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## Cowtown Courts: Dodge City Courts, 1876-1886

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by C. Robert Haywood

THE STEREOTYPE OF FRONTIER or cattle town justice being "make shift as the towns that sprang up along the frontier's far edges" does not hold for the District Court of the Ninth and Sixteenth judicial districts in Dodge City, nor, for that matter, the city courts. Part of the misinterpretation can be blamed on the traditional image that all cattle towns adhered to quick, raw justice of the Judge Roy Bean vintage. The contemporary press gave a note of authenticity to these fanciful accounts by their own lurid stories printed at the time as jests and satire by journalists given to a flamboyant style of reporting. Unfortunately, these burlesques have been accepted as true, eyewitness accounts. Dodge City's reputation owes much to both sources: the latter stereotype and the contemporary exaggeration.

The stereotype has been enhanced by the assumption that the same lawless conditions present before the town became a cattle trading center continued to exist after the Texas trail herds arrived. At least three of the Kansas cattle towns had deserved, violent reputations, as well as shoddy or little law enforcement, before they began their careers as centers of cattle trade. Violence on the streets of Dodge City during its first three years after settlement, if not condoned, was not prosecuted in any orderly or consistent manner simply because the judicial system was not in place. None of the cattle towns, including Dodge, remained static for any length of time. They grew rapidly and altered in characteristics as economic and social changes occurred. In Dodge City, community attitudes toward law and order changed substantially after the buffalo business declined, and the community conscience moved toward the accepted national norms while the town developed as an important reception point for Texas cattle. Although Ford County with Dodge City as the county seat was organized in 1873, it was not until the fall of 1875 that Dodge received municipal status as a third class city and a full legal system was established. This, in turn, required even greater changes in community attitudes and policies.

Obviously, by 1875, the U.S. court system and legal procedures in the settled parts of the country were mature and sophisticated. But courts are no better than the individuals who interpret the law and serve on the bench and the bar. Fair and impartial trials depend upon how carefully those administering justice abide by acceptable standards. Frequently, depictions of the conditions under which justice was attempted in the West in the last quarter of the nineteenth century stress the ignorance, if not the corruption, of court officials. Such an unflattering image of those responsible for cattle town justice is offered in a recent popular account.

In the best of circumstances, with a conscientious jury and well-intentioned lawyers, a district judge still had his frustrations. Because many lawyers were abysmally ignorant of the law—only a relative few had been formally schooled in it before hanging out their shingles—a judge could expend a good deal of effort in prompting and guiding both prosecutor and defense. Nor was he himself necessarily versed in procedures and precedents. Though judges who presided over jury trials were expected to have some formal education in the law, those appointed to the Western bench often were men left over after others had picked off preferred judicial plums back East.<sup>1</sup>

The major actors in the Dodge City court dramas between 1876 and 1886 bear slight resemblance to the untutored, amateur administrators of the law represented by this description. The judges and lawyers were, in the main, competent and were generally sensitive to

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1. Paul Trachtman, *The Gunfighters* (New York: Time-Life Books, 1974), 141.



*When this photograph of Front Street was taken in 1873, Ford County had been recently organized with Dodge City as the county seat. By 1876 and the coming of the cowtown period, court and law enforcement systems were firmly in place with "attractive vices" still accepted for their economic importance.*

the requirements of preserving correct rules and form. If cases were decided in much shorter time than today, the speed reflects more on the nature of the docket than on hasty and erratic procedures. Obviously, there have been changes in form and practice over the years, but the decorum and basic rules in important matters are not greatly different. Today's lawyers would not feel terribly uncomfortable in the Dodge City district court of the 1880s; nor would they find the language of the court profoundly changed.

There is little evidence that in the *serious* cases in Dodge's district court, for the time period being considered, the judge tolerated excessive bombast or oratorical pyrotechnics. Oratorical flourishes were, however, more popular in the nineteenth century in any public presentation, whether in court or before civic, religious, or educational audiences. Lawyers were expected to be great, even grand, speakers. Such generalizations, however, need to be understood in terms of degree rather than absolutes.

The written briefs of Dodge City lawyers like Michael W. "Mike" Sutton, Harry E. Gryden, and James T. Whitelaw were carefully drawn. When their appeals reached the Kansas Supreme Court, considered the most practiced and exemplary judicial body in the state, the justices there used the language and arguments of the Dodge City briefs in reporting their judgments. But even these written statements submitted to the supreme court would appear overdrawn and excessive by today's standards. In a civil suit argued in 1880 by Mike Sutton, Jeremiah C.

Strang, and Charles M. Walker, the crucial point was made with exaggerated embellishments:

How, then, can the law for the sale of school lands be enforced in an unorganized county, except by giving authority to the officers of the organized county to which it is attached, to enforce and carry out the provisions of this act? This act alone renders life and the pursuit of happiness secure in all the unorganized counties of the state. Without it, crime would run riot, and the murderer would no longer need to seek the shades of midnight to wreak his deadly vengeance, or secure his unhallowed gains. Not alone in the mountain fastnesses, nor in foreign climes, nor yet in the dense and crowded hordes of criminals that infest our cities, would he whom justice seeks be found; but in the beautiful plains of the western part of our noble state he might revel in the delights of a pleasant home, beautified perhaps by the money taken from his slain victim. Public policy alone would dictate, were it necessary, that this act be upheld.

The rest of the argument was more prosaic, relying on clear marshalling of logic and facts.<sup>2</sup>

Equally wide of the mark is the popular picture of quick, hasty, and certain convictions in which judges and juries ignored the niceties and safeguards of individual rights. In most instances, trials were conducted

2. T. J. Philipin, et. al. v. Thomas L. McCarty, County Superintendent, etc., Kansas Supreme Court (24 of Kansas Reports), 393-405.



A prominent Dodge City lawyer, Michael W. "Mike" Sutton served as county attorney.

with dignity and careful attention to proper procedure. Juries were no more hasty, emotional, or partial than they are today. They usually took less time to reach a verdict, but there were instances of prolonged jury deliberations. As an example, the Atkinson-Warren case in 1886 found the jury impaneled from March 24 until March 29. There are other instances of juries moving at a snail's pace, as there are examples of lawyers resorting to delaying tactics. Both circumstances added to the judge's task. Yet there is little evidence to suggest that district judges badgered lawyers to hurry cases or tolerated shortcuts, even though a district judge's heavy work load was made doubly so by the distances he had to travel.<sup>3</sup>

If the trials proceeded without undue haste or pressure from the judges, convictions in the district court are about the same today as they were a hundred years ago. Even the notorious frontier "Hanging Judge

of Arkansas," Isaac Parker, hanged only 79 persons of the 13,490 he tried; 4,046 or 30 percent were acquitted. In Indian Territory, 30 percent of the indictments at trial led to *nolle prosequi*, judicial dismissal, or not guilty verdicts. Comparatively, Kansas in 1984 found 30.4 percent of felony cases and 28.8 percent of misdemeanors not guilty. Apparently, Mike Sutton, as county attorney in the Dodge City courts, had a considerably higher ratio of convictions than the average prosecutor, but he never reached the 100 percent that the press claimed for him. A random sample of three sessions (1878, 1879, 1881) of the district court in Dodge City, as reported in the local newspapers, placed convictions at 53.8 percent, continuances at 19.2 percent, and nonconvictions at 27 percent.<sup>4</sup>

One procedure that has changed and invalidates many comparisons is the present use of plea bargaining. The need to clear backlogged dockets did not have the priority that it now has. There was, however, a kind of modified process in which charges and punishments were scaled down. In one instance, a man named James Dempster (or Dempsey) had already been found guilty of first degree murder by a jury when County Attorney Whitelaw "persuaded" him to plead guilty to second degree murder, "owing to the circumstantial character of the evidence." In several cases, the defendant was tried first on "an attempted murder" charge, and when the jury failed to agree, the charge was reduced to "assault and battery" the second time around. Although neither process closely resembles current plea bargaining efficiency, the more awkward early process had the same effect. In these cases, neither haste nor crowded dockets motivated the court, but rather an attempt was made to "make the punishment fit the crime."<sup>5</sup>

Reducing the charge from assault with intent to kill to the lesser crime of assault and battery was a frequent adjustment in the lower courts. After tempers cooled or when a judge, who could look more dispassionately at the circumstances, directed, the justice of the peace could and did try such cases. One such instance, a fracas in neighboring Lakin, received full coverage and was treated with levity by the *Ford County Globe*:

4. Frank Richard Prassel, *The Western Peace Officer, A Legacy of Law and Order* (Norman: University of Oklahoma Press, 1972), 236; information from the Kansas Judicial Administration Office; Topeka; Glenn Shirley, *Law West of Fort Smith* (Lincoln: University of Nebraska Press, 1957), 198-99; *Ford County Globe*, July 2, 1878, January 25, 1881; *Dodge City Times*, January 11, February 1, 1879. It should be noted that four others sentenced by Parker either died in prison or were killed trying to escape.

5. James Dempster (or Dempsey) had killed his wife, and despite the reduced charge received a stiff sentence, twenty-five years in the penitentiary. *Dodge City Times*, October 30, 1884, February 12, 1885.

3. *Ford County Globe*, Dodge City, December 25, 1877; *Dodge City Times*, April 1, 1886.



The case was opened by Judge Burns [as acting county attorney], who surprised the opposite side by asking that the defendant [sic] be placed on trial for assault and battery, instead of assault with intent to kill. The defense objected, and a long argument ensued, in which each side exhibited great legal ability in expounding the law and smoking cheap five cent cigars to the great disgust of the honorable court. At the close of the argument court was adjourned for six hours, to take a rest and consider the matter.

Although the reduction was hotly contested, the justice of the peace decided to insist on the lesser charge.<sup>6</sup>

Undoubtedly, the surroundings in which a trial was held contributed to the degree of procedural decorum. When court was held in the cramped, upper story of the old city jail where prisoner, prosecutor, judge, sheriff, witnesses, and spectators sat cheek by jowl, the room forced a more informal and lax atmosphere. Dodge City was blessed in 1876 with a new county courthouse in which the district court could be held. The building of native stone and locally fired brick had, according to the *Ford County Globe*, "the best courtroom in western Kansas; good offices for county officers, and a splendid jail." The "splendid jail" in the basement, fashioned from limestone and known to those lodged there as the "lime kiln," reduced the necessity of releasing prisoners on inadequate bail. When the only jail had been the city's wooden-plank jail south of the tracks on Front Street, such releases had occurred because of limited space, and many prisoners had escaped prosecution by fleeing the area. Although the new jail was not totally escape proof, it was an improvement over the old wooden structure and added a sense of security.

The major physical improvement, however, was in the courtroom, which was large enough to also serve as an occasional theater and designed and furnished in traditional courtroom style. In this more commodious and formal setting, individuals charged with crimes and the parties to legal disputes could more easily sense the somber and judicious implications of the process. The legal actors—judges, lawyers, jury, and witnesses—were more willing to observe the proprieties of court procedures, and court etiquette seemed more appropriate. On the local level, the district courtroom provided a setting for government in its most formal and mature development.<sup>7</sup>

The types of crime on the dockets in the 1880s somewhat resemble those of today, with a major difference related to those of automobile and traffic violations. Drunkenness, disorderly conduct, and petty larceny occupied much of the time of the city courts. Dodge, perhaps more than most towns, was aware of vagrants and usually punished such persons by ordering them out of town by sundown. For a time following the August 6, 1878, passage of revenue-producing ordinances fining any "inmate or resident of any brothel, bawdy house or house of ill-fame" not less than \$5 and not more than \$50 and gamblers not less than \$10 and not more than \$100, the city did a brisk business in those categories. As intended, the city collected the fines and the proprietors of the houses and halls considered them a nuisance tax for doing a profitable business.<sup>8</sup>

The district courts dealt with a great variety of civil and criminal cases as determined by state statute. The only ones not handled were the minor offenses—small claims, misdemeanors, and the breaking of local ordinances. These were settled by the city courts and the justices of the peace. Horse stealing and cattle rustling cases did appear rather frequently, although not so often that they can be compared to the number of auto thefts on today's dockets. Larceny, divorce, and assault outnumbered other suits. Heinous crimes were far down the list. As a place of wild lawlessness, Dodge City's reputation was and is highly exaggerated. Although not a place for faint hearts while it remained a fairly wide open town as long as the Texas cattle came to the stockyards, Dodge's most lethal period had preceded the cowboy. After 1876, when the cattle town period began, Dodge's criminal justice system, from the peace officers through the courts, did a commendable job in curbing violence.

Civil cases do not appear as similar to today's as do the criminal cases. The human emotions generating crimes in that period were not much different from those a hundred years later. Passion, greed, covetousness, and uncontrolled tempers spark criminal actions in any age. But since civil suits deal in material matters, the nature of the economic life and the kinds of material development present cause those disputes to appear markedly different. Damages caused by livestock grazing on growing crops, the loss of "One Brown Canvas cooper riveted overcoat," debts of five dollars for Osage orange seeds, and attachments of "bay horses, harness,

6. *Ford County Globe*, February 21, 1882. For the same process at the district court level, see report of *State v. J. W. Choulton*, *Dodge City Times*, June 30, 1877.

7. *Ford County Globe*, January 15, 1878; Fredric R. Young, *Dodge City: Up Through a Century in Story and Pictures* (Dodge City: Boot Hill Museum, Inc., 1972), 91, 108.

8. Prassel, *Western Peace Officer*, 235-36; Joseph W. Snell, *Painted Ladies of the Cowntown Frontier* (Kansas City, Mo.: Lowell Press, Kansas City Posse of the Westerners, 1965), 5-6; *Dodge City Times*, August 10, 1878.

and buggies" speak of a far different time. But even in civil suits, many of the cases are quite familiar: damages caused by loss of goods, work uncompleted, divorce, and wages unpaid would not appear out of place on a contemporary docket.<sup>9</sup>

Both the Ninth and Sixteenth judicial districts required much travel by judges who were obliged to hold court at least twice each year in each of the counties with a district court, and, if the docket demanded, special sessions were held at other times. Dodge at first was in the Ninth District, which included eleven counties with district courts and "all that portion of the state lying south of the fourth standard parallel, and west of the counties of Hodgeman, Ford, and Clark." The Sixteenth District, in which the Dodge court was later included, consisted of twenty-seven counties. The Ford County District, because of its western location, had the unorganized counties in the southwestern part of the state attached to it for judicial purposes. These counties in 1881 included Clark, Meade, Seward, Stevens, Kansas, Stanton, Grant, Arapahoe, Foote, Sequoyah, Kearney, Hamilton, Greeley, and Buffalo. Only two district judges served the Dodge City district court: Samuel R. Peters of Newton served from March 1, 1875, to December 12, 1882, while Dodge was in the Ninth District; and Jeremiah Strang of Larned officiated from March 8, 1881, to January 1, 1890, while the area was in the Sixteenth District. Both men had considerable experience before coming to the district bench and both moved on to important political, legal, or judicial positions.<sup>10</sup>

In Dodge City, the required travel, which wore out many a frontier judge, was relieved by the easy access of the Atchison, Topeka, and Santa Fe Railroad. Still, it was a grueling job. Just how onerous is illustrated in the *Ford County Globe's* description of Judge Samuel R. Peters' work in the year 1877. He was reported to have dispensed with 919 docketed cases and traveled 8,170 miles in performing his "herculean task."<sup>11</sup> The district court judges' record was a remarkable one, and the process and the procedures maintained were at least on a par with district courts in the more settled eastern states.

The justice of the peace courts, although representing the lowest state governmental unit, the township,

were constitutional courts of great importance on the frontier. Each township could elect two justices of the peace for two-year terms with the governor filling vacancies that might occur between elections. The powers of that court were impressive, including original jurisdiction in both petty civil and criminal suits, holding preliminary examinations preparatory to handing cases to the grand jury or referring to the district court, confining the insane, acting as coroner, collecting any assessment made upon the premium notes of the insured, and staying execution of judgments. The justice of the peace could also perform marriage ceremonies and administer oaths. Matters of great importance came first to the attention of the justice of the peace. At inquests he determined the cause of death, the initial need to consider a charge, and the appropriateness of jail or bail. In civil suits he also handled cases in which sizable amounts of money were in dispute. As an example, when the county commission refused to pay a money warrant to H. P. Myton, he sought redress from Justice of the Peace R. G. Cook, who awarded Myton the full amount of \$299.30, plus seven percent interest from the date of issue. A number of similar cases were acted upon by Cook and other justices of the peace. Compensation of the justices was by fee; the rate established by state statute. Police courts resembled the justice of the peace courts, and a justice of the peace could serve as police judge in the absence of that official. The state statutes provided that "The police judge shall be a conservator of the peace, and shall have exclusive original jurisdiction to hear and determine all offenses against the ordinance of the city." Like the justice of the peace, no legal training was required of a police court judge, who was compensated by fees based on the same schedule as that of the justice of the peace.<sup>12</sup>

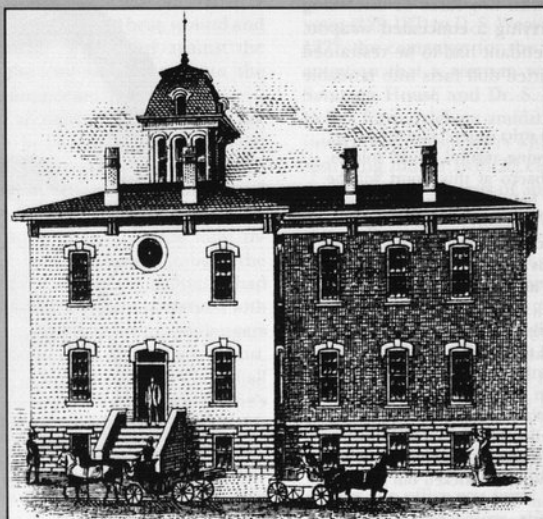
The local courts have suffered most from popular account, as well they should. Even in Dodge City, the justice of the peace and the city courts were occasionally in the hands of incompetents and the proceedings could border on the farcical. However, the municipal and township courts generally mirrored the values and expectations of the local community, and the judges serving them usually were respected by the citizens who elected them to office. It is difficult to discern this respect, however, for the newspapers at the time did much to exaggerate and perpetuate a ludicrous image, and what they often reported as having happened in court had only a general resemblance to the actual trial. Nicholas Klaine's description of "a day in the life of the Dodge City police court" has been widely distributed as

9. *Adams Express Company v. David Reudebaugh*, Selected District Court Cases, Ms. Microfilm Box 799; *Joseph Briggs v. William Wilkins*, Civil Cases, Ms. Microfilm Box 808; *Beeman v. Perera*, Civil Cases Case No. 168, Ms. Microfilm Box 807, Kansas State Historical Society.

10. "Official Roster of Kansas, 1854-1925," *Kansas Historical Collections*, 1923-1925 16 (1925): 667-68; *Session Laws of 1876, Kansas* (State of Kansas, 1876), 168-69, 1881, (State of Kansas, 1881), 199-200.

11. *Ford County Globe*, December 25, 1977.

12. *General Statutes of Kansas, 1876* (State of Kansas, 1876), *passim*.



The "splendid jail" in the basement of Ford County's new courthouse (constructed 1876) was a marked improvement over the city's earlier wooden-plank jail.

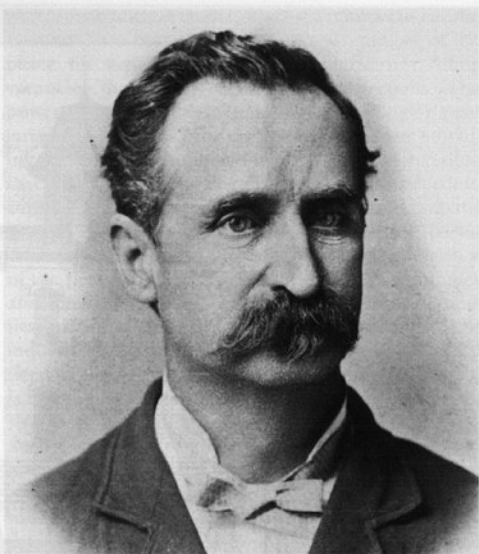


the real thing. Stripped of Klaine's hyperbole, the story reports the court dealing with two cases of disturbing the peace and one of carrying a concealed weapon. During one hearing, a defendant had to be restrained in court, and Klaine converted dull facts into readable copy:

"The Marshal will preserve strict order," said the Judge. "Any person caught throwing turnips, cigar stumps, beets, or old quids of tobacco at this Court will be immediately arranged [*sic*] before this bar of Justice." Then Joe [policeman, J. W. Mason] looked savagely at the mob in attendance, hitched his ivory handle a little to the left and adjusted his moustache. "Trot out the wicked and unfortunate, and let the cotillion commence," said his Honor.

City vs. James Martin—But just then a complaint not on file had to be attended to, and Reverent [*sic*] John Walsh, of Las Animas, took the Throne of Justice, while the Judge stepped over to Hoover's. "You are here for horse stealing," says Walsh. "I can clean out the d——d court," says Martin. Then the City Attorney [E. F. Colborn] was banged into a pigeon hole in the desk, the table upset, the windows kicked out and the railing broke down. When order was restored Joe's thumb was "some chewed," Assistant Marshall Masterson's nose sliced a trifle, and the rantankerous originator of all this, James Martin, Esq., was bleeding from a half dozen cuts on the head, inflicted by Masterson's revolver. Then Walsh was deposed and Judge Frost took his seat, chewing burnt coffee, as his habit, for his complexion. The evidence was brief and pointed. "Again," said the Judge, as he rested his alabaster brow on his left paw, "do you appear within this sacred realm, of which I, and I only, am high muck-i-muck. You have disturbed the quiet of our lovely village. Why, instead of letting the demon of passion fever your brain into this fray, did you not shake hands and call it all a mistake. Then the lion and the lamb would have lain down together and white-robed peace would have fanned you with her silvery wings and elevated your thoughts to the good and pure by her smiles of approbation; but no, you went to chawing and clawing and pulling hair. It is \$10.00 and costs, Mr. Martin."<sup>13</sup>

In the second case, Carrie Pembleton, a black prostitute, charged with carrying a concealed weapon, was the "prosecuting witness" against the man who had beaten her and been charged with disturbing the peace. The confused account in the *Times*, one of Klaine's more racist and sexist pieces, reported: "Miss Carrie, looked 'the last rose of summer all faded and gone' to ———.



Nicholas B. Klaine, newspaper editor and probate judge, once described for his readers "a day in the life of the Dodge City police court." Although Klaine may have intended a whimsical account, many have accepted his version as a true representation of frontier justice.

Her best heart's blood (pumped from her nose) was freely bespattering the light folds which but feebly hid her palpitating bosom. Her starboard eye was closed, and a lump like a burnt biscuit ornamented her forehead." Klaine concluded by maligning the court in much the same manner as he had belittled the plaintiff:

The City Attorney dwelt upon the heinousness of a strong giant man smiting a frail woman. Mr. Murphy, for defendant [*sic*], told two or three good stories, bragged on the Court, winked at the witnesses and thought he had a good case, but the marble jaws of justice snapped with adamant firmness, and it was \$5.00 and costs. Appeal taken.

It was Carrie's turn next to taste the bitter draughts brewed in our Police Court. She plead "Guilty, your Honor, just to carrying that razor in my hand. 'Deed, 'deed, your Honor, I never had it under my clothes at all." Carrie received an eighteen dollar moral lecture and a fine of \$5.00 and costs, and court stood adjourned.<sup>14</sup>

13. *Dodge City Times*, August 11, 1877. See also Nyle H. Miller and Joseph W. Snell, *Great Gunfighters of the Kansas Cowntowns, 1867-1886* (Lincoln: University of Nebraska Press, 1967), 171.

14. *Ibid.*

The court carried a far more prosaic statement indicating that Henderson had "conducted himself in a riotous and disorderly manner and did beat, wound and bruise this deponent [Carrie Pemberton] against the peace and disquiet of the city and contrary to the provision of Sec. II of ordinance no. 16...."<sup>15</sup>

Newspaper and other accounts of the time were not intended or understood to be factual reporting but were, as a thoroughly researched account of Kansas gun-fighters states, "the eruptions of humorous journalesse." Frontier humor tended to be broad and could be blatantly sexist and racist. If such accounts were intended to put prostitution in an unfavorable light, the editors failed miserably. On many occasions Klaine had condemned open prostitution, but when presented with a specific case did little to call attention to the dangers and meanness of the prostitute's life. The courts, at least, treated the victim as an offended person. The small non-punitive fine, however, was nearer to Klaine's assessment. Neither the press nor the courts in this and other specific instances did much to awaken the social consciousness of the community to the plight of the women or to the damaging effect prostitution had on the community at large.<sup>16</sup>

Flagrant personal corruption occurred only rarely in the Dodge City courts. According to Robert M. Wright, one justice of the peace attracted the attention of the humorist Bill Nye who then reported how the justice of the peace reversed a decision in favor of the plaintiff when he discovered the defendant was broke and unable to pay the court costs while the plaintiff had ample funds. The justice of the peace, W. Y. McIntosh, resigned after Nye's report and before legal proceedings against him were commenced. County attorney, Mike Sutton, and attorney William N. Morphy for the state brought him to trial for overcharging the legal limits for fees. Despite this incident, by the mid-1870s even the lower courts of Dodge City were in good hands. Frequently, lawyers held judicial offices as a means of supplementing their incomes. It was rarely the case that Dodge City courts were not presided over by one of the local attorneys. All lawyers were called "Judge"; most who had any rightful claim to the title gained it in one of the lower courts. The position of justice of the peace or police judge was not taken lightly. Col. T. S. Jones, one of the most dignified and respected attorneys, won a hard-fought campaign in April 1881 against two other candidates for the position of police judge. In fact, most

elections for the positions were hotly contested. In one of the closest races, Harry Gryden lost in 1880 by two votes (129-127) to D. S. Weaver, a non-lawyer. Earlier, in 1877, the campaign for the position attracted so much attention that a rostrum was erected in front of the Saratoga House and Dr. S. Berry Dorr and Dan Frost held a formal debate amidst considerable heckling that interrupted the speakers with "bright sally[ies] of wit or sparkling humor [which] electrified the audience with spontaneous outbursts of applause."<sup>17</sup>

Dan Frost, R. E. Burns, and H. M. McGarry, all attorneys, served as justices of the peace. The office was considered important enough by attorney Mike Sutton that he went to some pains, as usual behind the scenes and confidential, to get F. T. M. Wenie appointed justice of the peace by the governor. At the time, Wenie was primarily a businessman but also an active attorney. Additionally, one legal suit fought by Sutton all the way to the state supreme court had to do with the jurisdictional rights of a Finney County justice of the peace. The justice of the peace's status was certainly an honorable one and, because of the nature of most claims and crimes, the office was fairly active.<sup>18</sup>

These lower courts, the municipal and township courts, were charged, in the words of Anne M. Butler in her study of frontier prostitution, "with the responsibility for crime management." The justices of the peace, even more than the city council, were expected to mold, adjust, and curb activities deemed necessary to the community's prosperity. In the management of crime, the cattle trade in Dodge required sharp distinction between destructive acts—murder, highway robbery, horse stealing—and attractive vices—drinking, gambling, and whoring. The destructive acts would drive away the buyers and sellers carrying large sums of money; attractive vices would lure "the festive cowboy" to Front Street. The community understood that prostitution required regulation for the common good, but its elimination could not be tolerated because of the adverse effect on the town's economy. The same general rules applied to other forms of "necessary vices"—gambling, drinking, and boisterous rowdiness. Neither knowledge of jurisprudence nor practical legal training were as essential to the magistrate of the lowest court as

17. *Dodge City Times*, May 26, 1877, April 10, 1880; Robert M. Wright, *Dodge City, The Cowboy Capital* (Wichita: Eagle Press, ca. 1913), 187; *Ford County Globe*, April 13, 1880, February 15, 1881.

18. *Dodge City Times*, July 1, 1886; M. W. Sutton to Simon Briggs Bradford, March 29, 1886, photocopy, M. W. Sutton file, Archives Department, KSHS; *In re Hinkle*, Kansas Supreme Court (31 of *Kansas Reports*), 712-15.

15. *City of Dodge City v. Monroe Henderson*, Selected District Court Cases, Ms. Microfilm Box 799, KSHS.

16. Miller and Snell, *Great Gunfighters*, 171.



his knowledge of the community's mores and his sense of fair play. It was a demanding job. Not all who held it were deserving of the honor and meager fees.<sup>19</sup>

Preserved records of city court actions show the lowest courts' proceedings to be relatively formal with witnesses present, the accused represented by counsel, and accurate records kept. The individuals' rights were assured even before the bar of the lowly justice of the peace court. Fines were relatively heavy, and some judges took pride in being considered stern and unyielding. In the following instance, the costs totalled \$20.75, or about three weeks' pay for a laboring man:

Hattie Mauzy Defendant [sic] arrested on the comp[li]aint of James Masterson charging that on the 5th day of Oct. AD 1878 at the said City of Dodge City,—The said Defendant Hattie Mauzy...within the Corporate limits of the said city [was] an inmate and resident of a Certain Brothel Situated on...24 Block on Locust Street in the said City of Dodge City contrary to the provisions of Section II of Ordinance No 42 entitled an Ordinance Relative to houses of ill-fame. Now on this 8th day of Oct 1878 have this cause for hearing. The Plaintiff appears by its attorney E. G. Colborn and the Deft in person and by her attorney H. E. Gryden. The Defendant waives arraignment and pleads not Guilty. Whereupon Wyatt S. Earp, James Masterson, Wm Tilghman and James R. Ballard are sworn & testify for the plaintiff and Hattie Mauzy is sworn & testifies in behalf of the Defendant. After hearing the Testimony of both Plaintiff and defendant and listening to the argument of Counsel, the Court does find that the charges contained in the Complaint are true and that the Deft. Hattie Mauzy is guilty as charged.

It is there upon considered ordered and adjudged by the Court that Deft Hattie Mauzy do pay a fine of Ten Dollars and the Cost of this prosecution and that she stand committed until the same is paid.

Bond of appeal filed the 8th day of October AD 1878 and Defendant Hattie Mauzy released.<sup>20</sup>

All seemed to be in order and justice served. Although the legal language was a bit strained, the grammar unpolished, and the record preserved in an untidy and disorderly scrawl, the trial process was clearly far from the burlesque Klaine described in "a day in the life of the Dodge City police court."

The court to receive the most criticism in Ford

County was the probate court, which came near at times to representing stereotypical frontier justice. Having jurisdiction over the probate of wills, administration of the decedents' estates, and guardianship of minors and incompetents, the court had considerable administrative power. The major area of abuse came with the authority to issue writs of habeas corpus. Such a writ could secure release from custody of any imprisoned person on a convincing showing of a denial of a constitutional right or other official illegal conduct, such as the denial of or excessive requirement of bail or illegal arrest. Considering the frequent informality of arrest and the difficulty of following procedures to the letter of the law because of the distances traveled by the sheriff in transporting prisoners, writs were frequently sought and obtained in probate court.

Probate court judges rarely had legal training: only one of Dodge's probate judges during the cattle town decade was ever admitted to the bar, and one, August Crumberg, was elected under an assumed name because, as he said, he wished to "conceal his whereabouts." These judges, more than any other magistrates, would bow to the superior knowledge and glib tongue of an attorney. Part of their willingness to please undoubtedly came from the miserable pay the office received. Most of the fees were fixed by law and those that were not were determined by what the district court clerk was allowed. For issuing a subpoena a judge received twenty-five cents; administering an oath, ten cents; recording a will, ten cents; and probating a will or issuing a marriage license, one dollar. The highest fee that could be earned was three dollars, for a hearing on a writ of habeas corpus. The judges, consequently, were inclined to be overly cooperative in setting times for hearings to suit an attorney's convenience. On a number of occasions, the court was convened late at night and all parties involved were not necessarily notified of the hearing. A case in point was one dealing with an alleged theft of horses in the Texas Panhandle by W. B. (or B. W.) Rogers and four companions. The owner, Milton Harrison, "and a few companions" had pursued the thieves and caught them at Hays City. They then brought the thieves to Dodge and turned them over to Sheriff Bat Masterson for safekeeping. Masterson, smarting under his recent defeat for reelection, was at best careless for he accepted the prisoners and locked them in the Dodge City jail. The prisoners appealed to Sutton, the county attorney, and when he heard that they were being held without any authorization, he requested a writ of habeas corpus. Obviously, Masterson could give no justification for holding the men and, with complete candor, wrote a brief explanation for probate judge Nicholas Klaine:

19. Anne Butler, *Daughters of Joy, Sisters of Misery* (Urbana: University of Illinois Press, 1985), 100-2.

20. *Cook v. the Ford County Commissioners*, Civil Appearance Docket A, Ms. Microfilm Box 805, KSHS; *City of Dodge City v. Hattie Mauzy*, Justice Docket—Dodge City, July 5, 1878 to October 5, 1882, Box 96, photocopy, W. S. Campbell Collection, Division of Manuscripts, University of Oklahoma Library, Norman.

State of Kansas, Co. of Ford

To the Probate Court: I hereby state that I hold the within named parties without any authority whatever; that I have no commitment to them.

W. B. Masterson

Sheriff

Harrison was not informed of the hearing, which was held the next morning, and he was considerably disturbed to find that the men he had tracked from Texas were released and well out of the country. Masterson's excuse for not informing Harrison was that he could not find him and that the one plaintiff he did locate was so drunk that "he would not have known the difference between a writ of habeas corpus and a Texas steer."<sup>21</sup>

Other instances of an over cooperative judge freeing undeserving prisoners were cause for considerable complaint. After one such incident, the *Kinsley Graphic* editorialized under the headline, "Prostitution of the Writ of Habeas Corpus":

Unfortunately, Kansas, with a carelessness little less than criminal, the legislature has conferred the power to issue this writ, not only on the Judges of the Supreme and District Courts, but also on the Probate Courts. When it is considered that few of the Judges of our Probate Courts are men learned in the law, and many of them distinguished for their ignorance of the first principles of the common law, it is at once seen that to commit the power to issue a writ of such high character and dignity may lead—and, in fact, has led—to the most serious consequences. Criminals have gone unwhipped of justice, and the laws have been set at defiance. The great writ that was intended to be the safeguard of the liberties of the people, bids fair to become the destroyer of peace and welfare of society.<sup>22</sup>

The district courts were far better served than the lower courts. The finest eyewitness accounts of the procedure and atmosphere of the district court in Dodge City were given by Dan Frost. Not only was Frost, as an attorney, knowledgeable of the law, but he was a perceptive observer and appreciated the niceties of procedure. Representative of Frost's reporting was his coverage of the January 1877 session of the district court which was a busy one with "a large attendance...of interested parties, jurors, witnesses, etc." The court remained in session from January 7 through January 11 and then recessed for a week before reconvening to try the civil

suits. On Saturday, just before adjournment, Judge Samuel R. Peters passed sentence upon the six who had been convicted. Under the headline, "The Way of the Transgressor," Frost described the court:

To all who witnessed the scene in the court room last Saturday evening, the proof was positive that "the way of the transgressor is hard." The room was crowded with curious spectators, who had heard that the convicts were to be sentenced that evening, and as sentences in this community have been almost as rare as angels' visits in the past—few and far between—it was natural for the people to assemble as they would to witness a contest in the arena. The Judge was seated at his desk, his grave and solemn countenance told that his thoughts were stern and decisive. Groups of attorneys conversed in low whispers within the railing, all of whom, save one—the prosecutor—had failed to get the ear of the jury, and their spent eloquence was as pearls cast before swine—trampled and trod upon. In a row in front of the Judge sat the six sinners for whom they had labored; all were convicted, and from their features every ray of hope had fled. The whispering was hushed in the room as Judge Peters finished writing, laid aside his pen and reflecting for a moment, said, "James A. Bailey, you may stand up." The first of the six slowly rose to his feet. He was a man of fine appearance, and to questions propounded by the Judge, answered that he was born and raised in New York; was 42 years of age; had received an education, and before coming west was employed as a traveling salesman for his brother. When asked if he had any reason to offer why sentence should not be pronounced, he said he had none, as he had plead guilty; but in view of the fact that he was already advanced in years, he hoped the Judge would not sentence him to a long term, as he would be unable to survive it. He asked that the fact of his being under the influence of liquor be considered in mitigation of his crime.

He had stolen a horse.

Frank Jennings was next called up. He was from Pennsylvania; was 26 years old; had been in Kansas five months; has a mother living; by profession a house carpenter. Was under the influence of liquor. Begged the Court to treat him with leniency. His offence [*sic*] was horse stealing.

James Skelley, convicted of stealing a gun. Was 27 years old; been in the west two years; from Illinois; parents both living; by trade a glass blower; uneducated. Was under the influence of liquor; hoped the Court would be lenient.

H. Gould, ["Skunk" Curley] assault and battery with intent to commit murder. Mr. Gould wore a smiling countenance, and did not seem to fully comprehend his situation. Was a native of Kansas; by occupation a herder of cattle; age, 24 years. Was influenced by liquor. In view of his tender years, he asked the court to be merciful.

21. C. F. W. Dassler, comp., *Compiled Laws of Kansas, 1879* (St. Louis: W. J. Gilbert Publishers, 1879), 440. *Tarbox v. Sughrue*, Kansas Supreme Court, Case No. 3940, Series II, Archives Department, KSHS; *Ford County Globe*, November 18, 1879; *Dodge City Times*, November 22, 1879.

22. *Kinsley Graphic*, May 18, 1878.

Mr. Sebastian, charged with stealing 26 sacks of corn, was the only one of the six who claimed to be innocent, 31 years of age.

Mr. John Brown, charged with the same offense as Sebastian, said he supposed, from the evidence he was guilty. Was 36 years of age and by trade a butcher. Was intoxicated at the time of the theft.

Frost's report clearly depicts the types of crimes considered by the court and offers a more personal description than Klaine's broad characterization. Of the defendants' fate, Frost went on to recount:

After the prisoners had all been thus questioned, Messrs. Gryden, Jones and Kellogg, in behalf of their respective convicted clients, argued to the Judge, and directed his attention to the "brightest spots" in the lives and acts of the criminals, and asked that mercy be shown them. The Judge then passed the following sentences, the date of imprisonment to commence Jan. 7th, 1879; Bailey, two years and six months; Jennings, two years and six months; Skelley, two years and three months; H. Gould, two years and three months; Sebastian, eighteen months; Brown, two years and three months.

The remarks of Judge Peters on this occasion were very appropriate and the advice he gave should be followed by all who heard it and witnessed this sad scene. It was long after lamplight when court adjourned, and the crowd dispersed, free to go where they pleased, while the doomed six filed out under heavy guard to seek what comfort they might within the narrow bounds of their lonely prison cells.<sup>23</sup>

Not all sentencing appearances were conducted with such efficiency and dispatch. The trial of John S. McCarty, a "confidence man" charged with robbery by use of a "monte game," was a case in point:

The Judge overruled the motion for a new trial, and on Monday evening was the time set for the passing of the sentence. The accused had been admitted to bail in the sum of \$8,000, and when his appearance was demanded he was non est. County Attorney Whitelaw, on Monday, moved that the prisoner be taken charge of by an officer, but the court said that the accused was on bail and his custody was not necessary, "or words to that effect." The bonds of McCarty are also missing. It is said that the bond never passed into the hands of the District Clerk, so he informs us. A party started in pursuit of McCarty, supposing that he had gone south in the stage, but they returned without the fugitive, he having taken another course.

Judge [Jeremiah C.] Strang, in the course of some remarks to McCarty, commenting upon the latter's

course, said that the rolling stone gathers no moss. In his "argument" for his defense, McCarty retorted upon the Judge's suggestion by citing a circumstance in the life of another. In the defense of his course he said that it was "the rambling bee that gathers much honey." At this juncture, it would appear that McCarty is the rambling bee in search of more honey. Whose comb will he fill next from the result of his rambles, after the victims who too eagerly fall prey [*sic*] to his wily schemes?

The bondsmen are responsible notwithstanding the bonds cannot be found. The bonds can be proven by competent witnesses. A forfeiture of the bond was taken in court on Tuesday morning.<sup>24</sup>

The press was quick to expose irregularities and to call for an accounting of responsibilities. Klaine wrote in an editorial huff: "Ford County has been at considerable expense.... and [for] the efforts of justice to be frittered away in this manner is a shame and a mockery. The responsibility will be placed where it belongs." The editor wanted his readers to know that the integrity of the courts was under the careful scrutiny of the press.<sup>25</sup>

The extent to which individual rights were to be preserved and the letter of the law enforced were matters of great concern and occupied much of the court's time. Occasionally, the court was presented with questions the judge could not immediately answer. In one such instance, Judge Strang adjourned the court and spent much of the night researching the question: "Has the court, in the absence of a regular panel, power to order a drawing?" The next morning, he presented "a long and able argument" that found that there would be "no jury trial this term except by agreement." At the same session, the judge "spent several days" studying the briefs of E. H. Borton as to whether a judgment could be reopened after the statute of limitations had run out. Awareness of the importance of adhering to correct procedures, not haste, motivated these judges.<sup>26</sup>

In one of the most thoroughly covered trials, "Mysterious" Dave Mather's killing of Tom Nixon, the lawyers clashed over several points of procedure in the preliminary hearing. At one point, the defense attorney, Mike Sutton, moved that the court require the state to name its witnesses, that they be examined separately, and that all but the witness under examination be excluded from the courtroom. Whitelaw for the state then turned to Sutton and requested him to name his witnesses. Sutton opposed the motion saying he was not certain of what the necessary defense would be at that point and he

23. *Ford County Globe*, January 14, 1879. Except for the reports by John Speer, Frost's coverage of the courts was fuller than any of the others appearing in papers.

24. *Dodge City Times*, February 22, 1883.

25. *Ibid.*

26. *Ford County Globe*, February 12, 1884.



might require several witnesses or none in response to the prosecuting actions. He concluded that

there were able attorneys for the State and all the power of the great State of Kansas stood ready to sustain them. To refuse this [the right not to name his witnesses] was to throw upon themselves the imputation that they were afraid of justice. It is an established rule that the defense may or may not introduce testimony and no power can compel them to say at this stage that they will or will not do it. No undue advantage should be taken of the opposing counsel.

The court supported Sutton. Whitelaw then tried to get reporters barred from the court, arguing that if coverage was published, "nine-tenths of the people of Ford county would read them, and it would be impossible to procure an unprejudiced jury in the county." John Speer, the reporter for the *Kansas Cowboy*, who, as the free-state newspaper editor of Lawrence's *Kansas Pioneer*, was one of the targets of Quantrill's Raid, rose and defended his presence. Speer, age seventy at the time, was something of a legend in Kansas journalistic circles as a champion of the rights of the accused. In this instance, he won the day and the court overruled Whitelaw's motion. The press carefully and in detail reported all testimony, cross examination, and reexamination taken in the preliminary hearing. Mather was eventually granted a writ of habeas corpus, a change of venue, and found not guilty. The major consideration of the court, obviously, was a fair and impartial trial in which the legal safeguards of the defendant were upheld. The judge's decision was not unusual and he certainly was not "prompting" or "guiding" either the prosecutor or defense.<sup>27</sup>

Occasionally, a judge's decision was precedent setting. In 1884, at the height of the struggle over prohibition, Judge Strang acted to disqualify a juror. Kansas had been legally dry since 1881, but Dodge City blatantly ignored the state constitutional prohibition. While impaneling the jury in the widely publicized William M. Bird case,<sup>28</sup> the following exchange took place:

In the District Court on Tuesday, Judge Strang made a suggestion which created a slight sensation in court and had considerable effect on the outside of the court room. The precedent has been established that persons engaged in selling liquor are disqualified to sit as jurors.

In the empaneling of a jury in the Bird case, a barkeeper was proposed for a juror—Judge [N. C.] Sterry, counsel for Bird, propounded the following question to him:

Sterry—What is your business?

Proposed Juror—Barkeeper.

Sterry—Selling liquor?

County Attorney Whitelaw—I object; the counsel has no right to make the juror criminate himself.

Court—That is not your affair.

County Attorney—But I can suggest it to him.

Court—You have no right to do that.

County Attorney—Then the court should do so.

Court—That is not my business, either; and it is not the business of the county attorney to attempt to shield violators of the law, but to prosecute them.<sup>29</sup>

Both Sterry and the judge were fully within their prerogatives to challenge the prospective juror as to his ability to be fair and impartial. The circumstances of the county attorney defending an admitted lawbreaker must have seemed strange to the judge. Whitelaw, however, represented the community which had not accepted the prohibition law and had established other standards of conduct. Sterry from Emporia and Judge Strang from Larned were "foreigners" in the eyes of the majority of Dodge citizens, and in that sense, Whitelaw found justification in upholding his constituents' standards. The prohibitionists of Dodge were elated by the judge's action, however, and Klaine editorialized: "Little by little, prohibition is taking hold in this city." By preventing a barkeeper from serving on a jury, Judge Strang had indicated to the public that "the whiskey selling appeared disreputable." The ruling of the judge, no doubt, did affect the life-style of the town. Sentiments were changing and the trial of an unrelated matter did much to encourage the change.<sup>30</sup>

Usually the lawyers exercised considerable discretion in challenging the validity and decisions of the court, but on occasion such restraint was more than an attorney could bear. Such was the case when attorney Harry Cryden referred to a particular trial as comparable to the con games on Front Street. At a little later date, Mike Sutton was able to express his disapproval of a decision with more finesse and humor. Judge William Hutchinson recalled the time that the district court was held on Sunday. The jury brought in a verdict against Sutton's client, and Sutton's son, who was inordinately loyal to his father, rose and berated the judge for desecrating the Sabbath. He quoted the Scriptures at length and refused to be quiet until he sank exhausted

27. *Dodge City Kansas Cowboy*, August 2, 23, 1884; *Dodge City Times*, January 8, 1884, January 8, 1885; *Globe Live Stock Journal*, Dodge City, August 5, October 28, 1884.

28. Bird was charged with stealing cattle and the Western Cattle Growers' Association hoped to make an example of him, but were thwarted by the defense attorney's maneuvers.

29. *Dodge City Times*, June 12, 1884.

30. *Ibid.*; *Dodge City Democrat*, March 27, 1886.

in his chair. At that point the father rose and said: "Son, the passages of Scripture you have quoted are correct, and I will also quote you some. 'If the ox or ass fall in the well on the Sabbath, get it out.' Now Judge Hutchinson has twelve asses in the jury box and he wants to get them out." In his way, Sutton had helped ease the court over an awkward situation, and while he may have insulted the jury, he had not cast dispersions on the judge. The respect for the court usually displayed by the attorneys was generally shared by the people of the community. In that sense, the court by its example led the town in its quest for progress and the expectation of a more orderly future.<sup>31</sup>

Equal justice under the rule of law is a basic principle of American democracy. Albeit only imperfectly realized, its attainment is democracy's most cherished goal. The fulfillment of this basic objective is dependent on the laws supporting it, and especially on the procedures of the courts. Dodge City as a cattle town was well served by a court system firmly in place when the Texas trail herds reached the Atchison, Topeka and Santa Fe stockyards on the Arkansas River. Although much of what was found on the frontier in terms of social, economic, and political life was new, untested, and in a state of flux, the process and procedures of the courts had been refined over the centuries, dating back to the earliest English common law traditions. The courts in the new setting were more effective, more professional, and more attuned to the rest of the United States than any other unit of local government. The courts were, furthermore, under closer scrutiny from outside the community than other units, such as the school board or county commission. Challenges of procedures could be, and were, reviewed by the state's highest tribunal. The presence of experienced district court judges, who lived outside the area, and the work of attorneys, who came from other towns with a variety of experiences and educational

backgrounds, kept the atmosphere in the district court far more sophisticated and far less parochial than in the other governmental units.

Still, the courts, especially the municipal and township courts, responded to the local community's values, standards, and prejudices. In so doing, the judicial structure helped perpetuate certain vices, and some Dodge City residents who engaged in these "necessary frailties" were denied full expression of legal rights. Anne Butler found that in spite of this weakness, the courts offered prostitutes "a marginal spot within the community" when all other institutions—churches, social clubs, political parties—excluded them. Even the lowest wretch in the social system knew how to use the courts and found "the legal establishment represented the one institution...where prostitutes could feel comfortable."<sup>32</sup>

Finally, all of the courts benefitted from the important and searching review of a local community. The driving force behind the rule of law comes not merely from constitutions and statutes, but from an informed public conscience. Dodge City was fortunate in having a number of outspoken editors, frequently representing rival newspapers, who were quick to expose any serious deviation from acceptable procedures and practices, and who tended to show both sides of a dispute. The courts, charged with the responsibility of putting into operation the compulsory force of the government, had the power to deprive citizens of their liberty, their goods, and even their lives. It was a sobering responsibility which saw the community carefully looking over the court's shoulder, monitoring its actions.

If the courts were sometimes less than ideal, they did represent the democratic aspirations of a raw frontier community. As was true of the lawyers, the courts kept alive the hope for a better life, with the certainty of personal and social advancement. KH

31. *Dodge City Journal*, September 23, 1948.

32. Butler, *Daughters of Joy*, 112-15.