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Justices of the Supreme Court of the State of Montana

BY LLEWELLYN L. CALLAWAY*

The judges who served the Territory were Presidential appointees. Most of them started in with the handicap of being designated "carpet baggers." The people thought the Judges came to serve out their terms only, expecting them to leave the Territory when the salary ceased; and many did so. The people looked askance upon these judges, and mildly resented the rule of those whom they regarded as mere temporary federal employees. Nevertheless, the Montanans were courteous and friendly to the distinguished gentlemen.

The judges came into an unsettled region, sparsely settled, the towns far apart, travel between arduous, mostly by stage coach. For example, at first one could go by stage from Virginia City to Helena, the most populous towns, in less than 24 hours. As business slowed, it took a day and a night, and eventually, the journey settled down to two days, stopping over night at Whitehall. This is indication of travel over the Territory. In the flush days one had to keep his seat in the stage coach or he would lose it.

Accommodations for holding court were few. It will be remembered that Judge Hosmer held his first court in the dining room of the Planter's Hotel in Virginia City, one table being placed upon another to give him elevation, the upper table serving as the "bench." Gradually, better accommodations were provided. A court room properly equipped had two jury panels, one for the grand jury and one for the petit. The chairs were rigid affairs. There were no swivel chairs enabling the juror to squirm around or lean backward to assuage his feelings in the long day. I claim to have been the first district judge to put pliable swivel chairs into a court room in Montana.

The Territorial judges were confronted with a great variety of litigation and few law books were available. The law of mining and water rights was in a formative state. In the first Montana Report we observe the court dealt with a considerable assortment of matters, but outstanding were controversies involv-

*Mr. Callaway needs no introduction to the Montana Bar and Bench. His reminiscences of the territorial judges may be found in 4 MONT. L. REV. 5.

ing mining and water rights. The judges' opinions were generally sound, broad in conception and effect, largely governed by common sense.

At first the location of mining claims was governed by local laws and customs, largely patterned after California and Colorado. The courts encountered first the Federal Act of 1866, then the Act of 1872. If one desires to trace these laws into antiquity let him examine volume one of *Lindley on Mines*.

Irrigation commenced in the world at an early time. The investigator may pursue his search in volume one of *Kinney on Irrigation*. In irrigation matters our territorial legislatures and courts followed California, Nevada, and Colorado to a considerable extent.

In mining Montana first followed California and Nevada with respect to the use of water.¹ The California Supreme Court recognized early that which has become the most essential maxim in water rights, "First in time is first in right."² In *Maeris v. Bicknell*³ the California Court said:

"In the case of *Kelly v. The Natoma Water Co.*, 6 Cal. 105, this Court held that 'possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are not dependent upon ownership of the land through which the water flows.'"

In *Woolman v. Garringer*⁴ our court cited *Maeris v. Bicknell* with approval, but Montana has not followed California consistently either in mining or water right law; on the contrary, our courts have struck out boldly declaring principles which have seemed to them best suited to our conditions, conformable to our own policies and statutes.

The Bannock statutes were taken mostly from California. Generally speaking, we followed the California decisions in our earlier days. If a lawyer cited a California case in point he won his law suit, so every lawyer of any prominence had in his office the Montana and California Reports. Many had little else. It is the canon of construction that if we borrow a statute that has been construed by the Supreme Court of the state from

¹Incidentally, it appears that the first expression of the Supreme Court of the United States on the subject of appropriation of waters was in *Atchison v. Peterson* on appeal from the Supreme Court of Montana. Judgment affirmed. (*Atchison v. Peterson*, 1 Mont. 561, 87 U. S. (20 Wall.) 507, 22 L. Ed. 414; and see, *Gallagher v. Basey*, 1 Mont. 457, 20 Wall. 670, 22 L. Ed. 452.)

²*Eddy v. Simpson* (1853) 3 Cal. 249, 58 Am. Dec. 408.

³(1857) 7 Cal. 261. 68 Am. Dec. 257.

⁴(1872) 1 Mont. 535.

which we borrowed the statute we adopt the construction also, unless the strongest reasons impel a contrary course.

On the whole, the course of our Territorial Court proved satisfactory.

In the election of 1889 we elected Henry N. Blake Chief Justice with E. N. Harwood and William H. DeWitt, Associate Justices. The Court went along much as it had in Territorial days.

In the 80's it became the fashion to buy law books, and many fine individual law libraries were to be found in Montana. Upon the advent of the State it began to build up a State law library, now one of the best in the country. The members of the new Supreme Court were students making use of law books. These alone do not make a good lawyer or a good judge. One must have a lawyerlike mind and cultivate it; a good lawyer must be a clear thinker. This was the view of the renowned lawyer and orator, Wilbur F. Sanders, a dominant figure in Territorial life and in early statehood. The Colonel was a scholar and student, but he did not believe in following a dictum simply because someone, or some court, said it. Seeing Mr. Clayberg receiving some large boxes he inquired, "What have you in those boxes?" To which Clayberg replied "Books!" with an inflection that irritated the Colonel, who then asked "What kind of books?" "Law books, damn ye," said Clayberg. "Hum," said the Colonel, "law books confuse the mind."

The new Court was confronted with problems arising under a new constitution. It is pleasant to say that from the beginning the Court was inclined to give the governing statute a broad construction, though I have always regretted that it did not say that a state trial court had the fundamental right to instruct the jury as Federal judges have always done, with the right to comment on the evidence. The jurors like it; they want to know what the Judge thinks. This relegation of the trial judge, under our present practice, to a function less than that given the umpire in a baseball game is not conducive to justice. Many will disagree; I concede their right to think as they please.

Judge Blake, able, experienced, and impartial, carried on much as he had done as Chief Justice of the Territorial Court. He wrote many excellent opinions. The farther he goes into the distance the more highly we shall regard his work.

Edgar N. Harwood, a prominent member of the Billings bar, was new to judicial service. He entered into his new duties with fervor and was a conscientious and faithful workman. The books show his industry and the good quality of his work. I look back upon him with kindness (boylike) because he wrote

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the opinion in my first Supreme Court case.⁵ Two of his opinions⁶ especially have proved useful to struggling owners of mining claims—perhaps they were useful to rich owners too. He was in the thick of the famous *Davis Will Cases*, writing the opinions in *Root v. Davis*,⁷ and in *Cummings' Appeal*.⁸ He retired at the end of his one term with an excellent record, entitled to the thanks of the public for a duty well done.

William H. DeWitt, one of the most brilliant jurists who have adorned the bench of the Supreme Court of Montana, was born at Jersey City, N. J., in 1853. He was graduated from Hamilton College in 1875, and from the Law School of Columbia University in 1878. Admitted to the Bar of Montana in 1879, he was first associated with the famous firm of Chumasero & Chadwick. Afterwards he formed a partnership with Hon. Thomas C. Bach under the name of Bach & DeWitt. Judge Bach said of him:

“It seems to me that of all the men I ever knew, he, most of all, was actuated to do that which was right, that which it was his duty to do, merely because it was the right—it was his duty.”

Mr. DeWitt moved to Butte in 1881, continuing the practice of law in that city. He was United States Attorney from March, 1883, for two years. He was elected county attorney of Silver Bow County in 1886 and 1888. For a time he was a partner in the firm of Randolph & DeWitt. Thus he came to the Supreme Court, conversant with civil and criminal practice, and with an understanding of Montana affairs. Serving the State as Associate Justice he did much superior work. Many of his opinions are brilliant. All, with possible rare exceptions, are sound. At a later time the Supreme Court had to meet questions upon which the first three had disagreed. Almost invariably it followed the views of Justice DeWitt.

I must tell this story, which is too good to be lost. The appeal in *King v. Amy & Silversmith Consolidated Mining Company*,⁹ came before the Supreme Court of Montana in 1890. It was exhaustively briefed, Messrs. E. W. Toole and William Scallon appearing for the appellant, and Messrs. W. W. Dixon and Knowles & Forbis for the respondent. Judge DeWolfe filed a

⁵*Milot v. Reed* (1892) 11 Mont. 568, 29 P. 343.

⁶*Pelton v. Minah C. M. Co.* (1891) 11 Mont. 281, 28 P. 310, and *Block v. Murray*, (1892) 12 Mont. 545, 31 P. 550.

⁷(1890) 10 Mont. 228, 25 P. 105.

⁸(1891) 11 Mont. 196, 28 P. 645.

⁹(1890) 9 Mont. 543, 24 P. 200, [rev. 152 U. S. 222, 14 S. Ct. 510, 38 L. Ed. 419].

brief for respondent; to this brief counsel for appellant replied. The case turned on the apex question, the proper construction of Section 2322 R. S. U. S., [30 U. S. C. A. §26]. Mr. Justice DeWitt wrote a strong opinion, Justices Blake and Harwood concurring, reversing the case. On appeal to the Supreme Court of the United States, that court reversed the Supreme Court of Montana.

In the meantime, *Fitzgerald v. Clark*¹⁰ was tried, involving the point decided by the Supreme Court of Montana in *King v. Amy & Silversmith*. The trial judge naturally followed the Supreme Court of Montana, the Supreme Court of the United States having not yet decided the *King* case. When *Fitzgerald v. Clark* came to the Supreme Court of Montana, Pemberton, DeWitt and Hunt were on the Bench. Judge DeWitt was requested to write the opinion. August C. Schneider, the veteran Court Reporter, says he was called into take the dictation. Judge DeWitt was seated in his swivel chair pretty nearly in the center of the room with law books, opened at the proper place, in a circle about him. He remarked, "Mr. Schneider, we are about to reverse the Supreme Court of the United States." As was his custom (he possessed a faculty given to very few), he dictated his opinion, punctuation and all, quoting, as he had decided to do, from the authorities about him, and when he finished, affirming the judgment, he said, "Mr. Schneider, I think that will not require much change." It was not changed at all except slightly in punctuation. He set out boldly to demonstrate that the Supreme Court of the United States was wrong in its decision in *King v. Amy & Silversmith*, himself following the decision of the Supreme Court of Montana in that case. Pemberton and Hunt concurred. When *Clark v. Fitzgerald* reached the Supreme Court of the United States, it was affirmed.

Judge DeWitt did not seek re-election, preferring to return to practice in the City of Butte.

William Y. Pemberton succeeded Judge Blake as Chief Justice. He was known familiarly as "Old Pem." Born in Tennessee (note that three of our Chief Justices were natives of that state) he was reared in Missouri. He commenced his college work in Masonic College, Lexington, Missouri, finishing in the Cumberland Law School in Tennessee. He came to Montana in 1863 and attained prominence at once. In Alder Gulch in December he was chosen to serve as what we would call court stenographer in these days, in the spectacular trial of *The Peo-*

¹⁰(1895) 17 Mont. 100, 42 P. 273, 30 L. R. A. 803, 52 Am. St. Rep. 665.

ple v. George Ives, taking notes in long hand. This was before the creation of the Territory, a trial before the miners; leading men had constituted a sort of court. Time does not permit a description of the *modus operandi* here, but it is true to say it was a great trial and should be in the series entitled "Great American State Trials."

Mr. Pemberton was one of that first group to be admitted to practice in Montana; he was present on that historic occasion when Judge Hosmer opened the first district court in the Territory, in the dining room of the Planter's Hotel in Virginia City. Returning to Missouri, and going thence to Texas, practicing law wherever he happened to be, he returned to the mountains of Montana.

An active practitioner during Territorial days, and a powerful speaker, Judge Pemberton was appointed coadjutor with Judge McHatton in Silver Bow County. He had been a noted trial lawyer in criminal cases, and criminal matters in Butte were assigned to him. I have never verified the statement, but have heard he said often that he was one judge who never was reversed. Upon his election as Chief Justice in 1892, he served first with William H. DeWitt and William H. Hunt, then with Hunt and Horace R. Buck, and following Judge Buck's death with William T. Pigott. Thus he was associated on the Supreme Court with exceptionally strong men. While not the equal of either of his associates judicially, he was a satisfactory Chief Justice; a good lawyer, endowed with common sense and a consistent practice of fairness. He was a sociable man with the habits of his time, a constant tobacco chewer and a good judge of whiskey. Always friendly and inclined to conversation, he was an excellent story-teller. He called his associates by their first names. Judge Hunt was "Bill," Judge Pigott, "Billy." A medium sized man, he dressed well but moderately. His keen intellect and friendly manner—he talked with a twinkle in his eye—made his acquaintances his friends.

William H. Hunt was born in the City of New Orleans, November 5, 1857, the son of a lawyer of high renown who became Secretary of the Navy, and of a cultured mother. The boy was, of course, well reared, given fine educational opportunities, being graduated from Yale; and he studied at the Louisiana Law School. Admitted to the bar of Dakota in 1878, he went in 1879 to Fort Benton, Montana, whither came his friend Horace R. Buck to join him in the practice of law. The firm of Buck & Hunt was prominent from the start. They had real opposition, as Max Waterman and Henry G. McIntire were there. Mr. Hunt soon rose to political eminence. He was appointed Col-

lector of Customs for Montana and Idaho by President Garfield in 1881, elected a delegate from Choteau County to the celebrated and very able Constitutional Convention of 1884, and became a member of its Committee on Judiciary.

He was Attorney General of Montana in 1886 and 1887, with headquarters at Helena, and was elected in 1888 as Joint Representative from Lewis & Clark and Jefferson Counties to the Sixteenth, and last, Legislative Assembly of the Territory, being Chairman of the Judiciary Committee in the House. In the Ninth Montana, the first Report issued by the new state, his name appears as Judge of the First Judicial District. Elected in 1894, he qualified on January 7, 1895, as an Associate Justice of the Supreme Court, which office he held until June 4, 1900, when he resigned to become Secretary of the Territory of Porto Rico. He was promoted to Governor in August, 1901, which position he held until July 4, 1904, when he was appointed by President Theodore Roosevelt, United States Judge for the District of Montana. He occupied this high office with distinction until April, 1910, when he was appointed by President Taft, Judge of the newly created Court of Customs Appeals at Washington, D. C.; that place he occupied until he was assigned other duties as a United States Circuit Judge in 1911. This office he resigned in 1928, at the age of seventy-one years, to become associated in the practice of law with a leading firm in San Francisco (Gregory, Hunt & Melvin).

Judge Hunt inherited a superior intellect and was a judge of large ability. His career as a distinguished jurist was foreshadowed on the District bench of Lewis and Clark County.

One who will examine Volumes 15 to 24 inclusive, of the Montana Reports will see that during his entire service as Associate Justice of Montana his colleagues were strong men, and that the work of Judge Hunt was of a high order.¹⁴ No other Montana jurist has attained so many high places in our profession.

Horace R. Buck was a native of Mississippi. He was graduated from Yale in 1876, afterwards pursuing a course at the St. Louis Law School upon completion of which he studied with a prominent firm of lawyers, Noble & Orrick, in St. Louis. He

¹⁴Some of his notable cases are: *B. A. & P. Ry. Co. v. Mont. Union Ry. Co.* (1895) 16 Mont. 504, 41 P. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508; *Hamilton v. Great Falls St. Ry.* (1895) 17 Mont. 334, 42 P. 860, [reh. den. 43 P. 713]; *Leyson v. Davis* (1895) 17 Mont. 220, 42 P. 775, 31 L. R. A. 429 [dis. 170 U. S. 36, 18 S. Ct. 500, 42 L. Ed. 939]; *McKay v. McDougal* (1897) 19 Mont. 488, 48 P. 988; *Sanders v. Noble* (1899) 22 Mont. 110, 55 P. 1037; *B. & B. M. Co. v. Société Anonyme* (1899) 23 Mont. 177, 58 P. 111, 75 Am. St. Rep. 505.

was a natural student and an exceptional scholar. Admitted to the bar of Missouri in 1878, he went to Dakota in 1879, casting about to make a livelihood. After working as a hand with a threshing machine in Dakota, for a short time he taught school in Minnesota. Then he came to Fort Benton to join William H. Hunt, his college friend. Coming as an emigrant over the Union Pacific Railroad part way, he "reached Fort Benton hanging to a pile of mail sacks on the coach one bitterly cold night about the holidays, with a capital of \$7.00." He showed his capacity at Fort Benton at once, taking part in political as well as legal affairs. In 1884 he was elected to, and became one of the leading members of, the Territorial Council, the higher branch of the Legislative Assembly.

Joining Mr. Hunt in Helena, the firm became Carpenter, Buck, and Hunt. B. P. Carpenter, a distinguished lawyer of New York, came to Montana in 1885 by appointment of President Arthur as Governor of the Territory. Mr. Buck, while engaged in practice in Helena, for a time reported the decisions of the Supreme Court. After Judge Hunt was made District Judge Mr. Buck associated himself with Judge Bach for a short time, but in 1891, an additional judgeship having been created in the First Judicial District, Mr. Buck was made Judge Hunt's coadjutor. As District Judge, Judge Buck ranked among the first in this state. At the election in 1896 he was elected Associate Justice, again joining William H. Hunt on the bench.

A small man, of keen mind, he was sometimes impatient, even irritable: he had little consideration for a lawyer of slow mentality. Judge Buck died December 6, 1897. A committee of eminent lawyers consisting of B. P. Carpenter, J. K. Toole, William H. DeWitt, Henry G. McIntire, William T. Pigott, and Cornelius B. Nolan said of him:

"To the discharge of the duties of this office (associate justice) he brought legal learning, broad general culture, judicial experience and unswerving impartiality, executing his high trust with the same fidelity which he had previously evinced in every public station. His perception was so quick and keen, and his logic so assured and severe that he seem intuitively to detect a flaw in argument, or the false coloring of a fact or legal proposition. His hatred of fraud and chicanery was so intense that any palliation of them sorely tried his patience, and he sought at all proper times in the interests of justice, to give an equitable construction of any harsh precept or statute. A sense of the nobility of his character was impressed upon all of his acquaintances, and his courage was so great that he never pandered to popular caprice or prejudice, nor courted popular applause. So

long as he believed he was right, he was perfectly indifferent to censure or approbation. His opinions were prepared with an elegance of diction that added force to his masterly statements and logical conclusions.”

Almost invariably his opinions were short, a desideratum by practicing lawyers; but the opinions lost nothing by their brevity. He worked toward a broad concept as well as to clarify the law. In *Ellinghouse v. Taylor*¹⁹ he stated the broad principle that the use of water by a single individual is a public use under our constitution, refusing to follow the California Supreme Court's construction of a somewhat similar provision. This opinion has been of great service to the individual farmers in the State. In *Murray v. Tingley*²⁰ his opinion settled a long mooted question respecting the appropriation of water.

When he departed this life the feeling in Montana was well nigh universal that the state had lost a just and fearless servant of incorruptible integrity.

Justice Buck was succeeded by William T. Pigott. Justice Pigott was elected for a four year term in 1898.

Mr. Pigott was born in Missouri in 1861, educated in Missouri schools, including the Law Department of the University, from which he was graduated in 1880. He came to Virginia City when he was but little past 18 years of age, and remained there engaged in the practice of law until 1890.

When Mr. Pigott came to Virginia City the town had not yet outgrown its frontier aspect. As showing the state of society when there he tells this story in explanation of the manner in which he became a noted whist player (true whist): There were at the time in Virginia City Rev. Fr. Kelleher, the Catholic priest, a native of England, a fine rifle shot, and an all-around sportsman—he was a warrior too, having gone with Callaway's company to fight the Nez Perce Indians after the disastrous battle of the Big Hole; E. Gregory Prout, the rector of the Episcopal church, a learned man; and Eugene Stark, jeweler and gambler. Stark was one of those unusual characters who had the instincts of a gentleman and had been well reared, but who had taken up gambling to such an extent as to be rated as a professional. These three, after the priest had said his mass, and the Episcopal clergyman had finished his morning service, on Sunday afternoons played whist with the lonesome boy who was trying to make a living practicing law. An unusual assortment, all fine players, who added another to the whist playing

¹⁹(1897) 19 Mont. 462, 48 P. 757.

²⁰(1897) 20 Mont. 260, 50 P.723.

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fraternity. Judge Pigott has been heard to remark "I wish we could arrive again at that state of tolerance among the people."

Mr. Pigott moved to Great Falls, where he was associated first with Ransom Cooper and later with I. Parker Veazy. While practicing there he was appointed to the Supreme Court by Governor Robert B. Smith, himself one of the best trial lawyers I ever knew. Judge Pigott displayed unusual strength as a lawyer. He reveled in abstract propositions. His mind was so logical that it naturally had a trend to the exact which brought down the criticism that he was inclined to be technical. He was, however, broad-minded; his disposition was to arrive at justice. There was nothing small about him. He was a prodigious worker, anxious to arrive at a correct decision without the slightest regard for personalities, the rich man or the poor man. Private citizen and powerful corporation stood alike before his eyes. So solicitous of arriving at a correct decision was he that often he lay awake at night, turning and turning in his bed, thinking over some intricate legal problem."

At the expiration of his term Judge Pigott resumed practice in Helena. However, on October 25, 1918, Associate Justice Sanner resigned to enter War service, and Governor Stewart appointed Judge Pigott to fill out Sanner's unexpired term; he qualified November 14, 1918. Again Judge Pigott was called to judicial service: upon the death of District Judge Poorman in August, 1934, Acting Governor Cooney appointed him to fill out Judge Poorman's unexpired term. Judge Pigott filled the assignment, resigning December 3, 1934. He again resumed practice, in which he remained until reaching his eightieth birthday when he thought it time to retire. He is passing his declining years at his home in Helena.

Robert Lee Word, son of the famous pioneer lawyer, Samuel Word, was born in Virginia City, Montana, in June 1866. After attending the public school in Virginia City he was sent east for further schooling, attending High School in Ann Arbor, Michigan, and Phillips Exeter, from which he entered Yale University. Afterwards he matriculated at the Law School of Columbia University, finishing his course there in 1891. After

¹⁴Typical of his decisions are: *Sanford v. Gates, Townsend & Co.* (1898) 21 Mont. 277, 53 P. 749; *Forrester v. B. & M. C. C. & S. M. Co.* (1898) 21 Mont. 544, 55 P. 229 [reh. den. 21 Mont. 544, 55 P. 353]; *Stadler v. First National Bank* (1899) 22 Mont. 190, 56 P. 111, 74 Am. St. Rep. 582; *Smith v. Denniff* (1899) 23 Mont. 65, 57 P. 557, 50 L. R. A. 737; [rev. (1900) 24 Mont. 20, 60 P. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408]; *King v. Pony G. Min. Co.* (1900) 24 Mont. 470, 62 P. 783; *B & B. C. M. Co. v. M. O. P. Co.* (1901) 25 Mont. 41, 63 P. 825; *Cobban v. Hecklen* (1902) 27 Mont. 245, 70 P. 805.

returning to Helena he entered the office of Word & Smith—Samuel Word and Robert B. Smith. The firm became Word, Smith & Word. He was appointed Clerk of the Supreme Court in 1887, serving throughout the remainder of the Territorial days. He returned to practice until June, 1900, when Governor Smith appointed him to fill out the unexpired term of Justice Hunt, resigned.

Justice Word did not have the time to write many opinions, but his service was notable for the great care he exercised and the sound thought he displayed in the opinions he did write.¹⁵ All Judge Word's opinions have been followed by our Supreme Court, which is noteworthy.

On the expiration of his term he returned to practice, continuing until Governor Stewart appointed him Judge of the First Judicial District to fill the vacancy caused by the resignation of Hon. J. Miller Smith. He was elected to succeed himself and served out his elective term, since which he has been engaged in practice.

Theodore Brantly, generally regarded as the State's ablest jurist, was a native of Tennessee, born near Lebanon, February 12, 1851, springing from Revolutionary stock on his father's as well as his mother's side. He attended the common schools, chiefly under the personal teaching of his father, who was a school teacher as well as a clergyman. Later he attended Stewart College (which became Southwestern Presbyterian University), from which he was graduated with an A.B. degree. He worked his way through college. Thereafter teaching and studying law, he attended Cumberland University from which he received his LL.B. degree in 1880. After practicing law for three years he became professor of ancient language in Lincoln University, Lincoln, Illinois, where he taught until 1887 when he came to Deer Lodge, Montana as professor of Latin and Greek in the College of Montana.

He was a profound student of his subjects; unquestionably the best scholar of Latin and Greek in Montana from the time he arrived here until his death. Indeed, it is fair to say that in all-around scholarship he had few equals and no superior in Montana.

Having been admitted to the Bar of Montana, he commenced the practice of law in the spring of 1889. On January 3, 1893, he became judge of the Third Judicial District, residing in Deer Lodge. He was re-elected in 1896. Soon after his

¹⁵For example, *State ex rel. Helena Water Works v. City of Helena* (1900) 24 Mont. 521, 63 P. 99, 55 L. R. A. 336, 81 Am. St. Rep. 453.

ascent to the district bench he was universally regarded as one of the ablest district judges in the State. This eminence caused his nomination and subsequent election as Chief Justice of the Supreme Court. He took his seat on January 3, 1899. He was re-elected in 1904, 1910, and 1916; thus he served as Chief Justice nearly a quarter of a century. His judicial service covered the most momentous period in this state's history. His work as district judge had been arduous and difficult, but he frequently said that the most laborious and exhausting period of his life was the first four years of his service as Chief Justice. This was "because of the multitude of perplexing and troublesome issues and problems then existing" in Montana. That period was known to history as the "copper war." A multitude of other difficult questions arose for solution during the first decade of the new century. Judge Brantly possessed a strong sense of justice, great industry, and large ability. His integrity was unquestioned, his determination to reach a right result remarkable. A sound lawyer, committed to the theory that a judge should declare the law as it exists, and not as he might fancy it might better be, his mind was not fettered with outworn rules supposed to have been apposite to an earlier period, the exigency which brought them into being having long since passed; he sought the substance rather than the shadow. So when the time came in our judicial history that wrong defeated justice because under the device of ancient remedies the law seemed without remedy, in harmony with the maxim that "for every wrong there is a remedy," the Chief Justice declared the Constitution of Montana warrants the issuance of a writ of supervisory control.¹⁴ The impact of this decision upon litigation was, and has continued to be, tremendous in this state.¹⁵ Used within proper limitations this extraordinary writ has been a great step forward in the administration of justice.

The opinions rendered in his earlier years as Chief Justice indicate the breadth of his legal learning.¹⁶

Judge George R. Milburn was born November 15, 1859, in Washington, D. C., where he was reared. He attended the pub-

¹⁴MONT. CONST. Art. VIII, §2.

¹⁵State ex rel. Whiteside v. District Court (1900) 24 Mont. 539, 63 P. 395.

¹⁶Attention is called to these cases: State v. Peel (1899) 23 Mont. 358, 59 P. 169, 75 Am. St. Rep. 529, which led to State v. Keerl, (1904) 29 Mont. 508, 75 P. 362, 101 Am. St. Rep. 579; Bank v. Opera House Co. (1899) 23 Mont. 33, 57 P. 445, 45 L. R. A. 285, 75 Am. St. Rep. 499; Bramlett v. Flick (1899) 23 Mont. 95, 57 P. 869; M. O. P. Co. v. B. & M. C. C. & S. M. Co. (1902) 27 Mont. 288, 70 P. 1114 [mod. 27 Mont. 536, 71 P. 1005]; MacGinniss v. B. & M. C. C. & S. M. Co. (1904) 29 Mont. 428, 75 P. 89.

lic schools and Rittenhouse Academy from which he was graduated in 1868. In the fall of that year he entered Yale and was graduated therefrom in 1872. A variety of experiences followed: first, he entered the real estate business with his father at Washington, then held a clerkship in the United States Pension Department in which he remained until 1880. In the meantime he studied law at the National University at Washington, receiving his LL.B. degree in 1880. That year he went to New Mexico where he was a clerk at the Pueblo Indian Agency. In November, 1882, he was made Special Indian Agent and ordered to Dakota and Montana. In 1884 he built the Crow Agency and was engaged in inspecting agencies in his jurisdiction until March, 1885. That year he located in Miles City for the practice of law. He was elected the first county attorney of Custer County, serving one term.

In 1889 he was elected District Judge of the Seventh Judicial District, and was re-elected in 1892. Declining re-nomination, he resumed practice in Miles City. In 1900 he was nominated and elected Associate Justice of the Supreme Court. He came to Helena with his wife and younger children, but the family was hardly settled when his wife died. Judge Milburn was so distressed over this irreparable loss that it affected his life seriously.

As a man Judge Milburn was what would be aptly termed an individualist. He was tall, dark complexioned, always dressed in a Prince Albert coat. It reflected his dignity, and he was a dignified person. He possessed the highest sense of honor. No aspersion was ever cast upon his integrity. He was sensitive, quite given to taking offense even when none was intended. Very much a Southern gentleman, he was affected by that punctilio which was a mark of his early experiences. He was social, convivial. He had strong likes and dislikes, but he never allowed his personal feelings to affect his judicial actions. Although a good lawyer he was not much inclined to hard work on the books. His habits were consistent with his early life. He was on time for court, which met at ten o'clock, but frequently was not present before that. Judges Brantly and Holloway went to work at nine, sometimes went into consultation earlier. In consultation Judge Milburn usually reclined on the leather covered lounge in Judge Brantly's room. During the consultation he frequently would rise to a sitting position and tell a story, not often *apropos* to the subject under discussion.

He thought a lawyer's greatest usefulness to the public was in service as district judge. Upon his retirement my impression was that his ambition was to ascend the district bench again.

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But he suffered the fate of most of us: his ultimate ambition was not reached.

William L. Holloway succeeded Mr. Justice Pigott, beginning a career upon the Supreme Court of Montana which was to embrace nearly 24 years of continuous service during which his opinions embellished fifty-one volumes of the Montana Reports.

William Lawson Holloway came into the world at Kirksville, Missouri, on November 8, 1867, a descendant of Virginia colonial stock, one of his ancestors having been a member of the Constitutional Convention of 1787. Young William attended the public schools, a boarding school, and the State Normal School at Kirksville. After that he was principal of the schools at Crystal City, Missouri, for four years. He matriculated in the Law School of the University of Michigan in 1890, being a junior at the time I was a senior. Mr. Holloway was graduated in June, 1892, with the degree of LL.B. Coming to Bozeman in August of that year he soon inspired public confidence and built up a good practice. He was in the beginning a diligent office lawyer, and soon developed into successful trial work. In 1894 he was nominated on the Republican ticket for County Attorney of Gallatin County. Early in the campaign, in the early part of September, learning that I was in Bozeman on my way from White Sulphur Springs to Virginia City, he came to the livery stable just as I was hitching my team to the buggy. He said, "I am glad to see you—I've been nominated for County Attorney in this county, and I hear you have been nominated in Madison County. I will let you know the result, and let me hear from you." A day or two after election I received a postal card on which was written, "Dear Callaway, I am elected by 415 majority. Yours, Holloway." I bought a postal card upon which I wrote, "Dear Holloway, I am elected by 415 majority. Yours, Callaway." The official count gave him 414, me 412. I tell this story to reflect something of the personality of the man. He was gracious, friendly; but generally thought to be of an austere nature.

In November, 1900, he was elected Judge of the Ninth Judicial District, comprising the counties of Gallatin, Meagher, and Broadwater, under circumstances that appeared adverse to his candidacy. It was a democratic landslide year; while the head of the democratic ticket carried the district by close to 400, Judge Holloway was elected by 147 votes. Nominated by the state republican convention in 1902 for Associate Justice, Judge Holloway was elected by several thousand majority. A large number of people, astonished over the result, thought a boy had been elected to the Supreme Bench. They soon discov-

ered their error; the new Justice was a sound lawyer of tremendous energy and close application to his work. He began and continued to turn out more opinions than any of his associates and they were of fine quality.

Judge Holloway was a man of wide learning, a cultured gentleman. He was an unusually fine lawyer, with the judicial temperament; an intense student of the law, always fair and impartial, considerate and courteous in conference, but tenacious in adherence to his convictions of law and justice. Like unto other jurists he was wrong occasionally, and when he did "get off" he was "way off."

He delivered the following notable opinions during the period covered in this sketch: *Bair v. Struck*,¹⁹ and *Finlen v. Heinze*.²⁰ This latter case was one famous in the "copper war." It was briefed and argued ably, attorneys for the appellant being W. W. Dixon, A. J. Shores, C. F. Kelley, Forbis & Evans, D. Gay Stivers, and T. J. Walsh; for the respondent McHatton & Cotter, Toole & Bach, J. M. Denny, and Charles R. Leonard. It seemed, on cold principles, that the judgment must be affirmed, and Judge Holloway wrote an opinion accordingly. But he was not satisfied with it; it seemed to him that the record presented a situation affecting the rectitude of the court, reflecting on the judge *a quo*. He consulted his colleagues on the court and even the commissioners. One said, substantially,

"Some of the facts in that record show a gross breach of the moralities; I think an affirmance would be a reproach on the administration of public justice."

Judge Holloway had courage; he tore up his first opinion and wrote another reversing the judgment. In this opinion he said:

"No judgment of a court of justice so tainted with corruption as the record leaves this should stand, and its cancellation in this instance will be the evidence of the determination of this court to pursue to the utmost its constitutional and lawful authority, to the end that public confidence in our judicial system may not be lessened, and that the fountain of justice may be kept pure."

Other notable opinions delivered by Justice Holloway are to be found in *Forrester v. Boston & Montana C. C. & S. M. Co.*,²¹ and *State ex rel. A. C. M. Co. v. Clancy*, re, "Fair Trial" bill.²²

¹⁹(1903) 29 Mont. 45, 74 P. 69, 63 L. R. A. 481.

²⁰(1903) 28 Mont. 548, 73 P. 123.

²¹(1904) 29 Mont. 397, 74 P. 1088, [reh. den. 29 Mont. 397, 76 P. 211].

²²(1904) 30 Mont. 529, 77 P. 312.

When the Court consisted of Justices Brantly, Hunt, and Pigott, all great workers, even with their utmost endeavors it was impossible to keep the work of the court current. For this the litigation between the great copper companies at Butte was chiefly responsible. When the election of 1900 was held the "copper war" was at its height. When the legislature of 1901 convened, business in the Supreme Court was still increasing. To remedy the situation a movement to increase the number of justices to five, as permitted by the Constitution, was initiated. Likely it would have been successful if the Governor and the Assembly could have agreed upon the selections of the new justices. According to popular understanding, the Governor claimed the prerogative, the Assembly desired to name the men. So the project fell through.

When Judge Holloway was elected and qualified, the Court then consisting of Justices Brantly, Milburn, and Holloway, the Court was reckoned four years in arrears. Something had to be done in the public interest. Governor Toole was a Democrat, the Assembly of 1903, Republican. The same difficulty which existed in 1901 was present.

Someone suggested the appointment of a Supreme Court Commission by the Court, after the California system, and the Legislature passed Chapter XIV of the 1903 Session Laws directing the Supreme Court on or before the first day of April, 1903, to appoint "three persons of legal learning and personal worth" commissioners of the Supreme Court to assist in the disposition of the numerous cases pending in the Court undetermined. The commissioners were to hold office for the term of four years. The Act became a law without the Governor's approval on February 23, 1903.

Selecting the commissioners proved a considerable task. One practical requisite was that each should be free from any entanglement with the litigation which was part of the "copper war," and from any business or other connections with any of the contending parties. The Court, I am told, was besieged with applicants.

Those finally chosen were John B. Clayberg of Helena, William Henry Poorman of Kalispell, and Lew L. Callaway of Virginia City.

John B. Clayberg was a distinguished lawyer of long experience. At the time of his appointment he was and had been, beginning with 1891, lecturer on Mining Law at the University of Michigan. He was born near Cuba, Fulton County, Illinois, October 8, 1853. His grandfather came from Saxony to Pennsylvania about 1790, thence moving to Ohio. After a good academic education, Mr. Clayberg entered the Law Department

of the University of Michigan, and during his course also pursued studies in the Literary Department. In the Law Department he had the rare privilege of assisting the famous Thomas M. Cooley in the compilation of those authoritative works, *Cooley on Taxation* and *Cooley on Torts*.

Graduating in 1875, LL.B., he was admitted to the Supreme Court of Michigan, and entered into partnership with a lawyer at Lansing, which continued until 1877. From Lansing he went to Alpena, Michigan, where he practiced until 1884, when he came to Helena.

At Helena he became associated with Thomas H. Carter, whose fame as a lawyer was obscured by his eminence as United States Senator. In 1889 Newton W. McConnell, outstanding jurist, joined Messrs. Carter and Clayberg under the firm name of McConnell, Carter & Clayberg. Mr. Carter, having been elected to Congress, withdrew from the firm in 1889, which in 1892 became McConnell, Clayberg & Gunn, the new member being Milton S. Gunn. Mr. Clayberg and Mr. Gunn formed the firm of Clayberg & Gunn in 1897, which continued until Mr. Clayberg became Supreme Court Commissioner.

William Henry Poorman came into the world near Muncie, Indiana, November 3, 1858, of good stock, his father being of Colonial ancestry. Shortly after his birth William Henry's parents moved to Wisconsin and the boy was reared in that state. He was a farm boy. He attended Hillsborough and Virginia high schools, being graduated from the latter. He first studied law in a local office, then entered the law department of the University of Wisconsin from which he was graduated in 1888. In 1889 he came to Livingston and commenced practice after being admitted to practice in the Supreme Court of this state. He practiced in Livingston until 1901, except for his service in the Spanish war; he was a lieutenant of Company C, First Montana, serving in the Philippines from August, 1898 until October, 1899. He was an excellent soldier, at times serving in special assignments entailing heavy responsibilities. In Livingston he was elected City Attorney twice. In 1901 he moved to Kalispell and was practicing in that city when appointed to the Commission.

The appointees were sworn in on April 1, 1903, and got to work immediately. We elected Judge Clayberg as Chief Commissioner. The main building of the State Capitol having been dedicated on July 4, 1902, the state officers had not much more than got settled. The grounds were being improved. Two lines of lilacs were being planted, one line on either side of the main walk leading from Sixth Avenue straight to the main entrance.

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The Thomas Francis Meagher statue was not yet contemplated. As automobiles were not in general use the back entrance was used for freight and the like.

The Commission worked itself out of a job in two years; in other words, the Court was nearly up to date with its work in April, 1905, and the Commission was discharged. Having been elected Judge of the Fifth Judicial District I had resigned in December, 1904, and Judge Blake was appointed in my stead. From the beginning the Commissioners held conference as a body at which their opinions were debated and considered carefully; the opinions agreed upon were sent to the Justices who passed upon them in conference. On adoption by the Justices they became the opinions of the Court. Occasionally the Commissioners were called to sit with the Court in conference. Judges Clayberg and Poorman were intense workers as the record will show.²³

After the expiration of his services as commissioner Judge Clayberg resumed the practice of law. For a time the firm of Clayberg, Corbett & Gunn existed with an office in Butte as well as in Helena. Messrs. Clayberg and Gunn resided in Helena. Judge Clayberg afterward entered into partnership with Edward Horsky. Judge Clayberg was the author of the excellent article on *Mining Law* in 27 *Cyclopedia of Law and Procedure*. In this work he was assisted by Mr. Horsky. Later Judge Clayberg removed to San Francisco and engaged in legal work until he was fatally injured in an automobile accident upon a San Francisco street. Personally he was a fine companion in work and when at ease. He was a congenial and generous man.

Judge Poorman was an unusually sound lawyer, excellent in judgment, following the right as he saw it, and according to my observation he always followed the right path.²⁴

²³Typical of Judge Clayberg's opinions are: *King v. Pony Gold M. Co.* (1903) 28 Mont. 74, 72 P. 309; *Featherman v. Granite Co.* (1903) 28 Mont. 462, 72 P. 972, this opinion created a furor as it caught many appellants without a judgment roll, but it was then a statutory requirement; *Campbell v. Flannery* (1903) 29 Mont. 246, 74 P. 450; *Mares v. Dillon* (1904) 30 Mont. 117, 75 P. 963; *Western Iron Works v. Mont. P. & P. Co.* (1904) 30 Mont. 550, 77 P. 413; *Handley v. Sprinkle* (1904) 31 Mont. 57, 77 P. 296, 3 Ann. Cas. 531; *Merk v. Bowery M. Co.* (1904) 31 Mont. 298, 78 P. 519; *Watson v. Colusa-Parrot M. & S. Co.* (1905) 31 Mont. 513, 79 P. 14; *State ex rel. Beach v. District Court* (1903) 29 Mont. 265, 74 P. 498; *Ball v. Gussenhoven* (1904) 29 Mont. 321, 74 P. 871.

²⁴From the large number of opinions he wrote as Commissioner the following have been selected as illustrative of his work: *Nelson v. G. N. Ry. Co.* (1903) 28 Mont. 297, 72 P. 642; *Butte Hdw. Co. v. Knox* (1903) 28 Mont. 111, 72 P. 301; *Northwestern Mut. L. Ins. Co. v. Lewis & Clarke* (1903) 28 Mont. 484, 72 P. 982, 98 Am. St. Rep. 572; *Mont. R. R. Co. v. Freeser* (1903) 29 Mont. 210, 74 P. 407; *State v. Martin* (1903)

After his service on the Commission he became First Assistant Attorney General under Albert J. Galen, during which the "sound old war horse" was General Galen's right arm for nearly all of Galen's eight years as Attorney General. He was retained as first assistant by those two excellent lawyers who successively became Attorney General, D. M. Kelly and Joseph B. Poindexter. Thus for nearly twelve years under one Republican and two Democrats he was First Assistant Attorney General. He became District Judge of the First Judicial District on the first Monday of January, 1917, and held the office until his death, August 28, 1934. He was a nearly ideal trial judge. He served on the Supreme Bench at various times, as District Judge sitting in place of a Justice, and as District Judge serving as a Commissioner. Inspection of his opinions will demonstrate that as a judge he grew with the years.²⁵ As a jurist he was superior to many who occupied the Supreme Bench during that period.

My first opinion as Commissioner, *Less v. City of Butte*,²⁶ was also reported in 98 Am. St. Rep. 545, and in 61 L. R. A. 601.

I think the most valuable opinion I wrote was *State v. Keerl*.²⁷ It was written after considerable debate. The Commission concurred but the Chief Justice was the only member of the Court who gave it full approval. As will be seen, Judge Holloway's approval was qualified. The opinion held that insanity was a question of fact, not of law, and indicated the method of trying a case of that character. Prior to this decision, it was difficult to try an insanity case correctly in Montana. After that it has been found comparatively simple. While the opinion was not satisfactory to me in some respects, it was the best I could do in the circumstances. Regardless of its merits from a judicial standpoint, it has saved the trial courts of Montana many times more than my salary for my term as Commissioner.

²⁵ 29 Mont. 273, 74 P. 725; *Mueller v. Renkes* (1904) 31 Mont. 100, 77 P. 512; *Chessman v. Hale* (1905) 31 Mont. 577, 79 P. 254, 68 L. R. A. 410, 3 Ann. Cas. 1038; *Landt v. Schneider* (1904) 31 Mont. 15, 77 P. 307; *Morrison v. Jones* (1904) 31 Mont. 154, 77 P. 507; *State v. Tully* (1904) 31 Mont. 365, 78 P. 760; *Noyes v. Young* (1905) 32 Mont. 226, 79 P. 1063.

²⁶ I call to mind two notable opinions, one written as Commissioner: *Pioneer M. Co. v. Bannock Gold M. Co.* (1921) 60 Mont. 254, 198 P. 748, and *Galiger v. McNulty* (1927) 80 Mont. 339, 260 P. 401. Others might be mentioned.

²⁷ (1903) 28 Mont. 27, 72 P. 140, 61 L. R. A. 601, 98 Am. St. Rep. 545.

²⁸ (1904) 29 Mont. 508, 75 P. 362, 101 Am. St. Rep. 579.