How the Law Came to Kansas

by Paul E. Wilson

The life of the law has not been logic; it has been experience. . . . The law embodies the story of a nation's development and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.

Justice Oliver Wendell Holmes, Jr.

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Facing page: These artifacts, documents, and publications represent various components that were influential in the evolution of the Kansas legal system: the U.S. Constitution; an 1857 local election record; territorial laws, statutes, and legislative journals; supreme court reports; judicial gazette; military epaulet; revolver; and attorney's card. Pictured in the ambrotype is political activist Colius Jenkins whose murder in 1858 by James Lane, over a land dispute, had major legal consequences.

The purpose of this article is to examine antecedents, origins, and beginnings of contemporary legal institutions. While the focus is upon Kansas in the nineteenth century, the study is not confined by arbitrary limits. The story of the law’s development is not restricted by calendars and political boundaries. Growth occurs in response to social, economic, and political needs whenever and wherever such needs are felt. The Kansas experience is not unlike that of other societies on the trans-Mississippi frontier. Thus, occurrences in other frontier communities may assist in understanding how and in what manner the law came to Kansas.

In the complex, legalistic and litigious world of the waning twentieth century it is seldom remembered that only two life spans ago Kansas was essentially a juristic void. The land upon which Kansans now live was part of a politically unorganized area lying mainly between the Missouri River and the Rocky Mountains designated by Congress as Indian country, but often called the Nebraska Territory. Law, as an effective standard of human conduct and interpersonal relationships had not penetrated its boundaries.

Law Before the Law

Prior to the creation of the territorial government, the applicable law in the region that became Kansas is uncertain and the records of its administration are meager. The absence of a comprehensive and coherent body of law and effective agencies for law enforcement may not be significant. The law is concerned with people and their rights and responsibilities. Except for a few special constituencies, subject to their own disciplinary policies and procedures, the place that we now call Kansas was virtually without population. To the extent that there were no people subject to its constraints, speculation as to the law may be academic.

Across the Wide Missouri. Most of the present state of Kansas became subject to the sovereignty of the United States under the Louisiana Purchase of 1803. The act authorizing acceptance of the ceded lands provided that the then existing government and legal system should control until Congress should provide otherwise. Scholars do not agree as to whether the law of Spain or of France was applicable to Louisiana at the time of the purchase, but after the lapse of nearly two centuries the issue is largely conjectural.

In 1804, Congress divided the newly acquired domain into two parts, the Territory of Orleans and the District of Louisiana. Present Kansas was part of the District of Louisiana, which was attached to Indiana Territory for purposes of government, and the judges and governor of that territory were empowered to enact laws for the district. Substantive and procedural law was adopted and a system of inferior courts was created, but there is no evidence of its impact, if any, within the present boundaries of Kansas. In 1805, the District of Louisiana became the Territory of Louisiana, and a territorial government was authorized. In 1812, the territory was renamed as the Territory of Missouri, the territorial government restructured, and provision made for separate executive, legislative, and judicial branches. There is no record that any court of the Territory of Missouri ever sat at any location within the boundaries of the present state of Kansas.

The Missouri territorial legislature of 1816 declared the common law of England and the statutes of a general nature passed prior to the fourth year of James I (1607) to be the law of the territory except where inconsistent with the territorial laws and the statutes of the United States.

Four years later, a part of the territory lying east of the present eastern boundary of Kansas was detached and admitted as the state of Missouri. No territorial government was organized for the remainder of the former Missouri Territory. Hence from 1820 until 1834, persons in the former territory, with significant exceptions, remained subject to applicable federal law and to the somewhat indefinite residue of the law of the territories of which it had been a part. Jurisdiction to enforce those laws and venue to hear prosecutions and civil disputes were unclear.

At a given time one might find within the area Indians, soldiers, federal civilian employees, missionaries, traders, hunters, trappers, travelers, and illegal settlers. All were subject to the uncertain jurisdiction of the United States.

In 1834, Congress designated the part of the United States west of the Mississippi River, excluding the states of Louisiana and Missouri and the territory of Arkansas, as Indian country. The criminal laws of the United States applying to federal enclaves were given effect therein, except that they did not apply in cases involving crimes committed by Indians against the persons or property of other Indians. For judicial purposes, the area was attached to adjacent federal districts in Missouri and Arkansas. 10

The pre-territorial population of Kansas was sparse, diverse, and in many cases transitory. At a given time one might expect to find within the area Indians, soldiers, federal civilian employees, missionaries, traders, hunters, trappers, travelers, and illegal settlers. All were subject to the uncertain jurisdiction of the United States, yet the framework of remedies was neither inclusive, clear, nor effective. At the outset, no civil jurisdiction was conferred by any federal act relating to the Indian country. To fill this vacuum, affected persons relied on their own devices and efforts from which standards of rights and responsibilities emerged. In the first half of the nineteenth century the role of the Congress in enacting criminal statutes was limited and narrowly construed. The general power to govern belonged to the states and, where territories had been organized prior to statehood, jurisdiction over internal affairs was vested in the territorial government. The Indian country, of which Kansas was a part, was neither a state nor an organized territory. Only the Congress had power to enact and provide for the enforcement of penal laws governing its residents.

Federal Enclave Law. The applicable federal criminal law in the Indian country was that enacted by Congress to govern federal enclaves acquired or reserved by the United States for the performance of necessary governmental functions. 11 The criminal law applicable to federal enclaves was, at best, fragmentary. The failure of Congress to prohibit particular conduct meant simply that such conduct was not criminal.

Assimilative Crimes Act. In 1825, in order to supply interstitial rules and standards, Congress passed the Assimilative Crimes Act which made offenses committed in federal enclaves but not punishable under federal law subject to the penalties provided by the state in which the enclave was located. 12 Since the Indian country was not located within any state, it is arguable that the Assimilative Crimes Act had no significance in pre-territorial Kansas and there is no record of a prosecution based on that theory.

Beyond the Law

Several important groups were expressly or implicitly excluded from operation of the Enclaves Act. With respect to Indians, the federal jurisdiction did not extend to (1) crimes committed by an Indian against the person or property of another...
Indian; (2) crimes for which the tribe had already imposed punishment; and (3) crimes over which a treaty had given exclusive jurisdiction to the tribe. Military personnel were subject to the Articles of War and its standards of conduct, penalties for violation and procedures provided by the Articles. The Articles of War was a penal code, and courts-martial had no civil jurisdiction.

The Indians. Non-Indian settlement in Indian country was prohibited by law. Only those whites and other non-Indians who were employed, licensed, or otherwise expressly authorized by federal authority could lawfully be domiciled there. Others were trespassers; their removal was authorized by federal statute. Hence, Indians constituted the bulk of the area's pre-1854 inhabitants. Because of the migratory habits of some of the tribes and the impossibility of accurate enumeration, there is no reliable census of the Indian population of the area that became Kansas. However, it seems likely that the aggregate total was between fifteen and twenty thousand persons.

The tribes resident in the Kansas part of Indian country may be classified in two general groups: (1) the native tribes, which include those tribes that were indigenous or such early migrants to the area that their domicile there had been stabilized; and (2) the immigrant tribes, consisting of those Indians that had been removed from locations east of the Mississippi and resettled on reservations. William Elsey Connelley, whose voluminous writings on early Kansas history are often cited, provides a useful analysis of the pre-1854 Indian population of Kansas. Connelley finds eight native tribes representing five linguistic groups and twenty-eight immigrant tribes belonging to four linguistic groups. Some of the immigrant tribes who were assigned to reservations in Kansas never actually moved to their new homes. On the other hand, many Indians who were domiciled in other parts of the Indian country or had no fixed place of habitation ranged across the Great Plains in response to changing seasons and buffalo migrations, producing fluctuations in population at particular locations.

The Indian tribes of the United States had and continue to have a unique political status. Each recognized tribe is regarded as a separate nation—not sovereign for all purposes but "dependent, domestic nations." Each was competent, subject to the overriding power of Congress, to make and enforce its own laws. The tribes varied greatly in size, structure, habits, and degree of sophistication. At one end of the spectrum, many of the immigrant tribes had relatively advanced cultural and political institutions. Because of long association with white society they had adopted many of the white man's values and perspectives. Indeed, some of their leaders were white men who had married into the tribes and the children of such marriages. At the other extreme were the migratory tribes of the Plains whose main activities were hunting and warfare. Hence, any generalization about domestic law in the Indian country must be accompanied with the caveat that it may be inaccurate when applied in a particular context. Each tribe had its own law ways, its own standards, its own sanctions, yet a common thread of similarity ran through all.

Usually, the Indian population lived in small, self-governing communities, to which the idea of a separate judiciary would have been foreign. The early Indian societies were oral cultures in which patterns of law and order had been developed by consensus and were generally understood but often not articulated. They functioned without need for written laws or other paraphernalia of European and American civilization. In some tribes, disputes were settled by the chiefs or religious leaders. In many tribes, however, policy decisions affecting tribal members evolved by consensus in general council meetings open to all.

The private ownership of property has had a profound impact on the development of Anglo-American law. The Indian tribes were mainly communal societies in which the concept of private property, as it existed in European law, was unknown. A

16. Ibid., Secs. 10 & 11.
17. Paul W. Gates, Fifty Million Acres: Conflict over Kansas Land Policy, 1854-1890 (Ithaca, N.Y.: Cornell University Press, 1954), 15, states a total of 10,679 members of eastern tribes had been moved to Kansas. Based on a reading of tribal histories the number of resident native Indians appears to be from five to seven thousand.
20. Abelard Guthrie and William Walker, members of the Wyandotte tribe, illustrate this point. Both were important tribal politicians with roles in the movement to organize the territory. Guthrie was a white man who married an Indian woman. Walker was a Wyandotte Indian of one-sixteenth blood.
For individuals who committed offenses against tribal values, whipping or execution was sometimes imposed. In the close-knit Indian societies, scorn and laughter was a powerful method of punishing transgressors.

The body of law dealing with property rights would have been superfluous. For individuals who committed offenses against tribal values, there were no jails, although whipping or execution was sometimes imposed. A common punishment was ridicule. In the closely knit Indian societies, scorn and laughter was a powerful and effective method of punishing transgressors. Tribal disapproval expressed by ostracism was often an effective deterrent. For serious offenses, restitution was required by the tribal law; for example, a murderer might be required to pay blood money to the victim’s family. Informal mediation by tribal leaders was used to end disputes. However suited to their own culture, the customs of the Native American tribes did not contribute significantly to the law of Kansas.

The Military. From the standpoint of numbers, the second most significant population group in the Indian country was the military personnel stationed at the frontier army posts. Kansas provided the sites of three such installations—Fort Leavenworth, Fort Riley, and Fort Scott. During the 1850s, the total military population of the three posts was estimated to be around seven hundred. Unlike the Indian communities, members of the American army were subject to a code and system of courts that pre-dated the existence of the United States. The first American-written code of military law was the Articles of War, prepared to govern the Continental Army in 1775. These articles established a hierarchy of courts-martial and defined their composition and jurisdiction. While the Constitution adopted in 1789, expressly empowered Congress to make rules and regulations for the government of the army and navy, in the execution of this power Congress continued the system of courts-martial that had been previously established. Thus, it seems probable that the Articles of War was the first system of Anglo-American law to have any effect upon persons who were residents of pre-territorial Kansas.

The Civilian Non-Indians. This population of pre-territorial Kansas has been estimated to have been about equal to the military—five to seven hundred. These were Indian agents and agency employees, licensed traders and others involved in commercial enterprises, missionaries, and an estimated fifty trespassers. This segment of the population was governed by the uncertain and not very effective provisions of the Federal Enclave Law. However, as most lived in communities, it seems likely that a considerable amount of autonomy was practiced. The senior member of the group may have assumed or have been assigned an authoritarian role. The penalty for transgression was often expulsion from the community.

The nineteenth century was a time of migrations. Thousands of non-Indians passed through Indian

22. Byrne, Military Law, 7-8.
23. Martin, “Early Days in Kansas,” 129; and Connelley, History of Kansas, 1:304-5. Estimate total non-Indian population to be twelve to fifteen thousand persons.
24. 4 U.S. Stat. 115, Sec. 4.
country. Indians viewed with concern the establishment of trade routes across Indian lands, often causing friction between the Indians and travelers. For protection these travelers usually moved in wagon trains. Protection of travelers from attack was the responsibility of the military, although troop escorts were not always readily available. Internally, the train's governance was the responsibility of designated leaders.25

The position and authority of the designated captain was not unlike that of a military commander; his word was the law. But undue emphasis ought not to be given to the view that because these migrants were outside of the law's domain, they were law unto themselves. History indicates that although they may have gone beyond the reach of the law's long arm, they were not unmindful of the law's existence. In their camps and with their trains, the disciplines they sought to maintain and the procedures they employed were their adaptations of standards prevailing in the communities from which they had come. Indeed, the travelers' knowledge of and respect for society's norms of law and order may have been the strongest deterrent to violations of the emigrants' persons, property, and peace.26

In evaluating the extent to which federal law governed the internal affairs of pre-territorial Kansas, we must also consider the paucity of resources for enforcement. Although attached for judicial purposes to adjacent districts, there is no evidence that a court of the United States ever sat in Indian country. There is no record of nonmilitary personnel who had special responsibility for law enforcement in the area. In the case of crimes committed by non-Indians against Indians, it appears that enforcement was particularly lethargic and indifferent. Adding to these deficiencies the inadequacy and vagueness of the applicable substantive law, we conclude that for most purposes pre-territorial Kansas was a juridical vacuum.

The Infancy and the Impotence of the Law

With the signing of the Kansas-Nebraska Bill on May 30, 1854, Kansas was removed from the Indian country, its boundaries established, given a separate identity as a territory of the United States, and the structure of a territorial government was prescribed.27 However, the act of conferring territorial status on the area probably had little immediate impact on the lives of persons who dwelt there. The organic act prescribed no standards of conduct for persons subject to territorial jurisdiction nor did it purport to define and provide for the enforcement of rights to personal security and property. Under the act, territorial officers, including justices of the territorial supreme court who also functioned as district judges, were appointed by the president. Lesser judicial officers were initially appointed by the territorial governor, himself a presidential appointee. Legislators were to be chosen by the settlers in an election called by the governor.

Andrew H. Reeder, the first territorial governor, was appointed on June 29, 1854, and actually arrived in the territory on October 7. Three days after his arrival, the governor received the complaint of James C. Brown alleging that Wesley S. Davidson, John A. Davidson, and Samuel Burgess had committed assault and battery with intent to murder two persons named in the complaint. Based upon the complaint the governor, "as the conservator of the peace of the Territory, and in the absence of the judges, issued an executive warrant, specially directed, in the absence of the Marshal, to Malcolm Clark, for the arrest of the prisoners."28 On October 13, at a hearing before the governor, the defendants were admitted to bail conditioned on their appearance at the first sitting of the United States District Court for the territory.29 There is no record of further proceedings against these defendants. Indeed, it appears that most territorial criminal cases begun between May 30, 1854, and August 30, 1855, when the acts of the first legislature took effect, were dismissed by the prosecutor. Patent proof of crime was not possible in the absence of a statute defining and prohibiting the crime.

The first territorial justices were appointed in the summer of 1854, and all had qualified and were present in the territory before the end of that year. On February 26, 1855, Governor Reeder issued a proclamation establishing three judicial districts and

28. "Executive Minutes: Minutes Recorded in the Governor's Office During the Administration of Governor Andrew H. Reeder," Kansas Historical Collections, 1883-1886 3 (1886): 229.
29. Ibid.
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assigning a justice of the supreme court to act as district judge in each district. On November 8, 1854, the territory had been organized into districts for the appointment of justices of the peace, and on November 9 the first appointment had been made. James S. Emery of Lawrence was named as justice of the peace for the first district.

By the end of the year, justices had been appointed and qualified in more than half of the sixteen districts.

With the organization of a system of courts and the presence of qualified judicial officers, it might appear that the effective administration of justice had begun, but the appearance is illusory. No one, including the judges, knew what the law was. The governor thought it consisted of:

laws of the United States not inapplicable to our locality—the laws of the Territory of Indiana made between the 26th of March, 1804, and the 3rd of March, 1805, enacted for the District of Louisiana—the laws of the Territory of Louisiana—the laws of the territory of Missouri—the common law, and the law of the Province of Louisiana at the time of cession, except so far as the latter have superseded the former.

Compounding the problem was the fact that no one in the territory knew the provisions of this uncertain body of law nor were there libraries or other means of learning it. Some judges were said to follow the laws of their home states—Missouri, Pennsylvania, Ohio. For others the rules were simply their ideas of the right thing to do.

In midsummer 1855, after months of political strife and intrigue, the territorial legislature met. Its enactments took effect on August 30, 1855, fifteen months after the territory was opened for settlement. The main body of the law enacted by the first legislature was largely an adaptation of the statutes of the state of Missouri. Except for the provisions relating to slavery, it was probably a good nineteenth-century state code and much of its language remained in the law of Kansas well into the twentieth century. However, because of claimed fraud in the election of its members, the First Territorial Legislature is usually called the “bogus legislature,” and the validity of its enactments were denied and the acts of officers who purported to act under the code were not honored by many settlers; the territory was in turmoil.

Justice of the People, By the People and For the People

The migration to Kansas began in March 1854. Although the issue of slavery and an interest in its outcome was an important motivating force in the settlement of the territory, the promise of land...
was the overriding consideration of many immigrants. Some sought homes and the independence and security that the homeowner enjoys. Others saw an opportunity to reap a speculative harvest. Regardless of the moral objective of the owners, the fee simple ownership of land and the capacity of the individual to acquire such an interest is a basic concern of Anglo-American law. By becoming a freeholder one escapes the vestiges of servitude and becomes a peer in a democratic society. Political considerations may have been the paramount concern of politicians but land was the more powerful lure that drew both home seekers and speculators to the Kansas frontier. While the Indian campfires still burned, settlers and speculators crossed the Missouri border to identify and mark lands on which they hoped to establish claims. Thousands awaited the signing of the bill that would legitimize their entry into the newly created territory. The circumstance was ironic in that on May 30, 1854, there was no land in the territory that could lawfully be acquired or occupied by the settler. 33

The distribution of public land to settlers was governed by the Preemption Law of 1841. 34 The preemption right acquired by the first settler was a possessory right established by settlement and the construction of a dwelling and other improvements. Once the claim was established, the preemptor had the right to purchase the land at the minimum price (usually $1.25 per acre) before the public offering of the tract of which his claim was a part. Preemption claims were limited to 160 acres and preemptors' other holdings were limited to 320 acres. A declaration of intent to purchase was required from the preemptor within three months after settlement or the filing of the survey, whichever date was later. To be eligible to preempt, the settler was required to be either the head of a family, a male over twenty-one years old, or a widow, and a citizen or an alien who had declared an intention to become a citizen of the United States.

The Preemption Law governed the disposition of public lands of the United States. But there were no public lands in Kansas Territory when the first settlers arrived. Every acre was Indian land, either land to which the original Indian title had been extinguished and re-granted in perpetuity to tribes removed from communities east of the Mississippi River or lands still owned and occupied by the indigenous tribes. In either case, entry by settlers was illegal and heavy penalties were provided for violators. 35 While negotiations for acquisition of tribal lands and their return to the public domain had begun, none had been completed. The complexities of Indian tenures and the problems of freeing their lands for preemption and settlement are beyond the scope of this article. Without comment on the process and the policy and ethical considerations involved, it is sufficient to observe that eventually most Indian titles were terminated and the Indian lands opened to non-Indian acquisition by preemption or other purchase. However, the lack of coordination between government schedules and settlers' needs and objectives produced problems without easy solutions.

The uncertainty was compounded in that no public survey of lands in the territory had been undertaken by May 30, 1854, and settlement on unsurveyed lands was prohibited. While the prohibition was removed two months after Kansas became a territory, the inherent problems of settlement of unsurveyed lands remained. 36 The settler seeking to establish preemption rights to a quarter section could rely only on his own judgment and good faith in establishing its boundaries. At best, descriptions were imprecise and often overlapping. The following is a typical recorded description of a pre-survey claim.

Thomas L. Lease records his claim as follows bounded on the Mo River on the east by Tobias S. Lease on the south by a claim marked Y52 on a black oak tree and on the west by a vacant claim. This claim is situated near the head of the prairie [sic] bottom on the Mo River above bankses ferry. This claim includes a valley which is part timber and part prairie with a small branch running through it which usually sinks before reaching the river and was made on the 2nd day of June 1854. 37

The inevitable result of the dubious status of the land and the absence of legal guidelines was that the early preemptors' claims were tenuous and subject to dispute. All claimants were squatters and whatever

33. Gates, Fifty Million Acres, 3.
35. Gates, Fifty Million Acres, 16.
Self-help in frontier communities often took the form of vigilantism and there is evidence that vigilante companies were active in early territorial Kansas.

Rights they possessed arose from their naked prior or current presence and the extent of their improvements upon the land they claimed.

At its best, the life of the squatter was not easy. To establish a home on the frontier was a hazardous undertaking. There were elements of nature to contend with; hard work, often unrewarded; loneliness; and the absence of most of the amenities of settled communities. These hardships, compounded by the uncertainty of tenure and risk of eviction, were often devastating to the morale of the strongest. There was no effective law that defined the squatter's right and no court to which he could look for protection of whatever rights he possessed. His problems were real and immediate. The law and its processes were far to the rear. Without the security of effective government and motivated by the need to protect their persons, their homes, and their property, communities of settlers resorted to self-help.

Self-help in frontier communities often took the form of vigilantism and there is evidence that vigilante companies were active in early territorial Kansas. Vigilantism is lawlessness, unchecked by the restraint imposed by the public will, and lawlessness was not acceptable to many of the first Kansans. Although the squatter may have taken possession of his land without benefit of law, perhaps in defiance of law, he was not an outlaw. Coming from a settled community he understood the benefits of law and order and the institutions necessary to bring about these conditions. Hence the people created their own structures and procedures to achieve justice and stability. These were local, spontaneous organizations, created without formal legal authority and speaking with the voice of no sovereign. Called by various names—claims associations, squatters associations, claims courts, peoples courts—they were effective to the extent that their procedures and policies reflected the will of the people who created them.

The claims associations were not vigilantes. Their elected officers acted within a framework of written rules adopted by their members, defining the rights and responsibilities they sought to protect and enforce. When performing adjudicative functions they attempted to adhere to nineteenth-century concepts of due process. Notice and the opportunity to be heard was given to parties whose interests were affected. Evidence was presented in an adversary setting, and issues were determined by juries of peers. It must be conceded that the squatters' tribunals did not always produce unblemished justice. Sometimes their proceedings were flawed and there was usually no appellate review. They were capable of being used to accomplish other than just results. Some of the earliest associations were established primarily to protect the interests of non-resident claimants and speculators. Their importance lies in their establishment of rules and a regularized procedure for the resolution of disputes. They represent an important step away from lawlessness and vigilantism toward due process and the rule of law.

No one knows how many claims associations existed on the Kansas frontier. A dozen or so are
mentioned in the literature and there certainly were others. Their records were meager and often lost. Only a few association papers have found their way into the archives. Differing in details, they generally had the same characteristics and objectives. They were usually organized in mass meetings of settlers who sought their protection. Ordinarily an association served an area roughly equal to the later township. In the case of one association west of Lawrence, membership was limited to those settlers who from the meeting place could point to the smoke of their cabin chimneys.38 A constitution and by-laws, setting up the governing authority, defining the rights of members, and establishing the procedure to be employed before the tribunal were adopted at the beginning. The Mutual Claims Association in Douglas County was typical. Its constitution provided for a chief justice, a register, a marshal, and a treasurer. The article establishing the office of chief justice provided:

The duty of the Chief Justice shall be to try and decide all disputes between settlers in reference to claims or otherwise, and to try all criminals or persons guilty of the violation of the laws of the Territory. The said Chief Justice shall always take justice between man and man as his guide; and upon the demand of either party shall summon a jury of six persons to try all disputes or violations of law.39

The services provided by the squatters' associations to their members included the following:

1. A place and procedure for title registration prior to the time when county governments were established or other public facilities for filing claims became operative;

2. Protection of bona fide settlers against competitive bidding by outsiders at public land sales. The first public sale of Indian trust lands occurred on November 17, 1856, almost two and a half years after the opening of the territory. Other offerings followed.40 By that time many settlers had made valuable improvements to the lands on which they squatted. Representatives of the association were always present at the sales to assure that the settlers' rights were protected and, by means of combination, agreement and, perhaps, intimidation, to discourage bidding by speculators and other strangers.

3. Adjudication of disputes arising from claim jumping, innocent and otherwise, conflicts as to priority of claims, eligibility of claimants, location and value of improvements, and such other controversies that the circumstances produced; and

4. Trial and punishment of public offenders. Features common to all, or most, claims associations were:

1. The area over which the association purported to exercise jurisdiction was specified.

2. Membership was open only to bona fide residents, as defined by the association by-laws.

3. The associations were usually controlled by democratic procedures in which all claim-holding members were authorized to vote.

4. It was often provided that in the process of deciding disputes "principles of honor and fairness were to prevail at all times" or that "justice between man and man" should be the guide.

5. There was always the provision that the claimant should file a description of his claim and any transaction affecting it with the recorder who would record it for a nominal fee.

6. Each claim holder was entitled to protection of only a limited amount of land—quite often a quarter-section but there were variations.

7. The claim had to be the real home of the claimant or, in some cases, a tenant.

8. In some cases disputes were settled by the entire membership, but more often there was provision for a court, organized generally along Anglo-American lines with defined jurisdiction.

9. Enforcement of the claims courts' decrees and judgments were firm, but informal and summary. Failing to comply with the order, the offender was not only required to relinquish all claims to the land or other property in question, but he might be beaten, ducked, his personal property taken or destroyed, or his life otherwise made intolerable. The penalty for unyielding disobedience was often, in the language of the day, to be "put over the river." In extreme cases it is reported that "over" did not mean to reach the other side. Few offenders had the hardiness and persistence to resist judgment for long.41

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Critics of the squatters associations have found that they were not wholly successful in protecting the interests of bona fide settlers. By failure to establish and enforce rigid standards of residence on and improvement of claims, and by undue emphasis upon priority of arrival and assertion of claim, the associations were susceptible to manipulation by speculators and others who had no intention of becoming actual settlers but were motivated by consideration of profit and politics. Some, including people who were there, have expressed a different view:

The squatter courts seem, according to most reports, to have served their purpose well. To be sure there were some abuses. Some of the clubs were composed largely of speculators and outlaws who settled long enough to secure claims, raise what cash they could on them and move on. These unprincipled individuals did not hesitate to use perjury and all manner of fraud to obtain title to land. However, the cases where these transients outnumbered the real homemakers were relatively few. More often there was a high degree of satisfaction with the order maintained by the citizens' courts. The laws were highly responsive to local need. They were promptly and faithfully executed. The old settlers frequently described this period of local neighborhood autonomy as the golden age of territorial government in Kansas. According to one of the first residents, life and property has never been safer in Kansas than during this period when the territory was without law or legal machinery. The only hazard to the public peace was that produced by the continued threat of invasion by Missourians. There were but few offenses by resident citizens and these were promptly and impartially dealt with by the assembled citizens of the neighborhood.

Whatever their imperfections, the claims associations reflected the urge of civilized man to achieve goals through the law and its processes. They were better than bloodshed.

Ad Justitia Per Aspera

Although the structure of the territorial government was nearing completion by midsummer 1855, the quality of justice and public order had not improved. On the contrary, lawlessness, disorder, and hazard to persons and property were to reach their climax during the months ahead. The melancholy story of Bleeding Kansas is too well known to necessitate retelling within the space available here, but our concern is how the law fared during this troubled time. Under the most favorable circumstances competition for personal and political advantage in newly created communities of people with divergent views is likely to produce discord. In

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Kansas Territory, political debate degenerated into armed conflict. War is seldom mindful of the law and its orderly and benign processes. In Kansas, the disregard of the law’s purposes and disciplines was compounded by the indifference and ineffectiveness of those responsible for creating and applying the rule of law—legislators and judges.

The Legislature. The Organic Act provided for a legislature consisting of a council and a house of representatives to be elected by the residents of the territory. After a census had been taken and legislative districts established, an election was held on March 30, 1855. Because of massive participation by ineligible, non-resident voters, returns from six districts were rejected and new elections held in those districts. The two elections produced a council of ten proslavery partisans and three free-state sympathizers and a house of representatives with eighteen proslavery and eight free-state members.

Although the act creating the territory located the temporary capital at Fort Leavenworth, the first legislative session was convened by Governor Reeder at Pawnee, now part of the Fort Riley military reservation. Reeder’s critics claimed that the governor’s investments in Pawnee real estate prompted his decision to locate the capital there. He, on the other hand, said that Pawnee, more than a hundred miles inland, was selected because of a desire to remove the legislators from the polluted political atmosphere of Missouri. With a considerable amount of reluctance the elected councilmen and representatives assembled at Pawnee on July 2, 1855. After organizing each house their first action was to deny seats to most free-state members and to seat their proslavery opponents. One free-state councilman had not appeared for the opening of the session and the remaining free-state representatives resigned shortly. Thus, all members of both houses were proslavery partisans, many of whom had been chosen in elections claimed to be fraudulent. The legislators then passed, over the governor’s veto, an act to move the seat of government to the Shawnee Manual Labor School where they reassembled on July 30. The Shawnee Manual Labor School was a mile from the Missouri border. The legislature remained in session until August 30, enacting a complete code of laws consisting of 147 chapters and an aggregate 1,058 pages. Most of the code was a verbatim statement of existing Missouri statutes, and, according to mid-nineteenth standards, was a good code. But its provisions relating to slavery were anathema to the free-state settlers who were emerging as the political and moral majority of the territory.

Because of the circumstances surrounding the election of its authors and widespread revulsion at its infamous provisions relating to slavery, the entire code of 1855 was rejected by many, perhaps most, Kansans. In a democracy, words and phrases become law only with the consent of those whom they purport to bind. While the acts of the bogus legislature looked like law, their appearance may have been misleading, as they failed to merit the respect and consent of the governed.

The Judiciary. By the mid-nineteenth century, the structure of territorial government in the United States had become fairly standardized. The judiciary conformed to the pattern that had been established elsewhere. Three levels of jurisdiction were provided—appellate, general original, and limited original. Appellate jurisdiction was vested in a supreme court of three justices appointed by the president of the United States. In addition to deciding appeals en banc, each justice presided over a district court exercising general original jurisdiction. Limited jurisdiction was vested in justices of the peace and probate courts all initially appointed by the governor of the territory. Sixteen justices of the peace districts were created by proclamation of the governor and a probate court was established in each county. The probate judge also acted as chairman of the board of county commissioners.

All territorial supreme court justices were appointees of Presidents Franklin Pierce and James Buchanan, who were northern Democrats with sympathy or, at least, toleration for the southern point of view. Then, as now, presidents sought jurists whose ideas were compatible with their own. Hence, during the entire territorial period, the highest levels of the Kansas judiciary were made up of judges who favored or accepted the proslavery position.

44. Act of May 30, 1854, 10 U.S. Stat. 283, Sec. 27.
46. "Executive Minutes . . . of Governor Andrew H. Reeder," 229-32.
47. Statutes of the Territory of Kansas, 1855, Ch. 44, Sec.
Chief Justice Samuel D. Lecompte was described as "a man of frivolous mind, little ability, less integrity, great perversity and indolence, and limited knowledge of the law."

Ten justices were appointed to the supreme court of Kansas Territory of whom eight actually served. The first panel appointed by President Pierce consisted of Madison Brown of Maryland as chief justice, with Rush Elmore of Alabama and Saunders W. Johnston of Ohio as associate justices. Brown declined to serve and Samuel D. Lecompte was appointed chief justice in his place. Lecompte, a Democrat politician who had served in the Maryland legislature, was soon embroiled in the turbulent politics of the territory and is remembered more for his political activity than his judicial achievement. Governor Reeder described him as "a man of frivolous mind, little ability, less integrity, great perversity and indolence, and limited knowledge of the law." A year later, Gov. John W. Geary, sensing a state of insurrection caused, in part, by the inaction or incompetence of the judiciary, virtually undertook the direction of the judicial department under the threat of imposing military law. In the fall of 1856, the president attempted to remove him but as the senate declined to affirm the appointment of his designated successor, James O. Harrison of Indiana, Lecompte remained in office. While the evidence of Lecompte's abuse of the legal process is abundant and damning, objectivity requires recognition that the historians who wrote of territorial Kansas were not his friends. His own defense of his judicial conduct is plausible if not persuasive. His problems may have arisen from an inability to resist the influence of his friends or to question their motives. At some point in his service, Lecompte apparently experienced a conversion. His last years on the bench were less controversial. Perhaps he was less a monster than a political opportunist, but his tenure as the territory's first chief justice did little to assist in bringing the law to Kansas.

Of Associate Justice Johnston we know little. The supreme court heard no cases during his tenure, and records of his service on the district bench are meager. From other records we infer that he was the friend of Governor Reeder and interested in land acquisition and speculation. He was removed by the president along with Associate Justice Rush Elmore in September 1855. The stated cause of their removal was that the justices along with the governor had engaged in improper land transactions with the "Kansas half-breed Indians," but there is evidence that the real reason for their ouster was that they had been found politically unacceptable. Justice Elmore, although an Alabama slaveholder, was a political moderate. He came to Kansas after a successful career in law and military affairs. His judicial competence and personal integrity earned him the respect of both of the contending factions. After his

removal by President Pierce, Elmore remained in the territory and was again appointed to the court by President Buchanan in the summer of 1858. He remained on the court until Kansas became a state.  

Justices Elmore and Johnston were succeeded by Sterling G. Cato of Alabama and Jeremiah M. Burrell of Pennsylvania. Justice Burrell, who was ill when appointed, spent only a few weeks in the territory when he returned to his home where he died the following October. He did little to advance the law in Kansas. On the other hand, his colleague, Justice Cato, was an active politician who may have added to the infamy of the territorial judiciary. Cato, described by Connelley as "a villain in ermine," was appointed from the slave state of Alabama and was, apparently, an ardent proslavery advocate. His detractors are many; his defenders few. While Cato’s critics are mainly those who sat on the other side of the table, there is little evidence that Cato ever spoke or wrote in his own defense. The record of his tenure reveals a pattern of apparent bias and abuse of judicial power. In 1990, the distinguished historian Kenneth M. Stampp characterized both Lecompte and Cato, “neither of whom made any pretense of judicial impartiality,” as members of a group of “reckless men” in whose hands the proslavery party remained. Perhaps less objectionable on the frontier than in more sophisticated times, Cato is reported to have been intemperate and lacking in courtly decorum. Yet during the critical time of 1856 and early 1857, Chief Justice Lecompte and Justice Cato ran the territorial judiciary, and the law suffered. Unlike Lecompte, Cato experienced no conversion. Upon his removal by President Buchanan in 1858, he returned to the South where he died during the Civil War.

Justice Burrell was succeeded by Thomas W. Cunningham of Pennsylvania who resigned and returned home after seven months of service. Little is known of him and his contribution to the law of the territory was probably not significant. Justice Cunningham was succeeded by Joseph Williams, an experienced jurist who had served as justice and chief justice of the supreme court of Iowa. Although a Buchanan Democrat, Williams’ views appear more moderate than those of his predecessors. As district judge in southeastern Kansas during the troubled months of 1858, Williams had a significant role in advancing the rule of law. Finally, in March 1859, John Pettit of Indiana, a former United States senator, became chief justice, succeeding Lecompte. Thus, at the end of the territorial period, the two highest levels of judicial office were occupied by Pettit as chief justice and trial judge of the first judicial district, with Associate Justices Williams and Elmore completing the appellate panel and occupying the trial benches in the second and third districts.

The supreme court held its first session at the Shawnee Manual Labor School on July 30, 1855. At that session the court was requested by the United States district attorney for an opinion as to whether the legislature’s adjournment to Shawnee Mission was valid. Two of the justices responded “as judges but not as a court,” upholding the validity of the session. The third justice declined to participate, finding no case or controversy before the court. The first three cases set for hearing by the court were called on January 14, 1857, but no arguments were heard. Two were dismissed for want of prosecution and one was continued. At subsequent sessions twenty-eight opinions were rendered by the territorial supreme court, but none had great legal or political significance.

The first district courts were convened in March and April 1855, and thereafter court days were set in each county of each district once each year. There is no adequate record of the performance of the first courts, but in 1856 Governor Geary protested the failure and delays in prosecutions and unwarranted dismissal of cases. However, by mid-1857, the district courts had begun to function more smoothly and to move cases with greater dispatch—probably a result of the diminution of political unrest. A complement of justices of the peace was in office and probate courts were organized in each county. Law at the grass roots was becoming reality.

By the end of 1857 a new territorial legislature, reflecting the views of the free-state majority, had been elected and subsequently, by a process of

52. Connelley, History of Kansas, 1:546.
A statute passed in 1855 required only that a lawyer be free, white, male and that he secure a license from the supreme court or a district court of the territory.

repeal, amendment and reenactment, was to undo the work of the bogus legislature and provide a body of law acceptable to Kansans. Chief Justice Lecompte had undergone conversion. Justice Williams, a moderate, had joined the supreme court, and Cato had accepted defeat and, in August 1858, was succeeded by Justice Elmore. The lower courts were functioning. Finally, when the fifth session of the territorial legislature adjourned on February 11, 1859, a midnight bonfire was kindled on the adjacent Lawrence street and symbolically the acts of the bogus legislature were publicly consigned to the flames. Although grave problems remained unsolved and a war loomed on the horizon, it can be asserted that at this season the law had indeed come to Kansas.

The Lawyers Come to Kansas

The law's delayed response to the opening of Kansas Territory was not paralleled by the profession whose mistress it is. Lawyers came early and in ample numbers. The first census, taken eight months after the opening of the territory for settlement, shows about eight thousand residents and more than forty lawyers—one lawyer for each two hundred people. As some of the records do not show occupation, there were probably more lawyers than listed. By 1858, 162 persons had been enrolled as members of the bar in Leavenworth County alone. The largest number of lawyers in territorial Kansas came from the more heavily populated states of the east, perhaps pushed out by an overpopulation of lawyers or motivated to go west by a sense of adventure. The great majority of lawyers in Kansas in 1855 were under thirty years of age. This suggests that the lawyer-settlers were not failures who migrated westward to start new practices but, like the territory itself, were young and inexperienced.

Requirements for admission to the territorial bar were minimal. Initially the absence of formal standards may have accounted for the apparent over abundance of lawyers. A statute passed in 1855 required only that a lawyer be free, white, male and that he secure a license from the supreme court or a district court of the territory. There was no territory-wide bar examination. Admissions were handled by local judges, some of whom were apparently quite casual in granting licenses. William Tecumseh Sherman, who gained immortality as he marched through Georgia, was a Leavenworth lawyer for a short time before the Civil War. Sherman, who had never studied law nor had legal experience, relates that after he had begun to practice he mentioned to the judge that perhaps he should be admitted to the bar. The judge agreed and instructed him to stop by the clerk's office and pick up a license which would be granted without examination on the ground of

general intelligence. Kansas was not unique. Many mid-nineteenth-century jurisdictions had few requirements for admission to the bar. Some required only good moral character. It cannot be said that the absence of formal standards and the summary procedures for admission to the territorial bar produced a profession whose members were characteristically distinguished. They represented a wide range of professional ability and achievement. At one end of the spectrum were men who became leaders of the bench and bar during the first decades of statehood. Their professional stature is documented by their opinions, their briefs, their public services, and their continuing impact on the law of Kansas. At the other end were lawyers of more modest accomplishment, whose names and services may be forgotten or overlooked by historians, but whose contribution to the rule of law in their own communities and generations may have been real and lasting.

Litigation on the frontier was simple, if not crude, and in most places a comprehensive knowledge of the law or special legal training and skills were not required and were likely to be of little use to the average lawyer. The majority of the cases were of the type common to any new and sparsely settled community. The knowledge of the fundamental elements of the common law, often gleaned from Blackstone, and a sense of natural justice were usually enough for competent handling of the simple litigation that arose. There existed no collection of precedents to master and no array of authorities to cite. A sharp mind and an ability to marshal facts, the power of reasoning and a good deal of common sense were sufficient equipment to make a man a passable lawyer. Many of the cases were unsubstantial in nature, and it was the large number of suits rather than the amount involved in each case that enabled the average lawyer to make the practice pay. Farming, merchandising, land speculation, and money lending were the only businesses of any consequence. Thus, the practice of law, in the main, centered around these activities. The greater part of all civil suits dealt with debts, accounts, notes, contracts, titles, foreclosures, ejections, and bankruptcy. Because money was scarce, the lawyer frequently received for his efforts commodities, services, land, or just credit for merchandise. Most lawyers engaged in business transactions in addition to the practice and usually these transactions involved real estate.

Land litigation was the most profitable source of frontier practice, and those who did a land office business were usually prosperous. The routine land case involved little more than a disputed question of fact—who got there first. Hence, it required little legal learning. The debtor economy of the frontier influenced the law business. Some lawyers acted as brokers for eastern lenders, later foreclosing their mortgages, while others spent a substantial part of their time collecting debts from settlers. This, no doubt, explains the antagonism toward lawyers often expressed in rural areas.

The criminal practice was simple and forthright. Except for questions as to venue, jurisdiction and sufficiency of indictments, the issue was whether the defendant was guilty of the crime charged. The complex framework of constitutional limitations on prosecutions and rights of defendants had not been contemplated. The crimes charged were usually those violations of human rights traditionally recognized as basic—homicide, mayhem, rape, theft, and other invasions of personal security and public order. Some bore a close relationship to frontier conditions. Of the twenty-eight decisions of the territorial supreme court, four related to prosecutions for crimes—unlicensed liquor sales, larceny of “two steers or working cattle,” operating an unlicensed ferry, and perjury. The only federal prosecution in Kansas during the territorial period was for violation of the Fugitive Slave Law. Most criminal cases involved trials in court, and for the pioneer, court day was a matter of major interest, competing with the fair and the circus. People traveled miles to see the proceedings and hear the lawyers plead. To a society suffering from monotony and lack of entertainment, these seasons were pleasant interludes.


Each time frontier settlers observed government in action, the gun and the rope became less potent as instruments of frontier justice.

But a more serious purpose was served. To each prairie settler or aspiring entrepreneur who attended a session of court came a new awareness that law and not force is the way of civilized society. Each time frontier settlers observed government in action—their own government in which they participated—the gun and the rope became less potent as instruments of frontier justice.

To generalize about the Kansas frontier lawyer and his contribution to civilization is hard. He (and they were all masculine) spent his days advising people with problems—legal, financial, and personal; he represented clients with causes—both just and unjust; he made both friends and enemies; he tried to earn a living for himself and his family and to be a useful citizen of his community. His guidepost was the law—the constitution, the statutes, and the customs and traditions of his people. However it may be evaluated, his role in bringing the rule of law to the Kansas frontier was unique.

Conclusion

The story of the emergence of the rule of law on the Kansas frontier validates a few basic and well recognized truths of history.

First, in most men and women there is a basic urge for order. They abhor anarchy—a community without laws reflecting a sovereign will.

Second, the objective of laws is to foster and protect the people's values, whether inherent or the products of the culture in which they are nurtured.

Third, to protect those values that are overriding, society subjects itself to the restraints of government which, in essence, is the voice of the sovereign.

Fourth, where stable organized government is non-existent or ineffective the people, who are the ultimate sovereign, resort to informal and extra-legal means of protecting their values and interests until effective government can be established.

Finally, the story of how the law came to Kansas is the account of the efforts of a frontier people, thrust into a juristic void, to resolve doubt, conflict, and bloodshed and achieve the order that is basic in a civilized society.

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