
Pioneers on the Bench

1849–1879

CHAPTER ONE | BY CHARLES J. McCLAIN*

THE PERIOD AND THE COURT: SOME GENERAL OBSERVATIONS

THIS CHAPTER COVERS the first three decades of the California Supreme Court's history, from its inception through its November 1879 term, the last in the chief justiceship of William Wallace and the Court's last under the 1849 constitution. These were years of dramatic social, economic, and demographic change in the state of California. On January 24, 1848, roughly a week before Mexico ceded California to the United States, gold was discovered in the foothills of the Sierra Nevada mountains. News of the discovery spread rapidly throughout the world, and thousands of fortune hunters began pouring into what had previously been something of a backwater province of the Republic of Mexico, and California's population rose from about 26,000 to approximately 100,000 souls in a little over a year. An additional 300,000 would enter the state over the next decade, making it the fastest growing state in the Union during those years. With this huge influx of people from outside, California's demography changed significantly, with the original Mexican inhabitants of California, the *Californios*, soon constituting less than five percent of the state's total population.

Gold, and later silver, mining would dominate the California economy for the next decade and a half (not surprisingly, mining issues would crowd the Court's agenda during these years). By the 1870s, however, the California economy had become more diversified and farming had supplanted mining as its most important part. Economic development brought substantial wealth to the state. How equitably it was distributed is another matter. By 1870 California ranked fifth among the states in per capita wealth. By 1880 it ranked third. By that time, too, the state's population had risen to a million, with well over a third living in cities. It was a very different place from the somewhat rambunctious, frontier society that had sent the men to Monterey in 1849.

It goes without saying that these were years of enormous importance in the history of the California

Supreme Court. It is a period with its share of landmark cases. The dynamic society described above regularly brought before the tribunal public policy issues of large consequence that it had to resolve, often with little in the way of either legislative guidance or judicial precedent. It is the period in which the foundations of the state's common law jurisprudence were laid. Last, and not least, it is the period in which the Court began to carve out its own enduring place in the new state's scheme of government.

Perhaps the most striking institutional feature of the Court during this period is the rapid turnover of personnel. Twelve different men served as chief justice between 1850 and 1879. The longest-serving chief was William Wallace, who presided over the Court's affairs for almost eight years, from 1872–79. Royal Sprague, the shortest-serving, was chief for barely more than a month in 1872, though he served as a justice a total of four years. During these years, a total of 27 justices sat on what was until 1862 a three-member and after that date a five-member bench, with tenures varying greatly. Augustus Rhodes had the longest, serving for over almost 16 years, from 1867–80. E. B. Crocker had the shortest, sitting on the Court a scant seven months, though, one must hasten to add, these were seven months of prodigious output. To what extent the high turnover might have had an impact on the Court's decision making is a question difficult to resolve though one suspects it may have made it easier for the Court to do an about-face on previous decisions, as it did on several occasions, when the justices felt that was necessary.

The men who sat on the bench came from a range of backgrounds, but it was gold that had brought the largest number of them to California. Of the 27, 11 had come either to mine themselves or as officers of mining companies. Most of the justices had dabbled in some other line of work before taking up the law. As was typical of the American bench and bar at the time, virtually all of the justices had learned the law by apprenticing in a law office or judge's chambers. Only two, Jackson Temple and Oscar Shafter, had had any formal legal education, Temple at Yale, Shafter at Harvard. As was also typical of American lawyers at the time, few had attended college. A final comment on the justices: some of the most colorful and controversial judges to ever sit on an appellate bench peopled

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the California high court during this period. Their lives, personalities, and judicial philosophies, as well as those of the other justices who contributed significantly to the molding of California law in these years, are discussed at various points later in the chapter.

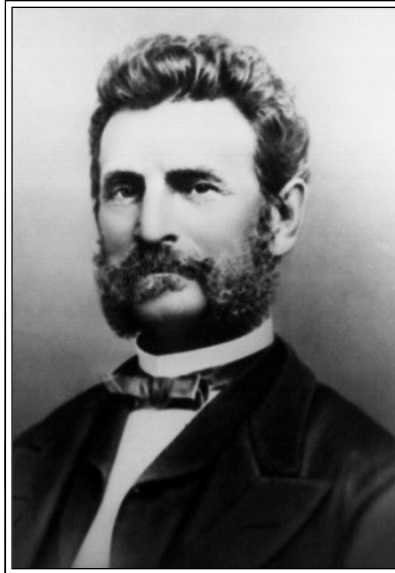
JUSTICES OF THE FIRST COURT

Serranus Hastings, the state's first chief justice, and his associates took their oaths of office in January, and on March 4, 1850 the California Supreme Court began to hold sessions, opening for business in a former San Francisco hotel. California's first appellate tribunal, like the Monterey convention, was made up of young men. Hastings was only 36 when

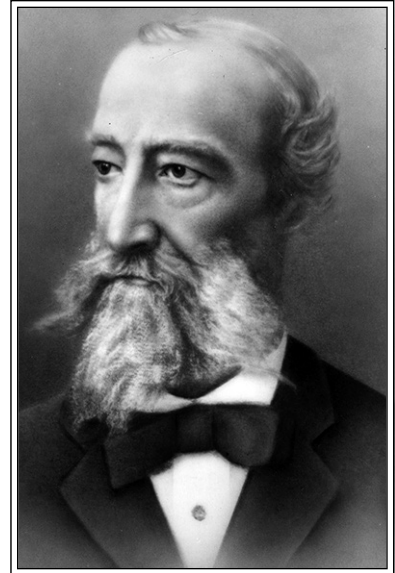
he took his seat on the bench. His associates, Nathaniel Bennett and Henry Lyons, were 34 and 40 respectively. Hastings hailed from New York but had moved to Iowa at an early age to practice law. He had a successful legal and political career there, winning election to Congress after Iowa became a state. In 1848 he was appointed chief justice of the Iowa Supreme Court but after losing an election for the U.S. Senate in 1849 he moved to California. Henry Lyons, the second justice selected for the Court and its second chief justice, had practiced law in Louisiana for many years before moving to California and retained strong southern sympathies after the move. (A nephew whom he raised served in the Confederate army during the Civil War.) He was the Court's first Jewish justice. Nathaniel Bennett was also originally from New York and had practiced law both there and in Ohio. On learning of the gold discovery he and several friends organized a mining company and traveled to California. They had some success in mining, but, for reasons that are not entirely clear, Bennett left the group to take up the practice of law again. He would be the dominant justice on the first Court. Even before taking his seat on the bench, he had played a crucial role in setting the direction of California law by his leadership in the campaign for the adoption of the common law.

A NEW COURT

A constitutional amendment reorganizing the state judiciary was approved by the voters in 1863. It expanded the membership of the Supreme Court to five, consisting of a chief and four associate justices, and provided that the justices be elected at a special election where only can-



CALIFORNIA'S FIRST CHIEF JUSTICE,
SERRANUS CLINTON HASTINGS

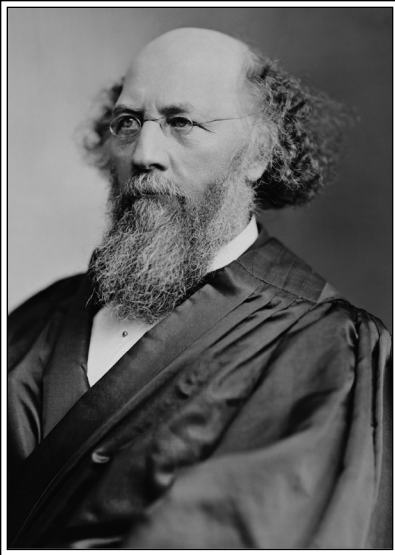


CALIFORNIA'S SECOND CHIEF JUSTICE,
HENRY LYONS

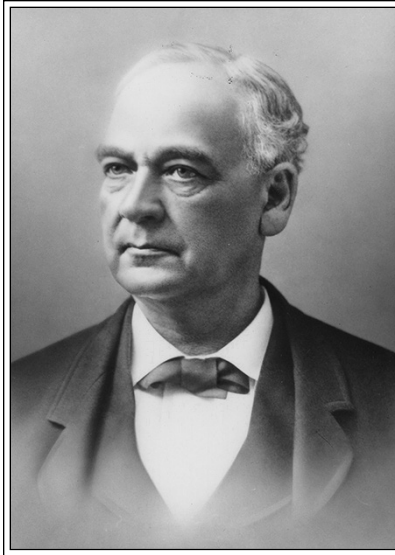
didates for judicial office and superintendent of public instruction should be on the ballot. (Justice W.W. Cope had argued in favor of just such a system for selecting judges.) The justices' terms of office were extended to ten years with a proviso that those elected at the first election should at their first meeting so classify themselves by lot that one justice would leave office every two years, the justice having the shortest term to be the chief. The Court's appellate jurisdiction was broadened to include equity cases and cases involving title to real estate irrespective of the damages sought. The amount in controversy necessary to invoke the Court's jurisdiction in all other damage actions was increased to three hundred dollars. In addition the Court was for the first time given original jurisdiction to issue writs of mandamus, prohibition, habeas corpus and certiorari. Such would be the composition and jurisdiction of the Court until the end of the period under consideration.

A NEW STATE ECONOMY AND A NEW DOCKET

By 1864 the economy and society of California had changed enormously. Its population had more than tripled since admission to the union. The state's economy, once so dominated by gold mining, had become much more diversified, with agriculture assuming an increasingly important role. The numbers tell the story of farming's dramatic rise. The value of farm implements, a broad measure of agricultural activity, stood at about \$3.8 million in 1850. By 1860 it had increased more than thirty-fold to about \$141 million. Production of wheat and barley, two mainstays of the national agricultural economy, had risen dramatically.



CHIEF JUSTICE
STEPHEN J. FIELD



ASSOCIATE JUSTICE SOLOMON
HEYDENFELDT

comprehensive, and serviceable legal framework was in place. Subsequent legislatures would add to it. Still, even with all this legislative activity, the framework had many gaps, and the way was open for the judiciary to become a partner in lawmaking. The California Supreme Court moved to the task with alacrity, taking the lead in forging legal doctrine in many areas of both public and private law.

Until a body of local case law had been able to accumulate, the Court naturally relied heavily on existing precedents from other states and to some extent from Britain. It also made large use of the main legal treatises, digests, and practice tools, American and

California produced about 17,000 bushels of wheat in 1850. By 1860 the figure had risen to six million, and by 1870 California would be the fourth leading wheat-producing state in the nation. Barley production stood at a mere 9,700 bushels in 1850. By 1860 California's farmers were growing more than 4,400,000 bushels of barley, much more than was being produced in any other state.

By the mid-1860s the docket of the California Supreme Court had itself undergone some important changes. Great issues of water and mining law no longer dominated the Court's agenda as once they had. The Court had said about as much as it would ever have to say about the largest Spanish and Mexican land grant questions. (Water, mining and Mexican land grant cases would continue to come the Court's way for many years, but they on the whole involved subsidiary matters.) Other issues of consequence were facing the Court, however, some of the most important lying at the intersection of law and the economy.

CODA

Thomas Green, himself a member of the body, famously labeled California's first legislature "the legislature of a thousand drinks," a reference to the alcohol that, legend has it, flowed freely during its sessions. The name stuck, and for a long while the image that prevailed both in popular and scholarly history was of an assembly lacking in work ethic and seriousness of purpose. But as Gerald Nash was one of the first to point out, this characterization is wide of the mark. The output of the 1850 legislature was prodigious and of a generally high quality. The same may be said of its immediate successors, and within a few years a large,

British, employed in all state courts during the nineteenth century. There was also regular citation of Spanish, Mexican, and civil law works. The Court, however, showed a real concern for local conditions and when it seemed warranted changed the received law to suit the needs of the growing state of California. As Justice Solomon Heydenfeldt put it in the early case of *Irwin v. Phillips*: "Courts are bound to take notice of the political and social condition of the country which they judicially rule." Throughout the period, 1849-79, but especially in its first half, the justices were conscious of being engaged in a pioneering legal enterprise, of molding a body of law that was rooted in the American common law tradition but that spoke as well to the peculiar requirements of the frontier state. One sees this most noticeably in fields like mining and water law, but the spirit of accommodation to local needs is detectable in other areas of law as well.

What can one say about the quality of the Court's output during this period? Several opinions stand out for the trenchancy of their legal analysis or for the sensitive and sensible way in which they addressed major issues of public policy. Others seemed too heavily influenced by the judge's personal values. These were at the time and remain today extremely controversial. A few opinions—*Perkins*, *Hall*, and *Archy* come prominently to mind—stand out as large blots on the Court's escutcheon. On the whole it seems reasonable to say that in terms of competence and legal acumen the Court's work compares decently with that of other American state appellate courts during the period. It is unquestionably true that many of the main lines of California's later jurisprudence were sketched out during these early years. ★