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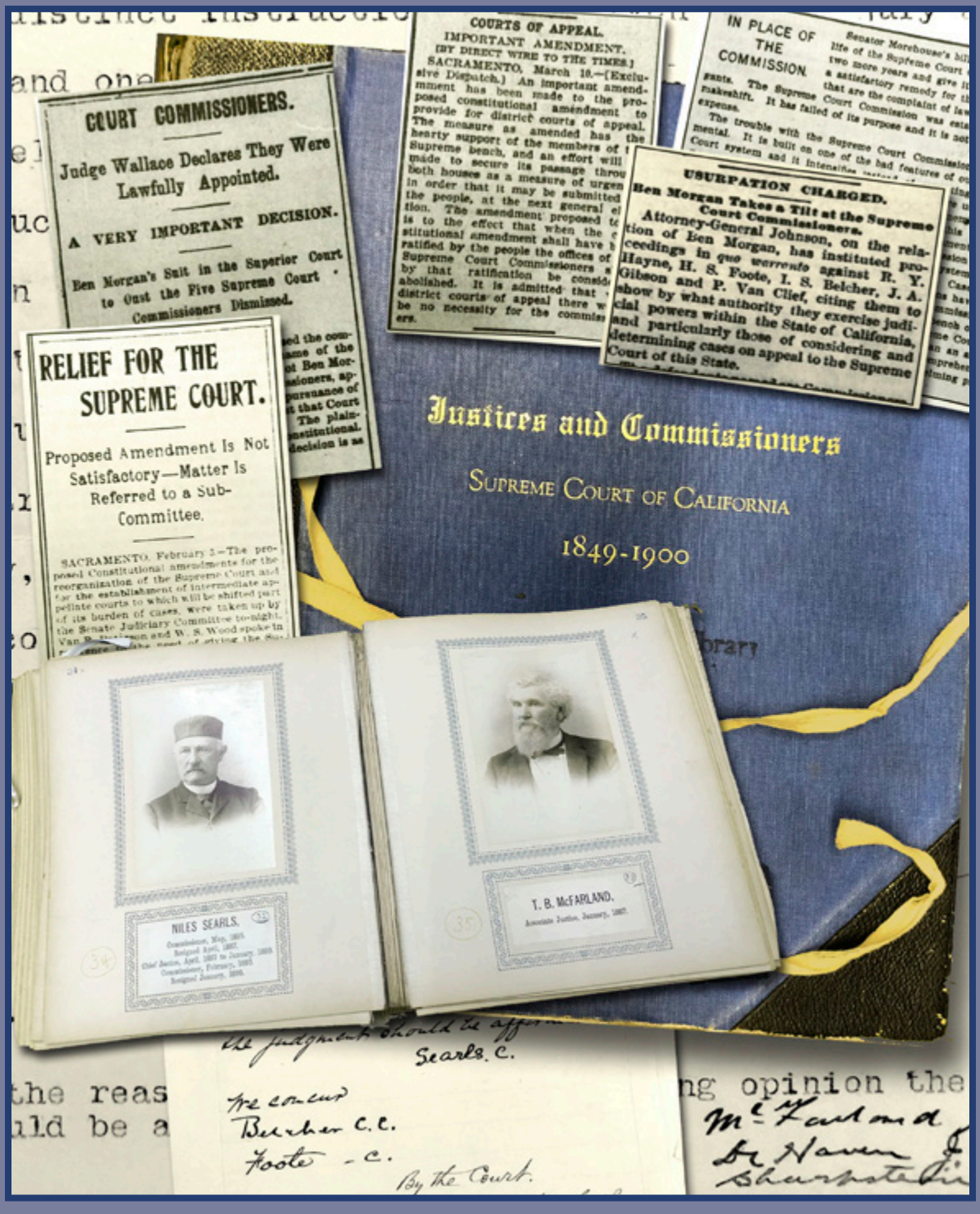


When Supreme Court Staff Signed Opinions

The Surprising Role That Commissioners Played, 1885–1905, in Creating the Courts of Appeal (in two acts)

BY JAKE DEAR

In the late nineteenth and early twentieth centuries, the California Supreme Court employed legal staff — then called "commissioners" — quite differently from how it uses chambers attorneys and law clerks today. Controversy surrounding that former system led to creation of the Court of Appeal. As we'll see, the story unfolds like a Gilbert & Sullivan operetta, in two acts. So let's set the scene.

EXPOSITION:
An Overburdened Court

It's the late 1870s. The Supreme Court bench, having been enlarged from three to five justices in 1862, is nevertheless severely backlogged. To cope with increased litigation in a growing and evolving state, the court resorts to strong measures. Taking advantage of its earlier conclusion that the Legislature can't force it to state the grounds for its decisions in writing, the court frequently decides cases by cursory memorandum decision, instead of by full written opinion — and sometimes it decides cases with no written decision at all. It publishes new rules under which the justices are quick to find that parties have waived their right to appeal, and attempts to shrink its docket by imposing costs when it deems appeals to be frivolous. And the court frequently avoids "the annoyance of petitions for rehearing" by simply making its judgments final immediately.

Yet those and related palliatives don't reduce the backlog. Instead they just upset and frustrate litigants and their attorneys, fueling extant calls for a constitutional convention. And although a former justice proposes that the state create an intermediate appellate court, that won't happen for another quarter century.

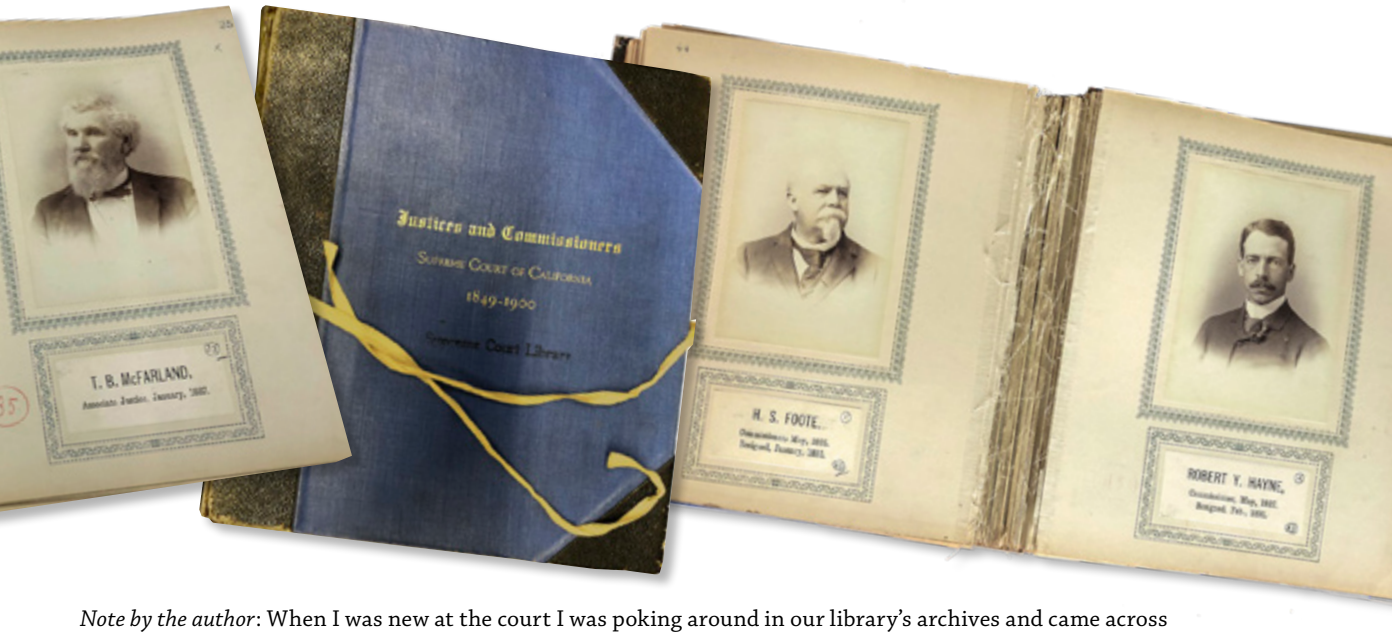
In the meantime, the state's new Constitution, approved by the voters in 1879, attempts to address the court's backlog through other incremental measures: It increases the Supreme Court bench from five to seven members, and adopts a novel procedure that allows the court to designate some of its cases for decision by one of two departments of three-justice panels, with the possibility of rehearing before all seven justices "in bank."

Even with these reforms, and although the court is regularly resolving many hundreds of cases annually (most with written opinions; the *California Reports* for 1882 contain approximately 880), five years later it is still quite backlogged for various reasons. First, because the court's appellate jurisdiction is mandatory — if an appeal of any superior court decision throughout the state is filed, the Supreme Court is obligated to resolve the case — even such high productivity is insufficient in the face of increasing appeals. Second, in an effort to delay judgment against them, many litigants contest minor rulings arising from increasing numbers of trial courts. Third, the Supreme Court's department decisions frequently are reconsidered by the full court in bank, meaning the court decides them twice. And it can't help efficiency that the justices are, as a constitutional convention delegate described, "a Court on wheels" — constantly boarding horse-drawn carriages and steam locomotives, traveling around the state to hear oral arguments not only at its headquarters in San Francisco, but also in Sacramento and Los Angeles.

ACT I, SCENE I:
The Legislature Tells the Court to Hire Help

In 1884 San Joaquin County Judge A. Van R. Peterson revived the earlier suggested solution to the backlog: Create an intermediate court of appeal. But instead, in

An expanded version of this article, with substantial footnotes providing additional and related information and sources, will be published under the title "California's First Judicial Staff Attorneys: The Surprising Role That Commissioners Played, 1885–1905, in Creating the Courts of Appeal" in (2020) 15 *Cal. Legal Hist.*, and will be available on HeinOnline. That expanded draft is presently, and will also remain, available at SSRN.com, at SSRN: *https://ssrn.com/abstract=3568576*.



Note by the author: When I was new at the court I was poking around in our library's archives and came across this lovely and falling apart album, *Justices and Commissioners, Supreme Court of California, 1849–1900*. Commissioners, I thought? Decades and some research later, this article is the result.

March 1885, the Legislature adopted a stop-gap measure, directing the Supreme Court to hire help, telling it to appoint "three persons of legal learning and personal worth" as "commissioners," who will be paid the same as the justices, to "assist the Court in the performance of its duties and in the disposition of the numerous cases now pending." This initial program was funded to last four years.

The court promptly appointed three commissioners, and within a few months the "Supreme Court Commission" was up and running. The court's original plan was to tap three former justices for the positions, but as it turned out, only one of them was available. Each of the three commissioners was nevertheless highly experienced.

Chief Commissioner Isaac Sawyer Belcher, a former gold miner, had been a district attorney and then a district court judge in Yuba County. He served briefly as a justice on the California Supreme Court in 1872–74, and presided as president pro tempore at the then-recent state constitutional convention. Henry S. Foote, son of a United States Senator, had been a federal judge in Oklahoma. Niles Searls, a true '49er, survived an arduous migration to California, and after trying mining took up law practice in Nevada City. He became district attorney, a district judge, and then a state senator. He was also a Mason. Hence, we may assume, the cap.

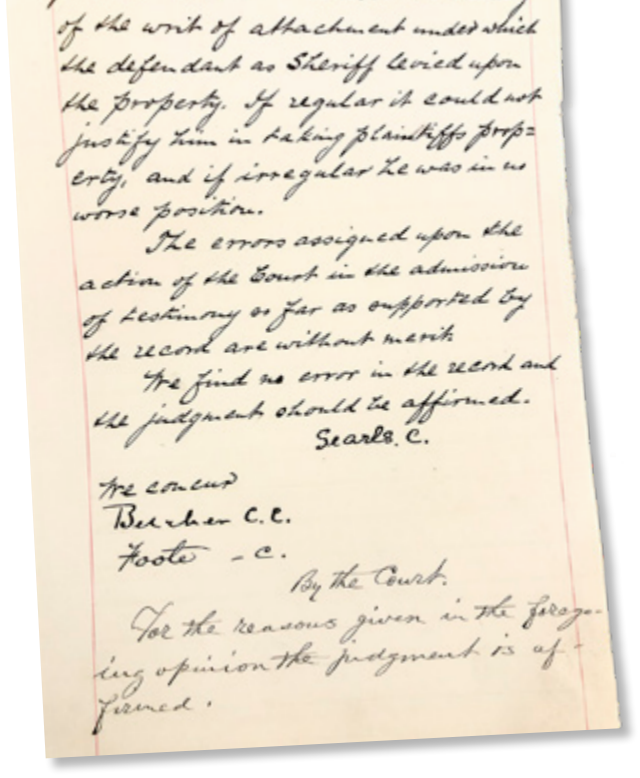
For good and ill, they also reflected their times. Key parts of the 1879 Constitution were astonishingly racist. Those passages mirrored the prejudices of the era, as already reflected in early case law and statutes. Similarly, the justices elected to the court under the new state charter were overwhelmingly members of the xenophobic Workingmen's Party. It's probable that some of the hired staff commissioners held similar views.

ACT I, SCENE 2:
The Commissioners Author and Sign Their Opinions — and the Justices Adopt Them

The staff commissioners performed functions similar to those of today's appellate court and Supreme Court attorney staff. After a case was assigned to three commissioners, they were to review the record and briefs, undertake any necessary legal research, and submit a draft memorandum in the form of a proposed opinion. This is in some respects akin to the model used currently.

There were substantial differences, however. The first related to constitutional organization. As noted, the 1879 Constitution encouraged the court to operate in two departments of three-justice panels. This effectively created a somewhat crude and ultimately dysfunctional internal form of an intermediate court of appeal. Final review was possible in bank before the full seven-member court. Sometimes, full review was *required*: Under the Constitution's judicial article, department decisions had to be unanimous in order to produce a judgment — meaning that any dissent would automatically trigger an in-bank hearing. The same provision afforded no right to oral argument except in cases that were heard in bank. This, in turn, allowed the justices to assign to the commissioners cases that, the court hoped, would be decided on the briefs alone, and with the understanding that they could be resolved without oral argument.

Second, whereas today it is understood that attorney staff serve a behind-the-scenes research and drafting role for the justices, the nineteenth century court commissioners were anything but anonymous. The commissioners' draft opinion — authored by one of them, and usually signed by the other two — would be submitted to a panel of three Supreme Court justices, sitting in one of the departments. And that signed "commissioner


of the writ of attachment under which the defendant as Sheriff levied upon the property. If regular it could not justify him in taking plaintiffs property, and if irregular he was in no worse position.

The errors assigned upon the action of the Court in the admission of testimony so far as supported by the record are without merit.

We find no error in the record and the judgment should be affirmed.

Searls, C.

We concur
Belcher C.C.
Foote - C.

By the Court.

For the reasons given in the foregoing opinion the judgment is affirmed.

opinion" — with each commissioner's name as prominent as any justice's — would be adopted (sometimes after modifications, but often verbatim) by the justices, making it the court's judgment, subject only to rehearing before the full seven-member court in bank. The result of this system was that the commissioners' opinion usually would become *the* opinion of the Supreme Court. And most of these opinions would be published in the *California Reports*, in a format that looked just like any other Supreme Court case set out in those volumes, complete with caption, abstract, headnoted text, and a disposition paragraph.

This process appeared to have vested far more authority in the commissioners compared with the present system, under which a staff attorney submits a draft to a single justice to whom the case has been assigned, and who then reviews, edits, requires rewrites and generally has significant input into the version that finally circulates within the court. It is unknown whether comparable initial (or subsequent) oversight was employed by the justices when they assigned matters to the commissioners.

Fewer than five months after the Legislature told the court to hire help (and just two days after the court decided a case in which Chief Commissioner Belcher himself was counsel of record for one of the parties), three justices of the Supreme Court adopted the first "commissioner opinion": *Smith v. Cunningham,* set out in the *California Reports* at 67 Cal. 262, looking like any other case of the court at that time.

Except for these differences: The opinion shows that it was written by "Searls, C." At the end, after the opinion's reasoning, comes this phrase — a version of which the commissioners and Supreme Court justices would use more than 3,700 more times in the *California Reports* over the next 20 years: "We find no error in the record and the judgment should be affirmed." The signatures of the concurring commissioners, "Belcher, C. C., and Foote, C.," appear next, followed by the statement (as reproduced by the publisher of the *California Reports*): "The Court. — For the reasons given in the foregoing opinion the judgment is affirmed."

ACT I, SCENE 3:
Reports of Unreported Opinions

The justices immediately adopted the same approach with respect to unreported commissioner opinions. Some might, at this point, be thinking: *Unreported* Supreme Court opinions? Yes indeed. Although an early statute mandated that all decisions were to be reported, the 1849 Constitution did not address that issue. And the 1879 Constitution, even as amended today, calls only for the publication of opinions as the court deems warranted. The court declined to report some of its opinions beginning in 1855, and that practice was codified in an 1860 statute, under which the justices were permitted to direct that certain opinions not be reported. The court issued approximately 1,800 unreported opinions over the next 25 years. That practice continued unchanged with the advent of the commissioners, who produced nearly 700 of the unreported opinions, bringing the total number of Supreme Court commissioner opinions to approximately 4,400.

Eventually the court's unreported opinions began to be collected and published regularly, albeit unofficially, in the *Pacific Reporter*, which commenced operation in late 1883. All unreported opinions that could be found from the prior decades were retroactively rescued from archives and published in 1913, in the amusingly named reports, "*California Unreported Cases*."

This page, top: the first "commissioner opinion": *Smith v. Cunningham*; *bottom*: Vols. 1–7 of *California Unreported Cases*.

Facing page, clockwise from top: *San Francisco Chronicle*, Oct. 11, 1889; *Daily Alta California*, Nov. 1, 1889; Ben Morgan, *City Argus*, July 26, 1890.

ACT I, SCENE 4:
Criticism of, and Litigation Challenging, the Commissioners

Even with the help of the three commissioners a substantial backlog of cases remained years later. Renewed calls to create an intermediate appellate court again failed. Instead, in early 1889, the Legislature renewed the commissioners program for another four years and increased their number to five.

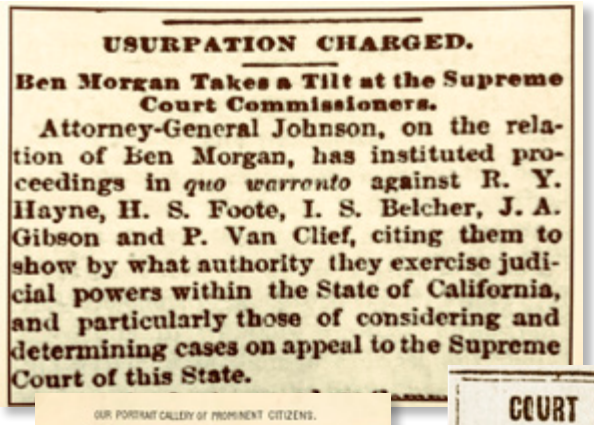
Yet storm clouds were gathering. After the court had issued more than 1,200 commissioner opinions, there was a legal challenge to the system. In mid-August 1889 Ben Morgan, a local attorney and perennially unsuccessful candidate for political office, sued the sitting five commissioners in a quo warranto proceeding in the San Francisco Superior Court, naming Commissioner Robert Y. Hayne the lead defendant. Morgan had, by then, appeared before the Supreme Court in eight cases, losing in his most recent four — thrice, and quite tellingly, in commissioner opinions, two of which were authored by Hayne. Hayne's most recent ruling against Morgan, filed three months earlier, had commenced: "There is absolutely no merit in this appeal." The opinion proceeded to call the underlying judgment, which Morgan sought to undo, "clearly right," and it dismissively concluded: "We cannot see the least shadow of excuse for the appeal." Finally, Hayne's opinion proposed not only affirmance, but also "20 per cent damages" in sanctions. The court, augmenting its customary per curiam adoption language, ordered judgment accordingly.

The *San Francisco Chronicle* noted Morgan's filing under the headline, "Usurpation Charged — Ben Morgan Takes a Tilt at the Supreme Court Commissioners." His suit alleged that the commissioners, by undertaking to give the justices their written opinions, were exercising judicial power that was not theirs. And by inference it suggested that the Supreme Court justices, having routinely adopted opinions submitted to them, were abdicating their own judicial duties.

Justice James D. Thornton and Commissioner Hayne appeared at the trial to testify as fact witnesses. Eyebrows must have shot up when it was reported that the justices review the commissioners' recommendations, but not the briefs submitted by counsel. Three times in his direct examination of Justice Thornton, Morgan pointedly referred to Commissioner Hayne as "Judge Hayne"; and even in his own testimony on cross-examination, Commissioner Hayne referred to his fellow commissioners as "Judge Belcher and Judge Gibson."

The testimony shed light concerning how the commissioners interacted with the justices. Justice Thornton explained, "there is a general order that if a case is not . . . argued orally" it is assigned to the commissioners. Commissioner Hayne elaborated that the commissioners very rarely hear oral argument, and had done so in only two cases in which the parties had specially requested that opportunity. Hayne explained that he and his colleagues prepare opinions concerning cases assigned to them and "send [the opinions] up" to the justices for their review; the justices retain their own copies of the case "record" — presumably including briefs; and he confirmed that, when the justices decide to adopt an opinion by the commissioners, they file a short per curiam statement to that effect. Hayne added that some commissioner opinions and work product, after being sent to the justices, "go[] into the waste basket."

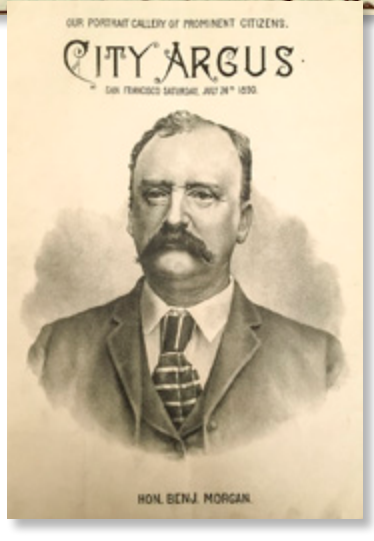
The trial judge ruled for the defendants, rejecting challenges to the statute and the court's implementation of it. The judge's loquacious decision reached back to mid–eighteenth century English jurists Lord Hardwicke, Lord Mansfield, and Lord Chancellor Loughborough to demonstrate that "courts of the greatest authority and . . . the most eminent judicial personages" had long relied on the ability to consult with others in forming their opinions and making decisions.

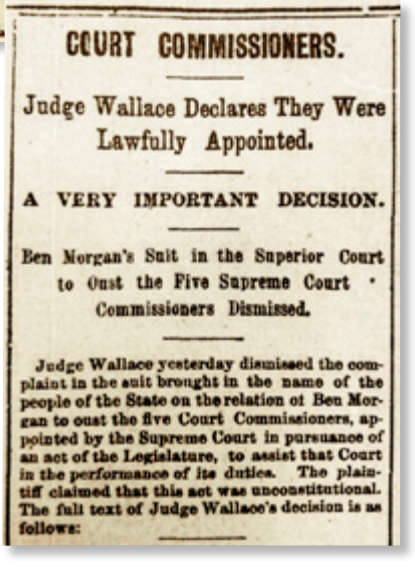


USURPATION CHARGED.

Ben Morgan Takes a Tilt at the Supreme Court Commissioners.

Attorney-General Johnson, on the relation of Ben Morgan, has instituted proceedings in *quo warranto* against R. Y. Hayne, H. S. Foote, I. S. Belcher, J. A. Gibson and P. Van Clief, citing them to show by what authority they exercise judicial powers within the State of California, and particularly those of considering and determining cases on appeal to the Supreme Court of this State.





COURT COMMISSIONERS.

Judge Wallace Declares They Were Lawfully Appointed.

A VERY IMPORTANT DECISION.

Ben Morgan's Suit in the Superior Court to Oust the Five Supreme Court Commissioners Dismissed.

Judge Wallace yesterday dismissed the complaint in the suit brought in the name of the people of the State on the relation of Ben Morgan to oust the five Court Commissioners, appointed by the Supreme Court in pursuance of an act of the Legislature, to assist that Court in the performance of its duties. The plaintiff claimed that this act was unconstitutional. The full text of Judge Wallace's decision is as follows:

The California Supreme Court in 1890. *Left to right*: Associate Justice John R. Sharpstein, Associate Justice Charles N. Fox, Associate Justice John D. Works, Chief Justice William H. Beatty, Associate Justice James D. Thornton, Associate Justice A. Van R. Paterson, Associate Justice Thomas B. McFarland. *Photo: California Supreme Court.*

ACT I, SCENE 5:
The Supreme Court Upholds the Commissioners!

The matter moved quickly from the superior court, housed inside San Francisco's then "New City Hall," to the Supreme Court's temporary quarters in a commercial building a dozen blocks away on Post Street.

Wisely deciding to sit in bank, the Supreme Court agreed to expedite review in light of the "commanding public importance" of the issues raised, which potentially implicated the validity of approximately half of the court's recent judgments. The *Daily Alta California* reported extensively about the oral argument: "During the course of Mr. Morgan's argument Justice Works remarked: 'The act seems to be an attempt to evade the Constitution. The only question is, whether or not the attempt has been successful.' Chief Justice Beatty at once replied with decided emphasis: 'Justice Works speaks for himself and not for the Court. I do not think there has been any evasion of the Constitution. The Commissioners certainly have not violated the Constitution. If there has been any dereliction of duty it has been, not by the Commissioners, but by the Court.' "

In addition to this jousting among the justices, the oral argument also touched on the art and challenge of opinion writing: "Justice Thornton remarked that for him the task of writing out an opinion was *a most tedious one*, as he went over his work two and often three times if he had the time. Chief Justice Beatty said that to write a long and loosely constructed opinion required little effort, but to write a concise opinion is a most difficult task. He said he often reached a conclusion in very much less time than the same could be set forth in writing."[1] The article reported that the "questions asked by the Justices . . . left an impression" that the court would "sustain the constitutionality of the act."

The prediction proved correct. Justice Fox's majority opinion affirming the judgment was issued only 27 days after the trial court's final ruling, and only 12 days after oral argument before the Supreme Court.[2] He spoke for *four* of his colleagues — including Justice Thornton, who as noted had recently testified as a fact witness in the trial court below, but not Justice Works, who, after being reprimanded by the chief justice at oral argument, appears to have taken ill. Chief Justice Beatty penned a concurring opinion. As both documents showed, the justices were quite able to write their own opinions. This assumes, of course, they didn't get help from any of the five defendants.

Justice Fox's decision downplayed the role of the commissioners. First, he said, they are kind of like retained counsel, or amici curiae — but maybe even more friendly and helpful: "It is no more unconstitutional for this court to receive such assistance from Commissioners designated by itself, or from amici curiae, than to accept similar assistance from the statements of fact and arguments of the counsel in the cause." He described the commissioners' work product as simply "*serviceable instrumentalities to aid us in performing our functions.*" He reported that the justices reject "many" commissioner opinions that don't see the light of day, and others are adopted only in part. And, he stressed, the commissioners' opinions don't become judgments unless we, the real judicial officers, say so.

Chief Justice Beatty's concurring opinion was, in some respects, more candid. He said, in essence: Let's get real — our commissioners *write* some of our opinions — yet there's nothing wrong with that. The 1879 Constitution, he pointed out, required that the court give its decisions " 'in writing, [with] the grounds of the decision . . . stated.' " But, he explained, this requires only that the justices *agree* on an opinion, not that they write one.

After briefly sketching how the system worked (and yet avoiding directly addressing whether the justices reviewed counsel's briefs), Chief Justice Beatty responded to a practical question: "If the court, after receiving the report of the commission, re-examines the case for itself, what is the use of the commission?" How does it save labor, or facilitate the disposition of cases? Echoing some of his and Justice Thornton's comments at oral argument, he answered himself: Writing opinions is difficult work. And yet "*[t]here are some persons in whom the literary faculty is highly developed, to whom the writing of opinions may be a*

1. All italics shown here and within subsequent quotes have been added.

2. *People v. Hayne* (Feb. 6, 1890) 83 Cal. 111.

trifling task." And so yes, he explained, this saves us time and energy, "without any abdication or delegation by the court of its constitutional functions."

Meanwhile, the commissioners did not skip a beat. The next opinion filed by the court — just one day after rejecting the challenge in which Commissioner Hayne was the lead defendant — was written by Commissioner Hayne.

INTERMISSION

ACT 2, SCENE 1:
Criticism Continues

The court's affirmation of the commissioner system did little to quell growing public criticism of the program. A January 1891 article in the *Los Angeles Times* called the commissioners "little better than clerks" and the system "a mere makeshift." It reported on pending legislation sponsored by the bar associations of San Francisco and Los Angeles to reorganize the Supreme Court and create intermediate courts of appeal in those cities and in Sacramento.

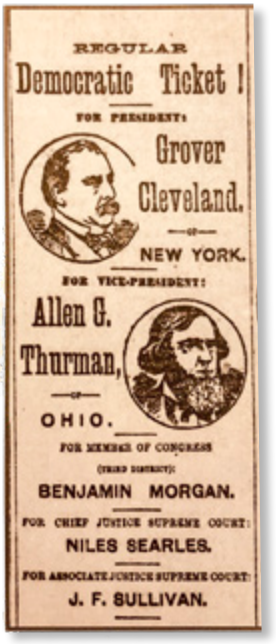
An August 1891 column in *The Wave*, a San Francisco literary weekly, criticized two recent opinions by the court's commissioners, and listed the names of the four commissioners who authored and signed those opinions. Justice Patterson, who had a year earlier concurred in the *Hayne* opinion upholding the commissioner system, responded, apparently on behalf of the court: "There is a general impression that [the commissioners] exercise judicial powers, but that is a popular fallacy. Their functions are purely ministerial. They assist the Court in determining the law and the facts of cases submitted on the briefs, but they decide nothing. Their views are generally, but not always, approved."

And yet, as commentators have observed, although the justices "could review and modify the commissioners' opinions, . . . in practice [the court] simply issued them as its own." It was unsurprising that, despite the court's protestations, many viewed the commissioners as "auxiliary judges." Another observer asserted that the commissioners operated as "an auxiliary court in intent and effect."

ACT 2, SCENE 2:
Musical Chairs

Notwithstanding these ongoing debates, the commissioner system had become useful to the governor, the justices, and the commissioners themselves — facilitating the filling of vacancies, advancement, and job security, all without any diminution in pay. The last two features were especially handy at a time of highly partisan elections, when judges and justices were regularly unseated.

Consider, for example, Niles Searls — one of the first class of three commissioners. He had served two years in that capacity when, in 1887, the chief justice died in office. Being experienced, a Democrat, and in the right place at the right time, he was appointed by the governor to fill in as chief justice. In 1888 he sought to stay in that position, and was promoted on the Democratic ticket along with Grover Cleveland for president, and . . . Ben Morgan, for "Member of Congress, Third District." But Searls lost the statewide partisan election to William H. Beatty. He went back to practice in Nevada City, but not for long: Four years later, and despite having lost to Beatty, he returned to the court to serve a final four years as a commissioner.

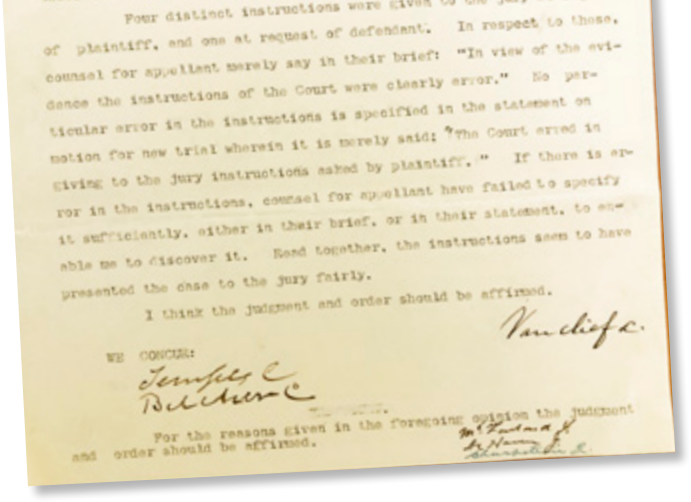


And now back to Isaac Belcher, also in the first class of commissioners. As noted, he was an associate justice before serving as *chief* commissioner for ten years. When that office expired he became a regular commissioner until 1898.

Others similarly traded hats as commissioners and justices. Jackson Temple holds the record, repeatedly bouncing in and out of the court, and between the bench and the commission, over the course of 30 years. He was appointed to fill a vacancy when a sitting justice resigned, and served as a justice from 1870 to 1872. He ran as a Democrat to keep the seat, but lost. He was elected to the Supreme Court in 1886, but resigned three years later in ill health. After recovering, he returned to the court as a commissioner in 1891. Four years later, while still in that position, he ran for yet another term as an associate justice, and was once again elected to that position, serving until his death in office, in 1902.

The justices appointed W. F. Fitzgerald, then a private lawyer in Los Angeles, as a commissioner in 1891. This may not have been the court's best hire. After moving up to San Francisco he served only about a year and a half, producing far fewer opinions than his contemporaries before he quit and briefly reentered private practice in that city. Then in early 1893 he was appointed by the governor to fill the vacancy created by a justice who had died in office. He served a full two years, producing again comparatively few opinions all of which a reviewer described as "distinguished only by their brevity."

Finally, there was one last round of musical chairs: The voters elected Ralph C. Harrison, with no judicial or other public office experience, to a 12-year position as an associate justice in 1891. He was said to have been "meticulous in everything he undertook" and to have "discharged every assignment with finesse." Many of his opinions appeared in casebooks prepared by "the first names in scholarship." He wanted to run for a second term that would start in 1903, but political party



Four distinct instructions were given
of plaintiff, and one at request of defendant. In respect to those,
counsel for appellant merely say in their brief: "In view of the evi-
dence the instructions of the Court were clearly error." No par-
ticular error in the instructions is specified in the statement on
motion for new trial wherein it is merely said: "The Court erred in
giving to the jury instructions asked by plaintiff." If there is er-
ror in the instructions, counsel for appellant have failed to specify
it sufficiently, either in their brief, or in their statement, to en-
able me to discover it. Read together, the instructions seem to have
presented the case to the jury fairly.
I think the judgment and order should be affirmed.
Vanclief C.
WE CONCUR:
Temple C.
Belcher C.
For the reasons given in the foregoing opinion the judgment
and order should be affirmed.
McFarland J.
De Haven J.
Sharpstein J.

Above: The first Commissioner opinion as to which the justices signed their names — scrunching them in at the end! *Right: San Francisco Examiner*, February 4, 1897.

machinations gave the nomination to another, and he resumed private practice. Yet not for long: The court appointed him a commissioner in 1904 — as a biographer said, "*making him for all intents and purposes once more a member of the Court*."

The latter and similar comments didn't help matters. In light of the frequent position-trading, they only underscored one of the continuing criticisms — that unelected staff commissioners and elected justices were, in effect, interchangeable.

ACT 2, SCENE 3:
Muddling Along, and Making Incremental Adjustments

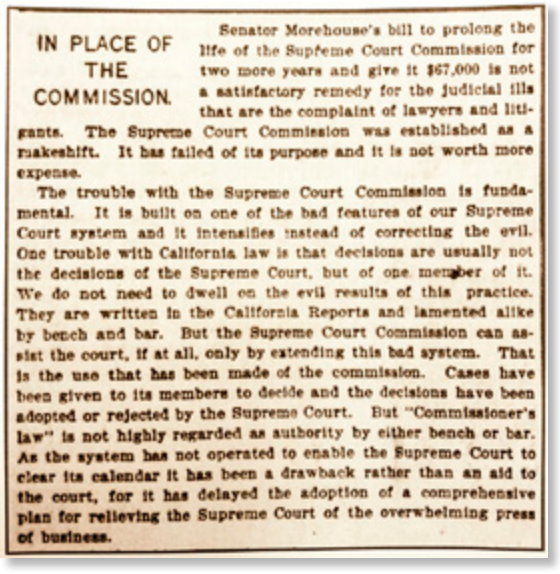
After the constitutional validity of the commissioner system was upheld in 1890, the court's backlog remained, and the Legislature periodically renewed the statute commanding the court to employ commissioners. But criticism of the commission continued.

In apparent response, both the commissioners and justices made some conciliatory adjustments. Instead of routinely ending their opinions by telling the justices that a judgment "should" be affirmed or reversed, the commissioners sometimes used more deferential language, writing what they "think" or "advise" or "recommend" should happen to the judgment. Yet there was no standard language, and the original "should" form continued to appear frequently over 20 years, even after many if not most commissioner opinions eventually adopted more deferential phrasing.

In line with the commissioners' sporadic efforts to show some deference, the justices in turn became a bit more transparent, signing their names when adopting the commissioners' opinions — signaling, apparently, that they had taken judicial ownership of them. A mid-July 1892 commissioner opinion, authored by Vanclief, C., started this new procedure. It concluded: "I *think* the judgment and order should be affirmed." Then the two other commissioners signed, showing they concurred: "Temple, C., and Belcher, C." Next, the justices wrote: (as corrected by the publisher of the *California Reports*) "For the reasons given in the foregoing opinion, the judgment and order are affirmed." And then, squeezing their names onto the bottom of the original typed opinion, *they* signed: "McFarland, J., De Haven, J., Sharpstein, J."[3]

ACT 2, SCENE 4:
Creating the Courts of Appeal (On the Second Try)

But even as some things changed, others remained the same: Still the court remained backlogged; still there was criticism of the justices and their use of commissioners; and there were louder and more frequent calls to create



IN PLACE OF THE COMMISSION.

Senator Morehouse's bill to prolong the life of the Supreme Court Commission for two more years and give it $67,000 is not a satisfactory remedy for the judicial ills that are the complaint of lawyers and litigants. The Supreme Court Commission was established as a makeshift. It has failed of its purpose and it is not worth more expense.

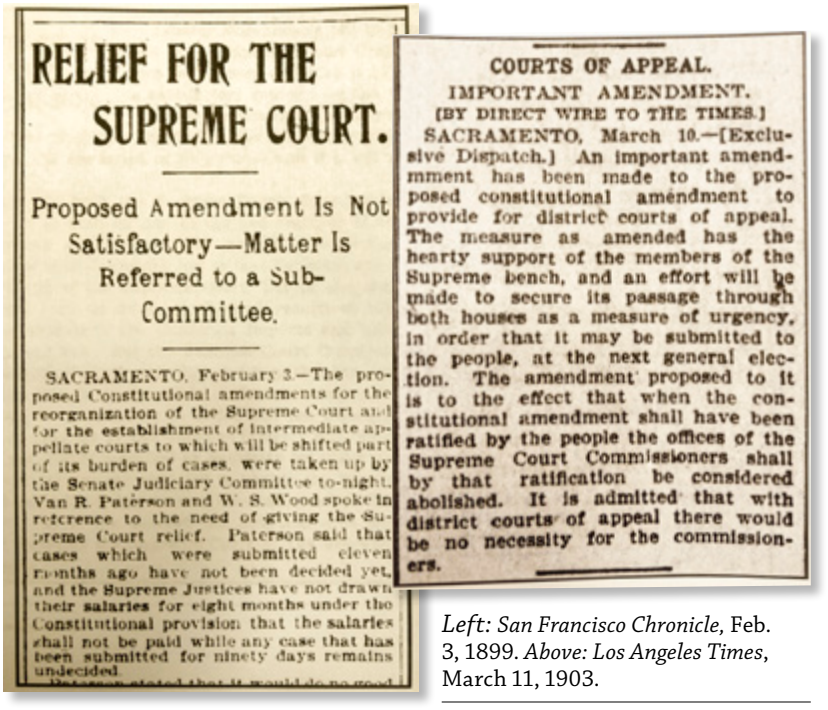
The trouble with the Supreme Court Commission is fundamental. It is built on one of the bad features of our Supreme Court system and it intensifies instead of correcting the evil. One trouble with California law is that decisions are usually not the decisions of the Supreme Court, but of one member of it. We do not need to dwell on the evil results of this practice. They are written in the California Reports and lamented alike by bench and bar. But the Supreme Court Commission can assist the court, if at all, only by extending this bad system. That is the use that has been made of the commission. Cases have been given to its members to decide and the decisions have been adopted or rejected by the Supreme Court. But "Commissioner's law" is not highly regarded as authority by either bench or bar. As the system has not operated to enable the Supreme Court to clear its calendar it has been a drawback rather than an aid to the court, for it has delayed the adoption of a comprehensive plan for relieving the Supreme Court of the overwhelming press of business.

appellate courts. A trenchant 1897 editorial in the *San Francisco Examiner* focused on the unhappy symbiosis of the dysfunctional department system and the commission: "The trouble with the Supreme Court Commission is fundamental. It is built upon one of the bad features of our Supreme Court system and it intensifies instead of correcting the evil." For good measure, the editorial also slammed the decisions authored by the commissioners as "not highly regarded as authority by either the bench or bar."

An article two years later in the *San Francisco Chronicle* reported that the court remained so far behind in its work that the justices had not been paid for eight months, having failed to decide and file its cases within 90 days after submission. The same article critiqued the commissioner system as a "fifth wheel on a coach," and generally supported the idea of a constitutional amendment designed to reorganize the Supreme Court and to create appellate courts.

A few weeks later the Legislature (finally) adopted a proposed constitutional amendment that would revise

3. *Joyce v. White* (1892) 5 Cal. 236, 239, italics added. The original opinion, along with the original opinion in *Smith v. Cunningham*, mentioned earlier, is on file in the California State Archives, Sacramento.



RELIEF FOR THE SUPREME COURT.

Proposed Amendment Is Not Satisfactory—Matter Is Referred to a Sub-Committee.

SACRAMENTO, February 3.—The proposed Constitutional amendments for the reorganization of the Supreme Court and for the establishment of intermediate appellate courts to which will be shifted part of its burden of cases, were taken up by the Senate Judiciary Committee to-night. Van R. Paterson and W. S. Wood spoke in reference to the need of giving the Supreme Court relief. Paterson said that cases which were submitted eleven months ago have not been decided yet, and the Supreme Justices have not drawn their salaries for eight months under the Constitutional provision that the salaries shall not be paid while any case that has been submitted for ninety days remains undecided.

COURTS OF APPEAL.

IMPORTANT AMENDMENT.

[BY DIRECT WIRE TO THE TIMES.]

SACRAMENTO, March 10.—[Exclusive Dispatch.] An important amendment has been made to the proposed constitutional amendment to provide for district courts of appeal. The measure as amended has the hearty support of the members of the Supreme bench, and an effort will be made to secure its passage through both houses as a measure of urgency, in order that it may be submitted to the people, at the next general election. The amendment proposed to it is to the effect that when the constitutional amendment shall have been ratified by the people the offices of the Supreme Court Commissioners shall by that ratification be considered abolished. It is admitted that with district courts of appeal there would be no necessity for the commissioners.

Left: San Francisco Chronicle, Feb. 3, 1899. *Above: Los Angeles Times*, March 11, 1903.

the judicial article to provide for intermediate appellate courts. The would-be amendment also proposed to cut costs by reducing the Supreme Court from seven to five justices and requiring the court to cease hearing oral arguments in Sacramento and Los Angeles, and instead hold all of its sessions at its headquarters in San Francisco. Following litigation about whether the proposed amendment should appear on the ballot, the measure was submitted to the voters at the 1900 General Election. Alas, it failed.

In 1903, after some additional proposals had been floated — including one to increase the court to ten justices working in three departments, and another to double down on commissioners by increasing their number to twelve — the Bar Association of San Francisco regrouped and proposed a new constitutional amendment. A few weeks later, the *Los Angeles Times* breathlessly reported on an "important amendment" to that legislation, a sweetener designed to capitalize on the repeated criticisms of the commissioner system: The measure would be revised to provide that "when ratified by the people the offices of the Supreme Court Commissioners shall . . . be abolished." Three days later the Legislature adopted Senate Constitutional Amendment No. 2.

The question again went to the voters. This time the measure proposed to keep the Supreme Court at seven justices, and allowed them to continue to hear oral arguments in Sacramento and Los Angeles, as well as at their headquarters in San Francisco. The eleventh-hour amendment, designed to seal the deal with a skeptical and cost-conscious public, was tacked on, in a final section 25: "The present Supreme Court Commission shall be abolished at the expiration of the present term of office, and no Supreme Court Commission shall be created or provided for after January 1st, A. D. 1905."

Newspaper articles before the election reminded voters that the court was "embarrassed" by being 1,000 cases behind and "hopelessly in arrears" — despite its filing about 650 opinions annually. The voters overwhelmingly adopted the measure at the November 1904 General Election, the intermediate appellate courts were born, and the Supreme Court Commission was eliminated. The "district courts of appeal" (note the "s" after "courts," but not after "appeal") commenced work, and the last published Supreme Court commissioner case was filed in mid-1905.[4]

With the departure of the last five commissioners (along with their own dedicated support, a secretary and stenographer), the seven justices were left with a spare staff roster: A reporter of decisions, an assistant reporter, two secretaries, two phonographic reporters, two bailiffs, a librarian — and three janitors.

EPILOGUE: Safe Landings for the Commissioners

The Supreme Court reacted to the amendment by articulating principles under which it operates today: It made clear that its oversight of intermediate appellate court work product would be discretionary — and it would not expend time and energy to correct "mere errors" made by those lower appellate courts. Its new role would be to preside over the orderly development of the law, by deciding important issues and resolving conflicts in appellate decisions. Doing otherwise, or more, the court reasoned, would defeat the purpose of the recent amendment. But, the Supreme Court cautioned, when it declines to intervene in an appellate decision, that doesn't mean it endorses that decision or opinion.[5]

And yet, even after the creation of intermediate appellate courts, the Supreme Court continued to struggle with an ever-growing backlog. It used the criticized department system fairly regularly for nearly 50 years, until the late 1920s, when the court began hearing each case in bank — except for two last instances in the early 1940s.[6] The obsolete department provisions were finally removed from the Constitution in 1966, when the judicial article was also amended to conform the appellate jurisdiction of both levels of appellate courts to long-standing practice. A proposal to adopt a new version of the department system was raised and rejected in the 1980s and 90s.

4. *Estate of Dole* (1905) 147 Cal. 188.
5. *People v. Davis* (1905) 147 Cal. 346, 349–50.
6. *Grolemund v. Cafferata* (1941) 17 Cal.2d 679; *Wiseman v. Sierra Highland Mining Co.* (1941) 17 Cal.2d 690.

The Constitution's vaccination against Supreme Court commissioners remained enshrined in the judicial article for 52 years, long after that court and the Courts of Appeal had adopted less controversial methods of utilizing judicial staff. The vestigial provision explicitly prohibiting Supreme Court commissioners was deleted from the charter in the mid-1950s.

But although the Commission had been abolished, never to arise again, the safe landing program continued for the last five commissioners. After considerable press speculation about whom the governor would appoint to the newly created judicial positions, when the music stopped in 1905, each existing commissioner was made a new Court of Appeal justice. Ralph Harrison served as Presiding Justice, First District Court of Appeal, 1905–07. Wheaton A. Gray served as Presiding Justice, Second District Court of Appeal, 1905–06. N. P. Chipman served as Presiding Justice, Third District Court of Appeal, 1905–11. J. A. Cooper served as Associate Justice, First District Court of Appeal, 1905–07, and Presiding Justice, First District Court of Appeal, 1907–11. Finally, George H. Smith, then the senior commissioner, having been in that position for the prior 15 years, served as Associate Justice, Second District Court of Appeal, 1905–06.

These former commissioners and their eleven predecessor colleagues are little remembered today. Yet all of them played a significant role in helping the Supreme Court fulfill its responsibilities for two decades. Moreover, as we have seen, they also facilitated, perhaps unwittingly, creation of the state's intermediate appellate courts. These early court staff attorneys are — and should be honored as — indirect ancestors of the current appellate judicial attorneys who provide analogous assistance to both the Court of Appeal and the Supreme Court, and help those courts fulfill their challenging and demanding responsibilities today. ✯

Jake Dear is Chief Supervising Attorney of the California Supreme Court. He thanks court colleagues Hal Cohen, Neil Gupta, Kyle Graham, Norm Vance, Steve Rosenberg, and Ryan Azad (and former colleague Carin Fujisaki, the latter now a Court of Appeal Justice) for their always helpful comments on prior drafts. And he thanks the court's library reference staff, Jan Gross, Jessica Brasch, and archivist Marie Silva, for their considerable assistance in identifying and locating source materials. Finally, he appreciates the helpful and extensive comments by former Chief Justice Ronald M. George; former court colleague Beth Jay, now of counsel at Horvitz & Levy; David Ettinger, of counsel at Horvitz & Levy and the primary writer for the *At The Lectern* blog; judicial branch historian, Levin; and Mary Ann Koory, of California's Center for Judicial Education and Research (CJER).

Roster of California Supreme Court Commissioners

By month and year of service on the court (listed by first service on the court)

Jackson Temple
Associate Justice, Jan. 1870–Jan.1872
Associate Justice, Jan. 1887–June 1889
Commissioner, March 1891–Jan. 1895
Associate Justice, Jan. 1895–Dec. 1902

Isaac S. Belcher
Associate Justice, March 1872–Jan. 1874
Chief Commissioner, May 1885–July 1891
Commissioner, Aug. 1891–Nov. 1898

Niles Searls
Commissioner, May 1885–April 1887
Chief Justice, April 1887–Jan. 1889
Commissioner, Feb. 1893–Jan. 1899

H. S. Foote
Commissioner, May 1885–Jan. 1893

Robert Y. Hayne
Commissioner, May 1887–Jan. 1891

Peter Vanclief
Commissioner, May 1889–Nov. 1896

James A. Gibson
Commissioner, May 1889–Jan. 1891

George H. Smith
Commissioner, April 1890–May 1905
(Associate Justice, Second District Court of Appeal, 1905–1906)

Ralph C. Harrison
Associate Justice, Jan. 1891–Jan. 1903
Commissioner, Jan. 1904–June 1905
(Presiding Justice, First District Court of Appeal, 1905–1907)

W. F. Fitzgerald
Commissioner, Feb. 1891–May 1892
Associate Justice, Feb. 1893–Jan. 1895

John Haynes
Commissioner, June 1892–Jan. 1904

E. W. Britt
Commissioner, March 1895–April 1900

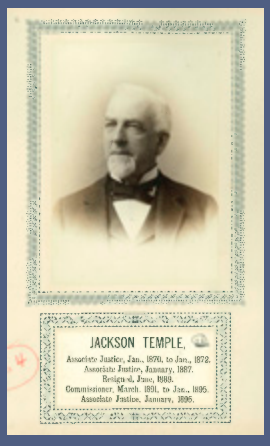
N. P. Chipman
Commissioner, April 1897–May 1905
(Presiding Justice, Third District Court of Appeal, 1905–1921)

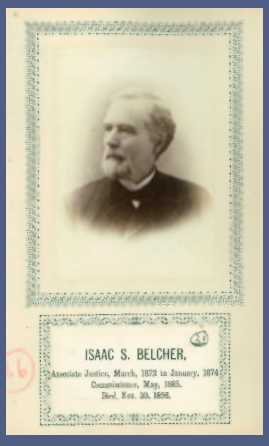
Edward J. Pringle
Commissioner, Feb.–April 1899

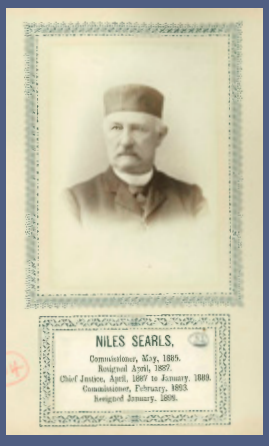
Wheaton A. Gray
Commissioner, Feb. 1899–June 1905
(Presiding Justice, Second District Court of Appeal, 1905–1906)

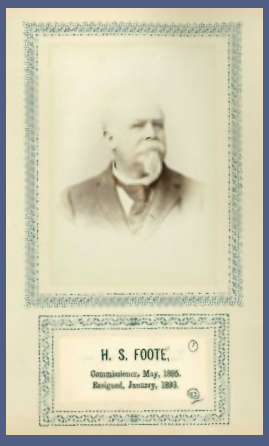
J. A. Cooper
Commissioner, May 1899–June 1905
(Associate Justice, First District Court of Appeal, 1905–1907)
(Presiding Justice, First District Court of Appeal, 1907–1911)

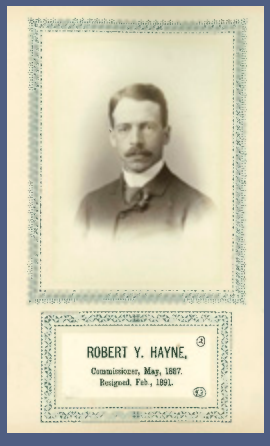
Facing page: Each of the 16 commissioners' portraits in the original album. All handwritten notes are on the originals.

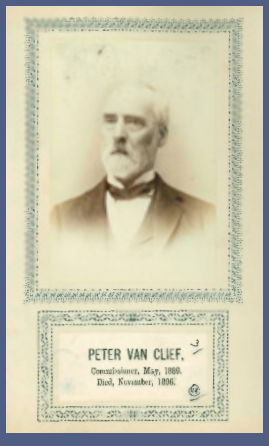

JACKSON TEMPLE,
Associate Justice, Jan., 1870, to Jan., 1872.
Associate Justice, January, 1887.
Resigned, June, 1889.
Commissioner, March, 1891, to Jan., 1895.
Associate Justice, January, 1895.

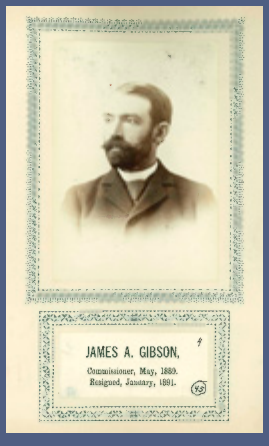

ISAAC S. BELCHER,
Associate Justice, March, 1872 to January, 1874.
Commissioner, May, 1885.
Died, Nov. 30, 1898.

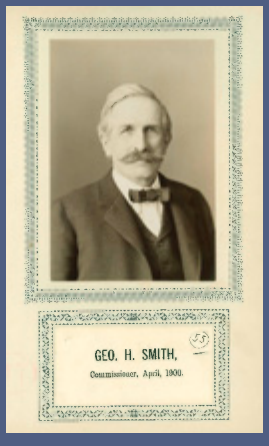

NILES SEARLS,
Commissioner, May, 1885.
Resigned April, 1887.
Chief Justice, April, 1887 to January, 1889.
Commissioner, February, 1893.
Resigned January, 1895.

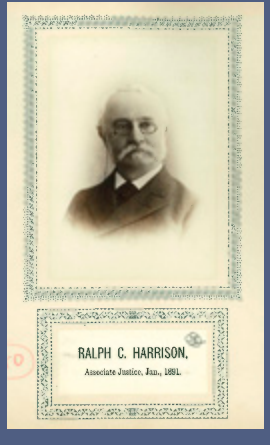

H. S. FOOTE,
Commissioner, May, 1885.
Resigned, January, 1893.

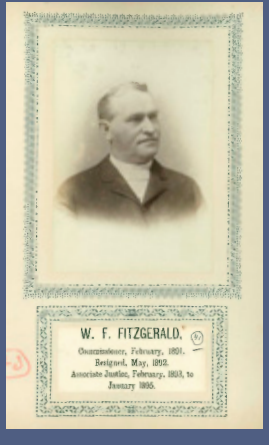

ROBERT Y. HAYNE,
Commissioner, May, 1887.
Resigned, Feb., 1891.

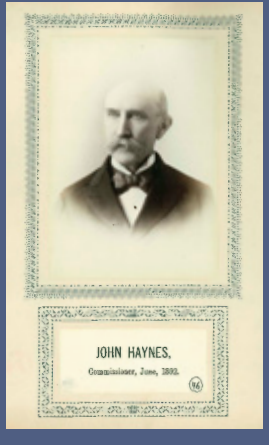

PETER VAN CLIEF,
Commissioner, May, 1889.
Died, November, 1896.

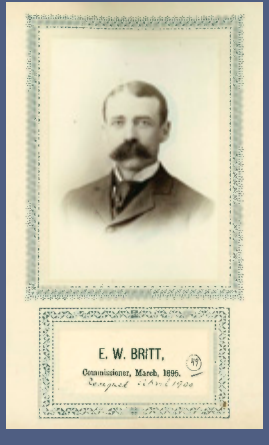

JAMES A. GIBSON,
Commissioner, May, 1889.
Resigned, January, 1891.

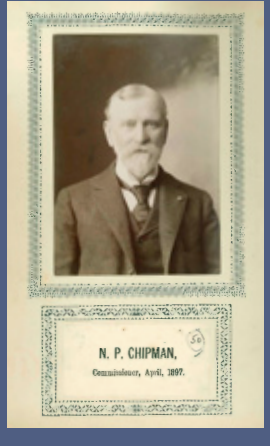

GEO. H. SMITH,
Commissioner, April, 1900.

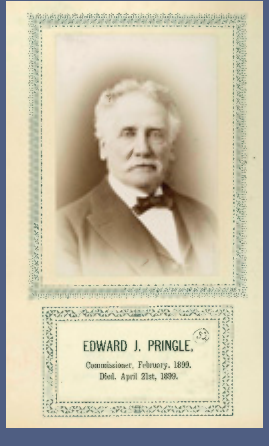

RALPH C. HARRISON,
Associate Justice, Jan., 1891.

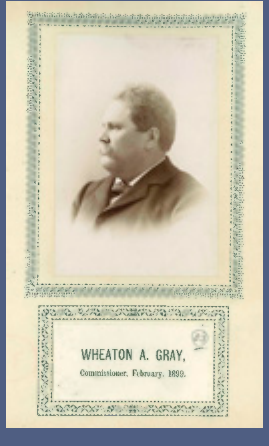

W. F. FITZGERALD,
Commissioner, February, 1891.
Resigned, May, 1892.
Associate Justice, February, 1893, to
January 1895.

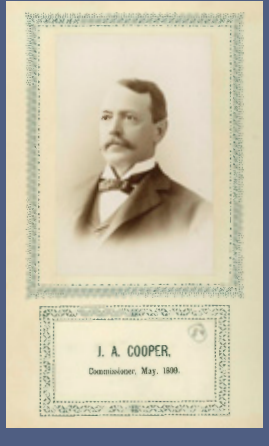

JOHN HAYNES,
Commissioner, June, 1892.


E. W. BRITT,
Commissioner, March, 1895.


N. P. CHIPMAN,
Commissioner, April, 1897.


EDWARD J. PRINGLE,
Commissioner, February, 1899.
Died, April 21st, 1899.


WHEATON A. GRAY,
Commissioner, February, 1899.


I. A. COOPER,
Commissioner, May, 1899.