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JUDGE HENRY CLAY CALDWELL

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Henry Clay Caldwell was raised on the western frontier in largely Indian territory, where he worked on his father's farm and was principally a self-educated young man. It is perhaps his early years that led him to develop a homespun populist philosophy and extreme sense of judicial fairness. Caldwell's career in public service began as a prosecuting attorney, which was followed by service in the Iowa House of Representatives and the Union Army. Caldwell came to Arkansas while serving in the military and was appointed by President Abraham Lincoln to the United States District Court for the Eastern District of Arkansas.

Although Caldwell came to Arkansas as an aggressor, as the Colonel who led Union troops that took Little Rock during the Civil War, Caldwell became known as one of Arkansas's most admired and cherished friends.[1] Judge Caldwell served on the District Court for the Eastern District of Arkansas until he became the first Chief Judge of the United States Court of Appeals for the Eighth Circuit.

Judge Caldwell was known to be a generous, kind, and virtuous man who had a strong understanding of the law. He was as active in civic affairs as he was in his courtroom. Judge Caldwell, who despised injustice and oppression, had a reputation for impartiality and saw the law as an instrument of substantive justice. Under his view of the law, no authority was necessary to justify doing what is right. Although Judge Caldwell usually sat without a jury upon the stipulation of parties who respected his pursuit of justice, he was a preserver of jury trials. He believed that the right of trial by jury was absolutely essential to preserve the rights and liberties of the people. Judge Caldwell's reputation as a jurist appears to be rooted in his notions that personal rights should prevail over property rights, and the common laborer constitutes the foundation of society. This article discusses Judge Caldwell's life and judicial career.

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1. As George B. Rose stated of Caldwell, "It is safe to say that no man ever did more for Arkansas than Judge Caldwell; indeed, I have heard my father say that no one had ever done so much." George B. Rose, *In Memoriam–Henry Clay Caldwell*, 117 Ark. 645 app. at 647 (1915).

I. EARLY YEARS AND EMERGENT CAREER IN PUBLIC SERVICE

Henry Clay Caldwell was born on September 4, 1832, to Van and Susan Moffet Caldwell. His father, Van Caldwell, an ardent Whig, named his son after the famous politician whom Van admired greatly.[2] Henry liked to be called "Clay."[3] Young Henry spent the first four years of his life on his father's farm in the Ohio River Valley in what was then Marshall County, Virginia, and is now Ohio County, West Virginia. Van and Susan Caldwell soon found the Ohio River Valley too civilized and too expensive.[4]

In 1836, they moved their family west to the Black Hawk Purchase in the territory of Wisconsin. Chief Black Hawk settled about half of a mile behind the Caldwells' cabin, and Van and Henry Caldwell visited the Chief on at least one occasion.[5] The Caldwells initially settled along the Des Moines River in unsettled land still occupied by the Sac and Fox Indians, land that would later be called the Territory of Iowa. Van Caldwell obtained permission from the government and Indians to establish a ferry across the Des Moines River to carry passengers to and from the agency mill nearby on Salt Creek. Traffic to the mill failed to materialize, so Van moved to what would become Davis County and began to farm. Young Henry worked on his father's farm and essentially educated himself by reading whatever books he could find. As a young boy, he had attended the school in the Indian agency station for a few weeks during the time his father ran the ferry, but this was the only formal primary education he had. Caldwell went to Keosauqua, in Van Buren County, in late 1847 for some secondary schooling.[6]

A little more than a year later, Henry Clay Caldwell began an apprenticeship with the law firm in Keosauqua where he had been

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2. *See* FAY HEMPSTEAD, HISTORICAL REVIEW OF ARKANSAS 314 (1911).

3. *See* Larry W. Roeder, Jr., *Henry Clay Caldwell: The Early Years*, 6 HIST. SOC'Y NEWS 1, 1 (1997).

4. Larry W. Roeder, the great-great-grand nephew of Henry Clay Caldwell, states that economic hardship as well as a feud between Van Caldwell and the Tomlinson family of Moundsville over Van's inability to make payments on an inn caused the Caldwells to leave Virginia. *See id.* The feud turned into a legal suit that continued until just before Van Caldwell's death in 1856. *See id.* at 3. Roeder postulates that this feud with the Tomlinson family was probably what "influenced Clay to use the bench to fight unregulated loans and a predatory system in Arkansas he called the 'Anaconda Mortgage.'" *Id.* at 1.

5. *See id.* at 2.

6. *See* CAPTAIN ADDISON A. STUART, IOWA COLONELS AND REGIMENTS 591-92 (Des Moines, Mills & Co. 1865).

working as a chore boy to support himself through school. The firm was Wright and Knapp, and its founder, George G. Wright, would later become a United States senator and Iowa Supreme Court judge. The other founder, J.C. Knapp, who had been influential in getting Henry to come to town for school, was an Iowa district court judge for Van Buren County. Henry joined the bar in 1851 at the relatively young age of nineteen.[7] Three years later, he married Hattie Benton, George Wright's niece and Judge Knapp's sister-in-law.[8]

Henry Caldwell began his long career in public service when he ran for the office of prosecutor for Van Buren County in 1856 on the Republican ticket. He was the only victorious candidate on the new party's ticket in all of Van Buren County.[9] He served as prosecutor for two years and then ran for the Iowa House of Representatives. He again ran as a Republican and again won. During his first term in the House he was appointed Chairman of the House Judiciary Commission. By 1860, he was ready for national politics. He made a trip to Chicago as a delegate to the Republican Convention being held in the "Wigwam" where he cast his vote for Lincoln.[10]

When the Civil War broke out, young Henry resigned from the Iowa Legislature to preserve the Union. He received a commission as a major in the Third Iowa Calvary, which he had helped set up and recruit.[11] Major Caldwell was placed in charge of the Second Battalion (containing four companies). The Second Battalion was split from the rest of the regiment and sent south to Jefferson, Missouri. From there Caldwell carried out patrols and scouting parties. The Second Battalion met much resistance. It suffered more than thirty percent casualties in its first year of operation, but inflicted proportionally greater casualties upon the Confederate forces.[12] The Second Battalion

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7. Many sources differ on the year Caldwell was admitted to the bar: 1851 or 1852. I have chosen 1851 because Judge Caldwell seems to have used that date. *See City Honors Man Who Captured It During Civil War*, ARK. DEMOCRAT, Mar. 19, 1914, at 1, *microformed on* clipping 1.147 (Ark. Hist. Comm'n) [hereinafter *Clipping 1.147*]. Moreover, the historians in Iowa, who would have access to the bar record, use that date. *See Journal of the House of the Thirty-Sixth General Assembly of the State of Iowa* 2147, *reprinted in* ANNALS OF IOWA 154 (3d Series, July 1915) [hereinafter *Journal*]; and EDWARD H. STILES, RECOLLECTIONS AND SKETCHES OF NOTABLE LAWYERS AND PUBLIC MEN OF EARLY IOWA 235 (1916).

8. *See* STUART, *supra* note 6, at 592.

9. *See id.* at 593.

10. *See Notes: Hon. Henry Clay Caldwell*, 30 AM. L. REV. 282, 284 (1896).

11. *See Journal*, *supra* note 7, at 2147.

12. *See* BRIG. GEN. GUY E. LOGAN, IOWA GENERAL ASSEMBLY, 4 ROSTER AND RECORD OF IOWA SOLDIERS IN THE WAR OF THE REBELLION, 1861-1866, at 419 (1910).

stayed in Southern Missouri conducting patrols, although it did fight in the battles of Pea Ridge in September of 1862 and Prairie Grove in 1863. Caldwell was promoted to Lieutenant Colonel, on September 1862, to replace an officer who was severely wounded at Pea Ridge. In late 1862, his command was augmented by two more companies to assist him in patrolling the frontier between the Iron Mountains of Missouri and the Boston Mountains of Arkansas. In 1863, the Second Battalion moved south. Caldwell's troops joined Brigadier General Steel along the White River in Arkansas and moved in towards Little Rock to take the Arkansas capitol.

On the morning of September 10, Caldwell led the advance cavalry column that actually took Little Rock. His troopers crossed the Arkansas River east of the city and, after brief skirmishes, rode into the essentially evacuated city. Shortly thereafter, the infantry marched effortlessly through the abandoned Confederate lines. Mayor Charles B. Bertram formally surrendered the keys of the city to Colonel Caldwell. It seems the keys were safe in his hands. Caldwell organized a system of patrol for the city, which sixty years later an Arkansas paper would praise as never being duplicated:

> During the time that the city was in the hands of his troops[,] Colonel Caldwell day and night rode over the patrolled sections and saw that everything was in perfect order, and in that time there was not a single display of rowdyism or destruction on the part of his men or the citizens of the town.[13]

Caldwell's commanders later recommended that he be promoted to the rank of Brigadier General, but Caldwell seems to have set his mind on civilian life. By early 1864, much of Arkansas was under control of the United States Army and civilian control was soon to follow. Colonel Caldwell knew that the seat for the United States District Court for the Eastern District of Arkansas was vacant, so he applied for it. He received the endorsement of Supreme Court Justice Samuel F. Miller, who had practiced law in Iowa in the 1850s, and the Iowa Congressional delegation.

The Third Cavalry meanwhile returned to Iowa for furlough after three years of duty. The regiment then packed up and headed for Memphis, Tennessee, where it remained throughout 1864. On May 4, 1864, Caldwell was promoted to Colonel of the regiment, replacing the

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13. *See Clipping 1.147, supra* note 7.

former Colonel, who had become a Brigadier General.[14] Apparently, Caldwell was also in line to becoming a general officer. Sometime shortly after Caldwell received Lincoln's nomination on May 2, 1864, he received a letter from his close friend James F. Wilson, who was at that time a congressman, that informed Caldwell, "You can be a Brigadier General or a United States Judge. Which do you prefer?"[15] On June 4, 1864, Henry Caldwell resigned his commission with the United States Army and began his trip west to Little Rock where, sixteen days later, he took his oath as United States District Judge for the Eastern District of Arkansas.

II. UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF ARKANSAS

The Eastern District of Arkansas was typical of other federal districts. It had two trial courts, the district court and the circuit court. The jurisdictions of these courts were vastly different. The district court had jurisdiction over petty crimes and admiralty matters. The circuit court was the primary trial court in the federal judiciary, having jurisdiction based on diversity of citizenship. In theory, the circuit court was intended to have multi-judge panels made up of the district court judge(s) and the United States Supreme Court Justice assigned to that circuit. In reality, the district court judges or judge for the district presided. The Justice assigned to Arkansas and its respective circuits never sat in Little Rock until 1868.[16]

Congress placed Arkansas in the Sixth Circuit in 1863, which included Texas and Louisiana, but three years later it placed Arkansas in the Eighth Circuit along with Iowa, Kansas, Minnesota, and Missouri.

Judge Caldwell held court in 1864, but did not hear cases. He merely swore in the marshals and clerks. He also spent the fall of 1864 reading and learning Arkansas cases.[17] In the spring of 1865, the federal court house in Little Rock opened its doors for business.

Judge Caldwell came to Arkansas both as an outsider and as a conqueror. As can be imagined, he was not instantly embraced by the local population. A local historian writing in 1877 sums up the spirit well:

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14. *See* LOGAN, *supra* note 12, at 432.

15. *See* STILES, *supra* note 7, at 218; and STUART, *supra* note 6, at 432.

16. *See* THEODORE FETTER, A HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT 3 (1977); *see also* records of Eastern District of Arkansas.

17. *See* HEMPSTEAD, *supra* note 2, at 314.

> The young soldier-jurist, fresh from the victorious northern army, at that excited period when the intense prejudices engendered by the civil war were still at fever-heat, did not inspire the confidence of the southern people, who then knew nothing of his qualification or antecedents. The confiscation and other stringent Federal laws were to be administered by a soldier, who was supposed to be full of the pride and prejudice of the conqueror, with the tremendous machinery of a powerful government to sustain him. The old order of things had perished in the ruins of the revolution and a new *regime* was springing into power and crystallizing under the supreme dictation of the conqueror, whose limitation was controlled by nothing but his own sense of propriety.[18]

Judge Caldwell, however, was not one to hold back. He began his long career on the bench by launching a crusade against the practice of writ pleading in his court. His predecessor, Judge Daniel Ringo, had been Chief Justice of the Arkansas Supreme Court from 1836 until 1844 and the federal district judge from 1849 until Arkansas seceded from the Union. Ringo had been instrumental in establishing a system of special pleading in both state and federal courts that was comparable only to the system that prevailed in England in the 18th century.[19] Reflecting upon this crusade a few years later, Caldwell himself summed up his feelings on writ pleading:

> There was a time in England and in this country when the fundamental principles of right and justice which courts were created to uphold and enforce were esteemed of minor importance compared to the quibbles, refinements and technicalities of special pleading. In that period the great fundamentals of the law seemed little, and the trifling things great. The courts were not concerned with the merits of a case, but with the mode of stating it. And they adopted so many subtle, artificial, and technical rules governing the statement of actions and defenses—for the entire system of special pleading was built up by the judges without the sanction of any written law—that in many cases the whole contention was whether these rules had been observed, and the merits of the case were never reached, and frequently never thought of.[20]

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18. JOHN HALLUM, 1 BIOGRAPHICAL AND PICTORIAL HISTORY OF ARKANSAS 482-83 (1887).

19. Ringo would later appear before Judge Caldwell in circuit court under indictment for treason, but was dismissed and discharged from the indictment because he received a Special Charter of Pardon from President Andrew Johnson on April 16, 1866. *See* Docket Book of the Eighth Circuit Court of Appeals, Apr. 20, 1867.

20. *See* United States District Court for the Eastern District of Arkansas, *Memorial:*

Needless to say the local bar, which had grown up under the old system, was less than receptive to these new reforms. A local historian recounts an anecdote about the mood in Judge Caldwell's early courtroom:

> The late Judge Watkins, then one of our honored legal luminaries, had a large practice in that court, and had prepared a large number of pleadings embodying these harassing obstructions, but he watched the indications closely to catch the practice before filing them. Finally his name was reached in alphabetical order on the roll, and he was politely asked by the court if he had any favors to ask. He rose slowly, and with dignified composure, said he had a bag full of pleas in abatement and demurrers prepared to file, but would graciously decline to do so—not desiring to promote and advance the cause of his adversaries.[21]

The effect of Judge Caldwell's quiet revolution took place in the context of an Act of Congress that prevented anyone who had been disloyal to the Union from practicing before a federal court.[22] Local lawyers fought Judge Caldwell's imposition of code pleadings for several years until Justice Samuel Miller, who arrived in 1868 to sit on

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Henry Clay Caldwell 6-7 (1915), *in* "Henry Clay Caldwell" individual manuscript file, Ark. Hist. Comm'n [hereinafter *Memorial*].

21. *See* HALLUM, *supra* note 18, at 484.

22. An interesting note is that the famous case invalidating the loyalty requirement for admission to the federal bar came up out of Judge Caldwell's court. In 1862, Congress passed an act prescribing that every person holding or taking an office in the government of the United States take a loyalty oath affirming that he had taken no part in the rebellion. *See* Act of July 2, 1862, ch. 128, 12 Stat. 502. Three years later, Congress extended the provisions of the oath to embrace attorneys and counselors of the courts of the United States. *See* Act of Jan. 24, 1865, ch. 20, 13 Stat. 424. The amendment also provided that no persons would be admitted to the respective bars of any of the federal courts without taking this oath. *See id.* Petitioner Augustus H. Garland had been admitted to the bar of the United States Supreme Court in 1860 and had followed his state into the Confederacy. *See Ex parte Garland*, 71 U.S. (4 Wall.) 344, 375 (1866). In fact, he had represented his state in both houses of the Confederate Congress. In July of 1865, Mr. Garland received a Special Charter of Pardon from President Johnson. *See id.* In October, the United States brought Mr. Garland before Judge Caldwell on an indictment of treason, which the judge dismissed on the basis of the pardon. *See id.* at 340. Shortly thereafter, Mr. Garland traveled to Washington and moved to be admitted to the bar of the United States Supreme Court on the grounds that the act was unconstitutional, or that his pardon released him from compliance. *See id.* at 375-76. The Court, in an opinion written by Justice Field, held that the act was in essence punishing Mr. Garland for his conduct in joining the Confederacy. Since the act was enacted in 1865, several years after the violation took place, the act was an ex post facto law and therefore violated the United States Constitution, Article I, Section 9. *See id.* at 377-78.

the circuit court with Judge Caldwell, affirmed the proceedings. With the exception of code pleading, however, Judge Caldwell seems to have quickly won the respect of the people of Arkansas.

During Reconstruction, Judge Caldwell proceeded cautiously and gently through the thorny political questions. It was said that "during the six years that the carpet-bag regime lasted, he was the greatest protection the people of the state had."[23] Judge Caldwell, however, was always a Union man. Although he opposed Governor Clayton's imposition of martial law, in which the Governor sought to stem the violence attributed to the Klu Klux Klan, Caldwell later recanted, citing the measure's effectiveness in restoring order.[24] He also seems not to have shirked from his duties in enforcing the Fourteenth Amendment. In a Resolution presented by George Rose of Little Rock before the Arkansas Supreme Court, Rose recounted:

> After having known the [black man] as a slave [the people of Arkansas] could not recognize his position as a freeman with equal rights before the law; and Judge Caldwell's strong insistence that the guaranties of the Fourteenth Amendment should be observed, gave offense to many.[25]

Judge Caldwell was also a die-hard Republican, but never let his political views interfere with his duties as a judge. The following article, written to show support of Caldwell to replace Circuit Judge McCrary[26] in 1884, shows how Caldwell was perceived during these times:

> When he first went upon the bench, now nearly twenty years ago, he had to deal with the acts of Congress confiscating the property of Confederates. These laws were designed to act upon the principle and follow the usages and procedure of Admiralty Courts, where no juries are allowed, and nothing was said in the act in regard to jury trial. Hence most, if not all, of the district judges, in administering these laws, held that causes under them were admiralty causes, and no trial by jury should be allowed. But Judge Caldwell, then newly administering Federal procedures, saw through the fallacy of this reasoning, and held that under the constitution they were common law causes, and their issues triable by jury; in which he was

23. *See* AMERICAN COUNCIL OF LEARNED SOCIETIES, 2 DICTIONARY OF AMERICAN BIOGRAPHY 408 (Allen Johnson ed., 1929).

24. *See* POWELL CLAYTON, THE AFTERMATH OF THE CIVIL WAR IN ARKANSAS 207 (1915).

25. Rose, *supra* note 1, at 648.

26. This position was filled by David J. Brewer.

> sustained by the United States Supreme Court. He then had to pass upon the perplexing question of the statute of limitations growing out of the closure of the courts during the war and the construction of the limitation act of Congress of 1863—in all of which he was correct, and his rulings sustained by the Supreme Court.

And then came before him the questions growing out of the "direct tax" laws of Congress of 1861, and their amendments; in these cases he was also sustained.

Then came the variety of questions of slave contracts, contracts arising from the purchase and sale of slaves, negotiable paper and conveyances of property based upon slave consideration, in which he was also sustained (except for one case).

Others were also issues involving contracts, agreements, and conveyances based on confederate money consideration, and also contracts and conveyances dependent upon the legislation of the confederate governments in the rebelling states and the decrees, judgments, and orders of their courts, and the action of their ministerial officers.

And later questions arose concerning the administration of the reconstruction laws, the election laws, and civil rights laws passed by Congress, all of which involved new issues and the new application of legal principles. Besides these, the administration and construction of the revenue and bankruptcy laws of the United States, both of which were new, produced difficult cases.

In the construction and application of this long array of new statutes, great caution, sound judgment, and clear, precise, and accurate knowledge of legal principles were necessary, for there were few, if any, precedents to guide the steps of the traveler in these then unexplored regions of the law. To evolve just conclusions for all these various and momentous issues required a clear intellect, great grasp of mind, and thorough familiarity with legal principles. Judge Caldwell, though sitting on the bench with such distinguished jurists as Justice Miller, Judge Dillon, and Judge McCrary, never appeared at a disadvantage in their august presence.[27]

Judge Caldwell was reversed by the United States Supreme Court only once in this period, in a case involving the enforcement of a

27. *See* STILES, *supra* note 7, at 220-21 (quoting the Arkansas Democrat, article date unknown).

promissory note for the purchase of a slave, *Osborn v. Nicholson*.[28] Given the extreme dearth of reported cases from this period, we cannot adequately assess his treatment of freedmen. This case, however, shows that the judge was neither sympathetic to slavery, nor afraid of voicing his opinion to that effect.

In *Osborn v. Nicholson*, the plaintiff had brought suit on a promissory note issued in early 1861, to be paid at the end of a year for a slave. The defendant had demurred on the grounds that the Arkansas Constitution explicitly prohibited the enforcement of contracts for the sale of slaves.[29] Judge Caldwell, in a passionate opinion, sustained the demurrer on the grounds that the Arkansas Constitution did not infringe on contract rights in violation of Article I section 10 of the United States Constitution. As for the argument that slavery was legal in Arkansas when the parties made the contract, Judge Caldwell replied:

> The law of the place where the thing happens does not always prevail. In many countries a contract may be maintained by a courtesan for the price of her prostitution, and one may suppose an action to be brought here upon such a contract, which arose in such a country, but that would never be allowed in this country. *Robinson v. Bland*, 2 Burrows, 1084.
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> Now slavery contained in itself all the worst social evils, and the sale of female slaves for prostitution was only one of its many revolting features. Will anyone be so bold as to affirm that a slave contract entered into in a foreign country, and valued by the laws of that country, would now be enforced by the courts of this country, either state or nation. And if not, why not? Obviously because such a contract is against sound morals, and natural right, and opposed to the constitution and policy of our government. Now is there anything in our constitution and policy today by which the domestic slave trader is put in any better position before the courts of the country than the foreign slave trader would occupy?
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> It is said slavery was once lawful in some of the states of the Union, and was tolerated by the constitution of the United States. Granted. But it has been abolished by the constitution of the United States, and of the several states, and that abolishment has been followed up by acts for the enfranchisement of the former slaves,

28. 18 F. Cas. 846 (C.C.E.D. Ark. 1870) (No. 10,595), *rev'd*, 80 U.S. (13 Wall.) 654 (1871).

29. The 1868 Arkansas Constitution declared "all contracts for the sale and purchase of slaves are null and void." *See* ARK. CONST. of 1868, art. XV, § 14 (1868).

> and other legislation that indelibly stamps slavery and all contract and rights based on the slave code as illegal and void.[30]

He continues, citing *Dred Scott v. Sandford*[31] for the proposition that if the states' power over the institution of slavery was so absolute as to allow them to destroy Mr. Scott's marriage contract without violating the Constitution, then they must be able to abolish all contracts relating to it.[32]

The Supreme Court, however, disagreed. In an opinion written by Justice Swayne, the Court ruled that contract rights had accrued before the statutes authorizing them were repealed and therefore the Arkansas Constitution violated the Contracts Clause, notwithstanding the Thirteenth Amendment.[33] The Chief Justice dissented, citing the main arguments made by Judge Caldwell.

In addition to the abundance of cases involving legislation stemming from the War and its aftermath, in both the district and circuit courts, Congress passed a new bankruptcy law that increased Judge Caldwell's workload. The Act of March 2, 1867, gave the district courts bankruptcy jurisdiction,[34] which markedly increased the pressure on district court judges. On the circuit court, however, Judge Caldwell received some assistance when Supreme Court Justice Samuel Miller came to Little Rock for two weeks to join Caldwell on circuit court panels in both 1868 and 1870. Between these visits Congress also created nine circuit judgeships, one for each judicial circuit, to reduce the circuit riding of the Supreme Court Justices to riding circuit every other year.[35] From 1870 until 1890, the Eighth Circuit's judge sat on the Circuit Court in Arkansas for one week per year, although the court was in session for over four months per year.[36] So while he was a district court judge, Judge Caldwell was a de facto circuit court judge.

The first circuit judge for the Eighth Circuit was John Forrest Dillon, who was Chief Judge of the Iowa Supreme Court when appointed to the federal bench. Judge Caldwell wrote letters of recommendation supporting Dillon's nomination. Dillon resigned in

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30. *See Osborn*, 18 F. Cas. at 849-50.
31. 60 U.S. (19 How.) 393 (1857).
32. *See Osborn*, 18 F. Cas. at 853.
33. *See* Osborn v. Nicholson, 80 U.S. (13 Wall.) 654 (1871).
34. Act of Mar. 2, 1867, ch. 390, 18 Stat. 168. The Act was repealed by the Act of June 7, 1878, ch. 160, 20 Stat. 99.
35. Act of April 10, 1869, ch. 22, 16 Stat. 44.
36. *See* FETTER, *supra* note 16, at 4-5.

1879 and was replaced by another Iowan, George Washington McCrary. McCrary had practiced law in Keokuk, Iowa, with Justice Miller, and had also been a pioneer in the Iowa Republican party with Caldwell.[37] McCrary would resign in 1884, to be replaced by David Brewer of Kansas. Brewer went on to the United States Supreme Court in 1890 and was replaced by Henry Clay Caldwell. But we are getting ahead of our story.

In 1871, Congress created a new judgeship for the Western District, which was filled by William Story until he resigned and was replaced by the famous "hanging judge," Isaac C. Parker. The statute moved the terms of court for the Western District to Fort Smith, Arkansas, and set up a Helena division of the Western District despite the fact Helena is in the extreme eastern portion of the state. Within six years, however, Congress removed the Helena district from the west and attached it to the Eastern District. At this time, however, it stipulated that the District Court in Helena should have the jurisdiction of a circuit court, except for appeals. So the only circuit court held in Arkansas continued to be that in Little Rock.

On the Circuit Court, Caldwell's duties were compounded in 1875 by legislation that radically increased federal judicial jurisdiction. Luckily, Arkansas was spared from being inundated by cases brought under the Federal Enforcement Act of 1870, which flooded the other federal district courts in the South.[38] The Act of March 3, 1875, gave general federal-question jurisdiction—cases arising under the laws, treaties, or Constitution of the United States—in addition to the court's former jurisdiction based on diverse citizenship of parties. The Act also allowed certain cases involving a federal question brought in state court to be removed to the federal circuit court by the defendant. After this Act, the jurisdiction of the federal courts would remain fairly stable until after Judge Caldwell was appointed Circuit Judge for the Eighth Circuit.

As Reconstruction weakened, Judge Caldwell actively supported returning Arkansas to home rule—eliminating federal supervision and allowing former Confederates to vote. When the Brooks-Baxter war broke out in 1874, Judge Caldwell actively supported Baxter and is

37. McCrary was appointed from Congress where he was a principal sponsor of an Act in 1875 that expanded federal courts' jurisdiction. He also was an organizer of the Electoral Commission that decided the Presidential Election of 1876.

38. *See generally* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM (1928); and CLAYTON, *supra* note 24.

credited with helping secure his recognition by the national government.[39] Later that year, the new Democratic government adopted a new constitution that superseded the Reconstruction constitution of 1868 and allowed Confederate officers once again to vote and hold office. President Grant saw this move as essentially a return to the state of affairs that had existed before the war, and asked Congress to reimpose reconstruction, i.e., federal authority. Congress appointed an investigating committee and sent its members to Arkansas. Judge Caldwell informally intervened. He lobbied these Congressmen, housing some in his home. He believed that the new constitution was not rebellious, but an exercise of popular sovereignty, and Arkansas should remain under home rule. The committee members agreed by returning with a favorable report. No action against the state of Arkansas was taken.[40]

With Reconstruction gone, Judge Caldwell's court began to take up the type of business that would continue to fill the federal reporters up through the turn of the century—railroad and labor cases. From the reported cases of Judge Caldwell during the 1870s and 1880s, we can see his judicial persona emerge. This persona would stay with him until his retirement. First, however, a more personal description is due.

Judge Caldwell seems to have reflected his upbringing on the frontier. He stood well over six feet tall, but was somewhat quiet. He had a large head with a broad forehead. He wore a beard, and the older he grew, the longer it grew. By the time he retired, his beard was very long and a bit unkempt—giving him the appearance of a trapper or mountain man. Henry Caldwell was also not known as a natty dresser. He was often described as being careless about his appearance.

Despite a rough exterior, he was a very upright and proper man. He was also characterized as being generous and kind. He was regarded as being a man beyond reproach; no one questioned his personal or judicial integrity.[41] Judge Caldwell had strong opinions and

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39. *See* Rose, *supra* note 1, at 648. In 1872, Republican Elisha Baxter, a loyalist slave holder and Union veteran, won a contested gubernatorial election over Joseph Brooks, a carpetbagger backed by Democrats and native Unionists, who felt betrayed by the Republican Northerners. Baxter may have been a Republican when elected, but he did not act like one in office; he pushed through a constitutional amendment re-enfranchising former rebels. The Republicans soon disowned their Governor and took to supporting Brooks. Thus, the Brooks-Baxter war began with each camp having its own legislature and militia. Eventually President Grant recognized Baxter as Governor and ordered Brooks's forces to surrender. This is generally recognized as the end of Reconstruction in Arkansas.

40. *See* Rose, *supra* note 1, at 649.

41. *See* Judge George D. Reynolds et al., *In Memoriam in United States Court of Appeals for the Eighth Circuit*, 3 (Mar. 6, 1915), *in* "Henry Clay Cladwell," individual

never hesitated to let people know them.[42] Yet he was said to be charming and was often asked to speak at public ceremonies throughout the midwest both related to law and not.

Judge Caldwell was very active in civic affairs during his years in Arkansas, and is credited with sponsoring or influencing legislative reforms in the late 1870s and 1880s. His crusade for code pleading extended beyond the chambers of his courtroom. When a law school was established in Little Rock, Judge Caldwell took the chair of pleading and practice. From the lectern he tried to imbue his students with his desire to disregard technicalities and go to the merits of each case. He is credited as being the father of code pleading in Arkansas.[43]

Judge Caldwell also led the fight to get married women individual property rights. Under Arkansas law, as he first found it, when a woman married a man, the husband acquired all title to her personal and real property as long as she lived. Nor did a married woman who happened to work have any right to her earnings. Judge Caldwell proposed and helped secure the passage of articles in the Constitutions of 1868 and 1874, which provided married women with absolute ownership of their separate property free from the control of husbands and their creditors.[44] Judge Caldwell also supported women's suffrage, although he was less successful in winning over the Arkansas Legislature on this point.[45]

Judge Caldwell was also the author of Arkansas homestead and personal property exemptions. When Judge Caldwell came to Arkansas there were little to no exemptions allowed to insolvent debtors. Judge Caldwell actively recommended and supported the homestead exemptions and personal property exemptions. Again, these exemptions were ultimately incorporated into the Constitutions of 1868 and 1874.[46]

Another opponent in Judge Caldwell's crusades was Arkansas usury and mortgage laws. The Arkansas Constitution of 1868 had forbidden the Legislature from passing any law limiting interest rates.

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manuscript file, Ark. Hist. Comm'n.

42. *See* HEMPSTEAD, *supra* note 2, at 315.

43. *See* HALLUM, *supra* note 18, at 484; *Judge Caldwell Has Retired*, ARK. GAZETTE, June 7, 1903, at 1.

44. *See* ARK. CONST. of 1868, art. XII, § 6; ARK. CONST. of 1874, art. IX, § 7; Rose, *supra* note 1, at 650; PORTRAIT BIOGRAPHICAL ALBUM OF VAN BUREN AND JEFFERSON COUNTIES, IOWA 617 (1890).

45. *See* Rose, *supra* note 1, at 650.

46. *See* ARK. CONST. of 1868, art. XII, §§ 1-5; ARK. CONST. of 1868, art. IX, §§ 1-5 (1874).

Judge Caldwell is credited with getting the original usury section put into the constitution of 1874.[47] Later, corporations sought to get around the constitution by adding brokerage fees and attorney fees and other items that had the same effect as interest rates. Again Judge Caldwell came to the citizens' rescue. In 1887, he prepared and lobbied for an act, which passed, that allowed debtors to bring suits to vacate usurious mortgages without having first to tender the principal and interest of the loan.[48]

In 1886, Judge Caldwell gave a speech before the Arkansas Bar Association called "The Relation of Debtor and Creditor" in which he railed against Arkansas and farm mortgage practices.[49] The speech is wonderful in its emotion and vigor. It was printed with a cover picture that depicts an old man with a cane, his wife, and their dog walking down the road. As they walk they pass a sign pointing in the direction they travel on which is printed "Poor Farm." In the background is the homestead being plucked up by a spindly-clawed hand labeled "mortgage." Below the picture is printed: "The Usual Fate of Those who Mortgage their Homestead." Judge Caldwell began his speech by recounting how Solomon and Caesar had reformed their laws that punished debtors, but Arkansas and much of the Anglo-American legal community operated under the assumption which founded the debtors prison—"that all creditors were honest, and all debtors dishonest."[50]

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47. Article 19, section 13, of the Arkansas Constitution now provides:

(a) General Loans:

(i) The maximum lawful rate of interest on any contract entered into after the effective date hereof shall not exceed five percent (5%) per annum above the Federal Reserve Discount Rate at the time of the contract.

(ii) All such contracts having a rate of interest in excess of the maximum lawful rate shall be void as to the unpaid interest. A person who has paid interest in excess of the maximum lawful rate may recover, withing the time provided by law, twice the amount of interest paid. It is unlawful for any person to knowingly charge a rate of interest in excess of the maximum lawful rate in effect at the time of the contract, and any person who does so shall be subject to such punishment as may be provided by law.

(b) Consumer Loans and Credit Sales: All contracts for consumer loans and credit sales having a greater rate of interest than seventeen percent (17%) per annum shall be void as to principal and interest and the General Assembly shall prohibit the same by law.

ARK. CONST., art. 19, § 13.

48. *See id.*

49. *See* Henry Clay Caldwell, *The Relation of Debtor and Creditor*, Address before the Arkansas State Bar Association (Jan. 7, 1886), *in* 2 COIN'S FINANCIAL SERIES, 9-140, (1895).

50. *See id.* at 5.

An assumption, Caldwell quickly noted, "The converse of which would probably be never the truth."[51] He then launched out on a tirade against the "Anaconda Mortgage" employed by the landlord or planter to enslave the tenant farmer and small farmers of Arkansas, requiring them to obtain all credit and conduct all trade with the mortgagee. He ended his speech by recommending that the state prohibit all encumbrances on the homestead, and modify the Act allowing mortgages on crops so that farmers might mortgage only what they had left after providing for their family. This speech, followed by another made before the Drew County fair that same year, was reproduced in the papers in the state and sparked considerable public debate.[52] In 1887, the Arkansas Legislature amended part of the Act allowing mortgages of crops, to forbid mortgaging of any crop beyond those planted that year.[53]

Judge Caldwell was also a temperance man and constantly spoke out against the evils of alcohol. Although he was generally compassionate on the district court, he was ruthless on moonshiners, especially those who chose to operate in dry counties.[54] He was also the author of the Arkansas Liquor Trafficking Law said to be the best, or strictest, in the nation.[55] Caldwell's feelings about liquor came out in a case he decided in the Circuit Court for the Eastern District of Arkansas after he had become a circuit judge.[56] In this case, the defendant, an agent for the Excelsior Brewery Company, challenged the constitutionality of a United States statute that provided that intoxicating liquors in interstate commerce shall, upon arrival, be subject to the laws of the state. Judge Caldwell upheld the statute as an exercise of Congress's power to regulate interstate commerce. In his recount of Congress's desire to make original package houses—houses dealing directly in interstate commerce, subject to state law[57]—Caldwell says:

> Liquor imported in packages of all forms and sizes, but all original packages, was sold in these houses. In this way the retail traffic in liquor was practically established . . . . Peaceful and quiet communities from which the sale of liquor had been banished for years were

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51. *See id.*
52. *See Memorial*, *supra* note 20, at 6.
53. *See* Rose, *supra* note 1, at 651.
54. *See Caldwell Has Retired*, *supra* note 47, at 1; Rose, *supra* note 1, at 651.
55. *See* 9 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 478 (1967); *Caldwell Has Retired*, *supra* note 43, at 1.
56. *See In re* Van Vliet, 43 F. 761 (C.C.E.D. Ark. 1890).
57. *See* Leisy v. Harden, 135 U.S. 100 (1890).

> suddenly afflicted with all the evils of the liquor traffic. The seats of learning were invaded by the original package vender [sic], and the youth of the state gathered there for instruction were corrupted and demoralized, and disorder, violence, and crime reigned, where only peace and order had been known before.[58]

Another civil reform Judge Caldwell undertook, but upon the request of others, was the task of certifying a digest of Arkansas statutes. In 1874, Edward Gantt published *Digest of the Statutes of Arkansas*[59] under the authority of the General Assembly. Caldwell was chosen to examine and approve the work as being authentic. Not only is this quite a testimonial to the General Assembly's and the legal community's perception of Judge Caldwell's ability, but it shows his reputation for impartiality. After all, it would seem most logical to get a state court judge to certify this type of work, and the fact that the Legislature chose Caldwell shows he had something unique to add.

Judge Caldwell was as active in his courtroom as he was in his community. He hated what he perceived as injustice and oppression, especially under the law. In a memorandum written in his honor by the Little Rock Bar, the authors noted that:

> it might not be too much to say that on occasion he did not hesitate to stretch the judicial power to the limit—to defeat the operation of any rule of law, or practice, under which an advantage not consonant with his ideas of right and justice might be gained to the injury of a litigant."[60]

Judge Caldwell usually sat without a jury upon the stipulation of the parties because "the litigants knew that they would get from Judge Caldwell the same substantial justice which they hoped for at a jury's hands, and partly because his personality was so dominating that the jury was merely the mouthpiece of his views."[61] However, Judge Caldwell was a protector of jury trials and stated that trials by judge and jury are "immensely superior to any other mode of trial that the wit of man has ever yet devised, or is capable of devising."[62]

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58. *In re* Van Vliet, 43 F. at 766.

59. A DIGEST OF THE STATUTES OF ARKANSAS (Little Rock Printing & Pub. Co. 1874).

60. Reynolds et al., *supra* note 41, at 10.

61. Rose, *supra* note 1, at 652.

62. Henry Clay Caldwell, *Trial by Judge and Jury*, 33 AM. L. REV. 321, 346 (1899). In this address given before the Missouri State Bar Association, Caldwell commended and advocated jury trials. Caldwell argued that justice is better served by juries than by courts, and he stated that complaints being voiced against the jury were groundless. *See*

Judge Caldwell was active in asking questions of counsel and would often suggest corrections to defective pleadings. He would also ask questions of witnesses to seek the truth in determining their credibility.[63] He was reputed not to allow a lawyer's inexperience to lose a case with merit, as illustrated by the following anecdote:

> On one occasion, some years ago, Judge Yonley, a gentleman of ability and local distinction, with much ingenuity was about to defeat a good cause represented by a young adversary at the bar; but [Caldwell] came to the stripling's relief and saved him from disaster. Judge Yonley left the court-room tearing his disheveled hair in a rage, and swearing in vociferous oaths that he would rather have Rufus Choate, Reverdy Johnson, and William M. Evarts as opponents in the trial of a cause before Judge Caldwell than one d--n fool stripling.[64]

Local attorneys regarded Judge Caldwell as being very polite and courteous to all counsel. He also had a practice of coming down from the bench, greeting counsel, and shaking hands. Moreover, when Judge Caldwell served on the Court of Appeals for the Eighth Circuit, it is noted that after a lawyer from Arkansas had argued before the court, Judge Caldwell would always come down from the bench after argument and take the lawyer back to his chambers for a friendly talk.[65]

While serving on the district and circuit courts in the Eastern District of Arkansas, Judge Caldwell gained a reputation as a sound jurist. He was even asked to sit on circuit court panels in other districts. In 1876, he alone held a three-week session of the Circuit

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id. at 334-36, 343. He maintained that "the consequences of an erroneous verdict by a jury are immeasurably less than an erroneous verdict by the judge; for one jury is not bound by the error of a former jury, but the law of precedent will compel the judge to adhere to his error, for it is a rule of fixed tribunals that consistency in error is to be preferred to a right decision." *Id.* at 338-39. Caldwell noted the ability of a jury to take note of both moral and legal justification, whereas the law looks only to legal justification. *See id.* at 334. He praised John Peter Zenger's jury as being "twelve patriots" whose names "should go down in history with those of the foremost patriots of the Revolution," and he then listed the names of these jurors. *Id.* at 325. Caldwell inquired, "Suppose whenever the judge errs in deciding the law he was summarily ordered to step down off the bench. What would be the result? Not one single bench would be occupied next Monday; it is certain that this bench would be vacant, for the judges who sit here have been convicted of repeated errors by the Supreme Court." *Id.* at 343.

63. *See* Rose, *supra* note 1, at 652.

64. *See* HALLUM, *supra* note 18, at 486.

65. *See* Reynolds et al., *supra* note 41, at 4.

Court for the Eastern District of Missouri, and in 1880 held Circuit Court for the District of Kansas.[66]

Judge Caldwell's reputation as a jurist seems to be rooted in his notion that personal rights should prevail over property rights, and that the common laborer is the foundation of society. In his later years as a district judge, Caldwell developed several unique approaches to railroad receiverships that made him famous. The first of these practices was making claims for operating supplies preferential to bondholder's mortgages. He explained how he came to this practice, called "Coon-skin Cap Law," in a response to a toast given to him at a Colorado Bar Association Meeting in the 1890s, which was later reproduced in its entirety in Volume 37 of the American Law Review.[67]

His response was essentially a story that began with a tale of a poor timber cutter living on the Mississippi River bottom making railroad ties for an Arkansas railroad company. The man worked for the railroad for four long years, but the railroad, always being short on cash, never fully paid him. Then the woodcutter became ill and was laid up for over a year. As soon as he recovered, he learned that the railroad was in receivership and he went to court to file his claim. The man appeared personally before the young Judge Caldwell wearing a "coon-skin cap, with the tail hanging down the back, coarse cotton shirt, and pants and shoes to correspond."[68] The cutter explained how he should be paid his claim because whenever he supplied wood to the steamship companies, he always received a lien superior to all mortgages. The judge knew that the Supreme Court had not found that such a rule applied to railroads, but of course, railroads were relatively new. While the timid judge had found some authority for treating claims for supplies preferentially when they had accrued within four months, he was willing to stretch this time out to six months only.

The short of the story is that the court did not grant the man his claim and the poor man hung himself. Caldwell explained:

> Nothing is a lesson to us if it doesn't come too late. The specter of that man of honest toil hanging from that tree, the vision of that cap, and an uneasy and alarmed conscience, imposed upon that judge the burden of prayerfully inquiring whether the judgment that produced this awful tragedy was just, and upon making that inquiry he found that there was a close analogy between ships and railroads; that both

66. *See* HALLUM, *supra* note 18, at 484; Kimberling v. Hartly, 1 F. 571 (C.C.D. Kan. 1880); Note, *Mr. Circuit Judge Caldwell*, 24 AM. L. REV. 299, 300 (1890).

67. *See* Henry Clay Caldwell, *Coon-skin Cap Law*, 37 AM. L. REV. 677 (1903).

68. *Id.* at 678.

> were instruments of commerce; that neither could perform their functions or be of any utility to the public, or of any value as a security, unless they were kept running, and that they could not be kept running without labor, materials and supplies, that were not and could not be paid for at the time they were procured or purchased; and that every one taking a mortgage on such property knew this, and must therefore be held to have impliedly consented that such claims should have preference over his mortgage.[69]

He found that there was just as much law for saying that such claims were valid if they accrued within six years, as there was for saying that they must have accrued within six months; that the length of time depended on the length of the chancellor's foot; in a word, that all the law on the subject was judge-made law; and that he thereupon determined to measure out equity according to the length of his own foot—not a small one—instead of that of some other judge, and to make a little judge-made law himself, and he then and there made it a rule of his own court that no railroad receiver would be appointed except upon the condition that all claims for labor, supplies, and materials necessary to keep the road in operation, and all claims for damages resulting from its operation that were not barred by the statute of limitations, should have preference over mortgages. And this rule is what the toastmaster has been pleased to call the "Coon-Skin Cap Law." This rule was without any precedent to support it, but it was sublimely just, according to Judge Caldwell. It was its own precedent, and it would be happy for mankind if all judicial precedents had the same everlasting and impregnable foundation. Since the adoption of that rule no citizen of Arkansas has had occasion to commit suicide for the same reason the "coon-skin cap man" did.

This explanation also gives us some notion of how Judge Caldwell saw the law—as an active vehicle of substantive justice. Under his view of the law, one needed no authority to do what was right. Receiverships were an equitable proceeding, and Judge Caldwell's philosophy seemed to echo greatly that "equity delights in doing justice and not just by halves."

Dow v. Memphis & L.R.R. Co.[70] is the first reported case in which we see "Coon-skin Cap Law" employed. This is the first case where Caldwell required, as a condition to the appointment, that parties requesting the appointment of the receivers agree to allow the receivers

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69. Caldwell, *supra* note 67.
70. 20 F. 260 (C.C.E.D. Ark. 1884).

to pay preferentially all future claims of suppliers in cash. The appointment of a receiver in a suit to foreclose a mortgage was up to the chancellor's discretion. The practice was controversial.[71]

Although the Supreme Court upheld the general principle of a court's placing conditions upon the appointment of a receiver in *Fordick v. Schalls*,[72] twelve years later Justice Brewer harshly criticized the practice in *Kneeland v. American Loan & Trust Co.*[73] In dicta, which some members of the Eighth Circuit bar said was aimed specifically at Judge Caldwell,[74] Justice Brewer said:

> Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver . . . could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations?[75]

Another practice that Caldwell is credited with creating is the practice of allowing receivers to be sued at law in state courts, especially for torts committed by the railroads. He allowed plaintiffs to bring these suits without leave of court. The first case in which this is reported is *Dow*.[76] In *Dow*, the plaintiffs, as a condition to reappointment of a receiver, had to agree that the receiver would allow the plaintiff to bring tort actions against the railroad and that the receiver would pay all judgments against the railroad. In explaining his condition, Judge Caldwell noted:

> The general license to sue the receiver is given because it is desirable that the right of the citizen to sue in the local state courts, on the line of the road, should be interfered with as little as possible.

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71. Caldwell claimed that the practice began when a Kentucky chancellor put in a receiver appointment order with the condition that the receiver agree to pay all wages accrued within the 30 days prior to that appointment. *See* Henry Clay Caldwell, *Railroad Receiverships in the Federal Courts*, Remarks at the Green Leaf Law Club, St. Louis, Mo. (Feb. 24, 1896) (transcript available in the Harvard Law School Library).

72. 99 U.S. 235 (1878).

73. 136 U.S. 89 (1890).

74. *See Notes*, *supra* note 10, at 283, n.1.

75. *Kneeland*, 136 U.S. at 97.

76. *See Dow*, 20 F. 260. Caldwell would later cite the author of *Dow* (himself) as being the originator of the practice in a speech he gave on railroad receiverships. *See* Caldwell, *Railroad Receiverships*, *supra* note 71.

> It is doubtless convenient, and a saving and protection to the railroad company and its mortgage bondholders, to have the litigation growing out of the operation of a long line of railroad concentrated in a single court, and on the equity side of that court, where justice is administered without the intervention of a jury. But, in proportion as the railroad and its bondholders profit by such an arrangement, the citizen dealing with the receiver is subjected to inconvenience and expense, and he is deprived of the forum, and the right of trial by jury, to which, in every other case of legal cognizance, he has the right to appeal for redress.[77]

This procedure was also a controversial one. In 1887, however, Congress explicitly authorized federal courts to allow suits at law in receivership.[78]

Through these railroad receivership cases, Caldwell, as District Court Judge, developed a reputation for standing up against the railroads and their powerful bondholders—a reputation that continued beyond his service on the District Court. Seymour Thompson, who would later write the treatises *Thompson on Negligence* and *Thompson on Corporations*, wrote in a law review article published in 1893:

> Mr. Circuit Judge Caldwell when Judge of the United States District Court for the Eastern District of Arkansas, and *ex officio* Circuit Judge, persistently refused to allow his court to go into the general railroad business, and granted receivers of railroads on a principle of necessity, and then, only upon equitable terms . . . . The Supreme Court approved his policy. One of the equitable conditions imposed by him on bondholders soliciting the appointment of a receiver, was that they should consent in advance, that the receiver might be sued in the State Court, and that they should appoint an agent within the jurisdiction, on whom the process of said court might be served. His decision in Dow vs. The Memphis, etc., R. R. Co. (20th Fed. Rep., 260), is one of the best judgments that has ever been delivered on the subject of railway receiverships. One cannot read it without acquiring the impression that if other Judges had pursued the same policy, the disciplinary Act of Congress, passed in 1887, authorizing actions against receivers of railroads appointed by the Federal Courts to be brought without obtaining leave of court, would not have become necessary. . . .
>
> One cannot read the decision of this eminent Judge without feeling regret that he has not long before this been transferred to a

77. *Dow*, 20 F. at 267-68.
78. Act of March 3, 1887, ch. 373, § 3, 24 Stat. 552, 554.

> seat on the highest Federal bench. His long experience as a Federal Judge, his clear perception of legal principles, his strong sense of justice, his well-known firmness of character, and especially the entire absence of any unsteadiness in his judicial work, point to that place as his proper sphere.[79]

It is clear that Judge Caldwell's service on the District Court bench had a great influence on Arkansas law and the rights and legal powers of Arkansans. However, the legal legacy of Judge Caldwell was not yet complete; for, as stated previously, he went on to serve as the first Chief Judge of the Eighth Circuit Court of Appeals.

III. UNITED STATES CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT

When President Harrison offered Judge Caldwell the circuit judgeship for the Eighth Circuit on February 27, 1890, Caldwell did not immediately accept. Judge Caldwell had not solicited the position.[80] He was, however, chosen from a pool of at least twenty-seven nominees whom the Justice Department had screened. This pool included famous jurists such as Caldwell's brother in the Western District of Arkansas, Judge Parker, and his future brothers on the Court of Appeals, Walter Sanborn and Amos Thayer.[81] Again Justice Miller, who would pass away later that year, supported fellow Republican and Iowan Henry Caldwell. Some people also seemed to think that Caldwell's wartime friend, the man who took his place as Colonel of the Third Iowa Cavalry and who was Secretary of the Interior to Harrison, John W. Noble, had some part in the nomination.[82]

Apparently, Judge Caldwell was hesitant to leave his home and live the life of a "tramp" wandering all over the vast territory that made up the Eighth Judicial Circuit.[83] At that time the Eighth Circuit included one-third of the territory of the United States and had a population of over 11 million people.[84] As mentioned earlier, Caldwell had some experience with the size of the circuit because he had served as a circuit judge by assignment in other districts. Caldwell, however,

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79. STILES, *supra* note 7, at 226-27 (quoting Seymour D. Thompson, *The Court Management of Railroads*, 27 AM. L. REV. 481 (1893)).

80. *See* FETTER, *supra* note 16, at 15.

81. *See id. See also* Note, *supra* note 66, at 300.

82. *See* Note, *supra* note 66, at 300.

83. *See id.*

84. *See* FETTER, *supra* note 16, at 13.

accepted the position and was sworn in as United States Circuit Judge for the Eighth Circuit on March 13, 1890.

Judge Caldwell spent his first year as a circuit judge traveling throughout the circuit and holding court in various districts. On March 3, 1891, however, the Circuit Court of Appeals Act became law, and Judge Caldwell's duties changed drastically. The Circuit Court of Appeals Act of 1891 came about as an attempt to relieve the overburdened federal judicial system, especially the Supreme Court, from a crushing work load. The Act of 1869 had intended for circuit courts to have a panel of two judges, one being either the circuit judge or circuit justice, and the other a district judge. By late 1880s, none of these ideals were met—circuit riding by the justices had for all intents and purposes ceased, and eight-ninths of all cases in circuit courts were heard by single judges, almost always district judges. The situation was worse in the Eighth and Ninth Circuits, principally because of the vast geographical areas. The problem was exacerbated by the circuit court's appellate jurisdiction; while circuit courts were the primary trial courts in the federal system, they were also the appellate courts for district courts. As a result, it was common for a single district judge to sit on the circuit court and hear an appeal from his own decision in the district court. An ABA report made in 1890 characterized the situation as follows: "Such an appeal is not from Phillip drunk to Phillip sober, but from Phillip sober to Phillip intoxicated with the vanity of a matured opinion and doubtless also a published decision."[85] This problem was compounded by the fact that the decisions of the circuit court were final in all cases involving less than $5,000.

A district judge alone in a district, like Judge Caldwell, who held circuit court in his district, enjoyed an enormous amount of power. The Act of 1891 created a circuit court of appeals to hear cases on appeal from the district and circuit courts. The primary impulse had been to relieve the overburdened Supreme Court, and the Act transferred cases from the Supreme Court docket to these new courts of appeals. The Supreme Court, however, retained direct appellate jurisdiction over particular types of cases.[86] The circuit courts lost their appellate jurisdiction but remained, along with the district court, a court of first instance. The Act created a second circuit judge for each circuit

85. FRANKFURTER & LANDIS, *supra* note 38, at 87 (quoting Walter B. Hill, *The Federal Judicial System*, 12 A.B.A. REP. 289, 307).

86. In fact, the Court's jurisdiction over criminal matters was enlarged by this Act to include all cases of "infamous crimes." *See* FRANKFURTER & LANDIS, *supra* note 38, at 109-11.

and designated that the courts of appeals would be made up of three-judge panels with one district judge sitting with the circuit judges.

The Court of Appeals for the Eighth Circuit was organized in St. Louis, Missouri, on June 16, 1891, with Circuit Justice Brewer and Judge Caldwell attending.[87] The court heard its first case on October 12, 1891. Judge Caldwell presided over the three-judge panel, which also included District Judges Amos M. Thayer of St. Louis and Moses Hallet of Denver.

The Eighth Circuit was the busiest circuit in the country between 1892 and 1901.[88] Luckily, Judge Caldwell was joined by Walter H. Sanborn of Minnesota on April 4, 1892. The workload on these two was so great, however, that in 1894 Congress authorized a third circuit judge position for this circuit. On August 20, 1894, Amos Madden Thayer of Missouri joined the Court of Appeals for the Eighth Circuit.

87. *See* FETTER, *supra* note 18, at 14. The Eighth Circuit was the largest circuit in the country, spanning the heartland of the country from the Mississippi to beyond the Rockies, and from Canada to Texas and Louisiana. It included ten states: Arkansas, Colorado, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, and Wyoming. It would later also include New Mexico, Oklahoma, and Utah, as they were admitted to the Union.

88. Court of Appeals Caseload
1892-1901

	All Circuits				Eighth Circuit			
Year	New Cases Docketed for Year Pending June 30	Cases Disposed	Cases Pending June 30	New Cases Appealed to Supreme Court	Docketed for Year ending June 30	Cases Disposed	Cases Pending June 30	Cases Appealed to Supreme Court
1892	841	403	438		207*	120*	87	
1893	704	542	438	29	163*	145*	99*	17*
1894	766	684	510	21	182*	156*	125*	9*
1895	866	870	510	43	170	189*	112*	15
1896	815	824	501	56	157*	152	117*	21*
1897	775	729	547	33	151*	133*	135*	10
1898	806	833	521	35	127	182*	81	5
1899	907	856	572	38	193*	147	127*	8
1900	952	917	607	41	174*	191*	110*	11
1901	901	937	571	46	168*	165*	113*	21*

*Asterisk denotes category in which the Eighth Circuit led the other circuit courts of appeals. The Attorney General's reports throughout the period are not necessarily accurate since they were based on incomplete reports from other circuits. FETTER, *supra* note 18, at 14.

About this same time, the court began to hold an annual spring term in St. Paul, Minnesota, in addition to the fall term in St. Louis. In 1900, the court would add a third term in Denver, Colorado.

Hearing 150 plus cases in addition to sitting on circuit court (trial) panels obviously kept Judge Caldwell busy. In his twelve years on the court of appeals he wrote 306 opinions, thirty dissents, and one concurring opinion. In addition, he wrote twelve reported cases on the circuit court.[89]

Ironically, Judge Caldwell's dissents are the court of appeals opinions that generated the most commentary. One of these dissents was from a majority opinion written by Judge Sanborn in *McMaster v. New York Life Insurance Co.*[90] The United States Supreme Court heard the case on writ of certiorari and reversed the Court of Appeals, adopting the grounds articulated by Judge Caldwell.[91]

The case essentially came down to which terms would prevail—the express terms of an insurance policy or the terms of the insured's application that were later changed without his knowledge or consent. The insured had bought several life insurance policies that could be renewed annually. Upon delivery and payment of premiums for these policies, the insured asked whether the policies would insure him up to thirteen months from that day, December 18, 1893. The agent replied that they would. The buyer then took the policies and stored them without reading them. If he had read them he would have seen that the agent had changed the terms of the preprinted policy, so that renewal payments were due on December 12, 1894. Since the policy offered a grace period of one month, the terms of the policy provided that the insured was covered thirteen months from December 12, 1893, not December 18, as the agent had promised. The insured did not pay a premium in 1894 because he died January 18, 1895. The administrator of his estate brought an action to collect on the policy in the Circuit Court for the Northern District of Iowa, which, after making findings of fact, dismissed the action. The plaintiff then appealed to the Court of Appeals for the Eighth Circuit.

Judge Sanborn, writing for the court, affirmed the circuit court. He found that the terms of the written policy were plain and unambiguous and therefore previous parol (extraneous) evidence could not be brought in to change those terms. The application contained proposed

89. Remember, the circuit court at this time was a court of first instance only, so the number of reported cases is no indicator of volume.

90. 99 F. 856 (1899).

91. *See* McMaster v. New York Life Ins. Co., 183 U.S. 25 (1901).

terms to which the insurance company was free to object in part or entirely. It did reject one term, which insurer failed to note because he failed to read the policy. Judge Thayer concurred in a separate opinion reasoning that the provisions of the policy were clear, and that the insurer is presumed in law to have consented to those terms by his acceptance and retention of the policy.

Judge Caldwell, of course, dissented, arguing characteristically:

> The right decision of this case does not depend upon any technicality of law. It is a case in which common sense and common honesty and legal sense and legal honesty are at one. It arises upon a contract of life insurance, which must be interpreted according to the settled canons for the construction of such instruments, and the determination of the rights of the parties thereunder. In every contract of insurance, the law prescribes to each party the observance of the strictest integrity and truthfulness. Insurance law, when rightly expounded, is always in harmony with honesty and sound morality. At the very beginning of insurance law in England there was infused into it, through the influence of the civil law, a different spirit from that which prevailed in other branches of the common law. Neither the maxim caveat emptor nor its spirit has found a lodgment in the law of insurance.[92]

Judge Caldwell continued by reasoning that the terms of the contract were formed when the defendant received the insured's application. The insurance agent's subsequent insertion of the challenged clause was an illegal act, if not fraud. The court should recall that where the construction of an insurance contract is doubtful, it should be settled in favor of the insured. In closing, Judge Caldwell launched into an attack on the rule created by the majority:

> The rule of the Court obliterates all distinction between truth and falsehood in the dealings of men. It establishes the doctrine that the law has no partiality for truth, and no prejudice against falsehood. It applauds and approves an end obtained by falsehood and fraud, as a high exhibition of business tact and skill, and reserves its censures for the innocent and trusting victim of the fraud, because, forsooth, he accepted as true the word of the man he was dealing with; and it permits the party who made the false representation to avail himself of his own falsehood, to the prejudice of the man who trusted him. It makes confidence and bunco games respectable, and elevates the sharper who practices them to a plane of equality with honest and

92. *McMaster*, 99 F. at 872 (Caldwell, J., dissenting).

> reputable business men. It is a rule at which all rascaldom will rejoice, and all honest and trustful men take alarm. It stimulates falsehood and deceit by the grant of impunity, and destroys confidence among men. It converts written contracts, which were designed to prevent fraud, into the most powerful agencies for the perpetration and protection of fraud. In this case the insurance company, in effect, receives a reward of $5,000 for its falsehood and fraud, and a penalty of $5,000 is imposed upon the beneficiary named in the policy, because the insured trusted in the truth of the company's representations.[93]

> It is undoubtedly true that a written contract is presumed to express the agreement of the parties, but this is not a conclusive presumption, and the exceptions to the rule are as well understood and clearly defined as the rule itself. No writing, however solemn, can be made a vehicle for fraud, or convert a mistake into verity. The case at bar, upon the facts found, falls within the well-defined exception to the rule, as shown by all the authorities. No apology is made for demonstrating the truth of this assertion by somewhat extended quotations from controlling authorities.[94]

The case was heard by the United States Supreme Court on writ of certiorari. In an opinion written by Chief Justice Fuller, the Court reversed the Court of Appeals and held for the plaintiff, essentially upon those grounds stressed by Judge Caldwell.

Judge Caldwell's most famous case on the Court of Appeals was also a dissent and would gain him further fame as a protector of labor and a preserver of jury trials. *Hopkins v. Oxley Stave Co.*[95] was an appeal of an interlocutory injunction granted by the Circuit Court for the District of Kansas.[96] The court had enjoined the local Coopers Union from boycotting the products of the company unless it discontinued the use of hooping machines. Judge Thayer, writing for the Court of Appeals, affirmed the lower court. The Court of Appeals was not persuaded by the defendants' argument that their acts were legitimate,

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93. *Id.*

94. *Id.* at 880-81.

95. 83 F. 912 (8th Cir. 1897).

96. Judge Caldwell scorned injunctions. In a speech he gave before the Missouri State Bar Association approximately two years after the *Hopkins* decision, Caldwell stated that the use of the injunction worked to "undermine the constitutional right of trial by jury" and in fact "disregard[ed] the constitution." He advocated the "customary and constitutional method of accusation, arrest, examination, indictment, and trial by jury." Caldwell, *supra* note 62, at 330. This speech directed the audience to his dissent in *Hopkins* and presented some of the arguments presented therein.

because they sought to prevent the future decline of wages and gain more employment for coopers. It found that the Oxley Stave Company did not threaten to decrease wages, and only one member of the combination worked there. It then held that the group was a conspiracy formed to incite violence and could be enjoined by the Circuit Court.

Judge Caldwell dissented in a lengthy and spirited opinion that espoused the right of workers to assemble peaceably. He began the dissent by attacking the court's characterization of the Coopers' actions as a "conspiracy," a term he claimed was wrought with evil purpose:

> From the earliest times the word has been used to denote a highly criminal or evil purpose. Thus, in Acts xxiii. 12, 13, it is said:
> "And, when it was day, certain of the Jews banded together, and bound themselves under a curse, saying that they would neither eat nor drink till they had killed Paul. And they were more than forty which had made this conspiracy."
>
> * * * * *
>
> The "conspiracy" charged upon the defendants consisted, then, in the Coopers' Union and the Trades Assembly agreeing not "to purchase or use any commodities that were packed in machine-hooped tierces and barrels, which came in competition with the hand-hooped barrels," which were the product of their labor (and the bill charges no more); and the "threats" consisted in giving the complainant and certain packing houses formal notice of this purpose.[97]

Caldwell challenged the court's jurisdiction over the matter even assuming the majority's characterization of the gathering by stating, "a federal court of chancery cannot exercise the police powers of the state of Kansas, and take upon itself either to enjoin or to punish the violation of the criminal laws of that state."[98] He then launched into a theme we have seen before with railroad receiverships, the threat he saw emanating from a growing tendency to resolve legal matters on the equity side of the court because of a growing mistrust of the jury. Noting the provisions in Article III and Amendment V preserving the right of jury trial, he wrote:

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97. *Id.* at 923-24.
98. *Id.* at 924.

> Undoubtedly, it is the right of the people to alter or abolish their existing government, "and," in the language of the Declaration of Independence, "to institute a new government, laying its foundations on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness." It is competent for the people of this country to abolish trial by jury, and confer the entire police powers of the state and nation on federal judges, to be administered through the agency of injunctions and punishment for contempts; but the power to do this resides with the whole people, and it is to be exercised in the mode provided by the constitution. It cannot be done by the insidious encroachments of any department of the government. Our ancestors, admonished by the lessons taught by English history, saw plainly that the right of trial by jury was absolutely essential to preserve the rights and liberties of the people, and it was the knowledge of this fact that caused them to insert in the constitution the peremptory and mandatory provisions on the subject which we have quoted.[99]

He then went on to compare this case with that of William Penn and William Mead, noting that in that case it was the jury's determination not to bow to the desires of the court that kept a travesty of justice from occurring. A large amount, but small proportion, of this dissent is provided below because of the insight it affords to us of Caldwell:

> This proposition, that it is unlawful for men to do collectively what they may do, without wrong, individually, was enunciated more than a century and a half ago, when all manner of association and cooperation among men, offensive to the king, or not in the interest of despotic power or the ruling classes, or not approved by the judges, were declared by the courts to be criminal conspiracies. It was promulgated at a time "when," in the language of Mr. Justice Harlan in his opinion in Robertson v. Baldwin, 165 U.S. 288, 17 Sup. Ct. 333, "no account was taken of a man as man, when human life and human liberty were regarded as of little value, and when the powers of government were employed to gratify the ambition and pleasure of despotic rulers, rather than promote the welfare of the people," and when laborers had no rights their employers or the courts were bound to respect. The idea of the power of men in association has always been abhorrent to despots, and to those who wish to oppress their fellow men, because its free exercise is fatal to despotism and oppression. The strength it imparts carries its own protection. In all ages those who seek to deprive the people of their

99. *Id.* at 926.

rights justify their action by ancient and obsolete precedents, and by coining definitions suited to their ends. . . . What each individual member of a labor organization may lawfully do, acting singly, becomes an unlawful conspiracy when done by them collectively. Singly, they may boycott; collectively, they cannot. The individual boycott is lawful, because it can accomplish little or nothing. The collective boycott is unlawful, because it might accomplish something. People can only free themselves from oppression by organized force. . . . The doctrine compels every man to be a stranger in action to every other man. This is contrary to the constitution and genius of our government. It is a doctrine abhorrent to freemen. It is in hostility to a law of man's nature, which prompts him to associate with his fellows for his protection, defense, and improvement. Under its operation every religious, political, or social organization in the country may be enjoined from combined action, if their religious faith or political creed or practice is obnoxious to the judge. It was originally designed for this very purpose.

* * * * *

. . . . The asserted rule has no boundaries or limitations other than the chancellor's discretion. Whatever combined action he wills to permit is lawful. Whatever combined action he wills to prevent is a conspiracy.

* * * * *

. . . . While laborers, by the application to them of the doctrine we are considering, are reduced to individual action, it is not so with the forces arrayed against them. A corporation is an association of individuals for combined action; trusts are corporations combined together for the very purpose of collective action and boycotting; and capital, which is the product of labor, is in itself a powerful collective force. Indeed, according to this supposed rule, every corporation and trust in the country is an unlawful combination; for while its business may be of a kind that its individual members, each acting for himself, might lawfully conduct, the moment they enter into a combination to do that same thing by their combined effort the combination becomes an unlawful conspiracy. But the rule is never so applied.

* * * * *

. . . . It cannot be the law that the men and women who do the work of the world, and who produce its wealth, have no rights against the wealth they create, and no right to prefer and promote by lawful and peaceful means the sale of the products of their labor, to secure for themselves continued employment. The "irreparable damage" suffered in business by a vanquished competitor at the hands of his successful rival constitutes no cause of action, either at law or in equity. It is the result of the law of competition, to which all men are subject. They take their chances, and must abide the result, whether it bring fortune or failure.

* * * * *

. . . . All capital seeks to increase its power by combination, and to that end assumes the form of corporations and trusts. The plaintiff in this case is a corporation. It represents a number of persons associated together for the very purpose of combined and collective action. Many of these combinations are on a gigantic scale. Their power and influence are wellnigh irresistible. They are the employers of the great mass of the laborers. They are formed solely for pecuniary profit, and know no other law than that which promotes their pecuniary interests. They defy all social restraints that would have a tendency to lessen their dividends. What the stockholders want is more dividends, and the best manager is the man who will make them the largest. The struggle is constant between the laborers, whose labor produces the dividends, and those who enjoy them. The manager is tempted to reduce wages to increase dividends, and the laborers resist the reduction, and demand living wages. Sometimes the struggle reaches the point of open rupture. When it does, the only weapons of defense the laborers can appeal to is the strike or the boycott, or both. These weapons they have an undoubted right to use, so long as they use them in a peaceable and orderly manner. . . . Let the person and property of every citizen be securely protected by fixed laws, and speedy punishment follow the commission of crime. Let the constitutional mode of trial remain inviolate. The necessity for this is illustrated in this case. No American jury could be found who would say these defendants were guilty of a "conspiracy," or of making "threats" to injure any one. Like the jury in the Penn Case, they would say, "Guilty of refusing to purchase the plaintiff's barrels and the commodities packed in them, only," and the common sense of all mankind would respond that that creates neither criminal nor civil liability on any one. The

> decree of the circuit court should be reversed, and the case remanded, with instructions to dismiss the bill.[100]

The case was not reviewed by the Supreme Court. Judge Caldwell's dissent did, however, catch the attention of labor organizations, who went so far as to try to get him nominated for the presidency.[101] He was a Republican from the days of the party's inception and continued to be one all of his life.

This was not the first time Henry Caldwell had been mentioned in national politics. In 1896, he had been mentioned as a possible Republican presidential and vice-presidential candidate.[102] That year the American Law Review printed an article by Caldwell on railroad receiverships and also wrote a sketch of the judge that seems to be a political endorsement of him. The article compares Caldwell to Lincoln and informs the readers that there is a movement under way to nominate Caldwell for the presidential (Republican)ticket:

> In stature, mind and heart, Judge Caldwell greatly resembles Abraham Lincoln. Like Mr. Lincoln, he stands at the remarkable height of six feet four. Like Mr. Lincoln, he carries on his tall frame a very large and massive head. Like Mr. Lincoln, he comes from Virginia ancestors. Like Mr. Lincoln, he has remained, through every elevation of official station, in touch and in sympathy with the common people. So extensive have the public acquired a knowledge of his character in this respect, that there is at the present time a strong, though quiet movement on foot, to make him a candidate for the presidency; and there are well informed politicians who do not hesitate to predict that if those who favor the free coinage of silver put in the field a separate candidate, Judge Caldwell will be the man.[103]

The Judge was never one to hold his tongue, so his political opinions were well known. The article mentioned above notes that Judge Caldwell was at that time in favor of the free coinage of silver. He wanted Congress to pass a law providing that all debts be dischargeable in either silver or gold and making void all contracts by which the debtor waives this option. He firmly believed that the

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100. *Id.* at 930-40.

101. *See* HEMPSTEAD, *supra* note 2, at 315; *Noted Jurist Dies in California City*, ARK. GAZETTE, Feb. 16, 1915, at 14.

102. *See* FETTER, *supra* note 16, at 16; Johnson, *supra* note 23, at 408; STILES, *supra* note 7, at 232-33.

103. *Notes*, *supra* note 10, at 285.

general government should supply only paper currency.[104] Finally, the article notes that Caldwell "is in favor of the passage and enforcement of just and wholesome laws, protecting the people against monopolies and trusts, and controlling to this end, the exercise of the corporate franchises."[105] Similarly, a Chicago politician wrote a personal letter stating the following:

> There was a gentleman in my office to-day, who has been in correspondence with a number of prominent men in the West on political matters in general; and he tells me that in every instance Judge Caldwell's name was the one name placed above all others. The silent mutterings that are now abroad in our land are surely going to break forth by the time the St. Louis convention comes together.[106]

Judge Caldwell did not, however, receive the Republican Presidential nomination. One commentator notes that the very things that made Caldwell popular with the rank and file of the party made him unpopular with the party leadership, especially in the East.[107]

In 1892, the Republican party nominated William McKinley and adopted a platform endorsing a single gold standard. This put Caldwell at odds with his party. In fact, Judge Caldwell's support of a double silver/gold standard was well known enough to attract the attention of the Democrats, and it seems that William Jennings Bryan was interested in having Judge Caldwell on his ticket.[108] Edward Stiles, in a chapter on Caldwell in his *Recollections and Sketches of Notable Lawyers and Public Men of Early Iowa*, quotes "the press of the time" on the subject:

> The Associated Press correspondent called on Judge Caldwell today and said to him: "An Associated Press dispatch from Minneapolis is authority for the statement that you have declined to permit the use of your name for Vice President. Is the statement in the above dispatch true?"

The Judge replied:

> Yes. Several weeks ago I received letters from some of the leading and influential members of the party intimating that it might become

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104. *See* STILES, *supra* note 7, at 285-86.
105. *Id.* at 286.
106. *Notes*, *supra* note 10, at 285.
107. *See* STILES, *supra* note 7, at 232.
108. *See* FETTER, *supra* note 16, at 16; Johnson, *supra* note 23, at 408.

> desirable to nominate me for Vice President. I paid no attention to the previous loose talk on the subject, but learning from these letters that the matter of my candidacy was assuming somewhat of a serious aspect, I immediately advised these gentlemen by letter that I could not under any circumstances consent to the use of my name for that position. A brief extract from one of these letters will disclose my reason. "No federal judge should become a candidate for any political office and continue to hold his judicial office. It would subject him to merited criticism, and impair his influence and usefulness as a judge. Moreover, I esteem the office of United States Circuit Judge of equal dignity with that of Vice President, and of more practical importance and authority. The Vice President has nothing on his mind except the state of the President's health, and nothing to do but to be the guest of honor at big dinners that kill. He is more ornamental than useful. The position would not suit me."[109]

It is interesting that Caldwell did not seem to object to the party affiliation. Perhaps he split off from the Grand Old Party for good.

Some sources say that Judge Caldwell was also considered for the Supreme Court of the United States, but there is much less documentation on this rumor. Theodore Fetter, in his *A History of the United States Court of Appeals for the Eighth Circuit*, asserts that both Presidents Cleveland and Harrison considered appointing Caldwell to the Supreme Court.[110] In 1915, *Case and Commentary* published an article on Judge Caldwell that described him as "famed in the judicial and political world as the only man who refused an appointment to the office of Chief Justice of the United States Supreme Court because he felt himself unfitted for the task . . . ."[111] Later in the article the author elaborates:

> Judge Caldwell was the principal in one of the political secrets that stirred the nation. Because of his great ability and his high standing in the South, Judge Caldwell was selected by President Cleveland to become chief justice of the United States Supreme Court, and a representative of the President called on the judge to ask him if he would accept. To the amazement of the political world, Judge Caldwell refused the appointment, and gave as his reason the simple statement that he felt he was unfitted for the office, that he did not have the proper mental equipment and training.[112]

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109. *See* STILES, *supra* note 7, at 233.

110. *See* FETTER, *supra* note 16, at 16.

111. *Judge Henry Clay Caldwell—Thirty-nine Years on Federal Bench*, 22 CASE & COMMENTARY 87 (1915).

112. *Id.* at 88.

We are unable to confirm the account with another source. Yet no matter how accurate one finds the article in *Case and Commentary*, it is obvious that Judge Caldwell's homespun populist philosophy and his extreme sense of fairness struck chords with people all over the nation and in both parties.

On June 2, 1903, Judge Caldwell, writing from his summer home in Wagon Wheel Gap, Colorado, tendered his resignation to President Roosevelt.[113] The President, in a letter dated June 8, replied:

> Sir: It is with sincere regret that your resignation as United States Circuit Judge for the Eighth Circuit, to take effect June 4, 1903, is hereby accepted as tendered.
>
> I desire to take this occasion to congratulate you upon your long and faithful service upon the United States bench with such distinguished usefulness, and to assure you of the high esteem which your ability and integrity have always commanded. The impartial administration of law and justice which has marked your judicial career should bring a serene satisfaction to you in your remaining years which I trust will be many and full of health and happiness.
>
> Sincerely yours,
> Theodore Roosevelt.[114]

Judge Caldwell's health had been declining. Also, the wear and tear of moving from St. Paul to Denver to St. Louis every year, and occasionally sitting on circuit courts throughout the circuit, began to take its toll on the judge despite the addition of a fourth circuit judge.[115] In fact, many people had believed that he was going to retire a year earlier when he became seventy, but he held out another year.[116]

Judge Caldwell retired on full pay ($7,500 per year)[117] and with the longest term of active service on the federal bench—thirty-nine years—a record he took to his grave in

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113. *See* STILES, *supra* note 7, at 236-37.

114. *Id.* at 237.

115. Judge Willis VanDevanter of Wyoming joined the Court on March 13, 1903. He was later appointed to the United States Supreme Court by President Taft in 1910. Judge Caldwell's successor was William C. Hook of Kansas. Also, at that time there was no senior status for federal judges. A judge could only do his full-time work load or retire.

116. *See Retires Next Year*, ARK. GAZETTE, Sep. 27, 1901, at 8.

117. *See Judge Caldwell Has Retired*, ARK. GAZETTE, June 7, 1903, at 1.

1915.[118] After a brief sojourn in the tropics to get rid of a spell of grippe, he briefly returned to Wagon Wheel Gap and then moved permanently to Los Angeles, California. There he spent the rest of his life reading and tending to his garden. While there, he was approached by people from the East in the hope of getting him to represent them, but he refused. It is said that he was once even offered $50,000 to go to Kansas and defend a corporation. Again, he refused.[119]

In his eighty-second year, 1914, Caldwell made a trip back to what he considered his real home—Little Rock, Arkansas—to celebrate his sixtieth wedding anniversary. The City of Little Rock greeted "the man who captured it" as one of their own, claiming that for forty years he was the "most prominent citizen of Little Rock."[120] However, Judge Caldwell went back to California, where on February 16, 1915, he passed away at the age of eighty-three. He left behind a widow, a son, two daughters, four grandchildren, three great-grandchildren, and forty-seven years of public service. On February 20, Colonel John M. Moree, Judge Jacob Trieber, Fay Hempstead, W.W. Dickerson, George B. Rose, D.H. Cantrell, W.P. Field, and Durand Whipple carried a large casket to a site in Oakland Cemetery in Little Rock. There lies Judge Henry Clay Caldwell, United States District and Circuit Judge, and Colonel, United States Army.

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118. *See Judge Henry Clay Caldwell*, *supra* note 111, at 88.

119. *See id.* at 87.

120. *See City Honors Man Who Captured It During Civil War*, ARK. DEMOCRAT, Mar. 18, 1914.