, whom he had on this occasion admitted to the bar of Washington Territory. A few days later (January 9, 1854), Judge Monroe convened court at Chinook City, then the county seat of Pacific County.

At this time the judgeship of the first judicial district was vacant, as Judge McFadden had not yet qualified for the office. Hence, both Judges Monroe and Lander held court in that district, Judge Monroe on January 9th, as mentioned above, and Judge Lander a day or two later at Columbia City (Vancouver). Since Judge Lander's terms in the third district were not scheduled to begin until the first Monday in February, 1854, he helped out in the other two districts. While Judge Monroe was holding the first court for the first district at Chinook City, Pacific County, Judge Lander was holding court at Columbia City, the county seat of Clarke County. Unfortunately, the court records of this county have been destroyed, and since there are no Vancouver newspapers for this period extant, we have no knowledge of what transpired at this first term of court. On his way to Columbia City, Judge Lander had arrived at Cowlitz Landing on the day on which Judge Monroe opened court at that place, and at the afternoon session both judges sat *en banc* for the remainder of the day. This is the first *en banc* proceeding on record in Washington.

The first term of the territorial court for Olympia was opened by Judge Lander on January 30, 1854, and at this session two new lawyers were admitted to practice. They were the secretary of the territory, Charles H. Mason, and Butler P. Anderson.<sup>41</sup> At the same time, several who had been admitted to the practice by Judges Strong and Monroe were readmitted to practice in the second judicial district. Among the latter was Simpson P. Moses, who on the day following (January 31) was indicted by the grand jury for misfeasance in his office as collector of customs. After a long delay and many postponements, this case was tried and he was acquitted.

Notwithstanding the assignment of Judge Monroe to the second judicial district, he seems never to have held court there, except for the drawing of a jury panel. In August, 1854, he was removed from office and Francis A. Chenoweth appointed in his place. Thus the second

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left for California, 1854.

<sup>41</sup>Charles H. Mason was born in Maryland, 1830; admitted to Rhode Island bar, 1851; appointed Secretary of Washington Territory, 1853; was acting governor through several critical periods of territorial history; died, 1859.

Butler P. Anderson was born at Winchester, Tennessee, 1828; graduated from law school, 1849; came to Oregon with brother, James P., 1850; held public offices of clerk of Legislative Council, District Clerk, clerk of Supreme Court, Register of Land Office, prosecuting attorney for second judicial district and U. S. District Attorney for Territory; moved to Texas, 1855; died, 1878.

term of the territorial court in Olympia was presided over in November, 1854, by Judge Chenoweth, at which time (November 17) he admitted Christopher C. Hewitt to practice law. After his admission to the bar Hewitt opened his office in Seattle, and the little village found another lawyer to replace the loss of her first one, George N. McConaha, who had met a tragic death by drowning on his return from the first session of the territorial legislature in Olympia.

Although it now seems like a strange rule, yet it was then necessary for attorneys who had been admitted under the jurisdiction of Oregon Territory to be readmitted under the jurisdiction of Washington Territory. And admission to practice law in one judicial district did not admit them to practice in the other two; nor did admission to practice in all three districts—which many attorneys enjoyed—admit them to practice before the Supreme Court of the territory.

In the third judicial district, to which Judge Lander was assigned, court was scheduled to be held at four places. It was to be opened at Steilacoom in Pierce County on the first Monday in February, 1854, which was on February 6th, the second Monday at Seattle for King County, the third Monday at Coveland for Island County, and the fourth Monday at Port Townsend for Jefferson County.

The court records for King County do not contain this first session, presided over by Judge Lander, but Thomas W. Prosch<sup>42</sup> has noted that it was held in Yesler's Cook House.<sup>43</sup> Dr. David S. Maynard—physician, apothecary, lawyer, and justice of the peace<sup>44</sup>—acted as clerk, and John S. Clendenin,<sup>45</sup> United States Attorney, served also as the prosecuting attorney. No jury cases were heard at this term, and the only business transacted was the admission to citizenship of Henry Van Asselt. It is interesting to note that the lawyers present at this session were Elwood Evans and Joseph Cushman of Olympia, Frank Clark<sup>46</sup> and William H.

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<sup>42</sup>*Chronological History of Seattle* (unpublished ms.), 52.

<sup>43</sup>The *Puget Sound Daily*, July 26, 1866, describes Yesler's Cook House as follows: "Judge Lander's office was in one corner of the dining room; the auditor's office for some time was under the same roof, and indeed, it was said to have been used for more purposes than any other building on the Pacific Coast. It was the general repository from which law and justice was dispensed throughout a large scope of surrounding country. It had at different times served as town hall, court house, jail, military headquarters, storehouse, hotel, and church, and in the earlier years of the Territory, served all these purposes at once."

<sup>44</sup>Dr. David S. Maynard was born in Vermont, 1808; came to Oregon, 1850; came to Seattle, 1852, where, as justice of the peace, he tried the first case at law in King County; practiced law and medicine in Seattle for a number of years; was first Seattle lawyer; died, 1873.

<sup>45</sup>John S. Clendenin was born, 1819; appointed district attorney for Washington Territory by President Pierce, 1853; resigned, 1856; died in San Francisco, 1857.

<sup>46</sup>Frank Clark was born in New York, 1834; came to Washington, 1852; settled at Steilacoom; member of territorial legislature, Board of Regents of University of Washington; candidate for delegate to Congress; successful criminal lawyer; died, 1883.

Wallace of Steilacoom, and George A. McConaha of Seattle. It is possible that Clark and Wallace had been admitted to practice law by Judge Lander at the term of court in Steilacoom the week before, although there is no record of this fact.

At Coveland on Penn's Cove, Whidby Island, on February 20, 1854, Judge Lander opened the next session of the territorial court for his district. This term of court was not the first one to be held at Coveland, as Judge Strong had held court there in April, 1853. This February term lasted four days and was not marked by any matter of particular interest. At the October term held at the same place, however, Judge Lander appointed Attorneys Elwood Evans, William H. Wallace and J. Patten Anderson,<sup>47</sup> the latter being the United States Marshal and brother of Butler P. Anderson, to examine Alonzo M. Poe, who had applied for admission to practice law. The next day (October 13), upon motion of Wallace, Poe was admitted.

The following week (beginning February 27, 1854) court was held at Port Townsend, but little of interest took place at that term. Judge Lander held the two terms of court in 1854 both in Coveland and Port Townsend, while Judge Chenoweth, who succeeded him in the third district in 1855, held the terms of court for the years 1855 and 1856. At the October term at Coveland in 1855, Judge Chenoweth admitted Winfield S. Ebey,<sup>48</sup> a brother of Colonel Isaac N. Ebey, to practice law. Winfield, in his diary, has told the story of this ceremony. His examining committee consisted of Elwood Evans, Victor Monroe and Frank Clark, all known to have been more than moderate drinkers. According to Ebey, "the only examination I passed consisted of a single question by Mr. Clarke, who asked me if I had any Good Brandy in the Custom House." (Ebey worked at the custom house in Port Townsend.) The answer being in the affirmative, Frank Clark moved his admission.

At a session in Coveland on August 3, 1857, Colonel William Wallace moved the admission of Selucius Garfield<sup>49</sup> to the bar, which motion was

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<sup>47</sup>William H. Wallace was born in Ohio, 1811; admitted to bar in Indiana; came to Washington, 1853; served for several sessions in territorial legislature; chosen president of Legislative Council; appointed Governor of Washington Territory by President Lincoln, 1861; elected delegate to Congress; commissioned first Governor of Idaho; elected first delegate to Congress from Idaho; elected probate judge when he returned to Pierce County home; died, 1879.

James Patton Anderson was born in Tennessee, 1822; admitted to bar in Tennessee, 1843; appointed U. S. marshal and census taker for Washington Territory, 1853; elected delegate to Congress, 1855; appointed Governor of Washington Territory by President Buchanan, but declined office, 1857; fought in Civil War for South; died in Memphis, Tennessee, 1872.

<sup>48</sup>Winfield S. Ebey was born in Illinois, 1831; settled on Whidby Island, 1854; deputy collector of customs under I. N. Ebey; died in Petaluma, California, 1865.

<sup>49</sup>Selucius Garfield was born in Vermont, 1822; came to Washington Territory, 1857; receiver of public monies, 1857-60; surveyor general of Territory, 1866-69; delegate to Congress, 1869-73; collector of customs on

granted by Judge Chenoweth; while a little over a year later (February 2, 1858) at the same place, Colonel Wallace moved the admission of Benjamin F. Dennison<sup>50</sup> to the bar. Thus two of the most outstanding lawyers of the territory in years to follow were admitted to the bar in this court.

During the years 1857 and 1858, all courts for the Puget Sound country north of Seattle were held only at Coveland; but they were changed to Port Townsend in 1859, where they were held regularly until statehood (1889).

This first session of the district court for King County (1854), referred to above, likewise was not the first term of court held in what is now King County. When this county was still a part of Thurston County, Oregon Territory, Dr. David S. Maynard, as justice of the peace for the Duwamps Precinct (Seattle area), and acting under the authority conferred upon him by his legislative appointment of July, 1852, held court in Yesler's Cook House. A charge had been filed against the mate of the brig "Franklin Adams" for misappropriating money and goods belonging to the ship. While it might have been doubtful that he had jurisdiction over such matters, Dr. Maynard nevertheless heard the matter and the mate was convicted. Since there was then no jail in the county in which to incarcerate prisoners, the mate was released with the admonition never to do it again, and in the future to keep his books in better order.

The first term of the district court held in King County (1854) has been described above, but the story of the second term is no less interesting. It convened on October 22, 1854, and lasted for almost two weeks. The sessions were held in the Felker House, which was more commodious than Yesler's Cook House.<sup>51</sup>

The twenty men chosen for the grand jury were from the band of pioneers resident in and around Seattle. It was indeed awkward for the grand jury to be asked to indict their fellow townsmen, especially when the residents were so intimately acquainted. Rumor had it, down at the Cook House, which was still the general lounging place, that the grand jury would be asked to indict several of the leading citizens who had participated at an earlier date in the lynching of certain Indians implicated in various murders. And, despite popular feeling, the grand jury did return the indictments.

Among those who were accused of murder were two prominent men—David Maurer and Luther Collins, then the county commissioners.

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Puget Sound, 1873; died in Washington, D. C., 1881.

<sup>50</sup>Benjamin F. Dennison was born in Vermont, 1820; admitted to practice in Ohio, 1848; came to Puget Sound and settled at Whatcom, 1858; appointed Chief Justice of Washington Supreme Court by President Grant, 1868; served two terms in territorial legislature; first president of Washington State Bar Association; died at Olympia, 1896.

<sup>51</sup>Roberta Frye Watt, *Story of Seattle* (1932), 171.



Another citizen, accused of having been an accomplice in the hanging of an Indian, was William Heebner. Strangely enough, Heebner was selected to sit on the grand jury, which thus found itself to be in an embarrassing position. The difficulty was met, however, by excusing Heebner long enough to indict him.

A subscription to raise money was started immediately in order that these men, all good Democrats, might have the services of the "smartest lawyers in the territory." Dr. Maynard, still the clerk of the court, headed the list with a contribution of one hundred and fifty dollars. The attorneys for the prosecution were Elwood Evans, then representing the United States, and Frank Clark, then the prosecuting attorney. For the defense, the attorneys were Joseph Cushman and W. C. Pease,<sup>52</sup> captain of the U. S. revenue cutter "Jefferson Davis." The verdict was for the defendants.

The Felker House was being operated by Mrs. Mary Ann Boyer Conklin, more generally known as "Mother Damnable." Following the term of court, Frank Clark, as prosecuting attorney, proceeded to settle with "Mother Damnable" for the use of her rooms for court purposes. She charged him \$25.00 for her best room as a courtroom, \$10.00 for rooms for the jurors, and \$4.00 for the use of the furniture. The jurors' meals came to \$66.00 at the rate of fifty cents a meal. Thinking the above charges rather high, the prosecuting attorney demanded a receipt. "Mother Damnable" could neither read nor write; neither did she know what was meant by a receipt. Furthermore, she did not like Clark, who was then a young lawyer trying to make a reputation, and who had worked hard for the conviction of the accused pioneers.

She told the young man that she would give him a receipt and stepped back into the kitchen. Returning with her arms filled with stove wood, she screamed at him, "You want a receipt, do you? Well, here's your receipt. I'll larn you for asking me for a receipt;" whereupon she began pelting Clark with wood. Clark fled, and she after him, throwing wood at him until he was out of sight. After that episode, no one ever again asked "Mother Damnable" for a receipt.

In the next term of court for King County (1855), presided over by Judge Chenoweth, the above-mentioned William Heebner was plaintiff in an action against Henry L. Yesler. The parties having agreed to settle the matter by arbitration, the court appointed Reuben Bean, David T. Denny and Leonard M. Felker as arbiters. The arbiters awarded the plaintiff the sum of \$94.96. In all probability this is the

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<sup>52</sup>Joseph Cushman was born in Massachusetts, 1807; came to Washington, 1852; appointed probate judge by first territorial legislature; Free-Soil candidate for delegate to Congress, 1855; appointed receiver in land office by President Lincoln, 1861; died, 1872.

No information concerning William C. Pease has yet been located.

first instance of a settlement of a law suit in the territory through this medium.

At the same session of court Tom Taylor, an Indian, sued William P. Smith, administrator of the estate of William Young, an engineer who had been murdered the year before, in an action to determine the ownership of certain articles of personal property. The interest in this case rests in the part which was taken by some of the most prominent lawyers of the territory: Victor Monroe, one of the judges of the first court and Judge Chenoweth's predecessor, and Colonel William H. Wallace, later Governor of both Washington and Idaho Territories and Delegate to Congress from both territories, represented the Indian, and Christopher C. Hewitt, subsequently Chief Justice of Washington Territory, and Joseph S. Smith, later member of Congress from Oregon, appeared for the administrator. The jury found that the property in question belonged to the Young estate, and the court ordered it turned over to the administrator.

## VII

As one of its early acts, the territorial legislature at its first session proceeded to carry out the mandate of Congress and to re-district the territory.<sup>53</sup> Before this was done, however, eight new counties had been created which were included in the new judicial districts.<sup>54</sup> By a companion act passed at the same session (April 27, 1854), the judges were assigned to their respective districts in the following order: Judge McFadden was sent to the first district and Judge Monroe to the second, while Judge Lander remained in the third district. Judge McFadden made his abode on a farm now included within the city of Chehalis, and there built his log home, which still remains and which, today, is occupied by a descendant of his family.

When the legislature convened the following December (1854), Judge Monroe, as mentioned above, was no longer on the bench, having been replaced in the second district by Francis A. Chenoweth. By the changes in a new court act, passed at this second session of the legislature,<sup>55</sup> Judges Chenoweth and Lander changed places, the former moving to the third district and the latter to the second. From this time on, Judge Chenoweth made his abode at Coveland on Whidby Island, and there built his farm home, which stands today as a reminder of these early days. As a part of the changes effected at this time, Chehalis County

<sup>53</sup>Wash. Laws 1854, p. 448:

<i>First District</i>	<i>Second District</i>	<i>Third District</i>
Walla Walla	Lewis	Pierce
Skamania	Chehalis (Grays Harbor)	King
Clarke	Thurston	Island
Cowlitz	Sawanish (Mason)	Jefferson
Wahkiakum		Clallam
Pacific		Whatcom

<sup>54</sup>Wash. Laws 1854, pp. 472-475.

<sup>55</sup>Wash. Laws 1854-55, p. 36.

(now Grays Harbor) was detached from the second district and made a part of the first district. Thereafter, Judge McFadden held regular terms of court at Montesano. At this time, Walla Walla was not yet settled, but had it been, litigants would have had to go to Vancouver for their court service, as all of eastern Washington extending even into the Rocky Mountains was then included in Clarke County.

As indicated above, it soon became the practice to move the judges about from one judicial district to another, and even to change the boundaries of the districts, without seeming need or gain. In fact, the practice early acquired a political significance, and before long the judges were the football in a game of practical politics. At one time (1868), the practice had become so vicious that, because Judge Christopher C. Hewitt,<sup>56</sup> then on the territorial court, had acquired some political enemies, and further because he was the appointee of a Republican President, he was transferred from the third district where he had made his home to Pinkney City (Fort Colville) and required to hold court in the first district. This, however, was not the extent of the legislative discipline, for, in addition, the first district was so changed as to leave in it only Stevens County, then a wilderness consisting for the most part of an Indian reservation over which the courts had a doubtful jurisdiction. Fortunately for Judge Hewitt, he still had friends in Congress, and to them he took the case, with the result that Congress refused to approve the act of the territorial legislature,<sup>57</sup> thus leaving the judicial districts as they had been.

### VIII

The first term of court for the Walla Walla area was held on June 4, 1860, by Judge William Strong, then serving as a judge on the Supreme Court of Washington Territory. The only resident attorney present at this term of court was Colonel Wyatt A. George.<sup>58</sup> At this term, Judge Strong admitted to the bar Andrew J. Cain, General Otis S. Bridges, his brother, Edward S. Bridges, and John G. Sparks,<sup>59</sup> these

<sup>56</sup>Christopher C. Hewitt was born in New York, 1809; came to Oregon about 1852; settled in Seattle, 1855; appointed Chief Justice of Supreme Court of Washington Territory by President Lincoln, 1865-69; practiced in Olympia until 1888; died, 1891.

<sup>57</sup>Wash. Laws 1868, p. 23; see also, Snowden, *op. cit.* iv. 182.

<sup>58</sup>No date or place of his admission to the bar is known. Probably he had been admitted at Vancouver which was in the same district. Unfortunately, the early records of this court are not extant. He was born in Indiana, 1819; settled in Walla Walla, 1860; left Walla Walla in 1878 to practice in Dayton, then in Pomeroy, and later in Colfax, but returned to Walla Walla in 1869; died in Walla Walla.

<sup>59</sup>Andrew J. Cain was born in Indiana; came to Washington as a member of Governor Stevens' party; later was an Indian agent; practiced law at Walla Walla and was prosecuting attorney for first judicial district, 1869; died, 1879.

No information concerning Otis S. Bridges and Edward L. Bridges has yet been located.

John G. Sparks was born in Indiana, 1811; admitted to the bar in Illi-

men thus becoming the first lawyers to be admitted in Walla Walla.

The jurisdiction of the first judicial district in 1860 comprised the entire eastern part of the territory. In the following year (1861), Judge Strong's term having expired, the President appointed in his place James E. Wyche; while at the same time Judge Fitzhugh was replaced by Ethelbert P. Oliphant, and Judge McFadden by Christopher C. Hewitt. In succession, court was held in this district by Judges Wyche and Oliphant,<sup>60</sup> and within a few years such notable lawyers as William G. Langford (1863), James H. Lasater (1863), James D. Mix (1863), Benjamin L. Sharpstein (1865), and Wathan D. Caton (1867) were admitted to the bar of this area.<sup>61</sup>

According to John J. McGilvra,<sup>62</sup> then the United States attorney for the territory, the sessions of the court were held in the loft of a log house, approached by outside stairs. The attic was entirely unfinished within, and a saloon was running "full blast" below. The seats were slabs, bark side down with pegs for legs, and the judge's desk was an old-fashioned wash-stand.<sup>63</sup> Since there was no jail in the county, the prisoners were chained to large staples driven into the logs of the walls of the room.

In the fall of 1861, Judge Wyche opened the second term of court at Walla Walla. He had traveled up the river with several attorneys,

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nois, 1832; moved to Oregon, 1857; collector of internal revenue at Olympia, 1862-65; territorial auditor, 1870; justice of the peace for many terms; died, 1891.

<sup>60</sup>James E. Wyche was born in Mississippi, 1828; appointed Associate Justice of Supreme Court of Washington Territory, 1861-70; died 1873.

Ethelbert P. Oliphant was born in Pennsylvania, 1803; admitted to Pennsylvania bar, 1828; appointed Associate Justice of Supreme Court of Washington Territory, 1861; resigned second term, 1866; died in Washington, D. C., 1884.

<sup>61</sup>William C. Langford was born in Ohio, 1835; came to Oregon, 1850; moved to Vancouver, Washington, 1862; prosecuting attorney of first judicial district, 1863; member of Territorial Council, 1864; appointed Associate Justice of Supreme Court of Washington Territory by President Cleveland, 1885-89; Superior Court Judge, Spokane County, 1890; died, 1893.

James H. Lasater was born in Tennessee, 1823; arrived in Oregon City, 1852; admitted to bar of Oregon, 1855; came to Walla Walla, 1863; member of the territorial legislature, 1869; died, 1896.

James D. Mix was born in Virginia, 1818; came to Walla Walla, 1863; twice a member of the territorial legislature; city attorney of Walla Walla; died, 1881.

Benjamin L. Sharpstein was born in New York, 1828; came to Walla Walla, 1865; elected to territorial legislature three times; defeated by Orange Jacobs as delegate to Congress, 1874; died, 1907.

Nathan T. Caton was born in St. Louis, 1832; came to Oregon, 1850; admitted to bar in Oregon, 1861; moved to Walla Walla, 1867; elected to territorial legislature of Washington, 1869 and 1873; district attorney for one term; died, 1916.

<sup>62</sup>John J. McGilvra was born in New York, 1827; appointed U. S. Attorney for Washington Territory by President Lincoln, 1861; moved to Seattle, 1864; member of territorial legislature, 1866; city attorney of Seattle for two years; died, 1903.

<sup>63</sup>WASHINGTON STATE BAR ASSOCIATION, PROCEEDINGS (1895-96), 97.

including Judge William Strong, who—now that he was engaged in the practice of law—had gone along to pick up as much business as he could get. On the way, the steamer "Okanogan," on which they were traveling, was wrecked and the passengers had to amuse themselves fishing and playing cards for three days until the steamer "George B. Wright" was able to pick them up and take them to their destination.

## IX

A most extraordinary chapter in the judicial history of Washington Territory was written between the years 1856 and 1864. The general plan for the set-up of the district courts has been mentioned above, but in the interest of economy, on August 16, 1856, the Congress of the United States passed an act regulating the fees, costs and other judicial expenses of the government in the territories.<sup>64</sup> Section five of that act reads as follows:

"Sec. 5. And be it further enacted, That the judges of the supreme court in each of the territories, or a majority of them, shall, when assembled at their respective seats of government, fix and appoint the several times and places of holding the several courts in their respective districts, and limit the duration of the terms thereof: Provided, *That the said courts shall not be held at more than three places in any one territory*: And provided, further, that the judge or judges holding such courts shall adjourn the same without delay, at any time before the expiration of such terms whenever in his or their opinion the further continuance thereof is not necessary."

By this new arrangement, Congress provided that district courts should be held in only three places in each territory, and thereby limited the sessions in Washington Territory to one term in each of the three judicial districts. Such action was certain to cause great hardship to the settlers, who would be compelled to make long journeys with their witnesses. To relieve them, so far as possible, from this oppression, the territorial legislature was quite ingenious in devising laws to alleviate the condition.<sup>65</sup>

At the beginning of Washington Territory's existence, there were three classes of courts exercising judicial functions, namely: justices of the peace, probate courts and district courts.<sup>66</sup> Judges of the first two courts were not required to be lawyers, and in most instances they were not.

The justice of the peace court of the territory was the oldest. It even preceded the Provisional Government of Oregon, for we find that a justice of the peace was appointed by the Methodist Church in Oregon as early as 1838.<sup>67</sup> Later the Oregon Organic Act of 1848 specifically

<sup>64</sup>11 STAT. 49 (1856).

<sup>65</sup>Snowden, *op. cit.*, iv, 17.

<sup>66</sup>Wash. Organic Act. sec. 9, 10 STAT. 172 (1853).

<sup>67</sup>S. A. Clarke, *Pioneer Days of Oregon History* (1905), ii, 647.

provided for this judicial office.<sup>68</sup> Records in many of our counties show that justice court trials were held while Washington was still part of Oregon Territory. The Washington Organic Act continued the office of justice of the peace,<sup>69</sup> and the same was later carried over into the system of state courts.

The probate court, imported into the Washington judicial structure from Oregon,<sup>70</sup> was continued also by the organic Act of Washington (1853).<sup>71</sup>

The first attempt to relieve the settlers from the hardships created by the Act of August 16, 1856, quoted above, was the creation of a novel court which was invested with a criminal jurisdiction. Research in American jurisprudence has revealed no parallel to this anomalous court. It was composed of the probate judge and two justices of the peace of his selection who sat with him *en banc*, and to this court was given jurisdiction of all misdemeanors.<sup>72</sup> On January 29, 1857, the legislature conferred upon the probate court and the district court a concurrent jurisdiction in all civil cases up to \$500.<sup>73</sup> These plans do not seem to have worked well, for the first act was repealed on January 28, 1859,<sup>74</sup> and the latter act was repealed January 27, 1860.<sup>75</sup> Later (January 16, 1863), the legislature reenacted this same act, but broadened it to include criminal jurisdiction for this probate court over misdemeanors. This was also a novel arrangement.

Pursuant to the federal act of August 16, 1856, Judges Lander and Chenoweth met at Olympia on November 10, 1856, and designated Vancouver as the place for the holding of court in the first district, Olympia in the second, and Coveland in the third.<sup>76</sup>

On June 14, 1858, Congress passed an act providing that judges of the supreme court of each territory of the United States were authorized to hold court within their respective districts in the counties wherein, by the laws of said territories, "courts had been, or might be established," for the purpose of hearing and determining all matters and causes, except those in which the United States was a party. The expenses of these courts had to be paid by the territories or by the counties in which said courts might be held, and the United States in no case was to be chargeable therewith.<sup>77</sup>

Pursuant to this act of June 14, 1858, the Washington Supreme

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<sup>68</sup>9 STAT. 323 (1848).

<sup>69</sup>10 STAT. 172 (1853).

<sup>70</sup>ORE. LAWS 1849-50, p. 211; *ibid.* 1851-52, p. 41; *ibid.* 1852-53, p. 11.

<sup>71</sup>10 STAT. 172 (1853).

<sup>72</sup>Wash. Laws 1856, p. 13.

<sup>73</sup>*Ibid.*

<sup>74</sup>Wash. Laws 1858, p. 5.

<sup>75</sup>Wash. Laws 1860, p. 237.

<sup>76</sup>Sup. Ct. Journal, v. A, p. 29.

<sup>77</sup>11 STAT. 366 (1858).

Court met at Olympia on January 5, 1859, and provided for the holding of a court at Steilacoom for territorial business only, and also changed the place of holding court in the third district from Coveland to Port Townsend.<sup>78</sup> Such a court had been held at Steilacoom prior to the Act of 1856. While the legislature on January 21, 1859, confirmed this action of the supreme court in establishing a territorial court at Steilacoom,<sup>79</sup> the legislature of 1861 repealed it.<sup>80</sup> However, the legislature at the next session (1862) restored this territorial court to Steilacoom.<sup>81</sup> Even with this improvement, the territorial court system was still limited and restricted when compared to the system set up in 1854.

The legislature of 1858 passed a memorial protesting the Act of Congress of August 16, 1856;<sup>82</sup> and in years 1859<sup>83</sup> and 1860<sup>84</sup> memorialized Congress for the right to elect their own judges. In 1862 the legislature again memorialized Congress, protesting the act of August 16, 1856, and requesting the appointment of two additional United States district judges and authority for the territorial legislature to designate the places at which the courts were to be held.<sup>85</sup> At the same session a memorial was passed asking Congress to allow the holding of court in two places in the third judicial district.<sup>86</sup> In 1865 the legislature petitioned Congress to amend the Organic Act so as to give justices of the peace concurrent jurisdiction with the district courts in actions of \$250 and less.<sup>87</sup>

As a result of this constant agitation, and these numerous memorials, Delegate George E. Cole secured the passage on February 9, 1863, of an act providing that the district courts in and for the Territory of Washington "should be held at such times and places in said districts (not exceeding three places in each district) as the legislative assembly of said territory should by law determine: Provided, That until said legislative assembly should otherwise provide, said courts should be as then provided."<sup>88</sup> The legislature of 1863 created a number of new territorial courts for the various counties, and from then until statehood most of the counties, as the same were created, were provided with such courts.<sup>89</sup>

Thus, after the stormy days between 1856 and 1864, the territorial judicial system became again stabilized and went smoothly on to merge

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<sup>78</sup>Sup. Ct. Journal, v. A, p. 70.

<sup>79</sup>Wash. Laws 1859, p. 27.

<sup>80</sup>Wash. Laws 1861, p. 68.

<sup>81</sup>Wash. Laws 1862, p. 26.

<sup>82</sup>Wash. Laws 1857, p. 88.

<sup>83</sup>Wash. Laws 1858-59, p. 90.

<sup>84</sup>Wash. Laws 1859-60, p. 511.

<sup>85</sup>Wash. Laws 1861-62, p. 143.

<sup>86</sup>*Ibid.*, p. 146.

<sup>87</sup>Wash. Laws 1865, p. 162.

<sup>88</sup>12 STAT. 648 (1863).

<sup>89</sup>Wash. Laws 1879, p. 70.

into the new system ushered in by statehood.

### X

During the period covered by the first territorial supreme court (1853-1857), seven opinions were rendered, of which Judge Lander wrote four, Judge McFadden two, Judge Chenoweth one, and Judge Monroe none. In 1858, the personnel of the court having been changed by the appointment of Judges William Strong and Edmund C. Fitzhugh,<sup>90</sup> as successors to Judges Lander and Chenoweth, Judge McFadden became Chief Justice. During the period covered by the second court (1857-1861), twenty-two opinions were handed down, of which Judge Strong wrote nine, Judge Fitzhugh five, and Judge McFadden eight. While many of these were opinions of historical interest, space does not permit a discussion of them here. However, several of the first decisions rendered by the supreme court are referred to below as typical of the problems which arose at the beginning of the court's existence, and which serve to illustrate the difficulties which confronted the court in getting organized and into operation. Many of these procedural difficulties are attributable to a lack of judicial experience and training on the part of its personnel; they remained to disturb the frontier court for many years to come.

The first decision rendered by the territorial <sup>state</sup> supreme court was handed down at the December term, 1854. It was the case of *Nisqually Mill Co. v. Taylor*,<sup>91</sup> and was not only the first case to be heard by the Supreme Court of Washington Territory, but was also the first case to be appealed from the district courts north of the Columbia River. In other words, no cases were ever appealed from these courts to the Supreme Court of Oregon Territory while the counties north of the Columbia were a part thereof.

This first case arose in the second judicial district, then presided over by Judge McFadden. The action of the mill company was to recover compensation due it for labor and merchandise furnished to the defendant. The lower court granted recovery and upon appeal Judge McFadden affirmed his own decision. The defendant sought to take advantage of various defects in the record and errors committed at the trial. These, Judge McFadden held, could have been corrected before appeal, and since that had not been done, they could not be regarded as material to the merits of the appeal. One contention of the defendant was that judgment had been entered by the court on

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<sup>90</sup>Edmund C. Fitzhugh was born in Virginia, 1820; went to California, 1849; came to Washington, 1854; from 1854 to 1857 held offices of county auditor of Whatcom County, U. S. Commissioner, Inspector of Customs, Sub-Indian Agent, and Military Aide to Governor Stevens; appointed Associate Justice of Supreme Court of Washington Territory by President Buchanan, 1857-61; left Washington Territory, 1863, and joined Confederate Army; died in San Francisco, 1883.

<sup>91</sup>1 Wash. Terr. 1 (1854).



a day other than a legal court day. The facts show that there had been a judgment entered on the day following that set by law for the hearing of judicial matters. This error, the court held, could have been corrected if the defendant had been vigilant.

The facts of this first case present little of interest to the reader. In fact, most of the decisions of the supreme court for the first quarter of a century of its existence were based upon matters of procedure and lacked questions of substantive law. While many of these early decisions involved interesting historical and factual pictures, this first decision of the territorial supreme court might be classed as one of the "dull" cases, unless it can be said that, because of the attorneys who participated in the appeal, the case possesses some degree of interest. It is a somewhat singular coincidence that the attorneys in this case were both territorial officials; Charles H. Mason, the secretary of the territory, represented the plaintiff, while John S. Clendenin, the prosecuting attorney, represented the defendant.

The second opinion filed by the supreme court related to the sale of liquor to Indians. It arose in Judge Lander's district, from a term of court held at Steilacoom. The judge admitted that his *nisi prius* instructions were erroneous, and therefore reversed himself. The decision—*Fowler v. United States*<sup>92</sup>—is of importance neither as a precedent nor as a document of historical interest.

The third case heard at the first term was that of *Palmer v. United States*,<sup>93</sup> which arose on error to the second judicial district from a term of court held by Judge Chenoweth in Olympia. The facts were similar to those in the *Fowler* case, and in the opinion the court cites that case. This was the first instance in which the new court cited one of its own opinions. The supreme court held, in an opinion written by Judge Lander, that the trial judge committed an error in permitting the case to be tried without first having entered a plea of not guilty for the defendant, when he had stood mute and had refused to plead. The judgment was, therefore, reversed and the prisoner discharged.

The fourth and final decision rendered by the supreme court at its 1854 term was *Wassissimi v. Washington Territory*.<sup>94</sup> The opinion was written by Judge Lander in an appeal from a conviction of murder in a case tried in the third judicial district. The case is interesting in that it involved another error made by Judge Chenoweth in the trial of a case, and shows how inexperienced these first judges were. The plaintiff in error, and an Indian named Jack, had been convicted of murder, and a new trial had been denied. By mistake, the clerk entered two sentences against Jack, but failed to enter a sentence against the plaintiff in error. When the warrants of execution were issued the

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<sup>92</sup>1 Wash. Terr. 3 (1854).

<sup>93</sup>1 Wash. Terr. 5 (1854).

<sup>94</sup>1 Wash. Terr. 6 (1854).

plaintiff in error sought a *supersedeas*, which was granted, and an order directed to the sheriff of Jefferson County to stay further proceedings. The opinion of Judge Lander recites that such a proceeding is not such a final judgment, order, or decision as can be reviewed on a writ of error. Therefore, the case was remanded to the district court for further action by that court. Obviously, both Judge Chenoweth and his clerk were careless in incorrectly entering the proceedings in the journal of the court.

But one opinion was rendered in the 1855 term.<sup>95</sup> It was written by Judge Lander. In 1856, the supreme court did not convene for its December term because of the Indian War. At that time Judge Lander was serving in the field as a Captain of Volunteers, but no satisfactory explanation has been offered why the remaining justices, Chenoweth and McFadden, could not have convened the court. Judges Lander and Chenoweth had held their regular November terms in their respective districts and had finished them in time for the opening date of the supreme court. Judge McFadden, however, did not hold his November term in the first district, probably because the Indian trouble prevented the attendance of jurors. It would appear that, if Judge Lander could arrange his military duties so as to hold his district court, he could have done so for the term of the supreme court. Doubtless the true reason was that no business was then before the court. This view is strengthened by the fact that a year later, at the 1857 term, only two decisions were rendered. One of these is the famous *Leschi* opinion,<sup>96</sup> written by Judge McFadden, and the other is an opinion written by Judge Chenoweth. The latter opinion was based upon error committed in the trial court of the third judicial district by Judge Chenoweth in failing to have a judgment properly entered in a murder case which had been tried before him. This was the case of *Regan v. Washington Territory*,<sup>97</sup> and in it the court held that the entry upon the journal of a verdict of guilty, and also a copy of the warrant of execution, do not constitute a judgment from which an appeal can be taken.

During the 1857 term of court, Judge Lander was absent from the territory. He had gone to San Francisco for medical aid necessitated by the serious accident which befell him while on board a ship at Port Gamble, as a result of which his back had been broken. Hence, he did not participate in the deliberations of the court at this session, and probably did not again sit in the hearing of any appeals.

None of the other decisions rendered during the service of the first court are such outstanding historical or legal interest as that of the

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<sup>95</sup>Gove v. Moses, 1 Wash. Terr. 7 (1855).

<sup>96</sup>Leschi v. Washington Territory, 1 Wash. Terr. 13 (1857).

<sup>97</sup>1 Wash. Terr. 31 (1857).

*Leschi* case; and probably few, if any, have equaled it in length, logic, and soundness of legal diction. The opinion is too great in length to be considered here, but it is well to point out that it embraces over six thousand words and was delivered on the same day as the hearing of the appeal. To have written it so quickly would have been a physical impossibility. Furthermore, the character of its form shows that it was not hastily or carelessly prepared. It bears evidence of thoughtful study and reasoning. One well may wonder whether it had been written in advance of the hearing of the appeal. Probably the answer will never be known.