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History in its most common connotation is epic—indeed, tragi-epic. On its pages are spectacular accounts of movement and change: the drama of struggle, of the rise and fall of peoples and nations, of the birth, growth and decay of civilizations and governments, and of the emergence, dominance and decline of military and civilian leaders.

"The course of life is like the sea;
Men come and go; tides rise and fall;
And that is all of history."[1]

In this sense history excites the imagination. To the reader the words of each page become men revivified and deeds re-enacted, and verily, he is living imaginatively in a past.

Understandably, a history of a supreme court cannot be history in such a sense. Striving to dispense justice in accordance with principles, norms and standards which have been tried, tested and found good in the crucible of the Judeo-Christian ethic of the people, its history is generally one of stability and somewhat colorless constancy. And such in great measure is the history of the first one hundred years of the highest appellate court of this state.

Mr. Justice Wilbur F. Stone, in an address entitled "History of the Appellate Courts of Colorado" given to the Colorado and Denver Bar Associations on the occasion of the reorganization of the Supreme Court on April 5, 1905, had excellent authority,[2] when he

1 J. Miller, *The Sea of Fire.*
2 "History is the essence of innumerable biographies." Carlyle, Essays: "On History" (1839).

said, "The history of courts is more or less a history of their judges, for courts are very much what the judges make them."[3] The obvious truth of this observation makes departure from a history biographic in nature seem rather foolhardy.

But sheer numbers make such a history of doubtful value and probably of dubious interest to the reader. Not all men are cut in the heroic mold which makes interesting material for writer and reader, and among these may be counted, in great part, the justices of the Supreme Court of this state. Most of their biographies would not make the printed page glow with anything other than intellectual achievement. To say this is not derogation; in most instances they were dedicated men rendering a great judicial service.

During the court's near-centuried existence sixty-nine judges have occupied its bench. In addition, seven men have performed devoted assistance to the court as Supreme Court Commissioners.[4] A number of district judges aided the Supreme Court in the disposition of causes pending before it by acting as referees. It will thus be seen that many persons have participated in the rendition of decisions handed down by the Supreme Court.

By the time this article is printed there will have been greatly in excess of 19,000 cases filed in the Supreme Court, representing an average of more than 190 filings per year since the court's creation. In the determination of these many cases every facet of the law, from abandonment to zoning, has received the attention of the court.

In the beginning necessity begot improvisation. A young and raw frontier met the exigencies of the situation in typical American fashion. Without the facilities of an established judicial system, the settlers formed their own systems of courts. The lure of precious metals brought people to the territory, and what would be more natural than to create by consent miners' courts? "As far as can be ascertained, the first of these Miners' Courts was organized in 1859, soon after the discovery of gold in the upper Clear Creek region."[5]

Both the trial and the review thereof were simple, direct and quick. In longhand, recorded in a notebook, some of the pages of which are fading to the point of being unreadable (and they will soon be of no value unless immediate action is taken to preserve

3 Address by Mr. Justice Wilbur F. Stone, Inaugural Ceremonies, April 5, 1905, reported in 34 Colo. xxiii, xxiv (1905).

4 Those who served as Supreme Court Commissioners are listed at the beginning of each volume of the Colorado Reports from 10 to 16, inclusive.

5 *Bench & Bar of Colorado* 17 (Lewis & Stackelbeck ed. 1917).

this evidence of early Western Americana), are to be found enactments of the "Miners of Buckskin Joe's Diggings." Among them is the following:

> "Art 10th All disputes arising on Claims Matters shal be left to the President or to Refferees chosen by the Parties. Then either Party feeling aggrieved May bring the suit before the Miners of this District whos decision shal be the final and last Decision."

To maintain law and order so that rights might be assured in mining claims the settlers organized mining districts and set up machinery for governing their essential civic affairs. There was great similarity in the laws enacted for the administration of these local governments. They generally provided for a president, judge, recorder, treasurer and sheriff.[6]

"Whenever petitioned in writing by twelve miners," and upon the performance of certain conditions, a miners' meeting could be called.[7] It is to be noted that neither butcher, nor baker, nor candlestick maker, and certainly not the grocer, the saloon-keeper or the lawyer, could petition for such a meeting. Indeed, it is told (though the writer has been unable to verify the accuracy of this statement) that in at least one mining district lawyers were anathema in the settled areas after sundown, and if caught in violation of the law after that hour, suffered twenty lashes for their imprudence.

In the Lincoln District the trial could be to the judge of the miners' court or to a jury of three, and in the event of an appeal the contest was submitted to "a jury of twelve men, and from the decision of said jury there shall be no appeal."[8] Likewise in the Union District, trial could be had before the judge of the miners' court or to a jury, and the party suffering an adverse decision could take the case to the district's court of appeals.[9] "The court of appeals shall consist of the President of the district and twelve jurors. If requested, the said court shall sit at such times and places as the President shall direct, but every case of appeal shall be set for trial within ten days from the time the appeal shall be taken, and the decision of said court shall be final."[10] In other mining districts the right to appeal from the decision of the miners' court to a miners' meeting, composed of all the men in the district, was extended, and the determination of the miners' meeting in all cases was final.[11]

Originally the greater part of what is today Colorado was incorporated in the Territory of Kansas. In 1855 the legislature of Kansas Territory provided for "the county of Arapahoe in the Territory of Kansas," defined its boundaries, which included a vast part of present Colorado, and appointed Allen T. Tibbitts "Judge of the Probate Court of Arapahoe County, said court to be held at such place in said county as the said judge shall deem best for the interest of the citizens of said county, provided always that the places designated as the county seat shall be one place of holding said

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6 Laws and Regulations of Union District art. 1, § 1 (1864) (enacted Oct. 21, 1861); 2 Hafen, *Colorado and Its People* 370 (1948).

7 *Ibid.*

8 An Act Relating to Trial And Its Incidents, Laws of Lincoln District, (1860).

9 Laws and Regulations of Union District art. iv (1864) (enacted Oct. 21, 1861).

10 *Ibid.*

11 *Bench & Bar of Colorado* 18 (Lewis & Stackelbeck ed. 1917); 2 Hafen, *Colorado and Its People* 370 (1948).

Court," and so forth. Judge Tibbitts was also vested with executive powers by the act. This act was approved by Dan Woodson, the acting Governor of Kansas Territory, on August 25, 1855. The appointment of Tibbitts was abortive, for he never set foot in Arapahoe County.

This mining frontier was in ferment. There were settlers who openly espoused secession from Kansas Territory and the establishment of an independent state or territory. As a result, on October 24, 1859 the "Territory of Jefferson" became a *fait accompli.*[12] During November and December 1859 and January 1860 the bicameral legislature of Jefferson Territory met and enacted a code of laws.[13] A. J. Allison, as Chief Justice, and L. W. Borton and S. J. Johnson, as Associate Justices, were designated in an election the provisional judges of the Supreme Court of the Territory.[14]

It is obvious that the tranquillity of order would have difficulty taking root in such soil. Not only was there conflict between Kansas Territory and its creature County of Arapahoe, and the newly created Jefferson Territory, but in the unhealthy climate of conflict there sprung up other entities to vie for recognition, and particularly, Idaho Territory.[15] If it had not been for the local courts, all would have been chaos.

Congress in February 1861 created the Territory of Colorado, and in delegating authority to it brought order to the region. Under the organic act creating the territory, the territorial legislature was directed to divide the area into three judicial districts, each to be presided over by a judge in residence. Together these judges constituted the Supreme Court and reviewed the work of one another.[16]

To this Supreme Court, President Lincoln appointed Benjamin F. Hall to be Chief Justice, and S. Newton Pettis and Charles Lee Armour to be Associate Justices.[17] Pettis never served. His resignation was followed by the appointment of Allan A. Bradford. Their decisions appear in the first Colorado Report which contains a preface by Judge Moses Hallett in which he sententiously observed: "All dissenting opinions will be found in their connection, and when the bench was not full the fact is noted."

The first case of which there appears to be any record is Case

12 1 Hafen, *Colorado and Its People* 208 (1948).
13 Provisional Laws and Joint Resolutions of The General Assembly of Jefferson County (1860).
14 *Ibid.* (See list of provisional officers on second unnumbered page).
15 1 Hafen, *Colorado and Its People* 219 *et seq.* (1948).
16 Colo. Territorial Laws 1st Sess. 1861, § 9.
17 *Ibid.* (See list of federal officers of the territory).

No. 6, *Gardner v. Dunn*,[18] in which the judgment was reversed in the January 1864 term of court. An action in forcible entry and detainer had been filed before a justice of the peace in Park County. Unsuccessful before the justice of the peace, the plaintiff appealed to the district court, where the defendant sought dismissal for want of a sufficient bond. Leave to file a sufficient bond was asked and denied, and thereupon the appeal was dismissed. Referring to a statute permitting the timely filing of a good and sufficient bond to replace an inadequate one, the Supreme Court reversed with directions to allow the plaintiff to file a bond in compliance with law.

Worthy of note is the first criminal case decided by the Supreme Court. In the annals of criminal law it ranks high as a *cause celebre*. It is the case of *Franklin v. United States*.[19] Franklin was convicted of murder in the district court of the first judicial district, sitting at Central City, Gilpin County, and was sentenced to be executed. He prosecuted his writ of error, alleging that the trial court "erred in entertaining jurisdiction of the offense charged in the indictment, the first judicial district of Colorado Territory not being in the sole and exclusive jurisdiction of the United States."[20]

Involved was the construction to be placed upon a federal act providing that:

> "If any person or persons shall, within any fort, arsenal, dockyard, magazine or any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of willful murder, such person or persons, on being convicted thereof, shall suffer death."[21]

In a well reasoned opinion, written by Chief Justice Hallett, the court sustained Franklin's contention, concluding that: "Because there is no averment in this indictment as to the jurisdiction of the United States in the place where the crime was committed, the judgment of the district court is reversed."[22]

Dehors the record, it appears that "Franklin never was tried again. Released upon bail, he reported at the Gilpin County Courthouse at every term of court for many years, fully expecting to be placed on trial again. His periodical visits to the courthouse gave rise to a standing joke among attorneys and court officials. Whenever Franklin made his appearance, they would say, 'Here comes Billy Franklin to be hanged again.' The records do not disclose why Franklin never was placed on trial again. He was a very popular man and public feeling was greatly in his favor."[23]

Other important cases came before the court, but they need not be noted here. Before passing to the next step in the development and history of the Supreme Court, it should be observed that the Territorial Supreme Court pioneered in the law of mining and prior appropriation of water, and laid down principles from which there has been no deviation to this day.

To this point, this is a review of the appellate system of this state in its swaddling clothes. On March 3, 1875, Congress adopted an enabling act empowering the people of Colorado to form a con-

18 1 Colo. 1 (1864).
19 1 Colo. 35 (1867).
20 *Ibid.*
21 Act of April 30, 1790, c. 9, § 3, (later amended by Rev. Stat. § 5339 (1875)).
22 1 Colo. 35, 43 (1867).
23 *Bench & Bar of Colorado* 23 (Lewis & Stockelbeck ed. 1917).

stitution and state government, and providing for admission of the state to the Union. The act provided that "until said state officers are elected and qualified under the provisions of the constitution, the territorial officers shall continue to discharge the duties of their respective offices."[24]

Pursuant to the enabling act duly designated members met in convention on December 20, 1875 and thereafter, to draft a constitution for Colorado.[25] After much laboring the Convention drafted the Constitution and it was adopted by the Convention on March 14, 1876, and ratified by the people at an election held July 1, 1876.

Article III of this Constitution divided the powers of the state government into "three distinct departments — the Legislative, Executive and Judicial," and, by Article VI, established a judicial department. "The Supreme Court shall consist of three judges, a majority of whom shall be necessary to form a quorum or pronounce a decision." It made provision for staggered terms for the first three judges elected to the office, and provided that thereafter judges should be elected for terms of nine years.

In accordance with the Constitution of 1876 an election was held and the people chose for the first justices of the Supreme Court of the State of Colorado Henry C. Thatcher, Samuel H. Elbert and Ebenezer T. Wells. Thatcher became the first Chief Justice of the State Supreme Court.[26] The newly elected justices assumed office at the April Term, 1877.[27] Provision was made for the transfer and continuation of cases pending before the Territorial Supreme Court to the State Supreme Court.

Spanning the century we find that in this centennial year the Chief Justice is Francis J. Knauss, and O. Otto Moore, Leonard v.B. Sutton, Frank H. Hall, Edward C. Day, William E. Doyle and the author are Associate Justices of the State Supreme Court.

There is nothing novel about the present attempt to cope with a heavily burdened docket. A plethora of cases filed in the Supreme Court seems a recurrent problem. And various devices have been tried in an effort to keep the Supreme Court abreast of its work.

It was only a few years after the establishment of the Supreme Court of this state that the increase in cases filed created a mounting accumulation of unfinished work. To meet the emergency the legislature created a Supreme Court Commission, to consist of three members to be appointed by the governor "by and with the advice and consent of the Senate."[28] Under the law it was necessary to submit the determinations of the Commission to the Supreme Court for approval.

After the Supreme Court Commission functioned for a short time, it became obvious that it could not improve the situation. An opinion of the Commission had to be reviewed by the Court, and if the Court disagreed with the Commission, the Court had to

24 Colo. Enabling Act, § 6 (1875), 1 Colo. Rev. Stat. 238 (1953).
25 *Proceedings of the Constitutional Convention*, published by authority of Timothy O'Connor, Secretary of State (1907).
26 *Bench & Bar of Colorado* 25 (Lewis & Stockelbeck ed. 1918).
27 Their first reported opinion appears in 3 Colo. 155 (1877).
28 Colo. Sess. Laws, 1887, at 428.

write an opinion itself. "This involved j st about as much time and labor on the part of the court as if the commission had not existed."[29]

The Supreme Court Commission was short-lived; on April 6, 1891 it was abolished by the legislature and the Court of Appeals was established.[30] The Court of Appeals possessed "limited appellate jurisdiction of cases tried in the *nisi prius* courts."[31] That it decided many cases and was an industrious court becomes evident when one surveys the twenty volumes of its reports, covering a period beginning with the year 1891 and ending with the year 1905.

During its existence the authority of the Court of Appeals was tested in the case of *People v. Richmond.*[32] There is a familiar ring to some of the language contained in Chief Justice Helm's erudite opinion. Much of it could be applied with equal propriety to the congested docket of the Supreme Court of today. One wonders if the following quotation does not express thoughts which will have a constant timeliness:

> "Section 6 of the Bill of Rights, already mentioned, not only guaranties to the citizen a remedy for every legal injury suffered, but also provides that such remedy shall be enjoyed *without delay.* It is an open secret that the reviewing branch of our judicial machinery has for years been unable to give this provision full force and effect. Upon the organization of this tribunal, it received a bequest of more

[29] Address by Mr. Justice Wilbur F. Stone, Inaugural Ceremonies, April 5, 1905, reported in 34 Colo. xxiii, xxviii (1905).
[30] Colo. Sess. Laws, 1891, at 118.
[31] Address by Mr. Justice Wilbur F. Stone, Inaugural Ceremonies, April 5, 1905, reported in 34 Colo. xxiii, xxviii (1905).
[32] 16 Colo. 274, 26 Pac. 929 (1891).

> than one hundred causes from the territorial court of last resort. The state's diversity of industries and its marvelous growth in population and wealth have caused a vast and unanticipated increase in the volume of judicial business; as one of the natural results, nearly three thousand cases have reached this court for review. And when the novel and perplexing character of a large part of this litigation is considered, it is certainly not a matter of surprise that the court, despite diligent and earnest endeavor, has failed to keep pace with the rapid accumulations upon its docket. The annoyance and delay incident to this condition of affairs have amounted in many instances to a denial of justice. The gravity of the situation appealed strongly for some sort of legislative relief, if such relief were possible."[33]

Again, in 1911, the legislature moved to relieve the pressure of a mounting mass of cases by re-establishing the Court of Appeals "for a period of four years."[34] This time the legislature created a court consisting of five judges. And again the Court of Appeals, revivified, acted with industry and despatch. Volumes 21 to 27 of the reports of the Court of Appeals attest the fact that this court was a hard-working judicial body.

The Supreme Court tried to meet the problem of the "crowded docket" by adopting a rule on June 9, 1947, by the terms of which it could call upon "any district judge of the state and any former judge of this court, covered by section 33, chapter 46, '35 C.S.A., as amended, able and willing to undertake the task," to assign to such judge "as a referee to examine and report a suggested opinion in any case at issue."[35] District judges graciously responded notwithstanding that they, too, were busy with their own dockets.

This recurring problem of the congested docket is now the subject of a study,[36] and it is sincerely hoped that a remedy will be found. The legislature has established a Judicial Council which is empowered to review the whole judicial system of this state, and to made recommendations for improving the administration of justice. It is believed that in due time constitutional and statutory changes will be suggested which will result in a comprehensive program for the removal of causes hindering the judicial process, including measures for aiding the Supreme Court in its efforts to keep abreast of work coming before it.

Much of the history of the Supreme Court is comprehended in the written word—its decisions on matters of moment to litigants or to the public. This history would be impossible to summarize and present in narrative form. Approximately two and one-half volumes of the Colorado Reports bring us to the threshold of work undertaken by the State Supreme Court. The remaining decisions, approximating 136 volumes, represent the work of that court.

It is respectfully submitted that the people of this state may with propriety say to the Supreme Court in regard to its labors during its near-centuried existence:

"Well done, thou good and faithful servant."

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33 16 Colo. at 287.
34 Colo. Sess. Laws, 1911, c. 107, at 266.
35 116 Colo. 610 (1947).
36 Colo. Sess. Laws, 2d Reg. Sess. 1958, c. 33, at 204.