

December 2019

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Recommended Citation

William A. Riner, *Hon. Moses Hallett*, 4 Wyo. L.J. 86 (1949)

Available at: <https://scholarship.law.uwyo.edu/wlj/vol4/iss2/4>

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HON. MOSES HALLETT

WILLIAM A. RINER*

There is a reciprocity that ought to and frequently does exist between the Bench and the Bar. They are equal in a way before the law and before the people and the citizen. Here are three lawyers—one on the bench and one on one side and one on the other side of the case. Humanity is weak and frail—so much so that the lawyer does not absolutely know, indeed, he rarely ever absolutely knows which one of the parties to the cause is right and which is wrong; the judge or the jury does not absolutely know. We take much, in truth a great deal, on the faith of the witnesses; and thus all of us depend on the perceptive faculties, the recollection, and the judgment of frail humanity. So it is the duty of those three men to find out what is *right* as between man and man. And when that has been discovered, then, and only then will you have what is the law.

In this connection, I am reminded of a remark of an able lawyer to a young law student in his office, as the latter was taking final leave of his instructor. The lawyer was telling the young man how to take a case and, after advising him at some length with valuable suggestions, then said: "Now having gotten at the facts as nearly as you possibly can from your client, after cross-examining him and all that sort of thing, then go out in the suburbs of the town, go off and wander where you will not see anybody, think about it, think deeply, think sincerely, think honestly about it, until you have finally arrived at a conclusion as to what under the state of facts is right between the parties; and then, if you are fit to be a lawyer, you will have arrived at the law—unless some damn fool statute intervenes."

It is lamentably true, and many who may read these lines know it, that now and then a judicial officer is found who takes the attitude that he is not responsible to anybody particularly—"Nobody is paying me a fee," he says to himself—"I don't have to fight for this man or that." And so, in a careless and offhand sort of practice he decides the cases which come before him. The right minded citizens of the state and the wiser members of the bar admire the man on the Bench who is zealous to be right, who knows that the welfare of the community rests with him, and who knows that the people must look to him for righteousness, justice and peace. And the individual citizen at times manifests his feeling on the matter in no uncertain terms.

In Colorado many years ago there was a candidate for judicial preferment who approached another lawyer and solicited that man's vote and his support at the coming election. They belonged to the same political party. The candidate asked this man: "I suppose you

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will vote for me because we belong to the same political party?" The other fellow said: "No, I cannot vote for you," and evidently wanted to get way. But the candidate said: "Wait a minute. How is it? What is the reason you won't vote for me?" The man's answer was one long to be remembered: "A man who aspires to be judge of a court ought to possess three qualifications: The first and most important one is that he should be a gentleman; the second is that he should be an honest man; the third is of least importance—I think he ought to be a good lawyer. And I do not think you possess either of those qualifications." Those who overheard the conversation nearly fainted and the candidate did quite.

In recalling the names of those who have rendered great and signal service to their countrymen in the judicial departments of our state and national governments, the members of the Bar are rather inclined to turn to those who lived in the earlier periods of the nation's history. This is not unusual. The Bar is always conservative. Reputations must stand the acid test of time before they can be accorded truly great. Accordingly, we speak with great respect of Judge Cooley and his splendid work as an instructor and his clear expositions in the field of constitutional law. We refer with admiration to the opinions of Judge Lemuel Shaw of Massachusetts, who, you may remember, presided at the trial of Professor John Webster for the murder of Dr. George Parkman—that famous cause where the law of circumstantial evidence as well as the doctrine of reasonable doubt in criminal cases was so learnedly discussed. The name of Chancellor Kent comes to our lips as we have in mind our early legal studies and our later acquaintance with his decisions so thoroughly considered and developed as to form in large measure the basis of American equity jurisprudence. Then there is Judge Story whose industry was simply untiring, who wrote one of the opinions in the Dartmouth case and whose learning was such that it is told that the great Chief Justice of the Supreme Bench was wont to announce his opinions without citing a single authority or precedent, and at the end would say: "These seem to me to be the conclusions to which we are conducted by the reason and the spirit of the law. Brother Story will furnish the authorities." And finally, we recall with veneration the enduring fame of John Marshall, who, while relying on precedents so little, yet made so many and such conclusive precedents for subsequent judges to follow.

But it is the purpose of this article to draw your attention briefly to the career of one nearer home; one who was identified with the early growth of our own mountain country; who assumed office to serve in a judicial capacity for more than forty years; who solved the peculiar problems incident to this arid and rugged region where we now live with such learning and ability as to deserve and receive the

highest commendation; who found a code of mining law generally fashioned from the experience of the toilers in the wilds of our country and interpreted it so skillfully and beneficially as to bring order out of the original chaos and to establish his opinions as enduring monuments of his learning, his industry and his wisdom. It is possible that some of those who read this sketch may remember the Honorable Moses Hallett, the first United States District Judge for the District of Colorado.

He was born in Illinois on July 16, 1834. His initial study of the law was pursued in the City of Chicago and he was admitted to the Illinois Bar in January, 1858. Reared in a frontier community, he had enjoyed the pleasures and freedom of that life. He knew its good-fellowship and good-neighborhood where all are substantially on a level; where the things possessed are few, and the things wanted, many; and where each must depend, and may safely depend upon occasion, upon the kindly aid of his fellows. Very likely the memory of that life in Illinois induced him to move to Colorado in 1859 among the first settlers of the Territory. He spent some time in mining in Clear Creek County, but soon moved to Denver where he engaged in the active practice of the law. He became a member of the legislative assembly of the Territory and favorably known as a lawyer of ability, learning, industry and probity.

On the tenth day of April 1866, Andrew Johnson, President of the United States, sent to the Senate the name of Moses Hallett of Colorado for the position of Chief Justice of the Supreme Court of that Territory. All his predecessors and nearly all the associate justices had been non-residents when appointed. The two associates of Judge Hallett upon the Territorial Bench at the commencement of his term did not long hold their offices. The rigors of frontier life proved too much for them. There was no term of the Supreme Court during their incumbency and they held terms of the District Court only.

One of these gentlemen had been appointed from New York City. He had polished manners, was elegant in his dress and parted his hair in the middle. It was said that when he presided in the District Court he would, after the hearings of the day's business were over, ostentatiously convey to his chambers for examination and reflection, the pleadings assailed during that day; that on the morrow the demurrer first in the list was sustained, and the second overruled and so alternately to the end of the pile thus dispensing equal and impartial justice to all. One of the lawyers attached to his court came in one morning and noticing on the top of the head on the Judge's desk the declaration in a cause in which he represented the plaintiff, engaged His Honor in conversation and meanwhile skillfully shifted

this paper to the second place, thus avoiding the disastrous fate which otherwise would have been incurred. His adversary accused him of having improperly shuffled the deck.

Judge Hallett held the office of Chief Justice of Colorado Territory through repeated reappointments until the state was admitted. His next two associates upon the Territorial Bench were Judges Gorsline and Eyster and their opinions may be found in the first volume of the Colorado reports. Of the latter it is to be noted that he was amiability itself—so amiable, in fact, that he was always ready to hear or try any cause provided *both* sides were ready to proceed. Of the former, Judge Gorsline, it may be said that while he was a learned lawyer, he unfortunately had poor health. He disliked the judicial work and consistently avoided the court-house as he would the pest house. He used to remark that the difference between himself and Judge Eyster was that Eyster would rather call the docket than be in heaven; but he, himself, would rather be in Hades than call the docket.

Judge Hallett entered upon his service as Federal Judge for the District of Colorado in 1877, the year following Colorado's admission to the Union. The Court had already been organized by Circuit Judge Dillon assisted by Judge Dunby of the District of Nebraska. It was to be expected that many and very interesting questions would be forced upon the new Judge in a commonwealth which speedily began to uncover its wealth of mineral resource.

The first Act of Congress regulating and sanctioning the exploration of public domain for mineral deposits was not passed—as we all recall—until July, 1866. The legislation of Colorado Territory and of the several mining districts was very crude and imperfect. The mining claim was 100 feet in length along the vein, with only 50 feet of surface. There was no statute requiring a survey or the accurate definition of the boundaries of the claim. According to the common acceptation at that time in Colorado, the filing in the office of the Recorder of the County, of a certificate of four lines, setting out that the miner asserted ownership in a claim of designated number, east or west of the discovery, was supposed to confer title without any act of discovery within the claim limits, any marking of boundaries, or any actual ascertainment or definite location of the place of the vein or of the ground claimed. Thus, on the same paper, or by a separate paper signed later, other parties, real or nominal associates of the discoverer, would give notice of claim to No. 1 East, No. 1 West, etc. on the same lode. Not only would the associates of the discoverer make such records, but often third parties, without even going on the ground would file these side claims—in instances to the extent of several thousand feet on each side from the discovery claim.

These strange ideas so prevailed that after patents began to be issued, even able lawyers contended that the locator could seize the vein, wherever discovered even without the prescribed limits of the patent. In the language of the time the owner "could swing his patent." It took both legislation and litigation to unravel these tangles.

In 1870 Congress passed a supplemental act dealing with placer claims. This law and that of 1866 were thereafter codified and the law of May 10th, 1872 appeared in the Revised Statutes of the United States. This new Act of Congress, you will observe, had not been very long in operation when Judge Hallett came upon the Federal Bench. Naturally, the questions that had arisen before that time were those that related to surface lines,—those comparatively easily settled and not so very important matters which pertained to surface rights. Soon afterward there arose that class of cases, which long continued, relating to underground rights, and the infinite variety of conditions which nature creates, presenting the most complicated problems, when considered in relation to the artificial lines which the law imposed. The law of 1872 covered a very extensive field of possible controversy, but in a manner unique. The questions arising in the application of the law to diverse geological conditions could derive but little help from those jurists who had for decades lighted the paths of jurisprudence. It developed upon the Federal Judges of the '70' and '80's to interpret that law.

Among their decisions, none rank higher than those of Judge Hallett. His clear reasoning, based on accurate knowledge, gave a series of important and valuable precedents, and served to clarify a difficult subject as well as to reveal the symmetry and establish to a large degree the consistency of the mining law of the United States. It is not easy to mention the member of any court who has been more frequently quoted than Judge Hallett in mining litigation. In many instances, occasion has been taken by the justice of another court to attest in his opinion the great experience and learning of Judge Hallett in this branch of the law. In the well known case of *Iron Silver Mining Co. vs. Cheesman*, 116 U.S. Repts. 529, the Supreme Court of the United States was called upon to review on writ of error Judge Hallett's trial of the cause. In their formal opinion in the case, that great Court set out verbatim his charge to the jury containing his definition of a lode, and after adverting to and enlarging upon the extreme difficulty experienced in laying down a rule for the guidance of the jury in cases of this character, unreservedly expressed their approval in these words: "We are not able to see how the judge who presided at the trial of the case could have better discharged this delicate task than he has in the charge before us."

Mr. Justice Miller, of the Supreme Bench of the United States, occasionally sat in the trial of these mining cases in the Circuit Court in Colorado, and on one occasion it became his duty to give to the jury the definition of the word "lode" or "vein." After citing certain authorities, he said: "I am also aided by my Brother Hallett whose experience is greater than mine in this matter and who has also given the definition of the word which I propose to read to you as the law. 'In general it may be said that a lode or vein is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain.' And I do not know a better or more comprehensive definition than that."

Such words of appreciation and commendation coming from the august Court of last resort in the land, and from one of its most eminent justices testify emphatically to the high rank of Judge Hallett's judicial attainments.

His administration of the judicial power invariably exhibited a dignified demeanor, a sedulous regard for the rights of suitors and an earnest endeavor to administer the law without fear or favor. In so doing, he won the respect and confidence both of the Bar and of his State. Few have been those who imagined that personal influence or push or pull would have any effect in the Court over which he presided. If ever any misguided person assumed to possess influence in that Court, his illusion, at its first manifestation, was promptly and effectually dispelled.

One evening in the City of Pueblo four intimate friends, absent from their respective homes on business, in order to while away the time, sat down to play a few games of whist. One of these gentlemen was Judge Hallett. Another was a lawyer who expected to try a case in the Judge's Court on the morrow. The time passed swiftly until at the late hour—for those days—of eleven o'clock, the party broke up and each retired to his room in the hotel. The lawyer slept soundly—and long. Consequently, he arrived in the court-room the next morning about a half hour after Judge Hallett had opened Court promptly at ten o'clock as usual. As the delinquent appeared, Judge Hallett sternly began: "You are late, sir." The lawyer glanced at the judge in surprise, as if to say—"Well, you know why, don't you? We were *all* up late last night." But not a flicker of recognition passed over the Judge's features. He continued: "This Court expects those who have business before it to be here, sir, with promptness. It cannot tolerate such delays as you have occasioned, sir. This Court requires of counsel the same assiduity in the dispatch of business as it requires of itself, sir." There was much more of the same sort of thing. Needless to say, that lawyer never passed a more uncomfortable ten minutes. Needless to say, too, he was never late in Court again while Judge Hallett presided.

Judge Hallett expressed himself on the Bench with clearness and precision, always with strength and effectiveness. He was a master of English, and his oral opinions given and reported in open Court, read without editing like the utterances of the higher English tribunals as they appear in the law books. The writer of this paper was fortunate enough to hear several of these performances, and they were worthy of the closest attention.

Concerning this trait of effective speech on the part of Judge Hallett in his judicial utterances, it may be recalled that Judge Belford of the Colorado Bar was in the very early days one of Judge Hallett's associates upon the Territorial Bench. That doubtless accounted for a certain familiarity of expression with which the former habitually addressed the latter. On one occasion Judge Belford tried a certain criminal case before Judge Hallett. His client was convicted. Belford thought the conviction was due to the emphatic form of the instructions given by the Court. Some days afterwards, he met a brother member of the Bar on the street immediately after the latter had left Judge Hallett's Court-room where he had been engaged in an important jury trial. Belford inquired how the case was progressing and was told that the Judge had just instructed the jury. "Well," said Judge Belford, "did the Judge come down in front of the jury to talk to them?" "Yes,"—was the answer, "and that is something new to me; I have not seen him do that before." Thereupon Judge Belford remarked: "He did that way with me the other day, and after Court I went up to him and said, 'Mose, how is this? You didn't used to get down and hover over the jury like a hen over her chickens. What's the matter with you?' And the Judge replied, 'I find the jury has had some difficulty of late in hearing me. My voice seems to be somewhat weak.' To which Judge Belford promptly replied: "Mose, your voice may be weak, but your expressions are d - - - d strong."

All who knew Judge Hallett recognized that there was never any uncertainty in his views and that they invariably found a definite and vigorous and oftentimes eloquent form of expression. Two short utterances, the one made in the early days of his judicial career, the other towards its close, will serve as illustrations. Both are taken from irrigation cases which developed out of the aridity of our Western soils and required the application of different rules from those which had prevailed in the Eastern sections of the nation.

In 1872, when Judge Hallett was Chief Justice of the Territory, in such a case he used this language:

"The principles of the law are undoubtedly of universal application, but some latitude of construction must be allowed to meet the various conditions of life in different countries. The principles of the decalogue may be applied to the conduct of men in every country and clime, but rules respecting the tenure of property must yield to the

physical laws of nature, whenever such laws exert a controlling influence. In a dry and thirsty land it is necessary to divert the waters of the 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."

Only a few months before his retirement from the Federal Bench, he had occasion to say:

"Water is essential to human life, in the same degree as light and air, and no bounds can be set to its use for supplying the natural wants of men, other than the mighty barriers that the Creator has made on the face of the earth."

These quotations, it is thought, very well demonstrate the terseness, the vigor and the clearness of Judge Hallett's diction.

He was always the helpful friend of the young, but *modest* lawyer. On one occasion an associate Federal Judge was sitting with Judge Hallett listening to an argument being made by one of the younger members of the Bar. The associate presently turned to Judge Hallett and said: "This point has been settled by our Court of Appeals. Should we not stop further discussion?" His reply was: "This is almost the first case this young man has had in this court. To interrupt would be to shatter his argument. Let us hear him out." And that was done.

On the other hand, one could hardly be about Judge Hallett's court-room many times without realizing full well that his motto was: "Of him to whom much is given, much is expected," and the lawyer of experience and of age found small favor in his sight when he seemed to be unprepared in his case, and not to have examined the law before coming into court to try it.

There was that time when a lawyer, of equal age with Judge Hallett and of much experience, rose for the purpose of discussing a legal proposition and began by saying—"If the Court please, I have not taken time to examine the authorities in this case, but—" "Well, sir,"—broke in Judge Hallett—"If you have not taken time to examine the authorities, the Court will indulge the presumption that the Court knows as much about it as you. I do not care to hear you, sir."

The Judge was particular about some other trifling little things, too, as well as examining authorities. He believed that court papers should be prepared with neatness and with an eye to their legibility. A great many years ago, one of the lawyers—his name, I believe, was Ladd—practicing in Judge Hallett's court conceived the idea that a goose quill in writing would in some way lend inspiration. He had heard of learned authors, gentlemen of great culture, using a goose

quill, so that Ladd used to use one. He would dip it into the bottle of ink and secure as much ink as he possibly could and then smear it over the paper. One day he presented a motion to the Court down at Colorado Springs. After listening a short time, Judge Hallett said: "Will you let me see that motion?" Mr. Ladd stepped up to the Bench and handed it to him. The Judge looked at it for a minute or two and then, without regarding Mr. Ladd at all, turned to the Clerk and extending the paper remarked: "Mr. Clerk, you will hand that back to Mr. Ladd and ask him to paint it over again."

On the first day of May, 1906, this distinguished jurist retired from active service. It was the privilege of the writer to be present at the ceremonies held in the old Federal Court-room in Denver on that occasion. The place was crowded. Leaders of the Bar in Denver and the State of Colorado vied with each other in attesting the great service rendered by the man about to lay aside the judicial robe. As the impressive words of the oath of office were given by him to his successor, Judge Lewis, it was most surely in the minds of everyone there that Judge Hallett had well kept the trust committed to his care. No man who knew him during the forty years he served as a judicial officer could truthfully say he was ever once *intentionally* wrong. No one could truthfully assert that he had done those things of which he did not himself approve. All knew that neither the unjust attacks of unprincipled public press nor the harsh criticism of those who disagreed with him could ever swerve or deter him from the performance of such official duty as his own conscience told him he ought to perform. Truly and well did he administer justice without respect to persons, doing "equal right to the poor and to the rich."

No more fitting close to this brief sketch of Judge Hallett can, perhaps, be made than by leaving with you a few of the thoughts to which he gave utterance that day he bade farewell to public life. In the judgment of the writer they are worthy of remembrance, but you, the readers hereof, will likewise judge. He said:

"The condition of the Bench is in all cases an index of the condition of the Bar. Judges cannot be put in office, except with the consent and approval, or under the silence of the Bar.

"In the course of civilization there are periods of advance and retrogression which may or may not be of equal length and duration. It is so in Art and Letters, and in all functions of government. What are called exact sciences may retain their footing, until some great cataclysm shall extinguish or degrade the race. These periods usually extend beyond the span of human life and acquire an energy which very few are able to resist. Apparently we have fallen upon a period of decline in the law, the extent of which has not been estimated. The means of rescue from this condition is very nearly the whole problem

of government. When the Bar and the Courts go wrong it is not reasonable to expect that any other department of government will be right. The philosophy of these movements is somewhat obscure, but they appear to be reciprocal, following the moral tendencies of the people. Just where we are at present in a period of back-sliding, whether at the bottom of the pit, or midway between hope and resurrection, is largely and perhaps entirely a matter of conjecture. But there are signs of revival which afford some encouragement to those who seek to maintain the standards of the common law. I believe that the day is almost at hand when the law will be, as it has been in the past, a minister of justice among men, proceeding only upon established rules, with deliberation and candor, with not discrimination or invention to conform to the spirit of the times, or the heresies of what is sometimes called progress. If that day shall seem remote, let us recall the methods of real progress in the poet's lines:

"Tis weary watching wave by wave
And yet the tide heaves onward;
We climb like corals, grave by grave,
That pave a pathway sunward;
We are driven back, for our next fray
A newer strength to borrow,
And where the vanguard camps to-day
The rear shall rest tomorrow'."

Judge Hallet died April 25th, 1913.