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## FRONTIER JUSTICE

By Caroline P. Stoel

Lawlessness and violence on the frontier have long been popular themes of American history. Movies and television shows about the settlement of the West portray gun-slinging cowboys, rowdy saloons, cattle rustlers, and happy prostitutes. In the Northwest, however, the frontiersman was more likely to be found in the courtroom, suing his neighbor for debt or defending a foreclosure suit.

What was there about the Oregon frontier that created a fertile environment for law and order? One obvious answer is that the population was sparse and land abundant, increasing the need for cooperation and eliminating a basic cause of conflict. Further, many of the early settlers brought with them strong moral beliefs as well as a deep respect for government and a stable legal system. It has been said of the Oregon pioneers that they came primarily to settle down and cultivate the land and that those who sought to get rich quick took the trail south to

California and the gold fields.

No matter what moral platitudes they might express, the early Oregonians were opportunistic—often seeking positions of political importance as well as personal gain. The Northwest frontier was robust and lusty, but it was never openly opposed to an orderly society, as evidenced by the fact that the settlers formed the Provisional Government—to regularize their legal relationships and to protect their land claims.

### THE COURTS

Under the Territorial Act of 1848, the Oregon Territory was divided into three judicial districts, with a judge appointed by the president of the United States for each. Together, the three judges also comprised the territorial supreme court. This meant, of course, that the justices of the territorial supreme court were ruling on appeals from their own districts, a situation that was not corrected until Oregon became a state. In addition to the supreme court and the three district

courts, the act also provided for probate courts and justices of the peace.

The district court judges each had several counties within their districts. They held court for several weeks at each county courthouse, heard the cases that were pending, and then moved on to the next county. The district courts had original jurisdiction in all cases arising under federal law and under the laws of the territory. They heard cases in chancery and admiralty and appeals from the probate and justice courts.

### THE JUDGES

The territorial judges were political appointees and came primarily from the East, each with his own agenda. Some believed the position offered political advancement, while others sought adventure and possible wealth. Almost all were well educated by the standards of the day and capable of administering and applying the law according to prevailing standards. However, perhaps because of the rude conditions on the frontier or because they felt far from supervision or censure, many of them behaved in unjudicial ways.

#### William P. Bryant (Polk).

Among the most blatant offenders was Judge Bryant, who only served seven months of a four-year term (though he undoubtedly received a salary for a much longer period). He managed during that brief period to become personally involved in the dispute over Hudson's Bay Company Chief Factor John McLoughlin's land at Abernathy (Willamette) Falls and was one of several responsible for depriving McLoughlin of his lawfully held lands.

**Orville C. Pratt (Polk).** Another offender was Orville Pratt, who became

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Frontier justice in Oregon didn't fit the pattern we associate with the Wild West. Here, law and order usually prevailed and scores were settled in courts.



## President's Message

By Outgoing President  
Joyce Hyne

As we enter the new year and Al Bannon takes over as the society's new president, I want you to know how much I enjoyed my year as president. We accomplished some important things, had a lot of fun, and can look forward to more progress in several areas.

Earlier this year, historical writer Harry Stein came to us with an exciting idea: he wants to research the life of Judge Gus Solomon, with the eventual goal of writing a biography of this interesting, long-serving federal judge. The project has the support of the late judge's family. We hope to have all the details worked out by the time you read this column and be able to begin our role in supporting this research. What a fascinating project this should be.

Diane Rynerson has taken charge of our Oral Histories Project and has enthusiastically moved to continue expanding our coverage to regions outside the Portland area. Our chief judge, Michael Hogan, is of course resident in Eugene and has already begun encouraging interest in our society and the Oral Histories Project in and about Lane County. A training program for volunteers is in the works for 1996 in the Medford area. In the meantime, the histories of Judges Owen Panner and James Redden are being taken and we're working on completing Judge James Burns' history.

Our annual picnic moved this year to the Bull Mountain ranch of Judge Owen Panner. He and his wife, Nancy Panner, graciously hosted over 75 of our members for a barbecue in early September. The kids got to see the judge's horses and join some brave adults for gunny sack races and the "raw egg toss," organized by Judge Ellen Rosenblum and Judge Don Ashmanskas. Attorneys turned into barbecue chefs, and everyone agreed that the weather couldn't have been better.

Thank you all for your hard work and support this year. I wish Al the best in his term as president.

## Remembering The Hon. John Francis Kilkenny

A special joint session of the U.S. District Court for Oregon and the U.S. Court of Appeals for the Ninth Circuit was held May 1, 1995 to honor the memory of The Hon. John Francis Kilkenny. The ceremony took place in Portland's 1868 Pioneer Courthouse, which Judge Kilkenny fought to save 100 years later.

Bagpipe music, provided by attorney John R. Osburn greeted friends, colleagues, and family members as they filed into the historic courtroom, which is furnished with period pieces acquired through Judge Kilkenny's efforts. Speakers recalled the judge's devotion to his family, his love of history and of work, his wonderful sense of humor, and his importance as a role model to young lawyers embarking on their careers.

"A giant among giants, a leader among leaders," said The Hon. Otto R. Skopil, Jr., "he showed us that loving and caring for one another is the greatest of achievements." Said another speaker, George Corey, "He was a lawyer's lawyer; he charmed juries and impressed judges."

As the ceremony ended, The Hon. Michael R. Hogan, chief judge of the U.S. District Court for Oregon, observed, "Many of these comments can be summarized in the concept of wisdom that says wisdom is seen in cheerfulness."

Judge Kilkenny, who served as United States District Court judge from 1959 to 1969 and as U.S. Circuit Court judge from 1969 to 1995, exemplified the best traits of his Irish ancestry and inspired happiness in those who knew him.

## Another Kilkenny Anecdote

By Randall B. Kester

Before he was appointed to the federal bench, John Kilkenny was an outstanding trial lawyer—probably the most prominent in all of eastern Oregon. Once, in the late 1940s or early 50s, I was trying a railroad case in Pendleton before Judge Fee, with Pat Gallagher on the other side. I had associated John Kilkenny on the defense—not only because of his ability, but also because his wide acquaintance made him invaluable in picking a jury and his standing in the community gave stature to our side of the case.

When we arrived in court, we noticed Orval Yokom, an attorney from John Day, sitting in the courtroom. We didn't know his interest in the case until he came up and entreated all of us, "Fellows, my secretary is on the jury panel, so I shut up my office and drove her over here. Won't you please find some way to excuse her or challenge her so that we can go back to work? I can't practice law without her."

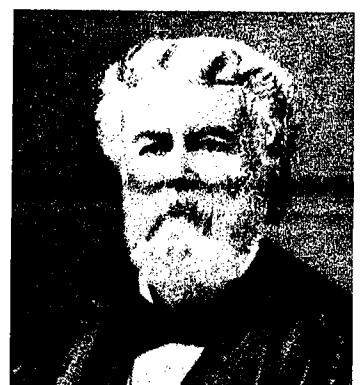
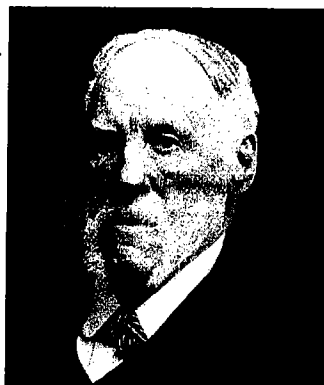
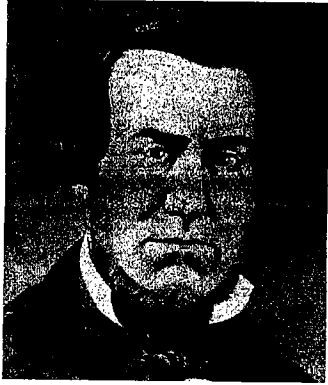
Of course we all agreed, but his secretary didn't know of the plot so she figured she had to get herself excused. During the voir dire, most of which Judge

Fee conducted, he asked her, "I see that Mr. Kilkenny is one of the attorneys for the defense. Now if I tell you what the law is but Mr. Kilkenny says something different, will you believe me or him?"

Orval's secretary replied, "Well, Judge, I have the greatest respect for Mr. Kilkenny...."

She didn't need to finish her sentence, because Judge Fee promptly excused her.

She echoed the sentiments of all of us. We had the greatest respect for John F. Kilkenny.



Dispensing justice in early-day Oregon were Judges William P. Bryant, Orville C. Pratt, George H. Williams, and Matthew P. Deady.

a wealthy man engaging in business enterprises while serving on the bench. It was he who presided over the trial of the Cayuse Indians for the murder of Marcus Whitman, and while it is difficult to place full blame on him for the hanging of the defendants on very thin evidence, it is obvious from his rulings where his prejudices lay.

Pratt was deeply involved in the politics of the day. This involvement is reflected in two controversies in which he participated while on the bench: the *Location Case* and the *Battle of the Blue Books*. Each had to do with the "single subject" requirement contained in Section 6 of the Territorial Act. Pratt, a Polk appointee and part of "the Salem clique," opposed the interpretation of Section 6 advanced by his fellow judges Strong (appointed by President Taylor) and Nelson (by Fillmore). None of the judges was willing to compromise. As a result, the functioning of both the government and the courts was held in abeyance for over a year until the matter was finally resolved by the U.S. Congress, which held that the legislative acts designating Salem as the capitol and the Big Blue Book (1843) as the proper statutory code were valid. The conduct of all the judges in these incidents was immature and irresponsible, and especially in the case of Pratt was politically motivated. Malcolm Clark, in *Eden Seekers*, describes Pratt as "dishonest, deceitful, egocentric and cunning in roughly equal parts."

**George H. Williams (Fillmore).** Perhaps one of the best of the judges on the bench was George Williams, who was responsible both for putting the disorderly schedule of the court into a workable routine and for formally publishing the court's records,

making the decisions available as precedent for the first time. His efforts led to the publication of the Oregon Reports, beginning with the December term 1853. After he resigned from the bench, however, Williams managed to get into trouble—some said because of his extravagant second wife—and was accused of using public funds for the purchase of a landaulet and a pair of horses. He is remembered as a not so skillful politician, but as a good judge.

**Matthew P. Deady (Fillmore).** Deady was a territorial supreme court judge as well as the first U.S. District Court judge. He also was involved in politics as a member of the Salem clique and was active in supporting Pratt's position in the *Location Case*. At the time of his appointment to the territorial court, his name erroneously appeared on the commission as "Mordecai P. Deady," Since there was no such person, Obadiah B. McFadden was appointed instead. In the ensuing controversy, Judge Olney ruled that Matthew Deady was indeed Mordecai and therefore a judge of the supreme court. This decision is probably the only Oregon case holding that a judge was not who he claimed to be. Although Olney's ruling was not the end of the matter, the mistake was eventually corrected and Deady took his place on the court in 1854.

#### THE CASES

Serious crime does not appear to have taken up much of the courts' time. While there are anecdotal accounts of shootings and death, few of these cases have appeared on the supreme court docket. It seems logical to assume that most cases of felonies—murder, arson, rape—would have been appealed (unless, of course, all the defendants were acquitted by the jury, which is highly unlikely). Because

the records of the territorial district courts in Oregon are still largely unexamined, it cannot be said for sure how much crime existed. However, the state of Washington has compiled some of these statistics and most likely Oregon was not too different. (The territory of Washington split from the Oregon territory in 1853.)

In Washington Territory during the 36-year period following its establishment, only 257 cases of murder were tried. Almost half of the criminal cases could be categorized as "substance abuse," including sale of liquor to Indians and opium use by the Chinese. The courts dealt mostly with civil disputes. As revealed by these case files, life for the majority of pioneers was difficult and not very exciting. They show the agony of families who moved to the West for a better life, only to lose everything they had in foreclosure procedures and lawsuits.

The first volume of the *Oregon Reports*, which contains cases appealed to the territorial supreme court from December 1853 through the last term of the territorial court, August 1857, reveals remarkably few criminal cases. Out of some 65 cases there is only one murder case, two extortion cases, one riot-as-sault case (actually a whipping), and three involving intoxicating liquors. Undoubtedly the district court records would reveal many more criminal cases but the fact that they were not appealed indicates they probably did not involve the death penalty and were not felt to be too serious. This assumption is subject to criticism, however, when one considers the murder trial of the Cayuse Indians, which was not appealed due to a conspiracy between Judge Pratt and the sheriff, Joe Meek, to see that

the execution took place immediately. This was, however, a very unusual case in which it was a virtual certainty from the beginning that the Indians would be executed as a matter of public policy. On the basis of the evidence available it seems highly unlikely that in the "Wild West" of Oregon, crime was a major problem and certainly not one of the settlers' chief concerns.

The one murder case heard by the territorial supreme court during the period 1852-58 is an interesting example of frontier justice as practiced in the Territory of Oregon. It was *Nimrod O'Kelly v. Territory of Oregon* (1 Oregon 51, Dec. Term, 1853).

**Facts.** Prior to 1852 Nimrod O'Kelly took a claim under the Donation Land Act (1850) of 640 acres of land—the amount allowed to a married man and his wife. According to an article in the *Oregon Historical Quarterly* (36 OHQ 359) by Lawrence A. McNary, "O'Kelly was beset with obstacles in obtaining title, and especially did one Jeremiah Mahoney attempt to take possession of a portion of the land claimed by him, on the ground that O'Kelly was single, not being accompanied by a wife. Enmity arose, and on May 21, 1852, the parties met and Mahoney was shot and killed by O'Kelly." O'Kelly reported the killing to the proper officer at Marysville (now Corvallis) on June 3, in these words:

*this irishman has been an intruder on my land or claim for two or three months. I was not afraid of his holding claim but he would threaten me every time I would meet with him on my own claim. On the twenty first of this inst I started out around my field where I was expecting to find some crows intruding on my farm when I met this Irishman or come within a few steps of him, but neither of us spoke. as I had told him to keep off my claim he did not speak to me. I went home & got my horse & went to the field to plowing & continued to work until dinner time of day, after which I started he met me again near my house coming towards my house. When a about ten steps apart he asked me what I was always carrying my gun for. I remarked to him it was none of his business it was my own. He continued coming towards me say-*

*ing if I did not mind I would get it thrashed out over my head. I made no reply for a short time but told him to stand off and get out of the path. he got out of the path also, rather sidling up towards me in a stooped position before however getting near enough to me to get hold of the gun. the gun went off in my hands hitting him I knew not where. I have no recollection of ever cocking the gun but held her down at arms length. I saw him set down. I left immediately. after traveling some distance I saw him lay down. I come down to town directly & give myself up to the proper officer, where I make this declaration. (36 OHQ 359)*

**Trial.** Judge Pratt called a special term of the court to try the case on June 29. The trial took place on that day, and the next day the jury returned a verdict of "guilty of murder in the first degree...as charged in the indictment." He was sentenced to be hanged a few days hence. By appealing to Governor Gaines, O'Kelly was able to secure a reprieve until August 24, while an appeal requesting a new trial was prepared.

**Appeal.** On appeal, the case first came before Justice Nelson and Associate Justice Strong on August 24. It was set over for consideration at a later time because the two justices disagreed. The case remained pending until December 5, 1853, when it was heard by a new court. At that time the court was composed of Chief Justice Williams and Associate Justices Olney and McFadden (Deady having been disqualified by the name mixup). Olney did not sit because of a conflict of interest and it is unclear from the record whether McFadden was present or not. Chief Justice Williams wrote the opinion. The errors assigned were all procedural, and were rejected by the court in affirming the conviction. Judge Williams:

*Time was when the unfortunate accused was dragged to trial without counsel, or a fair chance for self-defense; then other rules prevailed, and courts tried to make technicalities the means of justice; but, when a prisoner comes before our courts with more privileges and presumptions in his favor than he otherwise could have, these olden rules cease with the reasons on which they rested, and criminals cannot be allowed to take refuge from the judgments of our liberal laws in the*

*cobwebs of an antiquated practice. The awful import of these views to the plaintiff in error is not forgotten; but criminal laws were made to prevent crime, and their firm enforcement by the courts is a duty as plain as it is painful. Executive clemency may be interposed in one case and withheld in another, as a matter of discretion, but this decision must be followed hereafter; and if judicial compassion now bends the law to suit a seemingly hard case, a door may be opened through which the midnight assassin and mercenary murderer may escape from the punishment due to their crimes. (36 OHQ 361)*

**Post Trial.** Nimrod O'Kelly was NOT HANGED. It seems that at the trial no conclusive evidence of O'Kelly's marital relations had been given, but in 1854 O'Kelly's wife and several children arrived on an emigrant train from Missouri or Tennessee to Oregon. One of the sons, who had heard news of the murder conviction, rode ahead and informed the authorities of the existence and imminent arrival of the family. The sheriff holding O'Kelly in jail assumed that if the jury had known of the existence of the family the verdict would have been different. He reasoned that if O'Kelly were defending from intrusion the land to which he was lawfully entitled (the second 320 acres), the killing would have been justified. Without orders from the court or further ado, he opened the doors of the jail and freed O'Kelly, who remained in Oregon farming his claim until his death.

It is ironic that O'Kelly, who had based his assignments of error on the lack of procedural safeguards at his trial, was freed when the sheriff of Benton County ignored the entire procedural framework then in existence and freed him!

**Carolyn P. Stoel** is a founding member of the U.S. District Court of Oregon Historical Society and a co-author of *The First Duty, a history of that court.* This article is the text of a speech she delivered to the Society's board on July 19, 1995.

