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Something About the Territorial Judges

BY LLEWELLYN L. CALLAWAY*

My memory of the first jurists of Montana is pretty dim, naturally. That I should have known some of them early, in the circumstances, is easy to understand. My father took the position of Secretary of Montana in the latter part of March, 1871. The Secretary of a Territory is of considerable importance; he is in fact Lieutenant Governor, Secretary of State, Comptroller, and has other duties. He acts as Governor when that officer is absent which is not infrequent. Of course he becomes acquainted with the "official family" at once and shortly knows about everyone in the Territory that's worth knowing, and a good many that are not.

The Civil War was not far in the distance and men with military titles abounded. The Governor had been General Potts, my father had been Colonel of "Grant's Old Regiment," Mr. Blake, afterwards Judge, was Captain. It would take too much space to pursue this phase of things. I mention it because men with army experience found somewhat common ground and formed friendships quickly.

The Secretary and his lady had prominent people at their house often; Virginia, the Capital, was the "social city." Among these was Hezekiah L. Hosmer, first Chief Justice, the man who opened the first district court in Montana, and who in 1871 was Postmaster of the city. My memory of him is not clear, but he played with me,—a venerable man and a little

*Mr. Callaway came to Montana with his parents 72 years ago. Since receiving his law degree from Michigan in 1891, he has been engaged continuously in practice in Montana, either on the bench or at the bar. He served as County Attorney of Madison County from 1894 to 1899, and as Judge of the Fifth Judicial District from 1904 to 1912. In 1917 he was elected President of the Montana Bar Association. He replaced the late Theodore Brantly as Chief Justice of the Montana Supreme Court in 1922, holding that office until 1934. Since that time, Mr. Callaway has been engaged in active practice in the city of Helena.

boy,—gave me his photograph, upon which is written “Your friend, Hez L. Hosmer.”

Judge Hosmer was a learned man, with a literary turn. In the bound volumes of the Montana Reports none of his opinions appear. The reason for that is given in Judge Blake’s foreword to the First Montana.* Whether Judge Hosmer filed any written opinion in a case in which he presided as trial Judge, (and he presided in many) I do not know. It always has been a subject of wonder, what became of the written opinions of the first Territorial Supreme Court in the 60’s. Williston and Munson, Hosmer’s associates, were able lawyers.

At the beginning the Chief Justice was in a difficult place. He was the presiding Judge in the city in which the Vigilante organization was founded, and in which that organization existed for a considerable time, even after the Chief Justice had arrived. The people, or some of them, viewed courts with distrust. The administration of the Vigilantes, fierce at times, was just and it certainly was efficacious. In its action there was little delay; from its judgments no appeal.

Judge Hosmer was a wise man. That he appreciated the local condition is shown by his charge to the first Grand Jury December 5, 1864. You will find it in Vol. V, Montana Historical Contributions, page 235. It is significant when we read in the Biographical Sketch by his son J. Allen Hosmer (himself later a Justice on the Supreme Bench of California) (Vol. III, Montana Historical Contributions, page 288), that a citizen who had listened to the charge remarked to the Judge: “We are glad the government has sent you here. We have some civil matters to attend to, but you had better let us take charge of criminal affairs.”

On August 7 the Judge again charged the Grand Jury, and you will find it to your advantage to read it. (Vol. V, Historical Contributions, page 241.) You will see that this charge was deemed so important by the lawyers that 12 of them, including Alex. Davis, James G. Spratt, Samuel Word and W. F. Sanders, wrote his Honor as follows: “We, your friends at the Bar, who heard your excellent charge this morning to the Grand Jury of Madison County, take pleasure, and really feel

*Preface to the Montana Reports, Volume One: “During the terms that were held from May, 1865, to December, 1868, the opinions of the court in the cases that were determined were rarely delivered in writing. Orders were generally made that the judgment of the court below should be affirmed or reversed. . . . The records of the court before the December term, 1868, are imperfect, and the pleadings, briefs, and papers, in a majority of the causes that were heard before the term, cannot be found.”

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it a duty to the Community in which we live, to respectfully ask you to furnish a copy of the same for publication, believing that such productions must have a healthy influence in any society."

Someone may say, "it seems to me he's going pretty far afield in his memories." I confess the point, but shall try to avoid it by saying these recollections are inseparably connected with my memory of Judge Hosmer. You should know some facts about this remarkable man; and should read those charges.

I cannot say that I have a positive memory of Henry L. Warren; but although a very small boy when he lived in Virginia City, I must have been in his company often.

He resigned as Chief Justice in 1871 and formed a partnership with W. F. Sanders, who lived in Helena, Warren retaining his residence in Virginia City. He was elected to the Legislature in that year, member of the Council from Madison and Beaverhead counties. He was reputed to be a fine lawyer, a strong man.

But I knew Judge Wade, who was Chief Justice for sixteen years, quite well, my acquaintance with him being as early as 1876. I was at his house in Helena often because I used to play with his little daughter Claire, who was about my age. She was the first girl I ever accompanied to a party. I remember the Judge and his wife smiling as we left his house, hand in hand.

The fact that Judge Wade was appointed and re-appointed by President Grant, President Hayes, President Garfield or President Arthur, and that President Cleveland did not appoint his successor until 1887 would signify that Judge Wade was giving general satisfaction. Judge Clayberg, who had known Judge Wade, once said to me when we were upon the Supreme Court Commission, "The boys used to criticize old Wade, but the more I see of his work the larger he grows. He was an almighty fine lawyer." Judge Wade was a congenial man, and the consensus was that he had given great service to Montana as Chief Justice. He was sound, dependable. He was consistent with the general observation that usually a good Judge does not make a good practitioner. After his retirement from the high Bench he became a member of the firm of Wade, Toole & Wallace. Warren Toole was then recognized, as he had been for years, the head of the Montana Bar. He had an unusually fine record in the Supreme Court, Judge Wade writing many of the opinions. Col. Sanders frequently was a losing counsel. When the new firm was formed Col. Sanders was

asked if he had heard of the new firm. "What firm?" he asked. Being informed, he said in his biting way: "Oh, they have announced the partnership, have they?"

Another early day Judge was the Hon. Hiram Knowles, who served on the Supreme Court of the Territory for over ten years, and became our first Federal Judge. You will find many of his opinions in Volumes 1, 2 and 3 of the Montana Reports, good opinions, some very good.

He lived at Deer Lodge, but held court in many places. At Deer Lodge there was a celebrated lawyer named "Jacky" Robinson. His firm was afterward Robinson & Stapleton, and it was a dangerous one for the opposition. The story was that if a witness forgot anything or wasn't plain enough "Wash" (Mr. Stapleton) would supply the deficiency in his argument to the jury.

One day Judge Knowles ruled against Jacky who felt greatly outraged, leaving the court room in a high dudgeon. After adjourning, Judge Knowles strolled down the street thinking of a law problem. About to pass the Robinson office a thought popped into his head; there was a case in the second Montana that might settle the problem. Pressing down the latch he opened the front door and said to Robinson who was in the back room, "Jacky, have you the second Montana?" "No, Judge nothing in this office but law books."

After retiring from the Territorial Bench he became a member of the powerful firm of Knowles & Forbis, which carried much heavy litigation. After Montana was admitted to Statehood President Harrison appointed him Federal Judge in which great office he rendered distinguished services.

When he was nearing seventy he and I were sitting on the back steps of our boarding house in Helena of a summer evening. He had been holding court that day and was tired. He complained of a pain in a leg which had been injured in a fall, and that his rheumatism was giving him fits. I said to him, "You'll soon be seventy and can retire on full salary." He replied, "I'm afraid of that. Did you ever notice that after a man lives a long and active life, and retires and has nothing to do, that he doesn't live very long?" A year or two later he retired and didn't live long.

Lawyers defending the accused in criminal cases liked Judge Knowles, and certainly the accused did, for he was always sympathetic with the defendant. The United States Attorney thought his philosophy amounted to a prejudice! It did not hurt the Judge's feelings even if a defendant, pal-

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pably guilty, was acquitted by the jury, which, as every court attache knows, is a frequent occurrence.

Thought his Honor, true, it might serve as a good example to the public if the legal penalty were imposed upon the guilty man, but so far as concerned the defendant personally, he would be punished in one form or another even if a soft hearted jury did let him go: in the scheme of things he would suffer the penalty of his transgression, which was tantamount to thinking, "You can't do wrong and get away with it: Nemesis will catch up with you in the long run."

My recollection is that his library became part of the Law School library at Missoula.

One of the outstanding members of the court in the early '70s was Francis G. Servis. My father esteemed him the greatest lawyer before whom he practiced in Territorial days. Judge Servis' fame seems to have died with him, but the student finds real merit in his opinions.

Henry N. Blake, Associate Justice from 1875 to 1880, last Chief Justice of the Territory and first of the State, was a descendant of the Puritans, and a graduate of Harvard Law School, and he let you know it. He enlisted as a private in the Eleventh Massachusetts Infantry and rose to captain, having participated in twenty battles, being mustered out as the result of a wound received at Spottsylvania. He came to Montana in the '60s, engaging in law practice and editing Montana's first newspaper (the Post).

In whatever capacity he served in his varied career—as editor, United States Attorney, District Attorney of the First District, embracing Madison and Gallatin Counties and extending to the Dakota border, member of the legislature, historical writer and speaker, Associate Justice, practicing lawyer, Chief Justice, District Judge, Supreme Court Commissioner,—he was efficient; a useful citizen, doing much excellent work. He was a satisfactory trial Judge; his opinions in the Reports of our Supreme Court speak for themselves. He was given to stating the law as he found it in the books rather than following his own notions of what it should be. He was always seeking "authority" and if it came to him from Massachusetts that pleased him.

In Virginia City, where he lived so many years, it was his habit to go home with a law book under his arm (probably a Massachusetts Report) humming. He was a bulky man, full bearded, with gleaming spectacles, walking in apparent absent-mindedness. His humming sounded like "boom, boom, boom."

We youngsters delighted to attempt to imitate his idiosyncrasy.

He was not an ideal trial lawyer, but won his share of cases, because he was always well prepared. His argument to a jury was ponderous. He did not speak a jury's language. If he had known how, he would have employed his language with a Boston accent, with Harvard culture.

His clients trusted him; they knew he was ever honest and reliable. He was a kindly, congenial man, helpful to young lawyers. I cite an instance. Less than seven months from the Law School, it fell to me to argue a case before the Supreme Court. My opponent was absent; presumably he had missed the stage. Embarrassed, I consulted my old friend, the Chief Justice, telling him the situation. He said, "Oh, you'd better come in and break the ice." I did. (*Milot v. Reed*, 11 Mont. 568.)

History will judge him mostly on his judicial record. I quote: "Judge Blake was a painstaking, hard working, conscientious, high-minded lawyer and Judge. He revered the great Judges of his country and sought to follow their leadings." His courage was unquestioned.

Judge Blake was succeeded by Everton J. Conger, brother of United States Senator Omer D. Conger, of Michigan. The Judge came from Ohio. In the Civil War he had been Colonel of the First District of Columbia Cavalry, receiving a severe wound in the hip which affected him badly for the rest of his life. He had recovered sufficiently to resume command of his Regiment and was in charge of the Company that pursued and killed John Wilkes Booth fleeing from justice after the assassination of President Lincoln. Boston Corbett, one of the Colonel's sergeants, fired in disregard of the Colonel's express orders, but that fact did not free the Colonel from Secretary Stanton's wrath. Resuming the practice of law after the close of the war, Col. Conger practiced until appointed Associate Justice of the Supreme Court of Montana. He arrived in Virginia City in 1880. His advent may have been interesting to the lawyers, but it was more so to the boys in their teens, for in his family was a lovely daughter about 15. She was a pretty, hazel-eyed, fascinating girl. The boys were wild over her, but she had a level head, which is more than can be said of some of her boy admirers. Eventually she became the wife of Hon. Jos. B. Poindexter, once a District Judge, and later Attorney General of Montana, lately Governor of Hawaii.

Judge Conger was a good Judge, fair and honorable. There is a photograph in my mind of him, the lawyers and

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jurors walking down the street from the court house. The Judge, a medium sized man, his hair greying, walking with a "string-halted step" because of the wound "aforesaid." After his term had expired the Judge resumed practice; finally making his home at Dillon, latterly living with Judge and Mrs. Poindexter.

Judge Conger was a bright man, well educated, and naturally lively. In his declining years he told me more about geology than anyone else ever had. He had as nearly a thorough knowledge of the subject as has a Professor of Geology, and had read every standard work on the subject then extant. A patriot, a good Judge, an excellent citizen.

There came to Montana in 1887 as successor to Decius S. Wade, as Chief Justice, Newton W. McConnell, a distinguished citizen of Tennessee. He had been a Judge in Tennessee. Incidentally, as Judge he admitted to practice in that state a young man who was to be one of his successors in Montana and its greatest Chief Justice, Theodore Brantly.

Judge McConnell was a powerful jurist, as his opinions show. He was, too, a very able practitioner, excellent as a trial lawyer in District and Supreme Courts. In September, 1891, he was leading counsel for the defendant, a large mining company, in association with Judge Thomas C. Bach and N. B. Smith, opposed to Wm. Wallace, Jr., Henry G. McIntire and Max Waterman. I, fresh from school, thought his arguments to the Court on law points and to the jury marvelous. He was in Montana, variously, a member of the strong firms of McConnell & Clayberg, McConnell, Clayberg & Gunn, and McConnell & McConnell. He was a large man, grey headed when I first knew him. In 1904 he and I were breakfasting together at the Grandon Hotel in Helena. I noticed that in drinking his coffee his hand trembled so he nearly spilled the contents. I said, after a few moments, "Judge, I've known you for a good many years, now. You are growing old. How old are you?" He answered, "I never tell my age. If I did people wouldn't give me any business." This was true, although he was more competent than sixty percent of his competitors. *He knew.* Some time later I saw in a history that he had been married in 1856.

On the Supreme Court from August 9, 1886 until Statehood was Thomas C. Bach (he pronounced it Baych). Judge Bach was a typical New York Stater. He had been an athlete in his college days, and even after he was Associate Justice liked to put on the gloves. A man of good height though rather slender, he was no mean antagonist. He was well educated,

precise in whatever he did, a good dresser. He was an able lawyer, much affected by his dignity.

His opinions were carefully prepared, written in scholarly fashion. They will be found in volumes 6, 7, 8 and 9. Typical are *Upton v. Larkin*, 7 Mont. 449 (mining) and *Merrigan v. English*, 9 Mont. 113 (mechanic's lien).

As trial Judge, as were all members of the Court in Territorial days, he was punctilious in his government of the Court. The Bailiffs had to keep everything just so. At Fort Benton in early September, he opened court and summoned a jury from the county. Men came in from the ranches and herds, of course. The Judge, not to be too severe on the day the jurors came in, asked them the necessary questions and swore them as members of the jury panel. But, the story goes, it was different next day. Upon taking the Bench he delivered a homily on the deportment and duties of a juror, then called the first case and directed the Clerk to call a jury. As they filed into a box a juror appeared without a coat. The Judge said, "Mr. Juror, don't you know it is not proper to appear in court without a coat? Have you no coat?" "Yes sir." "Where is it?" "At home." "Get it." The juror left the court room in a hurry. The Judge said, "Mr. Sheriff, adjourn this court for ten minutes." But the juror hadn't returned in ten minutes, nor did he return during the next half hour. The Judge said, "Mr. Sheriff, where did that juror go?" The sheriff replied, with a twinkle in his eye, "The last I saw of him he was on his horse, said he was going home for his coat." "Where does he live?" "About 40 miles from town," the sheriff said.

After the expiration of his term as Associate Justice, Judge Bach practiced in Helena. At times he was a member of the firms of Bach & DeWitt, and Bach & Buck.

His practice was interrupted by his appointment as District Judge, *vice* Hon. Henry C. Smith elected Associate Justice.

In that capacity Judge Bach served acceptably until the qualification of Hon. J. Miller Smith.

He was Supreme Court Reporter with Fletcher Maddox in reporting the decisions in the 9th Montana, and sole Reporter of the decisions in Volumes 20 and 21.

James H. McLeary of Texas qualified August 6, 1886, serving until April 2, 1888, when he resigned. He was a large man with a full bushy beard. He looked like a man of large ability and he was. He left to his brother Judges and lawyers in Montana the memory of a courteous Judge of great strength of character.

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I have not essayed to speak of those Territorial Judges of whom I have no personal memory, and with whom I had no contacts. After 1880 I knew something of the general reputation of all the Territorial Judges. So far as I know there wasn't an unworthy Judge among them. The Territory was fortunate that it was served by such a patriotic, honorable and able body of men.