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Golding Fairfield

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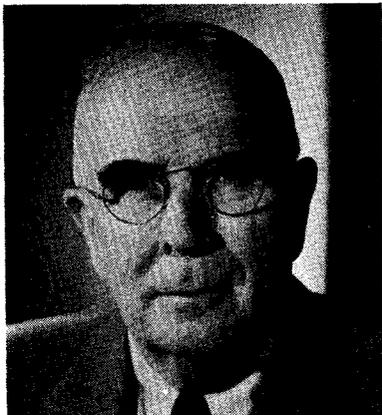
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## THE ORIGINAL "RUSH TO THE ROCKIES"

By GOLDING FAIRFIELD\*



Golding Fairfield received the A.B. degree from De Pauw University, and the LL.B. *cum laude* from the University of Denver in 1911. In the same year, he was admitted to the Colorado bar. From 1920 to 1932, he was a member of the Colorado State Senate, and from 1929 to 1945, Professor of Law in Real Property at the University of Denver College of Law.

He is a member of Phi Delta Phi Legal Fraternity, and of the Denver, Colorado and American Bar Associations.

Including the flag of Colorado Territory, and our present flag, Colorado has been under at least seventeen different flags.

The first known claim to territory now a part of Colorado resulted from Coronado's spectacular expedition into the Southwest in 1540-42, giving substance to Spain's claim to the entire western interior region of the United States.

In 1682, LaSalle floated down the Mississippi River and forthwith claimed the entire drainage area of the "Father of Waters," including a substantial part of Colorado, for the French King.

Also during the 17th and 18th centuries, the British Colonies of New England and Virginia generously extended their theoretical boundaries all the way to the Pacific Coast, overlapping the French and Spanish claims.

Between 1763 and 1848, Colorado belonged, in varying proportions, to France, Spain, Mexico and the Republic of Texas.

When Napoleon decided to withdraw his claims from the West, and negotiated the famous Louisiana Purchase in 1803, part of Colorado came under the jurisdiction of the United States of America for the first time.

Between that time and 1861, flags over Colorado included those of the District of Louisiana, the Territory of Louisiana, Missouri Territory, the State of Deseret (predecessor to Utah), Utah Territory, New Mexico Territory, Nebraska Territory and Kansas Territory.

White people lived in the "Pikes Peak Country" long before the discovery of gold in Cherry Creek. There were explorers, and their parties, including such leaders as Pike, Long, Fremont and Gunnison. There were the traders and trappers who could also be referred to as discoverers and explorers. Colorado fur traders of

\* In the preparation of this paper, credit is given to the following sources of information: The History of Colorado by W. F. Stone; the five volume History of Colorado sponsored by the State Historical Society; early articles published in *DICTA*; and articles heretofore published by the London Abstract Company and the Title Guaranty Company as the result of their research.

the "thirties" included Kit Carson, William Bent, Jim Baker and Jim Bridger. Trading posts were established of which Fort Bent was perhaps the most famous. In those early days there were also a few permanent settlers. Certain Mexican land grants had been made which included the historic Maxwell Grant and the Las Animas Grant. Development of these grants started early in our nation's history. Indian troubles occasionally flared up but for the most part the white occupants of the region lived undisturbed.

Congress eventually established what was then known as Kansas Territory and included in it what now comprises the State of Colorado. This territorial government created Arapahoe County and set up and attempted to maintain a county government. Probably the first recorded legal attempt to establish a court in the Pikes Peak region was the creation of a probate court for Arapahoe County by the territorial legislature and the appointment of Allen P. Tibbitts, a resident of Lawrence, Kansas, as judge of the court. Judge Tibbitts never took over his duties as judge and the court never functioned. One reason assigned for his failure to assume the office was that he believed there were few white people in the territory and he did not relish the long overland trip at a time when hostile Indians infested the region.

At the time Arapahoe County was established a delegate had been sent to Congress to work for the admission of an independent state (or territory) named Jefferson. This movement for statehood was started by submitting a constitution to a vote of the people



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who, however, rejected it, but later in the year did adopt a constitution for territorial government. The Territory of Jefferson maintained a wholly illegal, although a rather creditable, existence until 1861. Its laws were more or less disregarded although the creation of the first charter for Denver was one of its acts. A Jefferson territorial legislature actually convened and in a two months' session enacted more than forty laws and established a judicial system consisting of a supreme court, and district, county and justice courts.

Thereafter, Congress passed an act which created the Territory of Colorado. President Buchanan signed the act on February 28, 1861. This action had the effect of terminating all courts theretofore created but not before most court proceedings growing out of former court action had been validated. Only some local laws remained; these were confirmed by the territorial legislature and recognized by congressional enactments when not in conflict with existing statutes.

Up to the time the local courts were terminated an unusual situation had developed. There were courts which had been established by Kansas Territory, there were miners' courts, people's courts, claim club courts and the numerous courts created by the Jefferson territorial legislature. Litigants were at a loss to know which one or more of the courts properly had jurisdiction. A plaintiff would ordinarily solve the question by bringing his action in the court which he liked best.

The original "Rush to the Rockies" began in the late fall of 1858. Gregory and Jackson had panned gold, and news of their discoveries spread. It has been said that during 1859 more than 30,000 people came to Colorado. Placer mining developed along Cherry Creek, the Platte River, and Clear Creek. The newcomers seemed to take naturally to the Clear Creek camps. By the end of May, 1859, there were 300 men at work in the Jackson diggings and there the town of Idaho Springs grew up. About thirteen miles farther up the South Fork of Clear Creek the foundations of Georgetown were laid. Most important were the Gregory diggings where Black Hawk, Nevada, Mountain City and Central City developed.

Nevertheless, many of the fifty-niners soon became discouraged and streamed back to the states in a veritable stampede. These people were called the "Go-Backs." In spite of this exodus there were plenty of others who came in and the population of the territory continually increased. Emigration from the East was also stimulated by the financial panic of 1857 and the hard times following it. A continuous stream of settlers arrived through 1860-61 and '62. By July 1, 1859, one hundred sluices were running near the original Gregory diggings. The first steam quartz mill was erected on September 17, 1859.

The early settlers and gold seekers were forced by existing conditions to establish some sort of government, provide courts and make laws for themselves. Even though it was a part of the Territory of Kansas, the Pikes Peak region was so remote and means of communication and transportation so undependable and time consuming that the early settlers eventually decided that a separate

and distinct code of laws should be enacted to meet the requirements of each mining camp or district.

Colorado's first miners' court was organized June 15, 1859, in the Gregory District following the discovery of the rich Gregory lode in Central City. The citizens held meetings, elected their court officers and wrote their own civil and criminal codes. The latter were simple but adequate. Contemporary history books quote the criminal code of the Gregory District as follows:

Section 1. Any person guilty of wilful murder upon conviction thereof shall be hung by the neck until he is dead.

Section 2. Any person guilty of manslaughter or homicide shall be punished as a jury of 12 men may direct.

Section 3. Any person shooting or threatening to shoot another, using or threatening to use any deadly weapons except in self defense, shall be fined a sum not less than fifty nor more than five hundred dollars and receive in addition as many stripes on his bare back as a jury of six men may direct, and be banished from the district.

Section 4. Any person found guilty of petit larceny shall be fined in a sum double the amount stolen, and such other punishment as a jury may direct, and be banished from the district.

Section 5. Any person guilty of grand larceny shall be fined a sum double the amount stolen and receive not less than fifteen nor more than three hundred lashes on his bare back, and be banished from the district and such other punishment as a jury of six men may direct.

Thereafter, the enactment of mining district laws and the organization of miners' courts grew rapidly throughout the region. As mining activities spread and new camps were opened, similar mining districts were organized until there were perhaps a hundred or more such local governments created by the time the first Colorado Territorial Legislature convened in 1861. From the first these local laws and their enforcement had proved successful and effective and commanded the respect of law abiding citizens. The success of the miners' organizations caused the settlers of the valley to organize similar courts which they named "people's courts." Jurisdiction was for the most part criminal but to some extent civil. Usually no appeal could be had and the judgment of the court in criminal matters was either death, banishment or acquittal.

In order to meet a situation created by a new class of offenders known as claim jumpers another judicial tribunal was found necessary. This court was called a "claim club." Its function was not only to prevent claim jumping but also to adjust property rights. After the establishment of the first "claim club" in 1859, others were formed in various settlements. One in Arapahoe County was organized to act as a recording agent for its members' property—and, in case of trouble, to defend the claim of a member.

Denver's first capital trial by a "people's court" occurred on April 7, 1859. One John Stofel was arrested for the murder of his brother-in-law, Thomas Biencroff. Stofel freely admitted his crime,

saying he followed his brother-in-law to Denver City from the States for the purpose of killing him. At that time, there was no jail for the safekeeping of a criminal and there were no regular courts in which to try him. Since there was no doubt of his guilt, the citizens acted swiftly by organizing Denver's first "people's court." A judge was appointed and twelve men were called as jurors. In addition, a lawyer was appointed to see that the accused was fairly tried. Frontier justice was swift; the jury quickly returned a verdict of guilty, which was confirmed by a vote from the crowd of citizens in the open streets of Denver. The next day the prisoner, with his appointed executioner and a minister, was escorted by an ox drawn wagon to a large cottonwood tree near Tenth and Market Streets. The three men stood in the bed of the wagon as a rope was placed around the condemned man's head and thrown over a limb of the tree. Following a last prayer offered by the minister, the wagon was driven out from under the tree. Thus ended Denver's first trial and execution in the "people's court."

Clergymen joined the "Rush." It is told that the Reverend Mr. Dyer and others recorded their names in pioneer history by their efforts to establish religious meetings and teachings in the various camps and settlements. Reverend Dyer left Minnesota for Colorado in May of 1861 with \$14.95 in his pocket, undoubtedly unaware of what was before him. He had only to receive his first assignment to learn the reality of life in Colorado's mining camps. He stood just outside a saloon and pulled a worn Bible from his pocket. Bracing himself, he stepped briskly into a dimly lighted room. A dozen men were crowded around a quartet of roughly dressed miners playing poker. At the bar, another half-dozen were laughing among themselves. Loudly clearing his throat, Reverend John L. Dyer called out, "My friends, can't you close your game and come and hear preaching?"

For a moment, there was stunned silence. The men looked at one another, then at Reverend Dyer, who repeated his plea. Slowly, reluctantly, the gamblers laid down their cards. Avoiding each other's glances, the men followed the minister out of the saloon and toward a small circle of people waiting for services to begin. Reverend Dyer's direct powers of persuasion had won him a congregation.

Colorado's early-day ministers were used to lethargy on the part of most of the miners. But they persisted, and their efforts paid off. They supplied to the camps a commodity which was sorely needed—religion.

Dyer's territory was called the Blue River Mission, in the vicinity of South Park, and he preached at seven small camps every two weeks. As a base from which to operate, he purchased a cabin on the outskirts of Lincoln City. His bed was made of pine poles and his furniture consisted of a table, chair, and a sideboard for his utensils. The Bible, a *Methodist Hymn Book*, the *Methodist Discipline* and an occasional copy of a regular daily newspaper completed his library.

Privation was a part of the ministry at that time. It had been experienced first by the indomitable Catholic fathers who established Colorado's first church at Conejos in 1850; by George Fisher,

who preached the first sermon in Denver City in 1858; by Bishop Randall, who came to Colorado from Boston to establish Episcopal missions in the mining camps; by the Presbyterian ministers who organized their congregation in Denver in 1860.

No matter where these fearless ministers went, they exerted an influence on all who heard them. Soon, crude miners' huts were replaced by brick and stone churches. Small congregations swelled in number, and by the time Colorado achieved statehood, there were more than 100 churches in existence in the state.

The pioneers locating along Cherry Creek were accustomed to local government and, among other activities, they laid out towns and town lots. The first of the town companies was organized in September, 1859, by members of the Lawrence party. Their town was Montana City located on the east bank of the South Platte about four and one-half miles south of the present site of the state capitol. Some of the men who helped found Montana City believed that the land east of Cherry Creek was a better location for a town and there, on September 24, 1859, St. Charles City was laid out. In October, Auraria was started on the west side of Cherry Creek and in November the site of St. Charles was "jumped" by members of the Lecompton-Leavenworth party who founded Denver City. By the spring of 1859 Montana City was abandoned leaving Auraria and Denver on opposite banks of Cherry Creek to contend for supremacy. The men who founded Denver and the rival town of Auraria were wise in their choice of location. Their towns were subsequently united into one municipality by act of the legislature of Jefferson Territory in April of 1860. The consolidation was accepted, and Denver grew into the metropolis of the Rocky Mountain while scores of other towns with prospects apparently just as good ceased to exist or lagged far behind.

The great Cherry Creek flood occurred about midnight, May 19, 1864. When it was over the small frame city hall, located on the creek near the Blake Street crossing, had disappeared. With it had gone the large iron safe in which the town company records, municipal documents and papers pertaining to the first real estate titles to Denver land, had been kept. The loss of these records brought on new land title problems and started the famous "Denver Lot Question" controversy. Traces of that dispute can still be found

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A large number of persons had become associated together under the name of the Denver Town Company. The company had taken possession of a portion of the public domain now known as Denver, which they surveyed and laid off into streets, alleys, blocks and lots, and which they commenced to improve as a town, by the erection of dwelling houses, stores and offices. When the lands on which this city was built became surveyed, and the lots and buildings acquired value, the owners became concerned over their titles. The laws of 1844 limited an entry for town purposes to three hundred and twenty acres, and the city of Denver covered more than a thousand; so that there was no law by which a proper title to this land could be made for its occupants. To remedy this difficulty Congress passed the act of May 28, 1864, which provided:

“That the provisions of an act of congress entitled ‘an act for the relief of the citizens of towns upon the land of the United States, under certain circumstances, approved May 23, 1844,’ be so extended as to authorize the probate judge of Arapahoe County, in the territory of Colorado, to enter at the minimum price in trust for the several use and benefit of the rightful occupants of said lands and the *bona fide* owners of the improvements thereon, according to their respective interests, the following subdivisions of land, or such portions thereof as are settled and actually occupied for town purposes by the town of Denver aforesaid, to wit:

‘Section number 33, and the west half of section number 34, in township number 3 south of range number 68, west of the sixth principal meridian; that in all respects, except as herein modified, the execution of the foregoing provisions shall be controlled by the provisions of said act of the 23rd of May, 1844, and the rules and regulations of the commissioner of the general land office.’ ”

Some litigation resulted, but the courts held that an actual occupant and owner of improvements upon a lot in the city of Denver, at the date of the entry of the town site by the probate judge, was entitled to such lot.

The judicial history of Colorado really began with the organization of Colorado Territory by act of Congress on February 28, 1861. The act provided for a supreme court consisting of a chief justice, and two associate justices, whose salaries were \$1,800 a year. Further, the act divided the territory into three judicial districts and required that a district court be held in each, to be presided over by one of the justices of the supreme court. Inferior courts such as probate and justices of the peace were provided by statutes of the territory.

In 1866 a young lawyer, Moses Hallett, was appointed Chief Justice. He was the youngest in years and length of practice of all

the early judges when he came to the bench, but in knowledge of the law he was accounted the equal of any and the superior of most.

Moses Hallett as Chief Justice decided that riparian rights did not exist in Colorado. We quote from his opinion as follows:

"In a dry and thirsty land it is necessary to divert the waters of streams from their natural channels, in order to obtain the fruits of the soil, and this necessity is so universal and imperious that it claims recognition of the law. . . . Of course, lands situated at a distance from a stream cannot be irrigated without passing over intermediate lands, and thus all tilled lands, wherever situated, are subject to the same necessity. In other lands, where the rain falls upon the just and the unjust, this necessity is unknown and is not recognized by the law."

Courts were held during the territorial days in eleven different towns or cities of the Third Judicial District comprising all of the southern half of Colorado from the "divide to the New Mexico line on the south and from the western boundary of Kansas across Colorado to the Utah line." Judges, lawyers, court officials, witnesses, litigants and Spanish interpreters, and frequently prisoners with their guards, had to travel from court to court, sometimes 100 miles apart. They traveled on horseback and muleback and in wagons and buggies. The court houses were crude, having dirt floors and seating which often consisted of pine boards laid across boxes.

The following story is told of Judge Hallett. While he was on the circuit he noticed that the same faces frequently appeared in the jury boxes of widely separated localities where trials were had. Finally he asked the sheriff why he so often selected the same men for the jury panel. "The benches are so rough and splintery, Judge, I have to choose only those men who wear leather seats in their trousers." "Thereby," remarked Judge Hallett, "introducing a qualification for jury service unknown either to the statute or common law."

Mention should be made of Judges Gorsline, Wells and Belford on our Supreme Court bench during a part of that early period; also, Christian S. Eyster, territorial judge of the Supreme Court; Henry C. Thatcher, a Chief Justice of the Supreme Court; Samuel H. Ebert and Edmond L. Smith of the Supreme Court. Among the early lawyers were E. P. Jacobson, Vincent D. Markham, William E. Beck, Andrew W. Brazee, George G. Symes, H. P. Bennett and finally, Luther S. Dixon, who before coming to Colorado had been chief justice of the Supreme Court of Wisconsin.

Irrigation, mining and non-agricultural public domain required new rights of person, property and business, demanding new legislation and judicial interpretation. These conditions required original thought. The pioneer lawyers contributed vastly to the work of the legislatures. Our early judges responded in many instances with brilliant opinions which interpreted and applied the statutes and established principles of law unaided by precedent.

The resulting basic statutes and court decisions of those early times supplied the impetus which enabled first the territory and then the state to grow and prosper.

<sup>1</sup> *Yunker v. Nichols*, 1 Colo. 551, 553 (1872).