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Article Summary: Nebraska territorial justices successfully organized and expanded the territorial court system. Once statehood had been achieved, the system they had created proved very effective.

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Names: Fenner Ferguson, Eleazer Wakely, William F Lockwood, Augustus Hall, James Woolworth, Simpson Hargus, Samuel W Black, Brigham Young, John A Ahmanson

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Photographs / Images: Bellevue courthouse where first Nebraska court of record was held; Territorial Judge Joseph E Streeter; Table 1: judge, his state of residence, date of judge's commission, how the judge was succeeded; Table 2: judges appointed by each president, years served; Table 3: Supreme Court opinions in James Woolworth's 1871 selection; Territorial Judges Samuel W Black, William Pitt Kellogg, Joseph Miller, James Bradley, Elmer S Dundy, Augustus Hall, Fenner Ferguson

The Territorial Judiciary: An Overview of the Nebraska Experience, 1854-1867

BY MICHAEL W. HOMER

The vast public domain, identified in American history with the frontier, was created in 1780 when the western claims of some of the 13 original states were yielded to the federal government. By 1802 all of the western claims of the states, consisting of more than 200 million acres of land, had passed to federal ownership. The public ownership of this domain necessitated the development of a program by the federal congress to regulate the ownership, occupation and distribution of land, something that had never been accomplished under British rule.¹

The first program of public land disposal was enacted by the Continental Congress in 1785. It established the principles of survey before the sale and sale by public auction. Two years later Congress enacted the Northwest Ordinance, which established a territorial form of government for the lands of the public domain. This ordinance, which was largely the product of the experience of the settlers themselves, provided that the region of the Ohio valley would be divided into "not less than three nor more than five states" which when admitted would be "on an equal footing with the original states." To prepare the region for statehood a territorial scheme of government was created. This mechanism for creating states was in sharp contrast to the British system which imposed colonial status.² During the 19th century additional land was added to the public domain by conquest and purchase and organized into territories. Eventually 31 of the 50 states, including Nebraska, were carved out of the 30 territories created by Congress between 1785 and 1900 under the principles established by the Northwest Ordinance.

When Nebraska Territory was created on May 30, 1854, it

was part of the unsettled frontier. Only after territorial status was achieved did settlers immigrate and settle on sites along the Missouri River. The first census of the territory, conducted in 1854, revealed that there were only 2,732 inhabitants. By 1855 the population had increased to 4,494. One year later it was 10,716, and by 1860 there were 28,841 persons in the territory. When the territory achieved statehood in 1867, about 50,000 persons inhabited Nebraska. While the territory was increasing in population, it was also growing culturally and economically. Newspapers were started, banks chartered, and societies organized. There was also an increase in crime and lawlessness. Thus, both good and bad resulted from the territory's rapid growth.³

Until recently historians have generally been less interested than was warranted in the aspect of the territorial experience that dealt with the judiciary as it bore on the control of lawlessness and in the regulation of growth. This has been true in Nebraska even though documents are replete with examples of the impact the judiciary had upon growth and development. This paper will examine that impact, the judges appointed to the bench in Nebraska, the districts in which they served, and some of their decisions.⁴

The Organic Act of Nebraska Territory established the boundaries and a form of government. Geographically the territory "stretched all the way north from the southern boundary of present-day Nebraska to include all the remaining lands of the Louisiana Purchase." Politically it followed the format first established in the Northwest Territory. The executive power was vested in a governor, the legislative power in both the governor and a legislative assembly, and the judicial power in a supreme court, district courts, probate courts, and justices of the peace. The act provided that the Supreme Court would be appointed by the President and consist of one chief justice and two associate justices, any two of whom would constitute a quorum. The terms of the justices were for four years, but extended by the act "until their successors shall be appointed and qualified," which was an innovation not previously contained in other territory creating acts. The justices, whose salaries were \$2,000 per year, also served as district judges. Each was assigned to, and expected to

reside in, one of three judicial districts which were created by the governor and thereafter expanded and modified by the Legislature. The District Courts were given original jurisdiction over the same types of cases as the Circuit and District Courts of the United States, and later were also given appellate jurisdiction over cases originating in the probate courts and with justices of the peace. The Supreme Court was given appellate jurisdiction "from the final decisions of the said district courts."⁵

Implementation of the Organic Act—The Judges: Between 1854-1867 15 judges were appointed to the territorial Supreme Court.⁶ Of these, three never actually served because they either failed to assume their duties or resigned before serving. Thus only 12 justices served for any considerable period of time. The longest period of service for these 12 men was seven years, the shortest two years, and the average length three and one-half years. Five judges resigned their positions, two died while serving, two were removed, and the remaining three were in office at the time Nebraska achieved statehood. Of the 15 appointed only two were residing in the territory at the time of their appointments, but excluding the two who died during their terms, a total of five judges remained in Nebraska following the expiration of their appointments.

A territorial judgeship was a sought-after political plum. Judicial appointments were made by the President to men who usually "had either definite connections with the Executive or a vested interest in Nebraska plus some connection with the Administration." During the Pierce and Buchanan Administrations all of the appointees had been Democrats. Republican Chief Executives also selected from among their personal friends and supporters to fill judicial positions. Three of the appointees between 1861-1867, William Pitt Kellogg, Joseph Streeter, and William Kellogg were active political supporters of Abraham Lincoln in Illinois.⁷

Many of the judges were interested in advancing their political careers and saw an appointment to the territorial bench as an important step in this process. Others were obliged to accept the office to cushion political setbacks. For example, three of those appointed to the bench in Nebraska territory had been defeated for reelection to Congress just

previous to their appointments. Augustus Hall was defeated in Ohio in 1856 and appointed chief justice in 1857. He had previously sought an appointment to become governor of the territory. Joseph Miller, also a defeated Ohio Congressman, had been promised a judgeship by Buchanan previous to his failure to be elected to a second term. William Kellogg was the third defeated congressman appointed to the court. Another appointee, Pennsylvanian Samuel Black, had been defeated in the gubernatorial election of 1857, and appointed an associate justice in Nebraska the same year by Franklin Pierce.⁸ Four other appointees were members of the state legislatures, either at the time of their appointment or shortly before. Ferguson was a legislator in Michigan, Harden in Georgia, Bradley in Indiana, and Wakely in Wisconsin. Thus, although it was not uncommon to claim that these appointments were "unsolicited," most appointees were active in party politics.

An appointment to the territorial bench not only provided these men with political opportunity but also with new popularity and respect. Such achievement of dignity was certainly one of the attractions of the office. Harden, in his letters to his family in Georgia in 1856, wrote of the popularity he enjoyed among the people—"free soilers and all." For instance he wrote his sister: "I take tea out three times a week. . . . I am as a King here. My word is the law of the land. The evil doers fear me, and the better part of the community respect."⁹ Wakely also wrote about the lure of office in his "Reminiscences of the Third Judicial District":

"Did there come to my perception the image of a desolate frontier people yearning for the justice which was my special mission to dispense? Was I influenced, in a degree, by the temptation which comes to very many in my profession, to realize the independence, the dignity, and the opportunity for usefulness of a place on the bench. No matter. The result was, that I received, in due time, the parchment with the autograph of President Franklin Pierce appended, which invested me for the next four years, with an undivided one-third of the judicial power to be exercised by the district and Supreme Court of the Territory of Nebraska."¹⁰

Given the fact that the territorial Supreme Court was looked upon by many of the appointees as a political stepping stone for higher office, it is interesting to note that several of the judges continued their upward mobility after their terms on the Nebraska bench. Ferguson was elected as a delegate to Congress from Nebraska, William Kellogg was elected a

United States senator and governor of Louisiana, and Samuel Black was appointed governor of Nebraska Territory.¹¹ Others, less lucky in achieving their political aspirations, never held office again after finishing their terms on the bench.

Since the Nebraska territorial Supreme Court was one of the "several fat offices . . . to bestow" upon disgruntled, ambitious and loyal politicians, it was often vulnerable to political attack by members of opposing ideologies. Fenner Ferguson was accused of violating the preemption law during his term as chief justice, a charge that was apparently made to ruin his chances for election as a delegate to Congress. His successor, Augustus Hall, was accused by the *Republican* in Omaha in 1860 of appointing an incompetent a master in chancery against the advice of the bar. The paper noted that the Democratic appointee "has in this instance, as he usually does, acted contrary to the interests and wishes of the people." A fellow Democrat and colleague on the bench, Judge Wakely made a much kinder evaluation of Hall when he wrote that he administered "[w]ith strong intellect, abundant legal hearing, intuitive good sense, and perception of the law. . . . He administered justice, somewhat careless of form, or etiquette; but with accuracy and the unquestioned confidence of the bar, and the people." Political newspapers were often embroiled in debates over the competency of the judges and their decisions.¹²

The use of the judiciary to dispense political patronage was at no time more controversial in Nebraska than when Lincoln took office. In 1861 he removed two of the Democratic judges and appointed Republicans in their places. The third Democrat, Augustus Hall, who died before removal was possible, was replaced by Illinois Republican William Pitt Kellogg. These were the only two removals from the Supreme Court in the history of the territory.

One of the judges removed, Eleazer Wakely, challenged the power of the President to remove him before his term had expired. Wakely, originally appointed in 1857, was reappointed to a second four-year term shortly before President Buchanan left office in 1861. But after his inauguration, Lincoln cut short Wakely's term by appointing a Republican, William Lockwood, to take his place. Although Lockwood was commissioned in late April, 1861, Wakely continued to fulfill his duties as a judge until he adjourned court in his district on May 9.¹³

On June 11, when the Supreme Court convened a regular term in Omaha, Wakely challenged the seating of Lockwood. Both Wakely and Lockwood presented their certificates of commission for four years, both signed and executed by a President, "endorsed . . . duly certified and authenticated." Wakely argued his commission entitled him to another four years of service, while Lockwood claimed that his superceded Wakely's. The two judges, who had to determine whether their brother on the bench would be Wakely or Lockwood, were Chief Justice Kellogg, a Lincoln appointee sitting on the court for the first time, and Justice Miller, a holdover from the Buchanan Administration who had not yet been replaced. Predictably, when the vote was taken the judges were "equally divided in opinion" concerning Wakely's application. The deadlock resulted in the defeat of Wakely's challenge, and Lockwood took his seat as an associate justice.¹⁴

Wakely, however, did not give up, citing a territorial statute which gave a remedy of "information" or right to challenge "any person unlawfully holding or exercising any public office or franchise within this Territory." The district attorney of the 1st Judicial District, pursuant to this statute, filed such a challenge on June 15, 1861, in the name of the territory to test the right of Lockwood to hold office. The District Court in October held that there was insufficient evidence to proceed and Lockwood was affirmed by the territorial Supreme Court on August 24, 1863. Wakely appealed this ruling to the U. S. Supreme Court, which in 1865 sustained the territorial court and held the statute permitting a district attorney to challenge a presidential appointee was in conflict with the President's power to appoint territorial officials. The opinion did not discuss the origin of the President's removal power, which had been challenged, but instead argued that the territorial officials had no authority to challenge presidential appointees. J. Sterling Morton, who like Wakely was a Democrat, argued in his *Illustrated History* of Nebraska that the court based its decision on a technicality and never reviewed the real issue of whether the President had a right to remove federal judges. This exercise of presidential power remained controversial throughout the 19th century.¹⁵

In Nebraska, however, by the time the Supreme Court decided against Wakely, the removal question was largely

academic because Wakely's second term would have expired in 1865. By that time the Republicans still remained in control of the White House, and there was no political motivation to make further removals. Furthermore, in 1864 when Congress passed an enabling act allowing Nebraska to form a state government, the issue became less important for Nebraskans.

This is not to suggest that political considerations were the only criterion used in making appointments and/or for criticizing the appointees. After all, even politicians had to demonstrate to the President why they should be chosen over other candidates for the office. In 1859 Joseph Miller of Ohio was appointed to the bench by President Buchanan because the President "regarded the claims of Mr. Miller with special favor from the fact that Nebraska had adopted the Ohio code and of course it was advisable to have the office filled by one who was more intimately conversant with the practice in Ohio."¹⁶ Acquaintance with the law of the territory was also a consideration in the appointment of at least two other justices, William Lockwood and Elmer Dundy, both of whom were residents of Nebraska at the time of their appointments. Dundy succeeded an appointee who had failed to assume his duties, and it was necessary to appoint someone capable of serving in that capacity without delay. In addition, residents of Nebraska, like inhabitants in other territories, were tiring of a federal system which bypassed local talent in favor of others unacquainted with the territory. In 1859 one resident complained that "our Judges being appointed from men out of the Territory, and generally from disappointed politicians, seem not to take any interest in their duties, and hence disappoint us from year to year."¹⁷ Such complaints seem to have been heard by the President, as evidenced by the appointments of Nebraska natives Dundy and Lockwood, both of whom remained on the bench until statehood was achieved.¹⁸

While many of the attacks against the judiciary were politically motivated, other reactions were based on judicial performance. For instance, a Republican newspaper, the *Nebraska Enquirer*, noted in 1861 that Judge Wakely "politically . . . does not suit us but judicially we are entirely satisfied. If Lincoln should be so fortunate in his selection of judges for other Districts, Nebraska will be hard to beat in that line." It was later said that Wakely was one of the few men in

public life to have measured up to "the puffs of his party organ."¹⁹ Other judges were criticized for dereliction in fulfilling their responsibilities as district judges. For instance in 1858, a citizen in Nebraska City complained that the judges who had been assigned to that district—Black and Miller—were postponing cases and not paying proper attention to their judicial duties.²⁰ Such criticisms concerning imperfect administration of the territorial judiciary are not surprising considering the responsibilities imposed on judges to establish courts in each county and to travel at least once a year to hold district court and review decisions of lesser local courts.

Judicial Districts—Upon arriving in Nebraska each judge, pursuant to the Organic Act, was assigned a judicial district. The initial districts were organized by the acting governor on December 20, 1854, and reaffirmed by legislative act on March 16, 1855.²¹ Ferguson, Harden, and Bradley, the initial judges, were assigned respectively to the 1st District consisting of Douglas and Dodge Counties, the 2nd District consisting of Cass, Pierce, Forney, and Richardson Counties, and the 3rd District consisting of Burt and Washington Counties. From time to time, throughout the territorial period, the Legislature redefined the limits of these judicial districts and reassigned the judges to live within them. Changes were necessitated by the creation of new counties and appointment of new judges.²²

Some historians have argued that the power of the territorial Legislature to create and subsequently change judicial districts could be used as a weapon against unpopular jurists. Although this occurred in other territories, there is no evidence that any of the changes made in Nebraska were intended to punish or weaken any of the appointed judges. In fact, each judge, for the most part, was assigned by legislative act to the same district as his immediate predecessor and was even allowed under some circumstances to hold court in districts other than those assigned to him. The first Legislature in an act approved March 16, 1855, provided that district judges might interchange with one another as necessity required. Later, the Legislature approved an act on October 20, 1858, which provided that when there was a vacancy in a district or a district judge was "unable to act on account of sickness, interest, or absence from the district, or any other cause," other district



The first Nebraska court of record was held in this courthouse in Bellevue.



Territorial Judge Joseph E. Streeter

judges to whom application was made could hear and decide cases in that district.²³

It has also been argued that another weakness of the territorial system was its assignment of only three justices to administer a large geographical area. This problem was minimal in Nebraska, at least in the earliest years of the territory, because even though the geographical area of the territory was vast, the population was small and concentrated in a strip along the Missouri River. One of the earliest judges to visit the 3rd District, Justice Wakely, noted that his district consisted of about 350,000 square miles but observed:

I remember being impressed, when I first studied these boundaries, that it would take a great deal of justice to cover such an area, or that my limited supply of it would need to be spread out very thin to do it. But as the Indians, buffaloes and wild animals constituting the inhabitants of the unorganized country were not covetous of the white man's justice, I expended it wholly in the river counties, among a most intelligent, order loving, and law abiding people.²⁴

Notwithstanding Wakely's statement judges did have to travel considerable distances, often over rough terrain and through severe climatic conditions to hold court in the counties of their districts. The experiences of Wakely himself during his first trip to the 3rd Judicial District in 1857 provide a good illustration of the conditions found.

Court terms in the counties were at first set by the Legislature but later in the territorial period by the judges themselves. Court was held once or twice a year in the larger populated counties and during alternating years in the less populous ones. In January, 1857, the territorial Legislature provided that the judges assigned to the 3rd District would hold court in Washington County in April and November, in Burt and Dakota Counties in May and September, and other counties as the judge should appoint. After arriving in the territory in April, Wakely began what he called his first "tour of duty and observation." He first traveled to the seat of Burt County in Tekamah and found that court had only been held intermittently there by his predecessor, Judge Bradley. Evidently previous to that time "about all Judge Bradley ever did was to convene and adjourn the court." The 3rd District, which consisted of the northern counties, was seemingly not as litigious as the southern districts during the early years of the territory,

but at least one observer seems to imply that Bradley was somehow derelict in his judicial duties.²⁵ However, Bradley did at times hold court in the 2nd District.

Describing his first court held at Tekamah in 1857, Wakely wrote that "the court was there; but there was a discouraging scarcity of litigants, and no jurors. There was a tradition—perhaps on record—of one or two prior terms; but courts had been little known." His first session consisted of "fifteen minutes, the court was opened; the Journal made up, showing no business; and the court adjourned *sine die*." He noted though that "[t]hereafter, terms were held twice a year, always on time, with increasing business." After adjourning in Burt County, Wakely left to hold court in Dakota County. To make the trip he traveled first to Decatur "in an open wagon, and a pouring rain" and stayed the night in "a nascent hotel, with a roof shingled on one side" after dining in the open side dining room which served guests "with viands, and with rain-water free." Describing these accommodations the judge later wrote that he was permitted to stay on the shingled side and that "[a]s the guest of honor, in a sense, was permitted to spread his bedding on the floor, near the stove pipe, which came up through it for the economizing of heat. This was a luxury duly appreciated." The next morning the judge and his party crossed the river to Sioux City to spend the night and then removed to Omadi where they rested during some bad weather in "the bachelor rooms—half dormitory, half law office—of John Taffe," a local attorney. Several days later when the court convened in the county seat of Dakota, Wakely wrote:

No sheriff was visible. Some "amicus curiae" announced that the sheriff was "splitting rails in the bluffs." This was before Lincoln's election, and the court not taking in at once the dignity of this employment, fined the delinquent official \$25. The next morning he was at the *pro tem* court house, and put it in excellent order an hour before the judge arrived. He explained that he had never heard of a district court in the county, and supposed the statute fixing the terms was a harmless formality. The court set him straight on this point; and, its dignity having been vindicated, remitted the fine. This experience made him a good sheriff.²⁶

Later during the term the judge also held court in Fort Calhoun, Washington County, which he described as "better settled and wealthier." Following this first term Wakely noted

that "whether or not the judge was being overpaid, he had not been overworked."²⁷

As suggested by Wakely's experiences, there were some initial problems in the administration of justice in the territory, and they went far beyond the presence of sheriffs at court proceedings. Difficulties also arose from the actions of other participants, including attorneys, jurors and the parties themselves. For example, attorneys were not always respectful of courtroom decorum. This was first impressed on Justice Harden in 1855 when "the first legal 'mill' occurred before" him. "Hon. O. P. Mason and H. P. Bennett engaged in physical combat, but no blood was shed." According to an observer "the court was much astonished at western habits."²⁸ Such conditions eventually led Harden to resign his commission, since his wife, who never came to Nebraska, objected "to going to (as she termed it) a wild country." Another early justice chastised the conduct of counsel in his court by observing that "one-third of the time of the court was occupied by some of them in side-bar conversation, to amuse the spectators, show their own wit, and etc., to the great hindrance of the administration of justice, as well as to the insult of the court." It was observed by the *People's Press* that such offending conduct "against the rules of courtesy which should be observed among the members of the profession" was widespread.²⁹

But the problems of the bar did not all concern etiquette. The early frontier lawyer was often untrained in the complexities of the law and had limited access to legal texts and case opinions. This at times led to confusion. In Nebraska, for example, during the winter and early spring of 1858, there were many "suits of creditors suing for their debts," following the national financial collapse.³⁰

A new code of civil procedure had been enacted by the Legislature in December, 1857, but had not been published at the time these suits were commenced. Acting on the assumption that suits of this nature were commenced by original notice rather than by summons, several firms served notices without the aid of sheriffs or officers. Upon finding that these suits had been wrongfully commenced each side of the litigation made motions and countermotions to quash the other's notices. One attorney wrote:

That would virtually end the case until a new service was made, and the first term of the court I attended in Plattsmouth, the principal work of the Judge to quash the summonses on each side, quashing some 100 to 150 summonses. The only consolation I had in having my summonses quashed, was that the other attorneys fared no better. We tried to make an agreement to stop the havoc; but failed to do so.³¹

The Supreme Court and District Courts attempted to minimize such problems several times during the territorial period by formulating rules of practice before the court and publishing them in the capital city's newspapers.³²

Other participants in the judicial process provided problems as well. Juries sometimes functioned at a level less than expected by the judges. Wakely recounted that "[o]ne jury came in, after a two days' trial of criminal case, full and elaborate instructions from the court, and several hours of deliberation, to inquire whether the prisoner 'had plead guilty.' Set right on this important point, they presently returned a verdict of acquittal." In addition, some judges had difficulty getting people to respond to judicial process. Even J. Sterling Morton, a future federal secretary of Agriculture, failed to respond to an indictment for betting.³³

Besides these human failings of the participants in the legal process, the conditions of some court room facilities were less than ideal as well. Wakely noted that "the environments were not always propitious. Court houses were improvised from halls, school houses, store rooms, or abandoned buildings." In the 2nd District courts were held in log cabins, office buildings, and even a dancing room of a local inn. Nevertheless, as these facilities gradually improved so did the citizens' familiarity with the law as well as decorum in the court room.³⁴

Cases—Even though frontier conditions were not always conducive to judicial decorum, the judges were nevertheless required to settle a substantial number of disputes in their districts, and sitting as a Supreme Court by application of laws and procedures similar to those used in the rest of the nation. The surviving journals and docket books from the various districts give some indication of the number of disputes decided by these courts. From 1854 through 1867 almost 2,500 cases were docketed in Douglas County of the 1st District, while over 1,300 cases were docketed in the 3rd District for the

period between 1858-1867. While it is difficult to determine from these figures the case burden placed on each judge during his tenure, James Woolworth in 1861 stated that Augustus Hall, who served for three years, had "decided fifteen hundred cases no more than a dozen of which were carried to the Supreme Court and none were ever reversed." This figure, even if it is slightly exaggerated, together with the numbers from the surviving docket books, demonstrates that the courts were being utilized to settle many disputes during the territorial period.³⁵

But Woolworth's statement also suggests that only a fraction of the District Court decisions were reviewed by the Supreme Court. The three justices met together twice each year, usually in June and December, and occasionally during special terms when there was pressing business. The surviving minute book, "A Journal of the Supreme Court," covering the period from June, 1858, to July, 1866, the end of the territorial period, reveals that it reviewed approximately 230 decisions. The journal, however, often lacks specific factual information concerning the dispute recorded, and the judges did not always write formal opinions.³⁶

All of the entries in the journal are short summaries of the final disposition of a given case. A typical example is the entry for the case of *Shields v. Helfenstine Fore and Company* on June 12, 1858 (page 7):

On this day the motion of the appellees to dismiss the appeal herein having come on to the bench, it is ordered that said motion be and it is hereby sustained and the appeal is dismissed. And it is further ordered that the appellants pay the costs herein taxed at five dollars and seventy five cents: and that execution issue therefore.³⁷

According to the current clerk of the state Supreme Court, the early justices were not required to file written opinions, and none survive—even among the petition papers to the Supreme Court— except a limited selection published by James Woolworth in 1871.

It is not surprising that when Woolworth selected 21 of the territorial Supreme Court cases for publication in 1871, he chose those with which he had some familiarity (see Table 3). Of those he selected, Woolworth himself was counsel in 11 and seems to have been personally acquainted with the attorneys involved in the other disputes. Eighteen of the 21 decisions are

TABLE I

Judge	Res.	Commis.	How Succeeded
Fenner Ferguson	Mich.	6/29/54	Resigned (Hall)
Edward R. Harden	Ga.	6/29/54	Resigned (Underwood)
James Bradley	Ind.	6/29/54	Resigned (Wakely)
John W. H. Underwood	Ga.	1/ 2/57	Failed to Assume Duties (Black)
Samuel W. Black	Penn.	1/22/57	Resigned (Miller)
Eleazer Wakely	Wis.	1/22/57 1/24/61	Removed (Lockwood)
Augustus Hall	Iowa	12/ 3/57	Deceased (William Pitt Kellogg)
Joseph Miller	Ohio	3/ 5/59	Removed (Milligan)
William Pitt Kellogg	Ill.	3/27/61 4/17/65	Resigned (William Kellogg)
Sam Milligan	Tenn.	3/27/61	Failed to Assume Duties (Streeter)
William F. Lockwood	Neb.	4/27/61 7/23/65	Statehood
Joseph E. Streeter	Ill.	10/15/61 1/22/62	Deceased (Ketchum)
W. W. Ketchum	Penn.	3/11/63	Resigned (Dundy)
Elmer S. Dundy	Neb.	6/ 2/63	Statehood
William Kellogg	Ill.	1/15/66	Statehood

TABLE 2

	Years Served
<i>Appointed by President Pierce</i>	
Fenner Ferguson, 1st District	1854, 1855, 1856
Edward R. Harden, 2nd District	1854, 1855, 1856
James Bradley, 3rd District	1854, 1855, 1856
Samuel W. Black, 2nd District	1857, 1858
Eleazer Wakely, 3rd District	1857, 1858, 1859, 1860
<i>Appointed by President Buchanan</i>	
Augustus Hall, 1st District	1857, 1858, 1859, 1860
Joseph Miller, 2nd District	1859, 1860
<i>Appointed by President Lincoln</i>	
William Pitt Kellogg, 1st District	1861, 1862, 1863, 1864
William F. Lockwood, 3rd District	1861, 1862, 1863, 1864, 1865, 1866, 1867
Joseph E. Streeter, 2nd District	1861, 1862
Elmer S. Dundy, 2nd District	1863, 1864, 1865, 1866, 1867
<i>Appointed by President Johnson</i>	
William Kellogg, 1st District	1865, 1866, 1867

simply summarized by Woolworth himself, presumably from his personal recollection since as previously indicated the justices themselves very seldom wrote formal opinions. The three opinions actually written by justices were all by Justice Wakely, who for a time became Woolworth's law partner after his forced retirement from the bench.³⁸

These 21 decisions chosen for publication by Woolworth give some indication of how attorneys and judges argued and decided cases. In the three opinions written by Wakely, he cited from opinions written by the state courts of New York, Maine, and Ohio, the United States Supreme Court, as well as a treatise written by Smith on statutes. In *Bennett v. Hargus* he relied on state case law to demonstrate that a statutory cause of action "is terminated by the repeal of such statute, without a provision for saving rights accrued under it."³⁹

In *Newcomb v. Boulware*, instead of citing case law Wakely analyzed statutory language enacted by the territorial Legislature to determine by "fair construction" whether or not adequate notice had been given to a town's mayor by the taker of an appeal to district court. Similarly in *Mills v. Paynter* the judge, although he cited the U. S. Supreme Court to establish the consequences of fraud, determined from the language of the statute and the facts pleaded that a proper decision had been made in the District Court. Lawyers, whose arguments were summarized in some of the opinions, also utilized case law from other states. For example, Woolworth, McCracken, Mason, and Taylor cite cases from New York, Illinois, Indiana, Ohio, Iowa, Connecticut, Kentucky, and Nebraska.⁴⁰ In addition, they relied on Kent's *Commentaries*, Story's *Equity* and Willard's *Equity*. Although there is less evidence available concerning the methods used by district court judges in arriving at their decisions, it appears that they were even less formal than those used by the Supreme Court.

In some important cases, however, they evidently did make a formal record. For example, in the manslaughter case of Simpson Hargus of Nebraska City, Justice Black wrote a formal opinion citing Wharton on criminal law, Kent's *Commentaries*, and various United States Supreme Court decisions on the issue of common-law crimes. This was a controversial case, which perhaps accounts for its formality, and also for the fact that it was published in its entirety in a Nebraska City newspaper.⁴¹

Hargus had been indicted for manslaughter in the first recorded term of the 2nd Judicial District in 1856 for killing Benjamin Lacey. Hargus and Lacey had evidently been embroiled in a land dispute. Trial was set for the court term to be held in December, 1857, in Nebraska City. Before the trial took place Hargus obtained the help of Alan A. Bradford, a member of the territorial Legislature. At the session of the Legislature immediately preceding the trial, Bradford persuaded the legislators to repeal the existing criminal code without adopting a new one to take its place.⁴² This caused a stir in the public press, especially in the 2nd District. The *Nebraskian* argued that the legislative action had resulted in there being no criminal law at all, and bitterly attacked the motives of Bradford. Others, such as "Tecumseh" of Nebraska City, who wrote to the editor of a Nebraska City newspaper, argued that the common law would provide ample protection against crime. Attacking the editor of the *Nebraskian*, Tecumseh wrote:

Is he such a "Dampfool" that he don't know the common law is now in force in the territory; and that under it delinquents and transgressors will stand a poorer chance for escape than under the statutes, heretofore in force. The "common law" is far more stringent than the statutes were.⁴³

Tecumseh was right in asserting that the common law applied in Nebraska Territory. The Organic Act bestowed common law jurisdiction on both the Supreme and District Courts and a subsequent act passed by the first Legislature provided that

so much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the Organic Law of the territory, or with any law passed or to be passed by the legislature of this territory be and the same is adopted and declared to be law within said territory.⁴⁴

However, despite these legislative actions there was a split of opinion among American legal scholars of that period concerning whether there existed a federal common law of crimes. At least one U. S. Supreme Court decision had held that there was not, but some commentators at the time of the Hargus trial continued to argue there was.⁴⁵

In December, 1857, the case was argued before District Judge Samuel Black in Nebraska City. Following a lengthy trial Hargus was convicted of voluntary manslaughter. Argu-

ing that the Legislature's repeal of the criminal code had rendered the courts powerless to sentence Hargus, his attorney motioned the court to arrest the judgement: Black overruled this motion, noted that the common law still applied in Nebraska Territory, and rejected the argument that the indictment was defective even though it had been framed under the repealed statute which contained no savings clause. Instead, he noted that the statute had simply recognized the existence of common-law manslaughter and provided a statutory punishment for it. He "decided that the statute of 1855 which was repealed did not create the crime, nor was the whole subject of manslaughter revoked by the legislature." He also cited Chancellor James Kent for the proposition that jurisdiction is available under common law if not proscribed by statute, and that when such jurisdiction is vested "why ought it not to apply to criminal as well as civil cases." He noted the explicit grants of common law jurisdiction by both the Organic Act and the territorial Legislature and could not find any evidence that the Legislature had intended to set aside the common law crime of manslaughter when it adopted the criminal code. Thus Black found no difficulty in passing sentence of "nine hundred dollars fine together with cost of prosecution and five years and three months imprisonment."⁴⁶

Almost immediately after the District Court case, the *Nebraska News* called for the adoption of a new criminal code by the Legislature. The Hargus episode seemed even worse to some because of the financial panic which began in 1857 as well as the bad press it had given to the territory. The *Missouri Republican* noted that "[t]he territory is in critical condition. . . . Nebraska has neither revenue laws, collections laws or a criminal code." *The Nebraska City News* argued that "the immediate passage of such laws would tend greatly to promote the peace and prosperity of our people, and would also induce a better and larger immigration that can be reasonably looked for under our present rule of anarchy."⁴⁷

Although a new criminal code was passed in 1858, the whole affair was an unfortunate setback for the legal system and courts in Nebraska. Previous to the establishment of law, groups had taken it upon themselves to form vigilante committees to maintain peace, and claim clubs for the protection of their land rights. Members of the claim clubs even included judges and lawyers before the land had been surveyed.⁴⁸

The rescission of the criminal code provided an excuse for some to reinstitute this type of justice. In June, 1858, Washington County citizens called a meeting to form a vigilante committee. They argued that it was "not so much to discuss the importance of law-abiding in a law existing community, as it is to discuss what policy had best be pursued *where no law exists*—where criminality exulting grins, while the Goddess of Justice stands powerlessly by, with a 'barren sceptre' in her hand."⁴⁹ One early resident recalled that during that period, when there was no criminal code, "Judge Lynch was the principal officer that administered justice as far as crimes were concerned." Thus, in May, 1858, when there was no criminal code in effect, the 2nd Judicial District in Otoe County had on its docket "but one or two criminal cases, and some two hundred civil cases."⁵⁰ Just two years previously, in its first term in the same county, the court had heard "133 different cases, 41 of which were criminal cases, and 92 were civil cases."

Although vigilantism may well have existed even without the occurrence of this episode and did spring up again even when the criminal code was reinstated, the repeal of the statute did undermine respect for the law and legal process, especially in criminal matters.⁵¹ However, by 1859 Governor Black was able to report to the Legislature:

Nebraska has heretofore suffered from inconsiderate and hasty legislation as well as the sudden and untimely repeal of a large portion of her laws. We have, however, just cause for congratulation that the code, both civil and criminal, adopted by the legislature of last year, is in full and successful operation.⁵²

Notwithstanding Judge Black's analysis, the case was reversed by the Supreme Court. The court which in addition to Black, consisted of Chief Justices Hall and Wakely, overturned Black's decision by a memorandum opinion consisting of "six lines." The journal of the high court records only that since the "statute providing for the punishment of the crime of manslaughter which was in force at the time of the commission of the offense charged was unconditionally repealed before the trial and judgement . . . the judgement of the District Court . . . is reversed and . . . Simpson Hargus . . . discharged from custody."⁵³ It is unclear whether the basis of the court's decision was that the indictment was defective because

it had been brought under the repealed statute, or whether it had rejected the argument that any criminal actions could be prosecuted under federal common law at all.

One year after the Hargus criminal case, the Supreme Court reviewed a civil wrongful death action arising out of the same facts and again reversed the District Court decision against Hargus, this time clearly on the basis that the statutory cause of action had been repealed by the Legislature. Both of these Hargus decisions demonstrate that the Supreme Court was not always reluctant to reverse District Court opinions. One of the criticisms of the organization of territorial courts was that the same judges had both original and appellate jurisdiction in the same cases.⁵⁴ The district judge who decided a case at trial also participated in its appellate review as a Supreme Court judge. Given this organization, it was argued that a judge would be reluctant to vote to reverse his own lower court decision. It is difficult to determine the validity of this criticism in the Nebraska experience, since there is no indication in the journal or even in the published opinions, with one exception, which justices voted to affirm and which voted to reverse the District Court. Even if it were known how the three judges voted, it still would be difficult to determine whether they voted to reverse their own lower court decisions, since judges often decided cases in districts other than those to which they were assigned. In any case, it is arguable that giving the judges both District Court and Supreme Court assignments was not an inherent weakness in the system, since the two justices who had not previously heard a dispute could out-vote the justice who had decided the case at trial. In fact, of Woolworth's 21 case selection 11 affirmed the District Court, while 10 reversed.

From the earliest years of the territory, the types of cases brought to the courts covered a wide range of subject matter. A cursory examination of the journals of the 2nd and 3rd Districts reveals cases involving criminal indictments for cutting timber on public lands, selling intoxicating liquors to Indians, keeping a gaming house, assault with intent to murder, larceny, resisting an officer, perjury, forcible entry and detainer, riot, keeping a dram shop, betting on race horses and elections, as well as civil actions to enforce promissory notes, attach property, satisfaction of mortgages, collection of debts, replevin of property, recovery for trespass, and to obtain

decrees of sale, foreclosures, divorces and injunctions.⁵⁵

All of the decisions Woolworth published were on the civil side, even though the criminal cases, as the Hargus case demonstrates, were among the most controversial and notorious. Six of the cases he printed related to property law, six concerned civil procedure; two pertained to creditor rights, two to commercial law, three were about remedies, and two involved corporations. One covered contract law (see table 3).

However, almost all of these cases, notwithstanding the particular legal questions involved, originated in a property dispute between two or more settlers. Three of the property cases involved the conflicting rights of land owners to property sold at execution sales—those of the former owners to redeem and those of the subsequent purchaser to retain the forfeited property. Two others involved jointly held property interests, while another examined the right to replevin on a house located on real property. Both corporation cases involved the right of corporate agents to alienate property and enter into loans for the entity.⁵⁶ At least four of the six civil procedure cases also grew out of land disputes. Thus, it is clear that the courts of the period were dealing extensively with the settlers' most important possession—land.

While most of the property disputes heard by the territorial courts involved land claims, some also reflected concern about some of the national controversies then prevalent in the country. Two of the most argued about institutions of the period were slavery and Mormonism. Even though Nebraska was not at the center of the conflict over slavery or the increasingly controversial practices of Mormonism, some of the fallout from the debate over these institutions was present in Nebraska courts. One such dispute in the territorial period was argued before Judge Miller in the 2nd Judicial District in November, 1860. The southern portion of the territory had always been dominated by Democratic politicians who were not sympathetic to abolitionist or Republican ideals. Nebraska was unique in that it developed such a two-party system during its territorial period. Most territories did not.⁵⁷

Some slavery existed in this southern portion of the territory. Even 2nd District Judge Edward Harden brought his own personal slave with him from Georgia. Several years after Harden had returned to his native South, a bill was introduced in the

TABLE 3—SUPREME COURT OPINIONS IN JAMES WOOLWORTH'S 1871 SELECTION

Case Name	Date	Judge	Appellant Attorney	Appellee Attorney	Type of Opinion	Decision	App. from District	County	Subject
1. <i>Moffat v. Griswold</i>	7/25/64	Dundy	*McCracken	Woolworth	Memo	Reversed	2	Otoe	Comm. Paper
2. <i>Rogers v. Jones</i>	12/17/58	Hall	Howard	*Woolworth	Memo	Affirmed	1	Douglas	Cred. Rights
3. <i>Bennett v. Hargus</i>	12/23/59	Wakely	*Mason	Kinney	Written	Reversed	2	Otoe	Remedies
4. <i>Eaton v. Bender</i>	6/19/65	Lockwood	Redick & Briggs	*Lake	Memo	Affirmed	1	Douglas	Cred. Rights
5. <i>Newcomb v. Boulware</i>	6/19/58	Wakely	_____	_____	Written	Reversed	2	Otoe	Civil Pro.
6. <i>Aumcok v. Jamson</i>	6/14/65	Dundy	*Redick & Briggs	Poppleton	Memo	Reversed	1	Douglas	Civil Pro.
7. <i>Burley v. Shinn</i>	11/22/62	Streeter	*Redick & Briggs	Sapp	Memo	Reversed	1	Douglas	Prop.
8. <i>Clark v. Hotailing</i>	6/19/65	Kellogg	*Redick & Briggs	Woolworth	Memo	Reversed	1	Douglas	Civil Prop.
9. <i>Mills v. Redick</i>	6/14/66	Streeter	*Sapp	Redick & Briggs	Memo	Reversed	1	Douglas	Prop.
10. <i>Zoller v. Ide</i>	11/27/61	Lockwood	Woolworth	*Lake	Memo	Affirmed	1	Douglas	Corp.
11. <i>Mills v. Paynter</i>	6/19/58	Wakely	Howard	*Woolworth	Written	Affirmed	1	Douglas	Civil Pro.
12. <i>Brown v. Homan</i>	6/17/65	Lockwood	Lake	*Woolworth	Memo	Affirmed	1	Douglas	Prop.
13. <i>Neligh v. Bradford</i>	6/19/61	Lockwood	Taylor	*Mason	Memo	Affirmed	2	Otoe	Contract
14. <i>Woods v. Shields</i>	6/16/59	Miller	*Woolworth	_____	Memo	Reversed	1	Douglas	Remedies
15. <i>Murray v. Mills</i>	7/25/64	Kellogg	Little	*Woolworth	Memo	Affirmed	1	Douglas	Civil Pro.
16. <i>Bennett v. Townsend</i>	8/24/63	Streeter	Mason	*Harding	Memo	Affirmed	2	Otoe	Civil Pro.
17. <i>Platte Valley Bank v. Harding</i>	12/16/59	Hall	Woolworth	*Kinney	Memo	Affirmed	2	Otoe	Comm. Paper
18. <i>Pomeroy v. Bridge</i>	6/21/59	Miller	*Poppleton	Woolworth	Memo	Reversed	1	Douglas	Prop.
19. <i>Bennett v. Fooks</i>	11/27/61	Lockwood	Taylor	*McCracken	Memo	Affirmed	2	Cass	Prop.
20. <i>Adams v. Boulware</i>	6/17/61	Miller	*Woolworth	Taylor	Memo	Reversed	2	Otoe	Prop.
21. <i>Cook v. Kuhn</i>	7/10/66	Kellogg	Redick & Briggs	*Lake	Memo	Affirmed	1	Douglas	Corp.

* Successful attorney.

territorial Legislature to "abolish and prohibit slavery in Nebraska." In retaliation another bill was introduced to "Prevent Free Negroes or Mulattoes from Settling or Residing in the Territory" at all.⁵⁸ The bill to prohibit slavery eventually passed but was vetoed by Governor Black, who many suspected of having pro-southern sympathies.⁵⁹ One year following these proposals Stephen F. Nuckolls, one of the original settlers of Nebraska City, brought an action in court "to recover damages from defendant for stealing and carrying away two female servants, or 'slaves' owing service to the plaintiff in this territory." The court held

that under the Constitution and laws of the United States, the owners of slaves or persons owing service in this territory, could maintain an action against parties enticing and carrying away slaves, or persons owing such service.⁶⁰

While some viewed the decision as consistent with the Organic Act and fugitive slave laws, others declared that "the decision is in accordance with Buchanan's doctrine, and, under it virtually Nebraska 'is as much a slave state as South Carolina or Georgia.'"⁶¹ As in other parts of the country, both the Legislature and the judiciary were unable to resolve this conflict in Nebraska.

Another interesting property dispute of the territorial period involved Brigham Young, the controversial leader of the Utah Mormons, whose practice of polygamy had been attacked by the Republican Party in 1856 as one of the twin relics of barbarism. The other twin, of course, was slavery. While enroute to Utah from Illinois, Young and his followers had resided in settlements on the Missouri River in Nebraska and Iowa during the winter of 1846-1847.⁶² The following spring when he left, he directed some families to remain behind to help fortify and outfit subsequent immigrants. For the next 20 years Mormon converts from the East and Europe passed through the territory on the way to their Mormon Mecca. At certain times during this period, there is evidence that some Nebraskans, as well as residents of other states, suspected that Mormons were not loyal to the United States and deplored their unusual religious practices.

Suspensions regarding Mormonism and the presence of Mormons in Nebraska intensified during the so-called "Mormon War" in the winter and spring of 1857-1858, when President

Buchanan sent troops to Utah to accompany the newly appointed governor who was to replace Brigham Young. Young refused to allow the Army to penetrate the canyons leading to the Salt Lake Valley and threatened to burn the settlement to the ground if they forced their way in. This induced the Army to winter in Wyoming. Some Nebraskans viewed these events with alarm. One writer for the *Omaha Times* predicted:

When our army in Utah shall proceed to enter the valley of Salt Lake, the Mormons, *en masse*, will rise in hostile array, for they are sworn to resist. At that moment let the good people west of us look well to their safety. We hesitate not to say that those one thousand Mormons, near Loup Fork, armed and equipped as they are, can and will sweep from existence *every Gentile village and soul* west of the Elkhorn. As to Omaha City, the nursling of a Government hostile to Mormon rule—the rival of Mormon towns, and the victim of sworn Mormon vengeance, how shall she fare in this strife? In the space of one night, the one hundred saints now here could lay in ashes every home in our city, whilst the armed bands in our vicinity should pillage, and revel in our blood.⁶³

Not everyone in Nebraska held such extreme views. In the same issue of the *Omaha Times* the editors noted that although they had published the warning about the Mormons “at the request of our friend, we would beg to differ with him in some of the views expressed in it.” In particular the paper discounted the apprehension concerning Mormons residing in Nebraska:

The numbers of that sect in this vicinity are too few and too completely under the subjection of the more numerous ‘Gentiles,’ to cause any uneasiness in regard to a rising among them—the slightest attempt at which would be the signal for their extermination or banishment.⁶⁴

A resident of Elkhorn echoed this view by noting in a subsequent issue of the *Times* that its “correspondent has overrated the danger to be feared from the Mormons” but also suggested that

a body of U. S. troops [should] be stationed at this point immediately, with directions to examine all [Mormon] trains proceeding west, and to detain such as might seem to be endeavoring to give “aid and comfort” to the Mormon rebels.⁶⁵

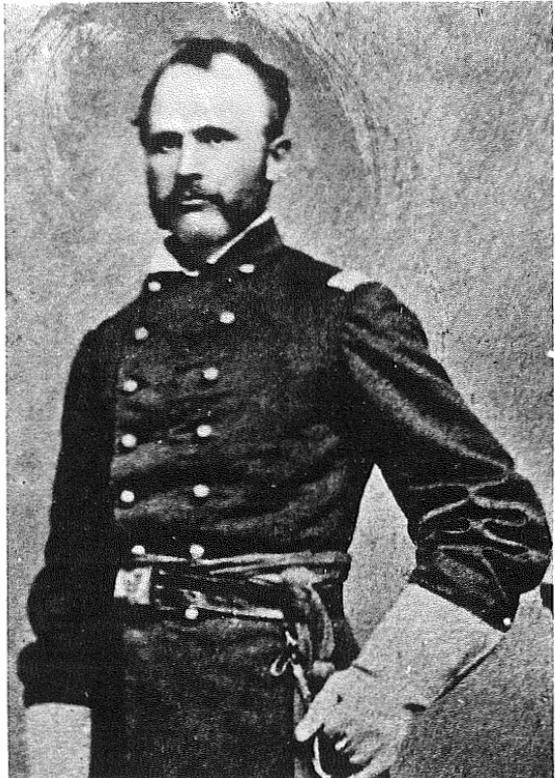
Another reader of the *Times* also doubted that Nebraska Mormons were dangerous and cautioned the paper that “in order that people may not be deterred from immigrating here, it is necessary to keep down all fear of future molestation from whatever cause.” He felt that “[t]here are too many Mormons settled permanently in Western Iowa and in Nebraska, who would, in event of any such consummation as imagined by

your correspondent, share the same fate of the gentiles.”⁶⁶

The *Nebraska Advertiser* was more suspicious of the Mormons. It accused them not only of blasphemies and treason but also of the following: “Many emigrants with their trains have been destroyed and many outrages committed, which have been time and again placed to the hostility of the Indians; when in most cases the work of destruction was instigated by the Mormons.” For these supposed crimes the paper asserted that

“[i]t would undoubtedly be far better to call a large volunteer force, let them enter Utah at the three principal points, and exterminate the whole abominable horde. Only by this means can this foul blot upon the escutcheon of our country be fully eradicated.”⁶⁷

A more moderate solution to the Mormon problem was advocated by the *Weekly Bugle*. It argued throughout the crisis that Utah should be admitted as a state, the Army withdrawn, and money appropriated to build a railroad to the Pacific. Ac-

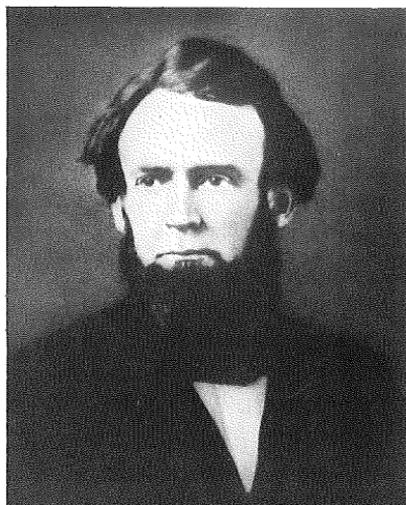


*Territorial Judge
Samuel W. Black*

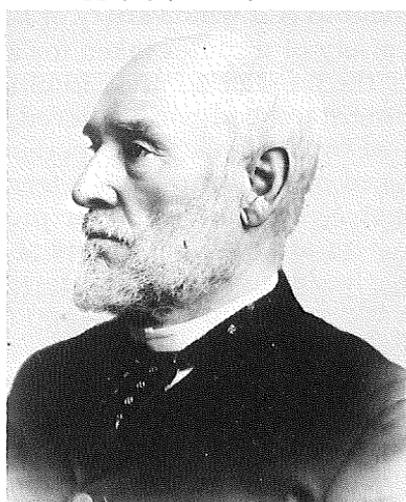
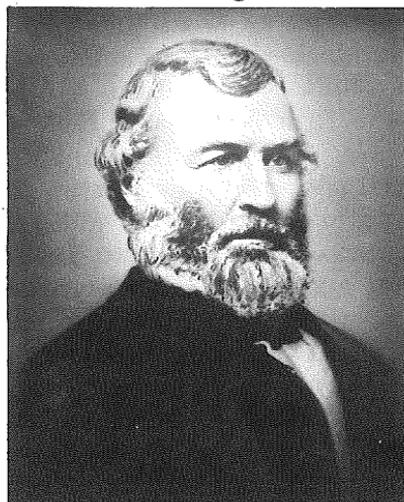
ording to the paper this would "afford the means of pouring into Utah an enlightened and industrious people, whose moral influence would do a great deal towards eradicating the errors of Mormonism," free the region from incompetent federal officials resulting in the maintenance of "the honor and dignity of the government, . . . a great expenditure of the public treasury saved, and the spilling of human blood and the loss of many valuable lives avoided."⁶⁸

As these excerpts demonstrate, there was some apprehension concerning the Mormons in Nebraska during the territorial period. Such suspicions were periodically fueled by disenchanting Mormon converts who left Utah and returned to the East, often with unflattering stories about the social, political and religious conditions of Utah. One such disillusioned Mormon was John A. Ahmanson, a Danish convert, who arrived in Utah in November, 1856. Following a bitter winter, both for its harsh weather and Ahmanson's crushed expectations, he fled to the East and eventually moved to Omaha where other former Mormons of Scandinavian descent were beginning to assemble.⁶⁹ Two years after leaving Utah, in 1859, he sued Brigham Young in the 1st Judicial District to attach church property located in Nebraska, claiming that some of his personal effects, which he had cached in Nebraska on his way to Utah, had not been returned to him, and further, that he had not been compensated for acting as captain for the handcart company he traveled with from May to November of 1856. Young argued in his responsive pleadings that he was not responsible for cache goods left by Ahmanson and that the Danish convert had never been employed by the church as a captain but had been chosen by immigrants for their own protection.⁷⁰

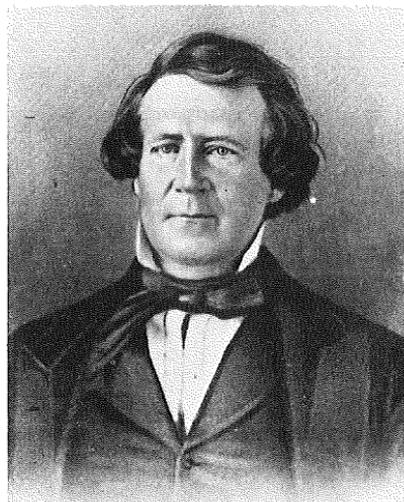
More than one year after Ahmanson filed his petition seeking relief from Young, a jury was chosen to hear the evidence but was discharged because it could not agree on a verdict. One year later on November 1, 1861, a new jury found in favor of Ahmanson and awarded him \$1,297.50. Given the national mood concerning Mormons, it may be that Young and his church did not receive a totally unbiased jury trial in Nebraska at this time and at one point in the trial disparaging comments were allowed to be made concerning church doctrine. In any event, the former governor and church leader ap-



Territorial Judges William Pitt Kellogg (left), Joseph Miller.



*Territorial Judges James Bradley (left), Elmer S. Dundy . . . (Below)
Territorial Judges Augustus Hall (left), Fenner Ferguson.*



pealed his case to the territorial Supreme Court challenging the trial judge's rulings, instructions to the jury, and the judgment. While papers are still in existence to record the filing of this appeal on August 21, 1863, the dispute was evidently settled out of court since there is no evidence in the Supreme Court journal that the court considered the case during the territorial period. Thus, Young and his church were apparently defeated in their battle against the disillusioned convert in a trial which incidentally took place at about the same time Congress was considering its first anti-polygamy bill.⁷¹

Conclusion—The Nebraska territorial courts sat in judgment over a wide variety of factual disputes. The number and variety of disputes taken for resolution to the courts increased as the population grew in numbers and sophistication. By the time statehood was achieved in 1867, the Nebraska judiciary had over 13 years of experience. Despite all of the problems faced by the courts in the territorial period, it is unquestioned that Nebraska was better prepared to administer its judicial system after these 13 years of federal stewardship than it was at the beginning of the territorial period. Even though the justices were political appointees, most were men of some ability and experience who attempted to decide cases with fairness and in accordance with legal standards brought with them from their home states. They were largely successful in organizing and expanding the various courts of the territory and in educating the settlers to bring their disputes to regularly held judicial terms and once there to observe judicial decorum.

Thus, the territorial judiciary was an important component in the organization and development of frontier Nebraska and helped make possible the conditions which promoted the statement of a Swedish Lutheran missionary, who upon arriving in Omaha in 1868, wrote: "The bandits which once frequented the area around Omaha have now retired westward, and more respectable people are coming to the city. Now is the time for Swedish Lutherans to come."⁷²

NOTES

1. Some historians have argued that the frontier had a unique impact on the development of the United States. The most famous proponent of this frontier hypothesis, Frederick Jackson Turner (1861-1922), said in a paper in 1893: "American history has been in a large degree the history of the colonization of the Great West. The existence of an area of free land, its continuous recession, and the advance of American settlement westward, explain American development. . . . The public domain has been a force of profound importance in the nationalization and development of the government." Frederick J. Turner, *The Frontier in American History* (New York: H. Holt & Company, 1920), 1, 3-4, 12; Frederick Merk, *History of the Western Movement* (New York: Alfred Knopf, 1978), 98-104 *passim*.

2. Merk, *Western Movement*, 102-104; Turner, *Frontier*, 168; Frederick J. Turner, "Western State-Making in the Revolutionary Era," *American Historical Review* (1895), 70, 72-73; Earl S. Pomeroy, "Toward a Reorientation of Western History: Continuity and Environment," *Mississippi Valley Historical Review* (1955), 383; see Francis N. Thorpe, editor, *The Federal and State Constitutions, Colonial and Other Organic Laws of the States, Territories, and Colonies*, 7 vols. (1909).

3. Merk, *Western Movement*, 106, 108; Orville Zabel, "To Reclaim the Wilderness, The Immigrants' Image of Territorial Nebraska," *Nebraska History*, 46 (1965), 315-316; Norman Graebner, "Nebraska's Missouri River Frontier, 1854-1860," *Nebraska History*, 42 (1961), 213, 216-219; James Olson, *History of Nebraska* (2nd ed., Lincoln: University of Nebraska Press, 1966), 83, 88; Ray Billington, "The West of Frederick Jackson Turner," *Nebraska History*, 41 (1960), 261, 275-279.

4. John D. Guice, *The Rocky Mountain Bench* (1972); W. English, "The Pioneer Lawyer and Jurist in Missouri," *University of Missouri Studies* (1947); Anton H. Chroust, *The Rise of the Legal Profession in America* (1965); Elizabeth Gaspar Brown, "Frontier Justice: Wayne County 1796-1836," *American Journal of Legislative History*, 10 (1972), 126; J. Potts, "Nebraska Territory, 1854-1867, A Study of Frontier Politics," PhD thesis, University of Nebraska, Lincoln (1973).

5. Dennis Thavenet, "The Territorial Governorship as Example," *Nebraska History*, 51 (1970), 387-388; Kansas-Nebraska Act (1854), paragraphs 2, 4, 9, 12, 17; Complete Session Laws of Nebraska, 1855-1865, Act passed by 3rd Session of Legislature, 1857.

6. Information in Table 2 is contained with some inaccuracies in *The Territorial Papers of the United States* (ed., Clarence Edwin Carter, 1934), 21-22, Carter assuming that William Pitt Kellogg and William Kellogg are the same person. Earl S. Pomeroy, *The Territories and the United States 1861-1890*, 123-4 (1947), 123-124. Pomeroy assumes the Kelloggs are the same; *Nebraska Blue Book*, 118 (1978) fails to list Sam Milligan and W. W. Ketchum as appointees.

7. Thavenet, "The Territorial Governorship," 391; J. Sterling Morton, *Illustrated History of Nebraska* (Lincoln: J. North & Company, 1905), 454, 517, 756.

8. Morton, *Illustrated History*, 348-349, 456-457, 517, 706; "Biography of Samuel Black," *Transactions & Reports of the Nebraska State Historical Society* (1885), 94-95; Letters, B. B. Chapman to Augustus Hall, April 10, 1857, Isaac Lewis Gibbs to Augustus Hall, April 21, 1857, Eli Shorter to Augustus Hall, May 10, 1857, Hall-Kinney Collection, Nebraska State Historical Society.

9. Alice Ferguson Forbes, "Fenner Ferguson, First Chief Justice of Nebraska," *Nebraska Legislative Bulletin* (1925), 308, 309; Nuernberger, "Letters from Pioneer Nebraska," *Nebraska History*, 27 (1946), 18, 19, 44; Morton, *Illustrated History*, 170, 171, 763, 765; Eleazer Wakely, "Reminiscences of the Third Judicial District, 1857-1861," *Proceedings and Collections Nebraska State Historical Society* (1894), 150, 151.

10. Wakely, "Reminiscences," 151.

11. Morton, *Illustrated History*, 57, 170, 154, 457; T. Tipton, *Forty Years of Nebraska: at Home and in Congress* (1902), 48, 82; Forbes, "Fenner Ferguson," 316; Addison Sheldon, *Nebraska: the Land and the People* (1931), 310; "Biography of Governor Samuel Black," *Transactions and Reports of the Nebraska State Historical Society* (1885), 94.

12. Thavenet, "Territorial Governorship," 391; *Nebraska City News* December 5, 1857; *Bellevue Gazette*, December 3, 1857; *Nebraska Republican* (Omaha), February 22, 1860; Wakely, "Reminiscences," (1894), 162; for dispute regarding several newspapers and their opinion of Samuel Black, see *Nebraska City News*, January 1, 1859.

13. *Territorial Supreme Court Journal* (June 11, 1861), 90-91; *Journal of the Third Judicial District* (November term, 1857, through May term, 1861).

14. *Territorial Supreme Court Journal* (June 11, 1861), 90-91.

15. *Territory v. Lockwood*, 70 U. S. 236 (3 Wall.) (1865); *Territorial Supreme Court Journal* (August 24, 1863), 144-147; Morton, *Illustrated History*, 457; See comment concerning the removal of territorial judges in *American Law Review* (1890), 308-311, and (1892), 470-471.

16. *Nebraska City News*, February 19, 1859.

17. "Notes of the Early History of the Nebraska Country," *Publications of the Nebraska State Historical Society* (1922, ed. Albert Watkins), 336, quoting *Missouri Republican* (St. Louis), August 16, 1859. For another indication of the disapproval Nebraskans had with federal appointees see Morton, *Illustrated History*, 170-172, quoting *Omaha Arrow*.

18. Morton, *Illustrated History*, 352; Edwin S. Towl, "Judge Elmer S. Dundy," *Proceedings and Collections of the Nebraska State Historical Society* (1902), 83.

19. *Nebraska Enquirer*, February 14, 1861; Morton, *Illustrated History*, 459-460.

20. "Notes of the Early History of the Nebraska Country," *Publications of the Nebraska State Historical Society* (1922), 335-336, quoting *Missouri Republican*, August 16, 1859.

21. *Complete Session Laws of Nebraska, 1855-65* (1886), 11-12, 78-79.

22. *Ibid.*, 287. New judicial districts created on January 26, 1856. The 1st Judicial District expanded to include Douglas, Dodge, Washington, Burt, and Dakota Counties, and the territory north and west. The 2nd Judicial District expanded to include Cass, Otoe, Lancaster, and Clay Counties, and the territories west thereof. The 3rd Judicial District expanded to include Richardson, Nemaha, Pawnee Counties, and the territory west.

Ibid., 370. Judicial districts expanded on February 13, 1857. The 1st Judicial District consisted of Douglas, Sarpy, Cass, Lancaster, Calhoun, and Dodge Counties and the territory west. The 2nd District consisted of Otoe, Nemaha, Richardson, Pawnee, Johnson, and Clay Counties. The 3rd Judicial District constituted Washington, Burt, and Dakota Counties.

Ibid., 568. Dixon County was added to the 3rd Judicial District on November 4, 1858.

Ibid., 809. Cass County was made a part of the 2nd Judicial District.

23. Guice, *Rocky Mountain Bench*, 14, *Complete Session Laws of*

Nebraska, 1855-65. (1886), 79, 370, 534, 809; Paul Jessen, "Historical Address," *Nebraska Law Bulletin* (1925), 317, 320-321; *Omaha Nebraskian*, June 23, 1860.

24. Guice, *Rocky Mountain Bench*, 13-14, Wakely, 153.

25. *Complete Session Laws of Nebraska, 1855-65* (1886), 370; Wakely, 154, 155-157; *Nebraska Advertiser* (Brownville), June 7, 1856; Jessen, "Historical Address," 322.

26. Wakely, "Reminiscences," 155, 156, 157.

27. *Ibid.*, 157.

28. Letter, S. F. Nuckolls to Old Settlers' Association, June 10, 1874, reprinted in *Transactions and Reports of the Nebraska State Historical Society* (1885), 32, 34.

29. Jessen, "Historical Address," 327; *People's Press*, January 31, 1860.

30. T. M. Marquett, "The Effect of Early Legislation Upon the Courts of Nebraska," *Proceedings and Collections of the Nebraska State Historical Society* (1894), 107.

31. *Ibid.*

32. *Territorial Supreme Court Journal*, June 18, 1860, 78-82, November 22, 1862, 130-136.

33. Wakely, "Reminiscences," 161; Jessen, "Historical Address," 333-334.

34. Wakely, "Reminiscences," 161; Jessen, "Historical Address," 339; J. W. Pearman, "The Early Annals of Nebraska City," *Proceedings and Collections of the Nebraska State Historical Society* (Lincoln, Nebraska: Jacob North and Co.), 140.

35. *Journal of the District Court First Judicial District* (Douglas Court). There are three volumes in the journal of cases decided by the district judges in the 1st District during the territorial period. In addition there are various docket books and execution books. All of these are deposited at the Nebraska State Historical Society. The records of the 3rd Judicial District are also found at the Nebraska State Historical Society. Four volumes consist of minute books and complete records. There is also a court calendar and execution book as well as a docket book. The 2nd Judicial District also has a variety of surviving court records including eight volumes of docket books.

36. A Journal of the Territorial Supreme Court (1858-1867).

37. *Ibid.*

38. These cases are located in the first volume of the State Supreme Court Reports. See 1 Nebraska (Woolworth) (1871), 415-473. The decisions are summarized in Table 3. The six justices whose decisions were summarized by Woolworth were Dundy, Hall, Lockwood, Kellogg, Streeter, and Miller. The journals indicate that Woolworth and Wakely argued cases together on various occasions.

39. 1 Neb. (Woolworth) (1859), 419, 421.

40. 1 Neb. (Woolworth) 428 (1858), 428, 440; *Woods v. Shields*, 1 Neb. (Woolworth) (1859), 453, *Bennett v. Townsend*, 1 Neb. (Woolworth) (1863), 460, and *Bennett v. Fooks and Moffit*, 1 Neb. (Woolworth) (1861), 465.

41. *Nebraska City News*, January 9, 1858.

42. Jessen, "Historical Address," 335. Bradford later became a territorial Supreme Court judge in Colorado. Guice, *Rocky Mountain Bench*, 69-70.

43. *Nebraska City News*, March 7, 1857.

44. Organic Act of Nebraska Territory, paragraph 9; *Complete Session Laws of Nebraska, 1855-65* (1886) (Act passed March 16, 1855).

45. Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (1977), 9-16; See also the arguments used by Judge Black in his opinion on Hargus printed in the *Nebraska City News*, January 9, 1858.

46. *Nebraska City News*, January 9, 1858, February 27, 1858.
47. *Nebraska City News*, February 6, July 17, 1858; *Missouri Republican* (St. Louis), September 7, 1858.
48. J. Q. Goss, "Bellevue, Its Past and Present," *Proceedings and Collections of the Nebraska State Historical Society* (Lincoln, Nebraska: State Journal Printers, 1898), 44-45.
49. *Cuming City* (Nebraska) *Star*, June 19, 1859.
50. Marquett, "The Effect of Early Legislation upon the Courts of Nebraska," *Proceedings and Collections of the Nebraska State Historical Society* (1894), 103, 105; *Nebraska City News*, May 29, 1858.
51. Jessen, "Historical Address," 333-334; 340-341; *Nebraska Advertiser* (Brownville), February 10, 1859; *Omaha Nebraskian*, October 13, 1860.
52. *Nebraska Advertiser* (Brownville), December 15, 1859.
53. Jessen, "Historical Address," 336. A Journal of the Territorial Supreme Court (Dec. 21, 1858), 45-46.
54. *Bennett v. Hargus*, Nebraska Reports (Woolworth) (1871), 419; *Nebraska City News*, December 31, 1859; Guice, *Rocky Mountain Bench*, 11-13.
55. Journal of the Third Judicial District (November term, 1857, through May term, 1861); Docket Books of the Second Judicial District (1855-1864), Volumes 1-8.
56. *Pomeroy v. Bridge*, 1 Neb. (Woolworth) (1861), 462; *Bennett v. Fooks*, 1 Neb. (Woolworth) (1861), 465; *Adams v. Boulware*, 1 Neb. (Woolworth) (1861), 470; *Burley v. Shinn*, 1 Neb. (Woolworth) (1862), 433; *Brown v. Homan*, 1 Neb. (Woolworth) (1865), 448; *Mills v. Redich*, 1 Neb. (Woolworth) (1866), 437; *Zoller v. Ide*, 1 Neb. (Woolworth) (1861), 439; *Cook v. Kuhn*, 1 Neb. (Woolworth) (1866), 472.
57. See Kenneth N. Owens, "Patterns and Structure in Western Territorial Politics," 1 *Western History Quarterly* (1970), 373, 384-385.
58. Goss, "Bellevue," 45; Marquett, "Early Legislation," 111.
59. *People's Press*, January 5, 1860; *Nebraska Enquirer*, October 4, 1860.
60. *Nebraska Advertiser*, November 15, 1860.
61. *People's Press*, November 1, 1860.
62. James B. Allen & Glen M. Leonard, *The Story of the Latter-Day Saints* (1976), 297; Leonard J. Arrington & Davis Bitton, *The Mormon Experience* (1979), 96-100.
63. *Omaha Times*, April 29, 1859.
64. *Ibid.*
65. *Ibid.*, May 13, 1858.
66. *Ibid.*, May 6, 1858.
67. *Nebraska Advertiser*, January 7, 21, 1858.
68. *Weekly Bugle*, January 20, April 14, April 21, 1858.
69. *Omaha Times*, May 6, 1858; *Omaha Nebraskian*, July 8, 1857; William Mulder, *Homeward to Zion: The Mormon Migration from Scandinavia* (1957), 184.
70. Papers Filed with the Territorial Supreme Court, August 21, 1863.
71. Allen & Leonard, *Latter-Day Saints*, 292.
72. *The Hemlandet*, December 22, 1868, quoted in J. Dowie, *Prairie Grass Dividing* 20 (1959), cited in Ray Billington, *The West of Frederick Jackson Turner*, *Nebraska History*, 41, (1960), 261, 272.