CHAPTER VIII

APPELLATE REVIEW BEFORE THE TENTH CIRCUIT WAS FORMED

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INTRODUCTION

Appeals and appellate courts are relatively new concepts in the process of resolving legal disputes. In less sophisticated systems of government, a person aggrieved by an official decision in a disputed matter may have recourse to a higher authority who has power to correct injustice. But the procedure is likely to be informal, perhaps unarticulated, and can hardly be called an appeal as that term is presently understood. It is more in the nature of an exercise in clemency—a means of employing the powers of sovereignty residing in the tribe or nation to soften the impact of a too harsh or otherwise erroneous decision. Generally, in rudimentary legal systems there is neither a trial record to review for error nor a framework of stated rules of law by which error can be determined.

Most American legal institutions are said to have developed from the law of England, which, some scholars assert, became operative in the British North American colonies with the settlement of Jamestown.[1] But prior to the reforms of the nineteenth century, post-trial proceedings in England bore little resemblance to the present process for review. In the Equity Courts, the Chancellor had power to reexamine all of the material that had been presented to the trial judge and to enter a new judgment based on the case as a whole. In the common law courts, no appeal by way of rehearing or review was available. The judgment of the court en banc was final and its entry terminated the action. However, either party might seek a writ of error on the ground that the judgment was not supported by the record. This action was a new proceeding begun in Chancery by suing out a writ of error directed to the chief justice of the court whose judgment was being challenged, and requiring him to produce the record of the case for examination by a superior court for consideration of the validity of the claim of error. In hearing the proceeding in error, the superior court could consider only the bare written record, consisting principally of the pleadings and other papers filed in the case and the judgment thereon.[2] Thus the appeal for review of the trial record for error appears to be an American institution of fairly recent origin and to have established a pattern for appellate review in other common law jurisdictions.

A. *THE HISTORY OF FEDERAL APPEALS*

1. *Articles of Confederation*

The Articles of Confederation made no provision for a national judiciary. In cases of boundary or jurisdictional disputes or differences that might have arisen between the states or "any other cause whatever" that constituted a conflict between two states, the Congress was designated as the last resort on appeal.[3] Proceedings on appeal were undertaken on petition of the executive or legislative authority of a state and heard by an ad hoc tribunal in conformity with procedures outlined in the Articles. Otherwise, the resolution of disputes were matters for the courts of the states. Hence, when the Constitutional Convention of 1789 undertook the creation of a separate federal judiciary, coequal with the executive and legislative branches of government, no national experience was available to supply guidelines. At the same time, the existence of a body of federal law, separate

from that of the states, required the creation of a separate federal judiciary.

2. *The United States Judiciary*

The response of the Constitutional Convention to the perceived need for a system of courts for the administration of federal justice is stated in Article III of the Constitution, which vests the judicial power in one supreme court and such inferior courts as the Congress may ordain and establish. Pursuant to this provision, Congress passed the Judiciary Act of 1789[4] which, with fairly extensive amendments, provides the basic structure of the contemporary federal judiciary. The number of justices of the Supreme Court was fixed at six. Thirteen federal judicial districts were created, with boundaries coterminous with those of the eleven states of the Union,[5] except in the cases of Massachusetts and Virginia, each of which was divided into two districts. A second tier of courts, called circuit courts, was created by dividing the country into three circuits, in each of which a court consisting of two Supreme Court justices and one of the district judges of the circuit was required to sit twice a year in each of the districts comprising the circuit.[6] No separate judgeships were provided for the circuit courts, but two of the three members of the circuit constituted a quorum.

3. *The Circuit Courts*

The Supreme Court was the court of general appellate jurisdiction. Subject to certain jurisdictional limits stated in the statute, it heard cases on appeal from the federal district and circuit courts, the territorial supreme courts and, on appeal or writ of certiorari, from state judgments involving federal questions. The circuit courts and the district courts both exercised original jurisdiction. Generally, the circuit courts heard, in the first instance, cases based on diversity of citizenship while the district court tried admiralty cases. Other miscellaneous kinds of litigation were apportioned between the two courts. In addition, the circuit courts had jurisdiction to hear appeals from some district court judgments. The district court was a nisi prius court. Its appealable orders, not in the appellate jurisdiction of the circuit court, moved directly to the Supreme Court.

From the outset, Supreme Court justices protested the requirement that they attend sessions of the circuit courts in each of the several districts. Travel conditions were primitive, even dangerous. Circuit riding, they averred, was an undue and unnecessary burden. By an amendment passed in 1793, only one justice was required to attend each circuit.[7] But dissatisfaction with the system of circuit riding justices continued, based on the personal hardship to the travelling jurists and the responsibility imposed upon them by the increasing judicial business on both the supreme and circuit court levels. An act passed by Congress in 1801[8] relieved the justices of their circuit riding duties and created sixteen circuit judgeships. This legislation was deeply enmeshed in politics and was intended to assure continued Federalist control of the national judiciary after the expiration of the term of the Federalist President, John Adams, who had been defeated for re-election.

Shortly after the beginning of the presidency of Thomas Jefferson, the 1801 act was repealed by Congress,[9] and the original scheme of circuit courts staffed by circuit riding Supreme Court justices and district court judges was resumed, continuing for many years with occasional modification. During this period of almost nine decades, Congress often debated the composition of the circuit courts and their role in the American judiciary.[10]

As the nation's population increased, as its economy expanded, and as new states were

added, the judicial business handled by the federal courts increased steadily. The initial response of the Congress was to create new circuits and to enlarge the Supreme Court by adding justices whose duties included circuit riding. In 1802 the country was divided into six circuits, each with a circuit court composed of one justice and one district judge to sit twice annually in each district of the circuit. Although justices continued to have the duty of riding circuit, the legislation allowed the circuit court to be held by a single judge.[11] Thus, as it became increasingly impossible for the Supreme Court justices to attend all circuit courts in all districts of each circuit, the district judge was often in the anomalous position of hearing and deciding appeals from his own decisions as a nisi prius judge.[12]

Throughout the nineteenth century the continued growth of the nation, the increase in litigation, and the expansion and reallocation of the federal judicial power made reform imperative. Attention was particularly directed to the circuit courts, where the concept of the circuit riding justice became increasingly inconsistent with sound judicial administration as well as the personal comfort and convenience of the justices. In 1850 California became a state. In 1855 in recognition of its remoteness from Washington and the difficulty of transcontinental travel, Congress designated California as a separate circuit with a separate circuit judge.[13] The California Act represented an ad hoc solution and the general system remained unchanged. However, the process of divorcing the circuit courts from the Supreme Court had begun.

In 1869 Congress again recognized the need for reform of the circuit court system. Without establishing intermediate appellate courts, nine circuit judgeships—one for each circuit—were created to assume the burden of most of the circuit court work. The circuit judge, the circuit justice, or a district judge could hold court, or any two of them were empowered to sit as a panel. The justices were still to go on circuit, but the circuit justice was required to attend each circuit court only for a single term every two years.[14] The justification for the circuit riding justice was the need for members of the Supreme Court to be in touch with the world outside Washington, a view that was never expressly repudiated by Congress.

Experience under the 1869 legislation demonstrated that its provisions did not provide the solution hoped for. The circuit courts continued to function as nisi prius courts with only limited jurisdiction to review district court decisions on appeal. The bulk of federal appeals were decided by the Supreme Court. And notwithstanding the addition of circuit judges to the system, improved travel conditions, and less frequent attendance at the circuit level, the justices continued to find their circuit riding duties unduly burdensome and inconsistent with their responsibility for promptly disposing of the increasing volume of appealed cases.

By 1890 the conditions that had vexed the federal appellate process for a century had become intolerable. The need for reform was critical. The result was the enactment of legislation creating intermediate appellate courts in each of the nine circuits then existing.[15] The newly created circuit courts of appeal were given general appellate jurisdiction in appealed cases. However, litigants could appeal directly to the Supreme Court from the district or circuit courts, where the issue was one of the jurisdiction of the court, conviction for "a capital or otherwise infamous crime," the construction or application of the United States Constitution, or a challenge to the constitutionality of any federal or state law, federal treaty, or state constitution.[16] An additional circuit judgeship was created in

each circuit, and each of the new appellate courts included two circuit judges and one district judge. Although there have been substantial adjustments in boundaries of circuits and changes in judicial personnel, the plan of appellate justice created in 1891 continues to the present.

While the 1891 reorganization divested the circuit courts (as opposed to the new circuit courts *of appeal*) of their appellate jurisdiction, it did not provide for the abolition of such courts. They continued to function in each district, sharing trial jurisdiction with the district courts. Finally, on January 1, 1912, as a result of the newly enacted judicial code, the circuit courts ceased to exist and all original federal jurisdiction was vested in the district courts.[17] General appellate jurisdiction was lodged in the several circuit courts of appeal.

In the area embraced by the present Tenth Judicial Circuit of the United States, special appellate branches with defined jurisdiction and procedures began with the creation of the several territorial governments by the Congress. Included in the circuit as it now exists are the states of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. Before being admitted to statehood, all, with some variations from present boundaries, for differing periods had the political status of territories of the United States. Each territorial judiciary included a supreme court with jurisdiction to review the judgments of the territorial trial courts of general jurisdiction. Proceedings in all the territorial appellate courts were similar, and all were under the supervision of the Supreme Court of the United States. However, conditions that were unique to particular territories produced some variation in procedures.

4. *The Work of the Territorial Appellate Courts*

Litigation is the product of its social, economic, and political environment. Hence, the range of cases in the territorial courts of the late nineteenth and early twentieth centuries was similar to that in the frontier state courts of that time. The courts of the territories had general jurisdiction in civil and criminal cases, excepting those matters reserved for the federal courts. At the outset, the territorial cases were usually common law or equity matters involving relatively simple facts and modest claims. Few in the communities had become affluent or developed complex relationships. One commentator has written, "Settlers on the public lands had not accumulated enough wealth to be pursued by creditors, nor had they become well enough acquainted with each other to have that confidence which inspires lawsuits."[18] The era of multimillion dollar claims, complex statutory remedies, and overriding social interests had not arrived.

The total product of each of the territorial courts is apparently, in part, related to the length of its existence. The Supreme Court of Kansas Territory (1854-1861) had the shortest life of those considered. Hence, it produced the fewest opinions. The Kansas Territorial Supreme Court decided twenty-eight cases. In 1870 the opinions were collected and published in a small volume called *McCahons Reports*. They were later published as pages 463 to 589 of Volume 1, *Kansas Reports, Second Edition*.

The opinions of the Territorial Supreme Court of Colorado (1861-1876) are published in Volumes 1 and 2 and the first 154 pages of

Volume 3 of *Colorado Reports*. The Wyoming Territorial Reports are in Volumes 1 and 2 and pages 44 to 388 of Volume 3, *Wyoming Reports*. The decisions of the Supreme Court of the Territory of Utah (1850-1896) are in *Utah Reports*, Volumes 1 through 12.

Oklahoma was a territory for a relatively short time (1890-1907). The federal court in the Indian Territory dates from 1889. Notwithstanding their relatively short lives, the combined number of reported decisions of the Oklahoma territorial courts was the greatest among those examined. This may be due to the former status of the Indian Territory, the cultural diversity of the population, the historic lawlessness in the early Indian country, the discovery and production of oil, and the accelerated economic growth that resulted. The *Oklahoma Reports*, Volumes 1 through 9, contain territorial decisions.

New Mexico was a territory for sixty-two years (1850-1912). During this period its supreme court produced the opinions reported in Volumes 1 through 16, *New Mexico Reports*.

B. *THE EIGHTH CIRCUIT*

Among the states that comprise the Tenth Circuit, Kansas was the first to become a state.[19] The act of admission provided that the state should constitute a federal judicial district. In 1862 the District of Kansas was made part of the Ninth Judicial Circuit, along with Iowa, Minnesota, and Missouri.[20] In 1866, the Ninth Judicial Circuit was renumbered and, with the addition of Arkansas, became the Eighth Circuit. As other states in the present Tenth Circuit were added to the union, to-wit, Colorado (1876), Wyoming (1890), Utah (1896), Oklahoma (1907), and New Mexico (1912), each was assigned to the Eighth Circuit. Indeed, the territories of Oklahoma and New Mexico had been placed in the circuit in 1900 by Supreme Court order.[21] All of these states remained in the circuit until the Tenth Circuit was created in 1929.

The Eighth Circuit was the largest of the circuits. Prior to 1929, it included thirteen states and was more than 1,000 miles across from east to west. The circuit court of appeals sat in St. Louis, St. Paul, and Denver. From the standpoint of cases processed, it was the second busiest of the circuit courts, exceeded only by the Second Circuit, which included New York, Connecticut, and Vermont. Of particular interest is the contribution of the districts in states in the present Tenth Circuit to the total case load of the Eighth Circuit before its division. These data are shown in Table I.

Table I shows only those cases appealed to the Eighth Circuit Court of Appeals from districts organized in states at the time of their admission to the union. It does not include any cases that may have originated in the territories of Oklahoma and New Mexico after 1900 and before their admission to the Union, nor does it reflect appeals that may have been taken to the circuit courts in the districts prior to 1891.

For several years before 1929, the size of the Eighth Circuit had been a matter of concern to the judiciary and to litigants. It was argued that the circuit was too large, that judges who sat on the panels and lawyers who practiced before the court were too far removed from the places of argument to permit the expeditious handling of the court's docket. Many proposals for reform were suggested, but bills providing for the reorganization of the circuit were defeated in Congress. Finally, in 1929 Congress passed and the President signed legislation intended to solve the problem. The Eighth Circuit was divided and the federal districts in Colorado, Kansas, New Mexico,

Table I

Cases Reviewed by
Eighth Circuit Court of Appeals
1891-1929

State	Date of Admission	Date of First Case	Total Number of Cases
Kansas	1861	1892	608
Colorado	1876	1892	663
Wyoming	1890	1892	112
Utah	1896	1897	181
Oklahoma	1907	1909	760
New Mexico	1912	1912	101

Oklahoma, Utah, and Wyoming were made to form a new circuit, designated as the Tenth Judicial Circuit of the United States.[22]

C. *THE PRE-TENTH CIRCUIT APPELLATE JUDGES*

Prior to the creation of the circuit courts of appeals, limited appellate jurisdiction was vested in the circuit courts of the several districts in the circuit. Until 1869 the circuit court panels consisted of a Supreme Court justice, assigned to the circuit, and one or two district judges who sat in the circuit. Kansas, the first of the Tenth Circuit states to be admitted, was assigned to the Ninth Circuit (later redesignated as the Eighth) in 1862. Hence, the earliest appeals in that district were to the circuit court on which a Supreme Court justice might sit with a district judge or judges. In 1869 the position of circuit judge was created in each of the circuits. Thereafter, the panels might include the circuit justice, the circuit judge, and a district judge.

The appellate jurisdiction of the circuit courts was withdrawn in 1891, but the circuit courts continued to exist until 1911. During this time the circuit justice had a statutory duty to attend periodic sessions of the circuit courts but his participation in circuit business was largely pro forma. After the abolition of the circuit courts, the office of circuit justice continued mainly for purposes of judicial administration and liaison with the courts of appeals in the several circuits.

1. *The Circuit Justices*

Samuel F. Miller[23] (1862-1890) was designated as the circuit justice for the Ninth Circuit (which became the Eighth in 1866) upon his appointment to the Supreme Court. Justice Miller was born in Kentucky and educated at Transylvania University, where he received the M.D. degree in 1838. Following graduation he practiced medicine in Kentucky for twelve years. Becoming bored with the practice of medicine, he acquired a law library, studied law, and was admitted to the bar in 1847. In 1850 he migrated to Keokuk, Iowa, and soon became a leader of the bar of that state. In politics he was a Republican, described as a "progressive moderate," and took an active interest in public affairs. He was appointed to the Supreme Court by President Lincoln in 1862, being the first

appointee from the newly created Ninth Circuit.

Justice Miller was a vigorous member of the Supreme Court during the post-Civil War era when the nation's frontiers were moving westward and the horizons of the judiciary were expanding. Among the many important cases in which he spoke for the court were the historic *Slaughter-House Cases*,[24] decided in 1872. His opinion, though later deprived of some of its vitality as precedent, remains a significant part of Supreme Court history. Apart from regular court duties, he served as a member of the Electoral Commission of 1876, assembled to resolve the contest between presidential candidates Hayes and Tilden.

As circuit justice, Justice Miller was a frequent participant in circuit court affairs. For example, he wrote opinions in five of the first six reported cases for the circuit court in the District of Kansas.[25]

Justice Miller served as an associate justice of the Supreme Court and circuit justice for the Eighth Circuit until his death in 1890. Upon the death of Justice Miller, he was succeeded as circuit justice by Associate Justice David Josiah Brewer of Kansas.

Justice Brewer,[26] the son of missionary parents, was born in Asia Minor in 1837. He came from distinguished New England stock and grew up in a Puritan, pacifist, and anti-slavery home. His mother's brothers included Associate Justice Stephen J. Field, who was Brewer's colleague on the Supreme Court, David Dudley Field, creator of the Field Code, a landmark in the history of the law of civil procedure, and Cyrus W. Field, a leader in the industrial world.

After graduation from Yale in 1856, Brewer studied law in the office of his uncle, David Dudley Field, in Albany, New York. After admission to the bar he migrated to the frontier, and following a few months in the Colorado gold fields, he began the practice of law in Leavenworth, Kansas, in 1858. His public service began early. Locally he successively served as probate judge and ex officio chairman of the board of county commissioners of Leavenworth, judge of the criminal court of Leavenworth County, judge of the district court of the first judicial district of Kansas, Leavenworth, and city attorney. In 1870 he was elected to the supreme court of Kansas where he served until 1884, when he was appointed circuit judge for the Eighth Circuit by President Arthur.

Judge Brewer served as circuit judge for five years. He was generally regarded as a conservative jurist who staunchly supported property rights against invasion under the police power. In a dissenting opinion on the Kansas Supreme Court, he had insisted that the Kansas prohibition law had destroyed the value of a defendant's brewery without prior compensation.[27] On the circuit bench he again argued for compensation of brewery owners under prohibition.[28] On another issue, notwithstanding Supreme Court precedent, he denied the states the legislative power to fix railroad rates, granting an injunction against the regulated rates in an Iowa case.[29]

In 1889 Judge Brewer was appointed to the Supreme Court of the United States by President Harrison. He was designated as circuit justice for the Eighth Circuit upon the death of Justice Miller in 1890. Shortly after Justice Brewer became circuit justice the Congress passed the act that deprived the circuit courts of their appellate jurisdiction and, at the same time, created an additional circuit judgeship for service on the court of appeals.[30] Hence, it does not appear that Justice Brewer was an active participant in circuit court matters.

Justice Brewer has been described as a prolific and forthright member of the Supreme

Court. His opinions are lucid, logical, and forceful. While he spoke for the court in several important cases,[31] he dissented more than 200 times during his twenty-one years of service.

Justice Brewer had deep concern for many public issues apart from his judicial activity. He was an advocate of international peace and cooperation. He opposed American imperialism. He was a strong supporter of the missionary activities of the Congregational church, under whose auspices his father had served abroad. He was a frequent contributor to the professional journals of his time.

Justice Brewer died in 1910, a member of the court at the time of his death. He was succeeded as associate justice and as circuit justice by Judge Willis Van Devanter of Wyoming, who had served on the Eighth Circuit bench since 1903. The old circuit courts were abolished shortly after Justice Van Devanter became circuit justice. As his principal judicial service to the district had been as a judge of the court of appeals, Justice Van Devanter is treated more fully in the next section.

2. *The Circuit Judges*[32]

From 1869 to 1891 the circuit judges sat on the circuit courts held in the districts, where they had limited appellate jurisdiction. However, their principal activity was on the trial level. Beginning in 1891 they sat as members of court of appeals panels, where their main activity was the deciding of appeals. Until 1911 they continued to participate with the circuit courts in trials, although with considerably less frequency than prior to 1891. After the abolition of the circuit courts in 1911, the circuit judges' sole function was the hearing and deciding of appeals.

John Forrest Dillon of Iowa was the first circuit judge of the Eighth Circuit. He was educated as a physician but later tutored himself in the law. After admission to the bar in 1852, he served as county attorney, district judge, and associate justice and chief justice of the Iowa Supreme Court. He was appointed circuit judge by President Grant in 1869 and served for ten years. During his tenure, Judge Dillon held a term of court each year in each district of the circuit, covering about 10,000 miles. He also found time for teaching part-time at the University of Iowa and for writing scholarly publications. After his resignation from the bench, he had a distinguished career in New York as a practitioner and teacher. He died in 1914.

Judge Dillon's successor was George Washington McCrary, also of Iowa. He had served as state senator, member of Congress, and secretary of war. He was appointed circuit judge in 1879 by President Hayes and served until 1884, when he resigned to become general counsel for the Atchison, Topeka and Santa Fe Railroad in Kansas City. Judge McCrary died in 1890.

David Josiah Brewer was appointed circuit judge by President Arthur in 1884. He served until 1889, when he was elevated to the Supreme Court. A biographical sketch appears under the heading of circuit justices, *supra*.

Judge Brewer was succeeded by Henry Clay Caldwell of Arkansas. Judge Caldwell had been admitted to the Iowa bar in 1852. He had served as a county prosecutor and was in the Iowa state legislature. During the Civil War, he was a colonel in the Union Army. In 1864 President Lincoln appointed him to the district bench in Arkansas where he served until 1889, when he was promoted to the circuit judgeship by President Harrison.

Judge Caldwell continued to serve the Eighth Circuit as the senior judge of the court of appeals after its creation in 1891. Judge Caldwell's judicial career, both on the district

and circuit benches, was distinguished for its fairness and perceptivity. Although he was a Yankee soldier who represented the federal judiciary for twenty-five years in a former confederate state, he came to the circuit bench enjoying almost universal respect. His stature was not diminished by his circuit service. Judge Caldwell resigned from the court in 1903 and died in 1915.

A second circuit judge was authorized for each circuit by an 1891 act.[33] Walter Henry Sanborn of Minnesota was appointed by President Harrison to fill the second position in the Eighth Circuit in early 1892. A Dartmouth graduate who had taught school in New Hampshire, Sanborn studied law in the office of his uncle in St. Paul and was admitted to the Minnesota bar in 1871. He practiced in St. Paul for twenty-one years, serving intermittently on the city council and as Republican county chairman. During his thirty-six years on the court of appeals, Judge Sanborn was the author of about 1,300 opinions. Many were authoritative statements in areas of corporate law, personal injury, contributory negligence, naturalization, and several other fields. Judge Sanborn died in 1928, while still a member of the court.

Congress authorized an additional seat on the Eighth Circuit bench in 1894.[34] President Cleveland appointed Amos Madden Thayer of Missouri. Judge Thayer had been a Missouri state circuit judge and was appointed United States district judge in 1887. He also served on the faculty of the law school of Washington University in St Louis. On the court of appeals, his opinions were usually concise and to the point, but demonstrated a thorough study of the facts, a knowledge of the law, and an understanding of the needs of society. Death ended his service in 1905.

Willis Van Devanter of Wyoming was appointed by President Theodore Roosevelt to fill a fourth judgeship on the court created by Congress in 1903.[35] Van Devanter was the first member of the court to be appointed from a Rocky Mountain state and the second Eighth Circuit judge to be appointed to the Supreme Court of the United States.

Judge Van Devanter was born in Indiana and educated at Indiana Asbury University (later DePauw) and the University of Cincinnati School of Law. After three years of practice in Indiana, he moved to Cheyenne, Wyoming Territory, in 1884. He served as a well-known railroad and ranching lawyer, city attorney, member of the territorial legislature, commissioner to revise the Wyoming Statutes, and chief justice of both the territorial and state supreme courts. In 1897 he became assistant attorney general of the United States, serving the Department of the Interior particularly on public land and Indian issues. Judge Van Devanter served seven years on the circuit bench and twenty-seven on the Supreme Court. His opinions on both courts reflected his concern for property rights and opposition to increased economic controls by the federal government. While serving on the court of appeals, he was often a participant in cases in the circuit courts which then exercised only original jurisdiction. In 1910 he reported that he had presided over several dozen major circuit court cases, including antitrust prosecutions, railroad rate cases, and felony charges against two senators.[36]

Judge Van Devanter was appointed to the Supreme Court by President Taft to fill the vacancy created by the death of Justice Brewer. His public image on that court was hardly that of a leader. He wrote few landmark opinions. His main interests were public land issues, water rights, and corporation law. Within the court he was a skillful negotiator, often able to bring diverse minds to agreement. He was interested in judicial reform and

was the principal author of the Judiciary Act of 1925, which virtually ended direct appeals to the Supreme Court and enlarged the jurisdiction and responsibility of the circuit courts of appeals.

Justice Van Devanter retired from the Supreme Court in 1937, but served as a trial judge for the Southern District of New York in 1938. He died in 1941.

William C. Hook of Kansas was appointed by President Roosevelt to fill the vacancy caused by the retirement of Judge Caldwell in 1903. A graduate of the law school of Washington University of St. Louis, Judge Hook practiced law in Leavenworth, Kansas, for more than twenty years, becoming a leader of the Kansas bar. He became United States district judge in 1899 and served for four years before ascending to the circuit bench. On the court of appeals, Judge Hook's well-written opinions in several antitrust cases earned him recognition as an able jurist. He died in office in 1921.

Elmer B. Adams of Missouri was appointed to the Eighth Circuit bench by President Roosevelt in 1905. He succeeded Judge Amos M. Thayer in a line that has consistently been filled by Missouri jurists. A Yale graduate who had studied law in Vermont and at Harvard, Judge Adams moved from Vermont to St. Louis in 1868. He had practiced law, was judge of a state circuit court, and had served as a judge of the United States District Court for the Eastern District of Missouri before his appointment to the Eighth Circuit. Judge Adams served on the court until his death in 1916.

John Emmett Carland of South Dakota was appointed to the special United States Commerce Court by President Taft in 1910. When the Commerce Court was abolished in 1913, Judge Carland was transferred to the Eighth Circuit under the limitation that upon his death or resignation his position would lapse.

Judge Carland was a native of New York and had attended the University of Michigan. He moved to Dakota Territory in 1875, practicing first in Bismarck and later in Sioux Falls. He served as U.S. attorney in the Dakota Territory and as associate justice of the territorial supreme court. He was an active Democrat and served as chairman of the judiciary committee in the North Dakota Constitutional Convention.

In 1896 after moving to Sioux Falls, he was appointed to the federal district bench in South Dakota where he served for fourteen years. As his judicial career advanced, he moved to the Commerce Court for three years and to the Eighth Circuit Court of Appeals for a final nine year period of judicial service. He died while in office in 1922. As stipulated at the time of his appointment, the vacancy created by his death was not filled.

Walter I. Smith of Iowa was appointed by President Taft to fill the vacancy on the Eighth Circuit caused by the ascent of Judge Van Devanter to the Supreme Court. His tenure on the circuit began in 1911. Judge Smith was a native of Council Bluffs, which remained his home. He practiced law, served ten years as a state district judge, and spent eleven years in the United States House of Representatives. Judge Smith died in 1922, having been a member of the Court of Appeals until his death.

Kimbrough Stone of Missouri was the third in the Missouri succession, being appointed to the court by President Wilson in 1916, upon the death of Judge Elmer B. Adams. Judge Stone was a native of Nevada, Missouri. His father was a congressman, governor, and United States senator from Missouri. The judge was educated at the University of Missouri

and Harvard Law School, after which he practiced law in St. Louis and Kansas City. He had been a court commissioner for the Missouri Supreme Court and judge of the circuit court of Jackson County.

Judge Stone served on the Eighth Circuit bench for thirty years, his tenure continuing long after the division of the Eighth Circuit and the formation of the Tenth. He was generally regarded as the most influential member of the court. He sat in more than 1,800 cases and wrote nearly 700 majority opinions, five concurring opinions, and fifty-one dissents. After retirement in 1947, Judge Stone died in 1958.

Judge Robert E. Lewis of Colorado was appointed by President Harding in 1921 to succeed William C. Hook of Kansas. Judge Lewis was a native of Missouri, attended Westminster College at Fulton and was admitted to the Missouri bar in 1880. He practiced law in Clinton, Missouri, where he was Henry County prosecuting attorney. After an unsuccessful candidacy for governor in 1896, he moved to Colorado. He was a state district judge from 1903 to 1906, when he was appointed to the federal district judgeship in Colorado by President Roosevelt.

In 1921 Judge Lewis was promoted to an Eighth Circuit judgeship by President Harding. His service there ended in 1929, when Congress created the Tenth Circuit Court of Appeals to which Judge Lewis was transferred as its first senior judge. Judge Lewis died in 1941.

William Squire Kenyon of Iowa was appointed by President Harding to fill the vacancy created by the death of Judge Smith in 1922. Born in Ohio, he moved to Iowa with his family in 1878. After receiving his law degree at the State University of Iowa, he practiced law in Fort Dodge and served as county prosecuting attorney and state district judge. Judge Kenyon returned to practice in 1902 and later became general counsel for the Illinois Central Railroad. In 1910 he became an assistant to the attorney general of the United States, with responsibility for prosecuting antitrust and carrier rate violations. In 1911 he went to the United States Senate, where he became a leader of the progressive Republican faction.

Judge Kenyon's service on the court of appeals was characterized by his deep commitments on public issues and by his forceful opinions. His most famous opinion was entered in the Teapot Dome case when he spoke for a unanimous panel against wrongdoing in high places.[37] Judge Kenyon remained on the court until 1933 when his service was terminated by death.

In 1925 two additional judgeships were assigned to the Eighth Circuit, bringing the total to six.[38] President Coolidge promptly nominated two judges during that year.

Wilbur Franklin Booth of Minnesota was the first of the new judges to receive his commission. He was a native of Connecticut and a graduate of Yale University and Yale Law School. Moving to Minnesota in 1888, he practiced law in St. Paul and Minneapolis and served as a Hennepin County district judge. In 1914 he was appointed to a judgeship in the federal district court. In 1925 in order to secure the support of Democratic congressmen for the Judiciary Act of 1925, President Coolidge agreed that one of the new judgeships would go to a Democrat. Judge Booth was the Democrat chosen by the President.

Judge Booth was apparently a highly regarded member of the court during the seven years that he served the circuit. His opinions were scholarly but not oblivious to the facts of the real world. He was an active judge until

his retirement in 1932. Judge Booth died in 1944.

The second appointee to one of the new judgeships was Arba Seymour Van Valkenburgh of Missouri. A native of New York and a graduate of the University of Michigan, he was admitted to the Missouri bar in 1888. He engaged in the general practice in Kansas City and served as assistant U.S. attorney and as U.S. attorney for the Western District of Missouri. President Taft appointed him to the federal district bench in 1910, where he served until his elevation to the circuit court in 1925. He was an active and perceptive appellate judge and a useful member of his court until he retired in 1933. Judge Van Valkenburgh died in 1944.

John H. Cotteral of Oklahoma was the last judicial appointee to serve on the Eighth Circuit bench prior to the formation of the Tenth Circuit. He was appointed in 1928 by President Coolidge to fill the vacancy created by the death of Judge Walter Sanborn. His tenure on the Eighth Circuit bench was terminated early in 1929 when he was transferred to the newly formed Tenth Circuit. As Judge Cotteral served on the Eighth Circuit court for only about nine months, his impact on that circuit was not great. His more significant judicial work was in the Tenth Circuit.

Judge Cotteral was born in Indiana, attended the University of Michigan, and read law in Kansas. He was admitted to the Kansas bar in 1885 and four years later moved to Guthrie in Oklahoma Territory. He was active in Republican politics and was a Republican candidate for the supreme court of Oklahoma in 1907. Also in 1907 President Roosevelt appointed him to a federal district judgeship in the Western District of Oklahoma. He served on the district bench until 1928, when he went to the court of appeals. Judge Cotteral served in the Tenth Circuit until his death in 1933.

During the period from 1869 to 1929, seventeen judges served on the circuit court level in the Eighth Judicial Circuit. Although their duties were changed significantly by Congress in 1891 and 1911, all served the circuit and bore the title of circuit judge. Of those seventeen, five were residents of states that are now assigned to the Tenth Circuit. They are: Brewer and Hook of Kansas; Cotteral of Oklahoma; Lewis of Colorado; and Van Devanter of Wyoming. Residences of other Eighth Circuit judges who served during the period were: Arkansas, Caldwell; Iowa, Dillon, Kenyon, McCrary, and Smith; Minnesota, Booth and Sanborn; Missouri, Adams, Stone, Thayer, and Van Valkenburgh; and South Dakota, Carland. Two judges terminated their service on the Eighth Circuit bench by advancing to the Supreme Court; two were transferred to the Tenth Circuit; three retired; three resigned; and seven died in office.

NOTES

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[1]Jamestown, the first permanent British settlement in the American colonies, was founded in 1607. It is often said, or assumed, that the colonists brought with them the then-existing laws of general application in England, subject to such modifications as were required by local conditions and subsequent legislation. *See, e.g., Clark v. Allaman*, 71 Kan. 206, 80 P. 571 (1905); *Kansas v. Colorado*, 206 U.S. 46 (1907); 1 Kent. Commn. 336 (1826); 1855 Stat. Kan. Terr., ch. 96.

[2]G.R.Y. Radcliffe and G. Cross, *The English Legal System* 209-16 (3d ed. 1954).

[3]Article IX, Articles of Confederation, March 1, 1781.

[4]Act of September 24, 1789, 1 Stat. 73.

[5]North Carolina and Rhode Island were not members of the Union in 1789.

[6]Act of September 24, 1789, § 4, 1 Stat. 74.

[7]Act of March 2, 1793, 1 Stat. 333.

[8]Act of February 13, 1801, 2 Stat. 89.

[9]Act of March 8, 1802, 2 Stat. 132.

[10]This aspect of American judicial history is reviewed at length in F. Frankfurter and J. M. Landis, *The Business of the Supreme Court* 4-102 (1928).

[11]Act of April 29, 1802, 2 Stat. 156, as amended by the Act of March 18, 1803, 2 Stat. 244.

[12]Frankfurter and Landis, supra note 10 at 12-14.

[13]Act of March 2, 1855, 10 Stat. 631.

[14]Act of April 10, 1869, 16 Stat. 44.

[15]Act of March 3, 1891, 26 Stat. 826.

[16]*Id.*, § 5, at 827-28.

[17]Act of March 3, 1911, §§ 5-24, 289, 301. 36 Stat. 1091-94, 1167, 1169.

[18]Inman, "The Supreme Court of Kansas," 4 *The Green Bag* 321, 327 (1892).

[19]Act of January 29, 1861, 12 Stat. 126.

[20]Act of July 15, 1862, 12 Stat. 576.

[21]T.J. Fetter, *History of the Eighth Circuit* 5 (1977).

[22]Act of February 28, 1929, 45 Stat. 1346.

[23]*See* "Gillette, Samuel Miller" in 2 *The Justices of the United States Supreme Court, 1789-1969*, 1011 ff (Friedman & Israel ed. 1969).

[24]83 U.S. (16 Wall.) 36 (1873).

[25]1 Kan. 601-42 (2d ed. 1868).

[26]*See* Fetter, *supra* note 21 at 7-8.

[27]*State v. Mugler*, 29 Kan. 252, 274 (1883) (Brewer, J., dissenting).

[28]*State v. Walruff*, 26 F. 178 (1886).

[29]*Chicago and Northwest Ry. Co. v. Dey*, 35 F. 866 (1888).

[30]Act of March 3, 1891, 26 Stat. 826.

[31]*See, e.g., In re Debs*, 158 U.S. 564 (1895); *Muller v. Oregon*, 208 U.S. 412 (1908).

[32]The data concerning the circuit judges are gleaned from Fetter, *supra* note 21.

[33]Act of March 3, 1891, 26 Stat. 826.

[34]Act of July 23, 1894, 28 Stat. 115.

[35]Act of January 31, 1903, 32 Stat. 791.

[36]Letter from Willis Van Devanter to Charles Nagel (April 19, 1910) in Department of Justice Appointment files, Van Devanter Record Group 60, National Archives, cited in Fetter, *supra* note 21 at 9, n. 19.

[37]*United States v. Mammoth Oil Co.*, 14 F.2d 705 (1926), *aff'd*, 275 U.S. 13 (1927).

[38]Act of March 3, 1925, 43 Stat. 1116.