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The Supreme Court of the Territory of Jefferson

THE SUPREME COURT OF THE TERRITORY OF JEFFERSON

BY WILLIAM HEDGES ROBINSON, JR.



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Dean Robinson was an Instructor and Dean at Westminster College of Law. On its merger with the University of Denver College of Law in 1957, he became Associate Dean of the latter school.

"Colorado will prove a second California, I have no doubt," Oscar B. Totten, the clerk of the Supreme Court of the Territory of Jefferson, wrote to his Missouri friend. "I think we will have a population of some 50,000 by next fall. In Denver, houses are going up on every side. The place is improving fast. We begin to present quite a city, there being some seventy-five to eighty-five houses erected and many more in progress. It is a most beautiful townsite. I predict that at a not distant day Colorado will be a rich and populous state. Auraria is a moral place; and an exception to all new countries, especially gold countries, you will be bound to admit, we have preaching every Sunday morning and a temperance society is started. I am a member of it."

The clerk of the Supreme Court of the Territory of Jefferson was not taking time away from his duties to do his correspondence. There simply were no duties to perform; besides, he was not being paid for them anyway. The Supreme Court had come into existence as a result of the election of October 24, 1859, which approved the creation of and the constitution for Jefferson Territory. At this same election Totten had been elected as clerk of the Supreme Court, and A. J. Allison as chief justice, and L. W. Borton and S. J. Johnson as associate justices, with Samuel McLean as attorney general. The election of these men to office was the result of a two party system under which there had been five candidates for the three judgeships on the court, two candidates for the post of attorney general, and only one candidate for clerk of the court.

A. J. Allison, J. N. Odell, and E. Fitzgerald ran on the Convention Ticket for the judgeships, while S. J. Johnson and L. W. Borton ran on the Independent Ticket. R. J. Frazier was the Convention Ticket's candidate for attorney general, while Samuel McLean was his opponent.

All of these men had been in the proposed Territory of Jefferson (comprising an area as large as Colorado with liberal slices of Utah and Wyoming) for only a short time. Dr. E. Fitzgerald had become a resident of Arapahoe County in the early part of the year. Apparently he had no legal training, and after his defeat he served in the capacity of assistant territorial assessor and then dropped from sight. J. N. Odell had become a resident of Golden a few months before and had since become fairly well known for his work in some criminal trials occurring in the Nevada Gulch area. He drafted the constitution of the Golden City Lyceum and later served as judge in Arapahoe County.

Allison, who had been elected chief justice, had arrived in the Territory in April 1859, in a party composed of Atkinson, Kansas, residents and his two brothers who were from Doniphan County, Kansas. This party was under direction of the Cherry Creek Bridge and Ferry Company which had been incorporated by the legislature of Kansas Territory. Its purpose was to establish toll roads and bridges along the route to the new gold fields. He had previously served as a delegate in the constitutional convention of August 1859, as a representative from the Jefferson district. He was known as an earnest citizen and an impartial delegate with an avid interest in having the territory become a state. In August 1860, the chief justice was returning to visit his parents who had settled in eastern Kansas, after migrating there from Indiana. On the trip he was suddenly taken ill, and died at Cottonwood Springs. He probably was the only Supreme Court justice who ever has been fined a pail of whiskey for wearing a plug hat—a penalty which he drew from a miners' court and promptly paid.

Of his associates on the court very little is known. S. J. Johnson, who came from Gregory Diggings, apparently died there soon

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after his election to the court. L. W. Borton came to the territory in 1859, and apparently thereafter served as a prosecuting attorney. Otherwise the records seem strangely silent.

While the territorial Supreme Court was authorized by the election in October 1859, and its judges were then elected, the court itself was not established until some time after the fore part of December. The constitution had only provided for the creation of such a body, and the action of a legislature was necessary to bring it into existence and establish its jurisdiction. Accordingly, a legislature was convened in Denver on November 7, 1859. It was a bicameral body consisting of a council of eight members and a house of twenty-one. By December 2, 1859, it had passed legislation which established a judicial system for the territory.

Heading the judicial system was the Supreme Court, with district and county courts in each organized county and such miners' and justice courts "as may from time to time be established," completing the judiciary. The Supreme Court had "appellate jurisdiction over all final judgments and decisions of the district courts, as well as in cases of civil actions properly so called as in proceedings of a special and independent nature." The court also had jurisdiction where intermediate orders involved the merits or materially affected the final decision, and could issue "all writs and process" necessary for the exercise and enforcement of its appellate jurisdiction. It could prescribe rules for allowing appeals on intermediate matters providing the same would not "retard proceedings" in the trial court. The power of "general supervision" over district courts was vested in the Supreme Court in order to "prevent and correct abuse where no other remedy is provided." It admitted on motion any "practicing attorney of the district court to practice in the Supreme Court upon taking the usual oath of office," as well as practicing attorneys of courts of record of another state or territory.

The court was required to meet on the third Monday of January, April, July and October, and to keep records of its proceedings. Whether any such records were kept is apparently unknown since if they ever were in existence, they probably were lost in the flood of 1864.

The personnel of the Supreme Court consisted of three judges, a clerk and a marshall. Compensation for these individuals was provided by statute. The clerk received, from the work incident to the office, fees which ranged from twenty cents to two dollars, and no other sums. The justices of the court were supposed to be paid a salary of \$2,500 per year beginning January 1, 1860, but, since the territory had no funds to pay salaries, were actually paid on a fee basis. Docket fees in the Supreme Court were "ten dollars in each case, to be divided equally among the judges," and such sums were credited against the salary due the judges. The marshall was to receive a salary of \$500, plus such fees as were allowed by law.

The compensation of the attorney general was one thousand dollars annually, "together with such fees as are allowed by law." The governor, on the other hand, was to be paid three thousand dollars per year, and the secretary and the auditor two thousand dollars each. Formal organization of the court was to occur when the chief justice took his oath of office before the president of the

board of canvassers, to the effect that he would support the Constitution of the United States, the organic act of the territory, and that he "will without fear, favor, affection or hope of reward, to the best of his knowledge and ability, administer justice according to law equally to the rich and the poor." After taking the oath, the chief justice was then to administer a similar oath to the associate judges.

Since the legislature had left the drafting of a civil code, which embodied procedural matters, and a criminal code, to a legislative commission consisting of Eli Carter and Zaremba Jackson, it is doubtful if much litigation was carried on in any of the territorial courts, other than the miners' courts, prior to February 1860. A special session of the legislature adopted the work of the commission on January twenty-third and January twenty-fifth. The courts were now in being and equipped to deal with the tasks assigned to them.

While the codes of civil and criminal law were well drawn, and in many respects more workable and comprehensive than those which were to follow, the judicial system of the territory, other than the miners' courts, never really functioned. The most telling blow against its effectiveness was the threatened rebellion of the miners who strenuously objected to paying a poll tax of one dollar to defray the costs of government. As a result of the lack of funds, the government maintained only a nominal existence for nearly a year, with most of the judicial work and indeed the usual functions of government being handled by the people's and miners' courts and the claim clubs.

In this state of affairs the Supreme Court probably operated in a vacuum. Upon the deaths of Judges Allison and Johnson, J. Bright Smith and J. W. Holman had been appointed to the vacancies. Holman had come to the territory in 1860, and settled in Blackhawk. There he entered into the operation of the Bobtail Mine with his partner, William H. Hurlbert, who had discovered the mine the previous October. Holman, who had been born at Fort Wayne, Allen County, Indiana, on May 5, 1825, had a rather extensive education for those days, having spent twelve years in common and Quaker schools in Indiana. Apparently he never studied law, as his prior background seems to consist of the operation of a dry goods and general mercantile business, which he operated for seven years, part of the time in partnership with his brother. Except for a hiatus of approximately eight years, during which time he married Mrs.

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The editors of *DICTA* wish to acknowledge the establishment at the District Court Chambers in Akron, Colorado, of a memorial law library in honor of the late Arnold M. Chutkow. Mr. Chutkow was active in law practice in the Akron area as well as in Denver and was Editor of *DICTA*. Contributions for this library should be sent to the County Treasurer, Washington County Courthouse, Akron, Colorado.

Emily J. (Clarkman) Smith of England, he seems to have spent most of his business life engaged in mining ventures. In 1872 he returned to Central City, from whence he moved in May of 1864. Apparently he lived in that city until his death.

The other appointee, J. Bright Smith, came to Denver just a few months prior to his appointment and was admitted to practice on July 30, 1861. He was one of the "few men who in that unsettled day had the temerity to part his name in the middle." In 1865 he edited a law book on Oyer, after serving as the city clerk and attorney for Denver from November 1861, to April 1, 1862, and as city attorney until April 1, 1863, when he was succeeded by Moses Hallett. He was an outstanding orator, appearing at many public functions such as the ceremony marking the completion of the Denver Pacific Railroad on June 24, 1870.

In spite of the fact that the Territory of Jefferson was apparently doomed and Governor Steele had warned that there were no funds on hand to pay salaries or per diem, there were plenty of candidates for the election which had been called for October 22, 1860, in conformity with the provisions of the constitution. Delegates were elected for the General Assembly which was to meet on November twelfth. In an election which saw Governor Steele returned to the governorship, Samuel McLean was re-elected attorney general, and J. Bright Smith was elected chief justice, with William Brackett and Charles C. Post as associate judges.

Although this new court was composed of men of vigor, there was little, if anything, for them to do. There was a continuing conflict in jurisdiction between the territorial courts of the Territory of Jefferson, those of the Territory of Kansas, of which Colorado was then a part, the nonexistent federal courts for the area, and the various popular courts established by the "miners" or the "people." It would seem in this welter of jurisdiction there would have been appeals galore, but apparently no one was willing to acknowledge the jurisdiction of the territorial Supreme Court and, further, the jurisdictional conflicts were solved in many cases by the same court officials being elected or appointed to the several courts and being able, therefore, to don whatever hat the litigants desired.

Of the newly elected judges, Charles C. Post was to make a niche for himself in the embryo state. Coming from a well known family of Vermonters who had migrated to Washetenaw County, Michigan, Post had gone to school in that area until he was nineteen. He then went to Decatur, Illinois, where he studied law in the office of his brother, Columbus J. Post. In 1855 he was admitted to practice and entered the law office of his brother until 1859. In May of that year he came to the Territory of Jefferson with his wife Angelina, whom he had married on May 16, 1856. His first efforts were devoted to mining in Missouri Gulch where he had no success, and in September he moved to Buckeye Bar, five miles below Idaho Springs, where he continued to mine. A month later he was elected to the House of Representatives for the provisional territorial government. After selling his claim for \$1000, he moved to Denver where he stayed until February of 1862. During this period of time and for some months thereafter, Post represented John N. Gregory, discoverer of gold in the area, in various law suits pending in the

Gregory District Court resulting from sums owed Gregory. Then he settled in Central City where he practiced law for the next twelve years. His selection as a judge of the Supreme Court apparently did not interfere with his law practice. He was admitted to practice August 14, 1862. He was appointed as a recruiting officer for the Union in the same year and later served in the Second Colorado Cavalry. Upon his return from service, he was elected, in 1868, as district attorney for the Second Judicial District, then composed of the counties of Boulder, Jefferson, Gilpin, Clear Creek, Larimer and Summit. He served in this capacity for two terms. In 1872 he moved to Georgetown where he resided until 1900 when he moved to Denver.

An active politician all his life, he was a Democrat until 1892, when in the great silver battle of that era he, like many other prominent Coloradans, became a Populist. In 1900 he was nominated for the position of attorney general and elected on a Fusion Ticket composed of Populists, Silver Republicans, and Democrats. He served in this capacity for one term. On November 22, 1906, he died, leaving a widow who died in December 1917, and a family of six children each of whom also contributed through public service to the growth of the state. One of his sons, George M. Post, served as assistant attorney general. Of Judge Post's other associate on the court, William Brackett, nothing seems to be known.

However, of all the men who composed the Supreme Court of the territory, the most colorful was its clerk. Oscar B. Totten was born in New Jersey on April 4, 1830, but was reared in St. Louis in the days when the Missouri steamboats were at the peak of their glory. The entire West opened from the port of St. Louis. Pike, Lewis and Clark, and Fremont had all made that city their headquarters for venturesome thrusts into the unknown West. Indians of many nations, voyagers, mountain men, fur traders and Mormons jostled each other on its muddy streets. There was a restless surge of population that centered upon the prairie schooners, but most of all upon the steamboats which plied their way from the French settlements on the New Orleans delta, to the Indian country of the Northwest.

In an atmosphere such as this, Totten followed the course of al-

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most any boy of the frontier. He worked on the steamboats until the cry of gold stirred the great California migrations of the fifties. Totten went to California in 1852, and like many another unsuccessful searcher later returned to resume his work on the steamboats. Again the discovery of gold in Gregory Gulch worked its magic, and in 1858 Totten joined the Steamboat Gold Hunters headed by Captain William Smith. By October twelfth they were at Big Bend on the Arkansas, arriving with little incident except for a mule stampede. Sixteen days later they arrived at Bent's Fort and by November eleventh they were in Auraria, the predecessor of Denver. As James Scudder was to write in the following January, the St. Louis men, of whom there were about thirty in the new town, thought they had "a good thing and we expect to get rich out of it." According to Scudder, the population of Auraria was five hundred men and three ladies. Since he had become a recorder of claims, he was probably in a better position to estimate the population than most of the enthusiastic residents who were suggesting figures of two thousand.

Few of the St. Louis men, though, were unappreciative of this beautiful site situated on the south bank of the Platte River at the mouth of Cherry Creek where the snow-topped mountains, about twelve miles away, seemed to be only a few miles distant. But the winter was spent in many *divertissements* other than looking at the gorgeous scenery. The townsite was laid out, the average size lot being 66 feet by 132 feet. The disputes between the St. Charles Town Company, the Denver Company, and the Auraria settlers were terminated. The town was provisioned. While most of the wants of the area were supplied from St. Louis by wagon trains, the residents, for the most part, had to depend upon their ability with their guns to furnish meat. Fortunately the valley was thick with game; so thick, indeed, that Totten writes of a hunt which within the space of four days killed fifty-eight black-tailed deer, four mountain sheep, two catamounts, and a few grouse. It required a four-mule team and three yoke of oxen to haul the game back to the settlement.

By March of 1860, Totten and three other St. Louis men had decided the weather would permit some exploration for gold. They had gone about sixteen miles into the mountains north and west of Denver when, shortly after finding some evidence of gold, a bad snowstorm drove them back to Auraria. After the snow melted, the party again set out, but this time for the north fork of the St. Vrain River. Once again a snowstorm halted explorations and the group huddled cold and miserable in their camp. When the storm ceased, they shoveled away three to five feet of snow. Then they built large fires to thaw out the ground. For a space of about eighteen feet into the ground they found gold which averaged from one to six cents a pan. Satisfied with the fact that the area would produce gold in paying quantities, Totten returned to Auraria to prepare for his return to St. Louis in order to bring his family to the territory.

Leaving the Denver area on May second, he arrived in St. Louis toward the end of the month, traveling by way of Omaha and St.

Joseph. He returned to Auraria, which was now officially known as Denver City, West Division, since it was situated on the west side of the river, in time to participate in the various elections attempting to create either a state or a territory independent of Kansas. Shortly after his election as clerk of the Supreme Court, Governor Steele appointed him a lieutenant colonel in the Second Colorado.

Soon thereafter Totten returned to St. Louis where he was placed in charge of the New Igo, a steamboat operating on the Missouri River for the benefit of the Union troops. As a steamboat captain he served with courage and daring. After 1865 he migrated to Helena, Montana, becoming interested in mining ventures there. Three years later he was elected police magistrate in which capacity he served for three terms. Elected as clerk and recorder of Lewis and Clark County, he continued in that office for nine years. Full of vigor and of love for the West and his steamboat days, he was fond of relating his experiences, and even in an era where adventure was common he held an appreciative audience.

Such were the men and the institution which they served—the Supreme Court of the Territory of Jefferson—a hundred years ago. By June 6, 1861, the territory had gone out of existence with the resignation of its governor, who called upon all officers of the territorial government, especially all judges and justices of the peace, to surrender their commissions and to abstain from exercising the duties of their offices. All citizens were requested “to submit to the laws of the United States and refrain themselves from deeds of violence.” Authority now lay in the hands of the officials of the Territory of Colorado, created by Congress on February 26, 1861. Appointed by President Lincoln, Justices B. F. Hall, S. N. Pettis, and C. L. Armour and Attorney General James E. Dalliba assumed control of the judicial system. An era had ended and another begun which itself was to end fifteen years later when the territory became the State of Colorado.

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