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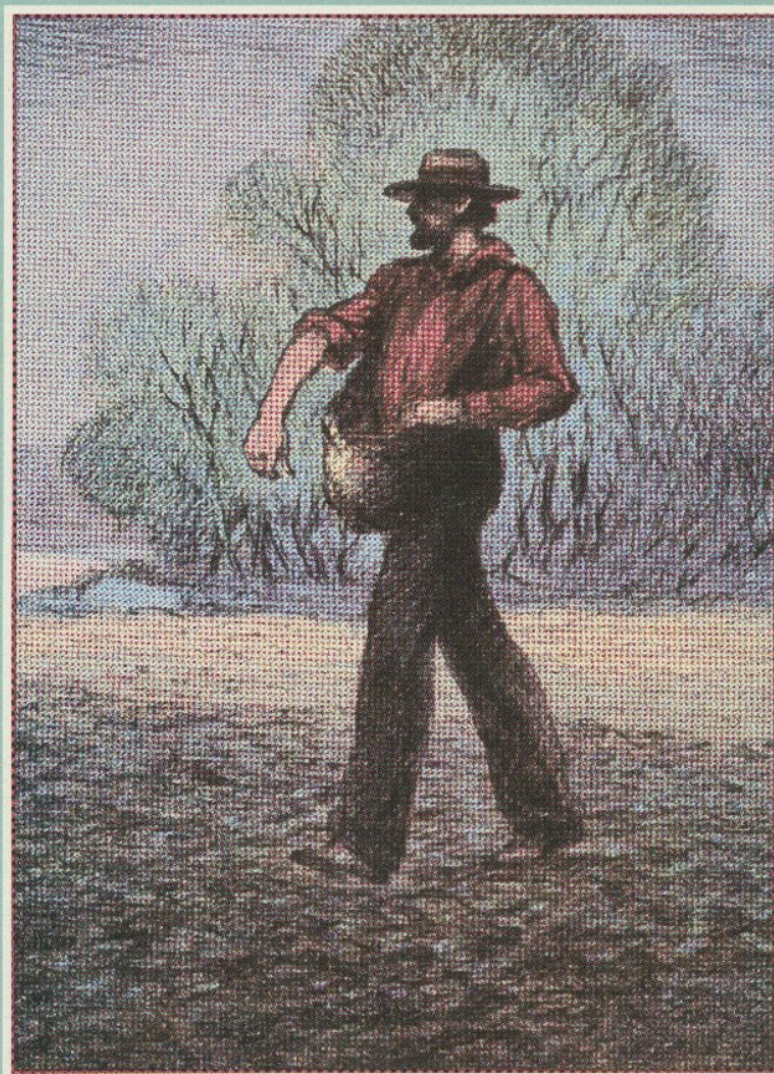
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## ERRATA

Vol. 14, no. 1, p. 29, line 3: Elizabeth Early should read Elizabeth Earl.







## KANSAS HISTORY

A Journal  
of the  
Central Plains

Volume 15, Number 1  
Spring 1992







The Economy Cafe, 1534 South Main, Ottawa, Kansas, December 8, 1941.

"Yesterday, December 7, 1941—a date which will live in infamy—the United States of America was suddenly and deliberately attacked by naval and air forces of the Empire of Japan." When President Franklin D. Roosevelt uttered these words and proceeded to ask Congress for a declaration of war, at 11:30 A.M. (CST), Monday, December 8, 1941, the customers at this Ottawa diner, their fellow Kansans and the entire nation, listened with trepidation. But, despite some anxiety and regardless of their political persuasion or previous attitude toward the ongoing "European war," Americans overwhelmingly supported their president in his call to arms. With confidence and determination, they joined him in making "certain that this form of treachery shall never endanger us again."

This milestone of a half-century past, along with the other events that unfolded over the next three and a half years, profoundly changed the lives of those who experienced it, and altered the course of human history as few single events have. In observation of the war's fiftieth anniversary, each issue of Kansas History during 1992 will devote this space and additional pages to preserving in photographs some of the moments and memories that Kansas and the rest of America experienced during World War II. "Kansas At War: The Call To Arms," the first of four installments, begins in this issue on page 36.

The photograph above is reprinted courtesy of Lowell Fouts (far left), who managed the Economy Cafe when this photo was taken. Soon after, he joined the military service, as did many of his contemporaries. He returned safely to Ottawa and to the restaurant business at war's end.

# KANSAS HISTORY

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Front and back cover: These World War II posters are similar to the more than one hundred posters now on display at the Kansas Museum of History as part of a special exhibit designed to commemorate the fiftieth anniversary of America's entry into the Second World War. Images of Kansas' response to the war are recorded in this issue in part I of "Kansas At War."

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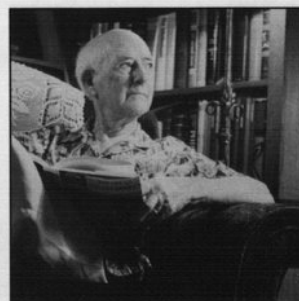
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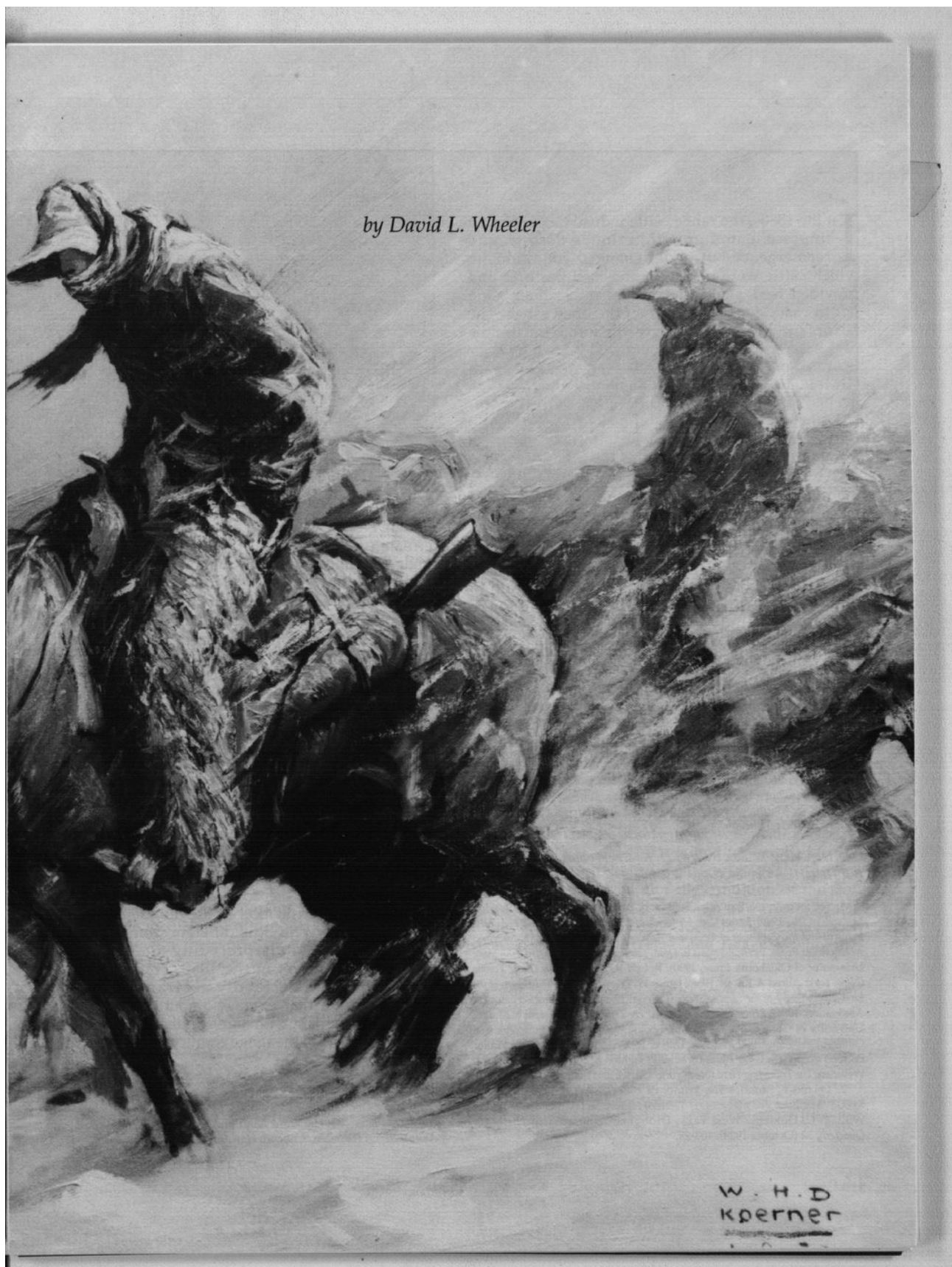
## Winter on the Cattle Range

Western Kansas, 1884–1886



# Kansas Memory

[In Progress] Kansas history: a journal of the central plains





In the 1880s, the range cattle industry experienced unprecedented growth, ruinous decline, and reemergence but under changed conditions in which cattle were placed in enclosed pastures and provided feed, shelter, and water rather than being left to rustle for themselves on the open range. The factors contributing to the growth and to the decline of the range cattle industry are well known and, for the most part, amply reported in the literature of the Great Plains.<sup>1</sup> Weather is cited often as a factor in the decline of the industry but few studies focus on this relationship except for the winter of 1886–1887 on the northern Plains and, to a lesser extent, the Texas drought of 1885–1887.<sup>2</sup>

This is a study of the impact of winter weather on the range cattle industry in western Kansas, an area taken here to extend from near the great bend in the Arkansas River to the Colorado line. It examines the relationship between weather and cattle mortality in the winters of 1884–1885 and 1885–1886 when blizzards ravaged the southern Plains bringing death to thousands of cattle and destruction to the range industry. The study is based upon official weather data compiled in Dodge City as well as upon contemporary newspaper reports and eyewitness accounts.

David L. Wheeler is dean of the graduate school and professor of geography at Ball State University, Muncie, Indiana.

Research for this study was made possible by a grant from the National Endowment for the Humanities Travel to Collections Program. The author gratefully acknowledges the assistance of Jimmy M. Skaggs, Wichita State University; Patricia A. Michaelis, Kansas State Historical Society; Katy Matthews, researcher, Topeka; and Patricia Heath, Kearny County Historical Society.

Overleaf: *Hard Winter* by W.H.D. Koerner, courtesy Buffalo Bill Historical Center, Cody, Wyoming.

1. See, for example, Ray Allen Billington, *Westward Expansion* (New York: Macmillan Co., 1949); James Cox, *Historical and Biographical Record of the Cattle Industry and the Cattlemen of Texas and Adjacent Territory*, 2 vols. (New York: Antiquarian Press, 1959); Edward E. Dale, *The Range Cattle Industry* (Norman: University of Oklahoma Press, 1930); Robert R. Dykstra, *The Cattle Towns* (New York: Alfred A. Knopf, 1968); James W. Freeman, *Prose and Poetry of the Livestock Industry of the United States* (Denver: National Livestock Historical Association, 1904); Ernest Staples Osgood, *The Day of the Cattleman* (Chicago: University of Chicago Press, Phoenix Books, 1960); Jimmy M. Skaggs, *The Cattle-Trailing Industry*, (Lawrence: University Press of Kansas, 1973); Walter Prescott Webb, *The Great Plains* (Boston: Houghton Mifflin Co., 1936); Paul I. Wellman, *The Trampling Herd* (New York: Carrick and Evans, 1939).

2. Leland E. Stuart, "The Winter of 1886–1887: The Last of Whose 5,000?" *Montana: The Magazine of Western History* 38 (Winter 1988): 32–41; William C. Holden, "West Texas Droughts," *Southwestern Historical Quarterly* 32 (October 1928): 103–23.



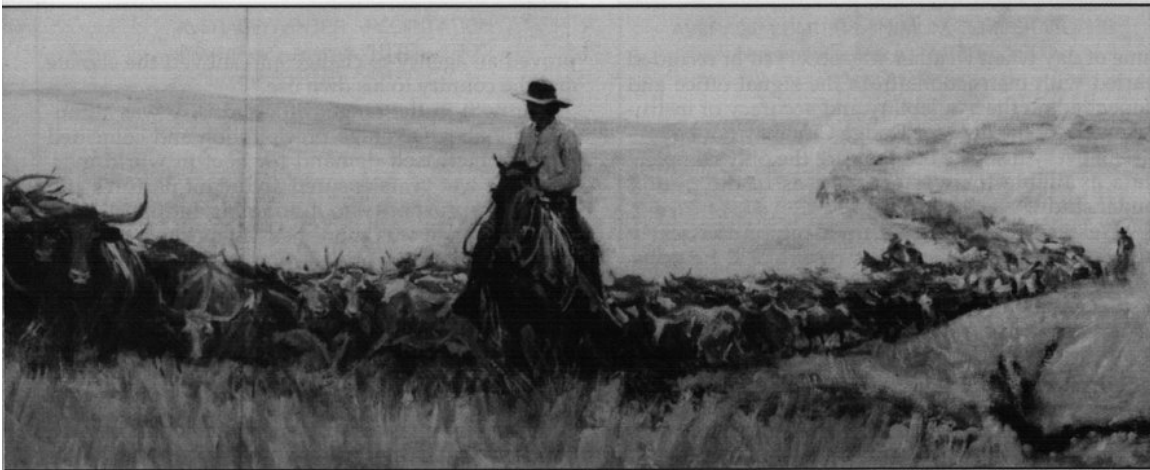
It analyzes the weather data, explains the causes and effects of cattle mortality, and provides a better understanding of the contribution of winter weather to the transformation of western Kansas from an open range to enclosed pastures and farm fields.

This study has three major limitations. First, an analysis of prevailing weather conditions cannot completely explain the reported losses of cattle, but it does provide a perspective on contemporary reports and historical accounts. Second, since the numbers of range cattle were determined most often by an estimate known as book count and seldom by actual head count, it is virtually impossible to know precisely how many cattle were on the range at a given time or, in most instances, to ascertain losses except by estimates.<sup>3</sup> Third, an analysis of temperature and precipitation cannot account for severe weather of short duration which could devastate herds of range cattle but leave average conditions relatively undisturbed.

Statistical analysis of weather reports compiled in Dodge City in the 1880s indicates that average temperature and precipitation in the months November through March were little different from that in the decades immediately preceding and following. Among the winters in the 1880s, 1884–1885 and 1885–1886 were decidedly aberrant in western Kansas. Greater than average amounts of rain, sleet, and snow attendant with high winds and low temperatures lay waste to the range country in Kansas and in

3. *Globe Live Stock Journal*, Dodge City, quoted in *Breeder's Gazette* 10 (July 22, 1886): 108; Hansford Land and Cattle Company, Ltd., *Fourth Annual Report* (Dundee, Scotland: Hansford Land and Cattle Co., 1887), 4.





*The western range cattle industry boomed in 1867 when Texas cattle were driven north to Abilene, Kansas. Many cattle were shipped on east while others remained on Kansas grasslands or were driven through to stock northern ranges. Trail Herd to Wyoming by W.H.D. Koerner, courtesy Buffalo Bill Historical Center, Cody, Wyoming.*

the southern Plains. At a time when the cattle industry was beset with greed, speculation, overstocked ranges, mismanagement, and the encroachment of civilization, severe weather inflicted the final, fatal blow bringing an end to one of the most colorful and celebrated enterprises in American history.

The western range cattle industry was established in 1867 when Texas cattle were driven north to Abilene, Kansas. While many cattle were shipped on east to supply domestic markets, perhaps after being held over to fatten or to fetch a better price, others remained on Kansas ranges or were driven through to stock northern ranges extending the industry from the Mexican gulf to the Canadian border and beyond. The industry was transformed in the period between 1876 and 1880 by the introduction of refrigeration. Now cattle could be shipped live or dressed to distant markets both foreign and domestic. The availability of dressed beef created an insatiable demand the world over stimulating production and inflating prices which by 1882 achieved unprecedented levels.<sup>4</sup> Large amounts of capital, British and American, were invested in the booming industry and ranges were stocked recklessly to

produce even more beef. Production in the northern Plains concentrated on places such as Miles City, Cheyenne, and Denver; in the southern Plains, however, no place was more dominant in the 1880s than Dodge City, "cattle market for the entire Southwest" and site of a regular, first order weather station.<sup>5</sup>

While the characteristics of weather stations varied, first order stations were operated usually by full-time, paid observers, equipped with self-registering instruments appropriate to the observations taken, and organized to report complete weather data on a regular basis. Instructions varied for the number of daily observations as well as the time of day they were to be taken. Generally, two to five observations were made each day between 7:00 A.M. and 11:00 P.M. and telegraphed to the War Department's signal office in Washington.<sup>6</sup> Weather was observed and the condition of the sky noted at the Dodge City station at various times throughout the day. During 1884-1886, weather was recorded at 7:00 A.M., 3:00 P.M., and 11:00 P.M.<sup>7</sup> Since the

5. William F. Zornow, *Kansas: A History of the Jayhawk State* (Norman: University of Oklahoma Press, 1957), 155.

6. Lewis J. Dartner, Jr., *List of Climatological Records in the National Archives* (Washington: National Archives, 1942), li, liv-iv. Weather observations were recorded at Fort Dodge from June 1866 to September 1874 when the Dodge City station was established.

7. U.S. War Department, Signal Service, *Dodge City, Kansas, September, 1874-August, 1892*, United States Weather Bureau, Climatological Record, 1819-1892, National Archives, RG27, T907, roll 173. [Hereafter cited as Climatological Record, 1819-1892.]

4. Cox, *Historical and Biographical Record of the Cattle Industry*, 1: 139-40; Herbert O. Brayer, "The Influence of British Capital on the Western Range Cattle Industry," *Journal of Economic History* 9 (Supplement 1949): 89; Dale, *The Range Cattle Industry*, 94.





## [In Progress] Kansas history: a journal of the central plains

time of day when weather was observed or recorded varied with instructions from the signal office and depended on the availability and accuracy of instruments used, the data for Dodge City may not be precise in every instance but they are the only complete data available for western Kansas in the period under study.<sup>8</sup>

Western Kansas is within a region that early nineteenth-century explorers reported to be occupied by a "Great American Desert."<sup>9</sup> A diminution of precipitation from east to west, a lack of surface water except for a few permanent streams, and a short grass vegetation led some who observed the region to believe it might ever remain a home for nomadic hunters and herds of buffalo.<sup>10</sup> By the middle of the century, weather observations taken at military outposts and elsewhere in the region revealed that while average amounts might be scanty, precipitation was concentrated in the summer months and varied considerably from year to year.<sup>11</sup> More rain than usual in the years between 1875 and 1885 led many to believe that the climate had changed.<sup>12</sup> The change was thought to be the result of extending settlement into the desert, cultivating the soil, and planting trees.

Successive waves of cattlemen, farmers, and townbuilders encroached on the so-called desert. There might be an occasional ebb in the flow but each wave extended beyond the last and was less affected by the next cycle of dry years. The spread of civilization was believed to be changing the climate and to be responsible for transforming the landscape from wasteland to prairie pasture to farmland. As a contemporary observer noted, "when man required the plains for agricultural and domestic purposes, its locked-up resources were gradually unfolded to him, and his will-power

proved an agency to change and subvert the climate and the country to his own use."<sup>13</sup>

Growth in the range cattle industry was stimulated by above average precipitation and coincided with an increased demand for beef in world markets. The wet years ensured abundant pastures and economic prosperity to a booming industry. Each year the range was more heavily stocked than the year before and while summers might be capricious, winters were open and invigorating necessitating little care for the burgeoning herds. The *London Times* reported:

the animals are never housed; weather is seldom severe; . . . the cold season is tempered by the warm Japan current which comes over the Rocky Mountains; snow does not lie so deeply as it does near the Atlantic. . . . Little provision is made for winter feeding; the luxurious grass, uncropped, dries where it stands and leaves a natural, well-preserved nutritive hay, from which the cattle scrape the light covering of snow.<sup>14</sup>

A document prepared in the U.S. House of Representatives declared:

the cattle of the West . . . are left to care for themselves in respect to shelter and can, during the winter season, be found hovering around some straw stack, side hill, or skirt of timber. The ranchmen calculate to lose about three to five percent from exposure, and consider it less expensive than providing shelter and winter food.<sup>15</sup>

Following a tour of the Plains, Walter Baron von Richthofen proclaimed:

the losses of cattle are larger among Eastern and European herds which are sheltered in stables and fed the whole year round. The losses . . . are practically reduced by long experience to a certain percentage which enables the stockmen to calculate infallibly the profits and losses of their business. This annual loss is found to average two to three percent.

8. U.S. Army Signal Corps, *Index of Meteorological Observations in the United States from the Earliest Records to January, 1890* (Washington City: Signal Office, 1891), 97-101.

9. Webb, *The Great Plains*, 147, 152-60.

10. Ralph H. Brown, *Historical Geography of the United States* (New York: Harcourt, Brace and Co., 1948), 374; U.S. Department of Agriculture, *Climate and Man: Yearbook of Agriculture* (Washington, D.C.: Government Printing Office, 1941), 183.

11. Brown, *Historical Geography of the United States*, 374.

12. *Ibid.*, 422; Frederic E. Clements, "Climatic Cycles and Human Populations in the Great Plains," *Scientific Monthly* 47 (September 1938): 198; Robert Claiborne, *Climate, Man, and History* (New York: W. W. Norton and Co., 1970), 389.

13. H. R. Hilton, "Influence of Climate and Climatic Changes Upon the Cattle Industry of the Plains," Kansas State Board of Agriculture, *Quarterly Report Ending March 31, 1888* (Topeka: Kansas Publishing House, 1888), 142.

14. *London Times*, April 4, 1880.

15. U.S. Congress, House, *Second Annual Report of the Bureau of Animal Industry for the Year 1885*, 48th Cong., 2d sess., 1886, Misc. Doc. 36, p. 427.



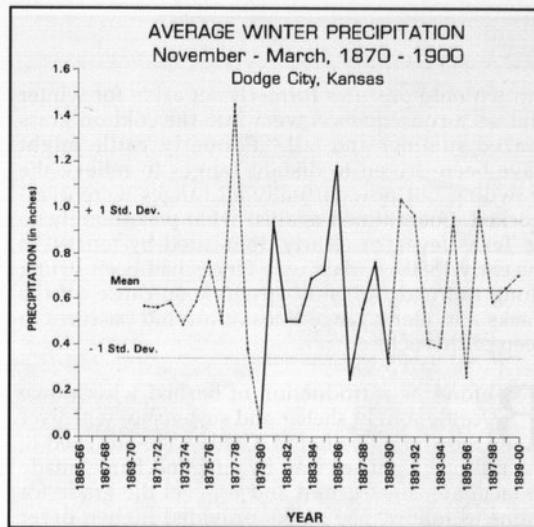


Fig. 1. Sources: U.S. Hospital Department, *Meteorological Register, Fort Dodge, Kansas, January 1870—December 1875*, National Archives (microfilm), U.S. Department of Agriculture, Weather Bureau, *Climatic Summary of the United States, Bulletin W, section 40—Western Kansas* (Washington, D.C.: Government Printing Office, 1930), 40-46.

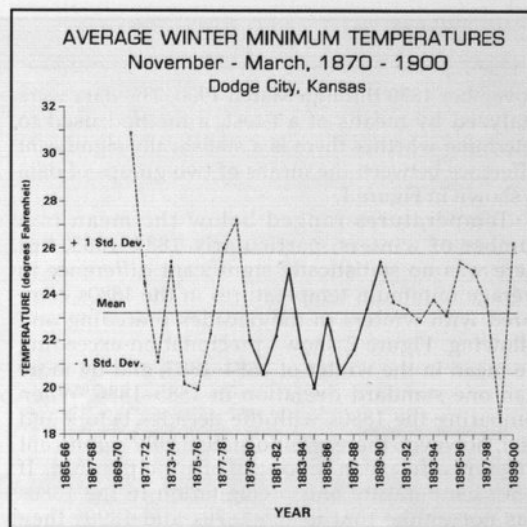


Fig. 2. Sources: U.S. Hospital Department, *Meteorological Register, Fort Dodge, Kansas, January 1870—December 1875*, National Archives (microfilm), U.S. Department of Agriculture, Weather Bureau, *Climatic Summary of the United States, Bulletin W, section 40—Western Kansas* (Washington D.C.: Government Printing Office, 1930), 40-46.

Von Richthofen concluded that there was “not the slightest element of uncertainty in cattle raising.”<sup>16</sup> As the 1880s progressed, however, the range cattle industry proved to be little more than a high stakes gamble; cattlemen were “betting against God almighty and a subarctic winter.”<sup>17</sup>

Cattle acclimated to winter on the range were able to withstand the coldest temperatures without sustaining serious losses when they had access to adequate supplies of grass and water. If the cold was preceded by rain, sleet, or ice, especially when the season was late and at a time when most cattle were likely to be in poor condition, it was possible for very heavy losses—a “die-up”—to occur.<sup>18</sup> Temperatures below

the mean accompanied by precipitation above the mean would serve to provide an explanation for the losses, but if temperatures and precipitation were at or near the mean, then other factors should be considered to understand what occurred on the western Kansas range in the winters of 1884-1885 and 1885-1886.

An analysis was made of temperature and precipitation as reported at Fort Dodge and in Dodge City between 1870 and 1900, a thirty-year period that represents the standard time interval used to analyze the climate of a region in the United States.<sup>19</sup> The purpose was to test the suppositions that 1) winters in the 1880s were extreme compared with winters in the decades immediately preceding and following, and that 2) statistically significant departures in mean temperature and precipitation occurred in the winters of 1884-1885 and 1885-1886 when enormous numbers of cattle are reported to have perished on the western Kansas range. Average minimum temperatures and average amounts of precipitation were compiled for each year from

16. Walter Baron von Richthofen, *Cattle Raising on the Plains of North America* (New York: D. Appleton and Co., 1885), 71-72.

17. U.S. Congress, Senate, *The Western Range*, Letter from the Secretary of Agriculture Transmitting in Response to Senate Resolution No. 289, A Report on the Western Range—a Great but Neglected Natural Resource, 74th Cong., 2d sess., 1936, Doc. 199, p. 122-23.

18. U.S. Congress, House, *Report of the Internal Commerce of the United States*. Report prepared by Joseph R. Nimmo, Jr., Chief of the Bureau of Statistics, Treasury Department, House Exec. Doc. 48th Cong., 2d sess., 1885, v. 20, no. 7, pt. 3, p. 106-7.

19. Huber Self, *Environment and Man in Kansas: A Geographical Analysis* (Lawrence: Regents Press of Kansas, 1978), 51-52.



November 1870 through March 1900. The data were analyzed by means of a t-test, a method used to determine whether there is a statistically significant difference between the means of two groups of data as shown in Figure 1.

Temperatures ranged below the mean in a number of winters, particularly 1884–1885, but there was no statistically significant difference in average minimum temperatures in the 1880s compared with winters in the decades preceding and following. Figure 2 shows precipitation exceeding the mean in the winter of 1884–1885, and by more than one standard deviation in 1885–1886. When comparing the 1880s with the decades before and after, however, there was no statistically significant difference in mean amounts of precipitation. If mean temperature and precipitation in the 1880s was not unlike that in the 1870s and 1890s then weather itself cannot explain the die-ups occurring in 1884–1885 and 1885–1886. The most probable explanation is found in a combination of factors to include not only the winter weather but also ranges stocked beyond the capacity of available grass to sustain the large numbers of cattle grazing upon them, barbed wire fences limiting the extent to which cattle could drift before the wind and rustle for themselves, and the farmyards and fields of homesteaders who broke up the range to exploit its agricultural potential.

The introduction of cattle to western Kansas followed the Civil War and, within twenty years, the number exceeded 900,000 or about 63 percent of the state's total.<sup>20</sup> Herds were brought up the trail from Texas to successive railheads (Abilene and Ellsworth) on the Kansas Pacific Railroad, then to Newton and Wichita and, in 1875, to Dodge City on the Atchison, Topeka, and Santa Fe Railroad. Between 1875 and 1885, Dodge City became the principal destination of Texas trail herds not only for shipping cattle east but also for stocking local and northern ranges. The demand for stockers and feeders grew so rapidly that by 1880 cattle ranches reportedly occupied all of the range between Dodge City and the Colorado line.<sup>21</sup> By the summer of 1885, the range was so crowded that cattle were

thrown onto pastures formerly set aside for winter and, as a consequence, went into the cold on grass grazed summer and fall.<sup>22</sup> Formerly, cattle might have been driven to distant ranges to relieve the crowding but now virtually all ranges were overstocked, quarantined against what was thought to be Texas fever, or clearly delineated by fences. In the early 1880s, barbed wire fences had been strung along railroad rights-of-way to keep cattle off the tracks and along range lines or around pastures to keep cattle enclosed.

Before the introduction of barbed wire, range cattle sought shelter and sustenance wherever they might be found. Cattle were attracted to the railroad rights-of-way by cuts and banks made to facilitate construction and to level the grade for trains to follow. The banks provided higher, dryer ground than that found nearby, while the cuts provided refuge from inclement weather. Rights-of-way might be plowed to reduce the danger of prairie fires caused by sparks from passing trains but, if left in a natural condition, grass was more abundant in these places than in the more heavily grazed ranges adjacent to them.

By congregating in the rights-of-way to find refuge or to search for sustenance, cattle impeded or endangered rail traffic.<sup>23</sup> Railroads were held liable for stock maimed or killed by trains, allowing owners to collect damages. A practical solution to the problem was the construction of fences to prevent stock from reaching the railroad tracks.<sup>24</sup> In the spring of 1881, the Atchison, Topeka, and Santa Fe constructed a cedar post and wire fence along both sides of its right-of-way. The fence extended two hundred miles from Dodge City to La Junta, Colorado, a frail but effective barrier.<sup>25</sup>

Cattle owners did not grasp immediately the efficacy of barbed wire but, with a rapid expansion of the range industry in the 1880s, some began to realize that land had to be acquired and protected. Fences enabled cattlemen to enclose land they bought or

20. *Globe Live Stock Journal*, January 11, 1887; U.S. Congress, Senate, *The Western Range*, 119.

21. Leola Howard Blanchard, *Conquest of Southwest Kansas* (Wichita: Wichita Eagle Press, 1931), 49.

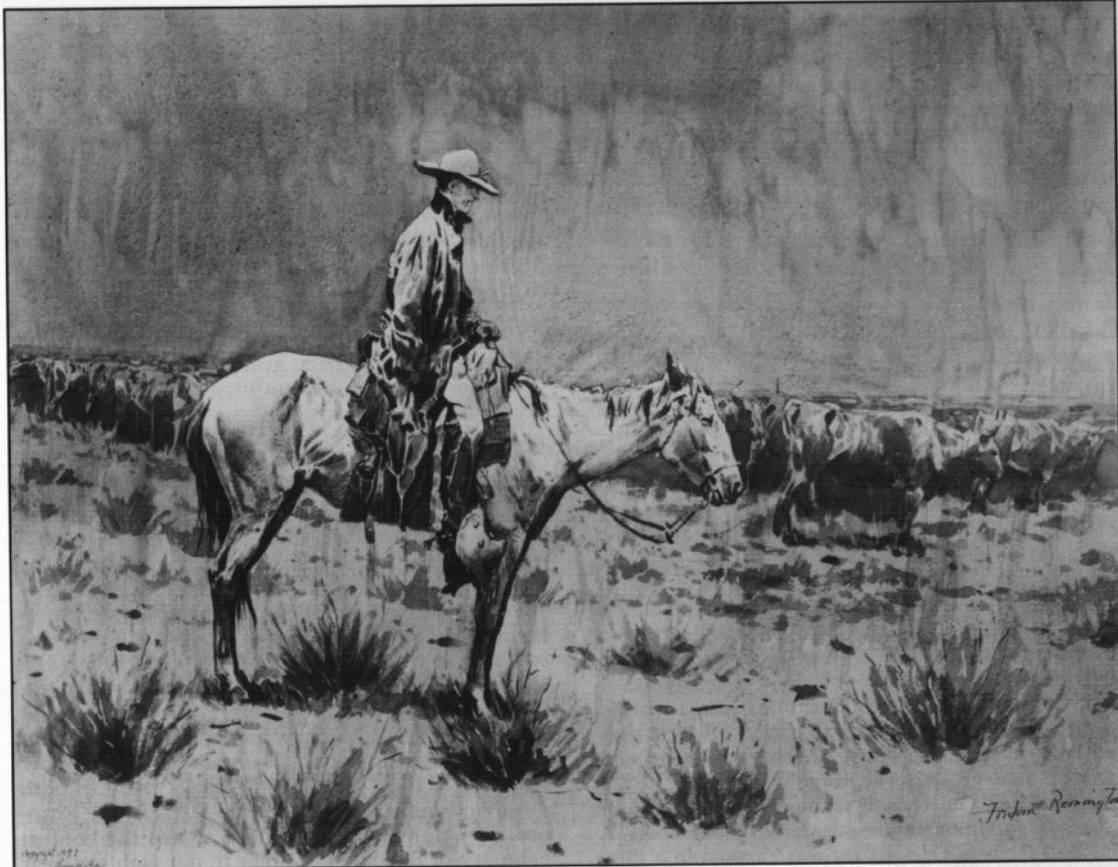
22. T. A. McNeal, *When Kansas Was Young* (Topeka: Capper Publications, 1934), 160; U.S. Congress, House, *Third Annual Report of the Bureau of Animal Industry for the Year 1886*, 49th Cong., 2d sess., 1887, Misc. Doc. 156, p. 107.

23. Earl W. Hayter, "Fencing of Western Railways," *Agricultural History* 19 (July 1945): 163.

24. *Ibid.*, 164.

25. Blanchard, *Conquest of Southwest Kansas*, 73.





Cattle acclimated to winter on the range were able to withstand extreme temperatures. If, however, the cold was preceded by rain, sleet or ice, cattle were in grave danger of starvation or death from exposure to weather. *Riding Herd in the Rain* by Frederic Remington, courtesy Buffalo Bill Historical Center, Cody, Wyoming.

leased, to protect grass and preserve water rights, and to guard the land against drift cattle and homesteaders. With cattle confined to enclosed pastures or restricted to the home range by drift fences, herds could be upgraded through the introduction of blooded stock and the scale of operations could be reduced.

When fencing got under way, it proceeded at an accelerating pace. Drift fences and pasture fences were strung as fast as wire could be obtained. In January 1885, Topeka's *Daily Commonwealth* reported "more land enclosed with fence within the year just past than during all previous period of the settlement of the country. One can scarcely go in any direction

but that he will encounter post- and wire-fences."<sup>26</sup> The range about Dodge City, open but a few years before, was now dotted with homesteads, farm fields and pastures, and was enclosed by barbed wire fences.<sup>27</sup> Fencing, according to a Pawnee River stockman, had become "the order of the day."<sup>28</sup>

Often the fences were of considerable length. The Forrester brothers strung twenty-two miles of fence on the south side of the Smoky Hill River while the sale of

26. *Daily Commonwealth*, Topeka, January 8, 1885.

27. Henry D. McCallum and Frances T. McCallum, *The Wire That Fenced the West* (Norman: University of Oklahoma Press, 1965), 192.

28. *Kansas Cowboy*, Dodge City, June 6, 1885.



the Diamond C Ranch on Deer Creek included a "fenced range of about six by seven miles."<sup>29</sup> Several cattle pools, whose members acted in concert, erected fences of even greater length. A fence strung on the south side of a range claimed by the Smoky Hill Cattle Pool was sixty miles long.<sup>30</sup> The Eagle Creek Cattle Pool, running stock in the Cherokee Strip, built "120 miles of four wire fence around their pasture" enclosing 25,000 cattle.<sup>31</sup> A fence constructed by the Comanche County Cattle Pool at an undisclosed location on its range was 180 miles long and required 60,000 posts and 240,000 pounds of barbed wire at an estimated cost of \$30,000.<sup>32</sup> Fences were said to extend almost without interruption from Dodge City to Pueblo, Colorado.<sup>33</sup>

When the range was open, cattle drifted freely in search of shelter or sustenance. With the erection of fences, however, freedom of passage was restricted, drifting cattle stacked up against the wire, and available grass was consumed. Now the range was clearly demarcated and stocked with more cattle than it could sustain. Should blizzards come, die-ups of staggering proportions were a distinct possibility.

In 1884, unseasonably warm weather extended without interruption from summer into autumn. Tomato vines were as productive in October as they had been in June. Trees lost all sense of season and put forth new growth. The range was stocked heavily with cattle.<sup>34</sup> Quietly and without warning autumn gave way to winter in the evening of November 17, and by 1:00 A.M., Dodge City was cloaked in a thin, white mantle. A few days later the lowest temperature of the month was recorded, 12.1°F.<sup>35</sup> The golden days of autumn were at an end and, while the inevitability of winter was acknowledged now, few

cattlemen were prepared for what was to come. More than usual precipitation was recorded in December and, for much of the winter, range cattle were denied access to grass by layers of ice and snow.<sup>36</sup> Stockmen who held supplemental feed for emergencies such as this quickly depleted their stores and could obtain no more.<sup>37</sup> Cattle were in grave danger of starvation from lack of feed, and death from exposure to the weather. The *Caldwell Journal* described the effect of freezing rain on cattle: "A slow misty rain began falling at early dawn and as fast as it touched the ground turned into ice. It was one of the brand that make cattlemen swear great big ten by twelve swears and doubles up the pilgrim yearling like a jackknife."<sup>38</sup>

Temperatures were 7.5°F to 10.5°F below monthly means throughout the winter of 1884–1885.<sup>39</sup> From December through March there was little respite from inclement weather. December was one of the coldest on record in Dodge City with below zero temperatures occurring on seven days, all after the middle of the month, and with –11.8°F recorded on Christmas Day.<sup>40</sup> The cold continued unabated in the days following plummeting to –18.2°F on January 1. Below zero temperatures were recorded on eight other days in January.<sup>41</sup> The weather in February was no better. Professor Frank N. Snow reported to the *Daily Commonwealth* that "in both mean and minimum temperatures and in the extraordinary number of zero days it was the coldest February of the coldest winter in our eighteen year record" and that "the snowfall was greater than in any other February except 1881."<sup>42</sup> March was altogether disagreeable: blustery and raw. Gale force winds buffeted Dodge City on eleven days of the

29. *Ibid.*, December 20, 1884; *Caldwell Journal* quoted in *Breeder's Gazette* 5 (June 5, 1884): 884.

30. *Kansas Cowboy*, December 27, 1884.

31. Nellie Irene Snyder Yost, *Medicine Lodge: The Story of a Kansas Frontier Town* (Chicago: Sage Books, 1970), 56.

32. Mary Einsel, "Some Notes on the Comanche Cattle Pool," *Kansas Historical Quarterly* 26 (Spring 1960): 64.

33. *Kansas Cowboy*, March 7, 1885.

34. *Washington Register* quoted in *Daily Commonwealth*, November 6, 1884; *Daily Commonwealth*, December 4, 1884; Angie Debo, *Southwest Cowman: Reminiscences of Oliver Nelson* (Glendale, Calif.: Arthur Clark Co., 1955), 219–22.

35. U.S. War Department, Signal Service, *Monthly Meteorological Report: Dodge City, Kansas, November, 1884*, Climatological Record, 1819–1892.

36. U.S. War Department, *Monthly Weather Review* (Washington City: Signal Office, December 1884), 304, 312; *Medicine Lodge Cresset* quoted in *Breeder's Gazette* 7 (January 29, 1885): 166; *Kansas Cowboy* quoted in *Breeder's Gazette* 7 (January 29, 1885): 166; *Daily Commonwealth*, March 28, 1885; McNeal, *When Kansas Was Young*, 160–61.

37. *Medicine Lodge Cresset* quoted in *Breeder's Gazette* 7 (March 5, 1885): 354.

38. *Caldwell Journal* quoted in *Breeder's Gazette* 7 (January 22, 1885): 130.

39. U.S. War Department, *Monthly Weather Review* (December 1884), 312; *Ibid.* (February 1885), 42.

40. U.S. War Department, Signal Service, *Monthly Meteorological Report: Dodge City, Kansas, December, 1884*, Climatological Record, 1819–1892.

41. U.S. War Department, *Monthly Weather Review* (January 1885), 19; U.S. War Department, Signal Service, *Monthly Meteorological Report: Dodge City, Kansas, January 1885*, Climatological Record, 1819–1892.

42. *Daily Commonwealth*, March 4, 1885.





Great losses of stock were due to a combination of factors, among them the introduction of barbed wire fences. With their freedom of passage restricted, unattended range cattle drifting before the winter wind often perished in large numbers along fence lines. *Drifting Before the Storm* by Frederic Remington, courtesy Thomas J. Watson Library, Metropolitan Museum of Art.

month. On the twentieth, gales blew first from the south then from the north in fitful anticipation of a storm which brought nearly an inch of snow and, on the twenty-third, a monthly low temperature of 11.8°F. By the end of the month the wind subsided and the snow melted, allowing cattlemen to tally their losses.<sup>43</sup>

Three quarters or more of the cattle in western Kansas were reported to have perished but losses varied considerably among individual stockmen.<sup>44</sup> Variations in losses depended on the availability of grass or supplemental feed, shelter or water, and care provided the animals. Some cattle were given all the

succor circumstances permitted while others were left unattended to fend for themselves.<sup>45</sup> Among the latter, losses in through cattle (cattle brought up the trail from Texas) and in feeder cattle shipped in from the Midwest were far heavier than in cattle bred and born on the Kansas range. Through cattle, arriving late in the season and often in poor condition, were especially vulnerable to the rigors of winter.<sup>46</sup>

Range cattle, drifting in the winter wind, perished in large numbers along fence lines and water courses. They tumbled over river bluffs or slid down icy stream banks and many, even if uninjured

43. U.S. War Department, Signal Service, *Monthly Meteorological Report: Dodge City, Kansas, March, 1885*, Climatological Record, 1819-1892.

44. Oliver H. Nelson, interview by J. Evetts Haley, February 26, 1927, interview file, Panhandle-Plains Historical Museum, Canyon, Tex.

45. Medicine Lodge Cresset quoted in *Breeder's Gazette* 7 (April 2, 1885): 511-12.

46. *Kansas Cowboy*, January 17 and March 21, 1885; *Daily Commonwealth*, January 27 and February 22, 1885; *Globe Live Stock Journal*, February 10, 1885; *Kansas Cowboy*, March 7, 1885; *Breeder's Gazette* 7 (February 5, 1885): 198; *Osborne Farmer* quoted in *Daily Commonwealth*, March 10, 1885.



in the fall, were unable to stand on the ice and died of exposure or starvation.<sup>47</sup> Cattle that succeeded in crossing water courses and in avoiding other natural obstacles were halted in their procession by barbed wire fences. Unable to drift farther and unwilling to turn into the weather, they stood bawling before the wire until at last they dropped in their tracks and died. When spring came, men were employed to skin the carcasses. In April, "thousands of hides . . . were [seen] stretched on the drift fences along the cuts on the railroad between Dodge City and Garden City."<sup>48</sup>

More than 25 percent of the cattle in Clark County were believed to have been lost, while in Comanche County dead cattle were seen "everywhere, all over the range."<sup>49</sup> Cattle operations, both large and small, sustained heavy losses. On one ranch in Clark County two steers only were found alive in a herd that had numbered 1,600, and on another ranch forty-five were recovered from a herd of 2,500 brought up from Texas the previous fall.<sup>50</sup> The Day Ranch outfit branded 900 calves in the spring of 1885 whereas 10,000 had been branded in the same herd the year before.<sup>51</sup> The Comanche County Cattle Pool herds were reduced from 84,000 to 7,000, although an undisclosed number of these had been marketed.<sup>52</sup> A contemporary observer estimated the pool lost only 8 to 10 percent to weather but, even if the estimate was accurate, the losses were enough to have had considerable financial impact on operations.<sup>53</sup>

The spring round up proceeded as planned and all took comfort in learning that on some ranges losses were not as large as supposed.<sup>54</sup> A report in the *Barber County Index* acknowledged that while losses might have been "unusually large" they were not "ruinous" for some at least, and given favorable weather conditions and strong cattle prices, the range industry would be in "good shape" once again.<sup>55</sup> The

summer of 1885 was viewed as an occasion to restock the range taking advantage of cattle markets which at the time were depressed and to wait for a rise in demand as a means of bringing ledgers into balance.<sup>56</sup> Cattlemen not ruined by the winter of 1884-1885 held on another year in grim determination to recover losses, but the days for wintering stock on the open range were at an end. The winter of 1885-1886 proved it.

Weather in the autumn of 1885 gave no portent of the winter to follow. Dodge City weather observers recorded precipitation in excess of the average in September and again in December. "Killing frost" in the morning of October 13 and snow on October 18 and 19 seemed strangely out of place in a succession of otherwise pleasant days.<sup>57</sup> Temperatures in November and December were 6.0°F above average.<sup>58</sup> Even though four inches of snow fell in Dodge City during the second week of December, rain in the two weeks following removed all trace of the snow before the month ended.<sup>59</sup> With the prospect of a mild winter ahead, some cattlemen began to reduce the number of hands tending their herds, ignoring all the while a forecast in the *Coffeyville Journal* that the winter of 1886 would be one of the worst ever.<sup>60</sup>

There was an abrupt change in the weather on New Year's Day and, as a consequence, life and livestock on the western Kansas range would not be the same again. The day began well enough but toward noon dark clouds appeared on the northern horizon. A sudden wind came up bringing a spatter of rain, then sleet and snow, as temperatures fell precipitously.<sup>61</sup> Soon all of western Kansas was in the grasp of a howling blizzard. Dodge City reported more than seven inches of snow piled into deep, wind-driven drifts.<sup>62</sup> By Tuesday, January 5, the storm had ended,

47. *Daily Commonwealth*, February 14, 1885.  
48. *Clark County Clipper*, Ashland, November 12, 1942.  
49. *Ibid.*, July 12, 1942; Debo, *Southwest Cowman*, 274.  
50. Fred Hinkle, *The Saddle and the Statute* (Wichita: McCormick-Armstrong Co., 1961), 29; *Clark County Clipper*, July 12, 1942.  
51. Debo, *Southwest Cowman*, 240.  
52. *Clark County Clipper*, April 9, 1942.  
53. *Medicine Lodge Cresset* quoted in *Daily Commonwealth*, April 15, 1885.  
54. *Daily Commonwealth*, April 2, 1885; *Breeder's Gazette* 7 (June 11, 1885): 893; *Kansas Cowboy*, June 13, 1885.  
55. *Barber County Index* quoted in *Breeder's Gazette* 7 (April 16, 1885): 591.

56. *Kansas Cowboy*, July 25, 1885.  
57. U.S. War Department, Signal Office, *Monthly Meteorological Report: Dodge City, Kansas, October, 1885*, Climatological Record, 1819-1892.  
58. U.S. War Department, *Monthly Weather Review* (November 1885), 286; *Ibid.*, (December 1885), 311.  
59. U.S. War Department, Signal Office, *Monthly Meteorological Report: Dodge City, Kansas, December, 1885*, Climatological Record, 1819-1892.  
60. *Coffeyville Journal*, November 7, 1885; *Leavenworth Times*, January 7, 1886.  
61. Carl Coke Rister, *No Man's Land* (Norman: University of Oklahoma Press), 46-47.  
62. Craig Miner, *West of Wichita: Settling the High Plains of Kansas, 1865-1890* (Lawrence: University Press of Kansas, 1986), 166; *Hays Daily News*, January 1, 1969.





*This is the real thing  
painted the winter of 1886  
at the OH ranch*

*C M Russell*



*This picture is Chas.  
Russell's reply to my  
inquiry as to the  
condition of my cattle  
in 1886. L E Russell*

The winter of 1885–1886 brought death and desolation to the range. One hundred thousand cattle were thought to have perished on the range in southwest Kansas. Many that survived were "too emaciated, mutilated by wolves, or crippled by the freezing cold to be of much value." Waiting for a Chinook by Charles M. Russell, courtesy Montana Stock Growers Association.

and the next day was so agreeable most everyone in Garden City was anticipating "a renewal of the open weather of the past."<sup>63</sup> Over in Englewood the folks were "in their shirt sleeves and bragging about the climate in sunny southwestern Kansas."<sup>64</sup>

Toward sundown on January 6, the wind kicked up again and shifted around to the northwest and north. During the night, according to one observer, "Cattle passing our house . . . were bawling with a mournful sound as the bitter wind bit into their not too fat bodies. Some would stop on the south side of

the house and crowd till some would get pushed out in the line of the storm and then they would go on south as thousands of others did."<sup>65</sup> The storm blew "a furious gale" for the next day and a half bringing unprecedented weather to western Kansas.<sup>66</sup> Freezing rain covered the Plains with ice, then frigid winds buried the Plains in heavy snow.<sup>67</sup> Years later an old-timer recollected:

65. Lon Ford, *The Kid: Lon Ford Story*, ed. Bonnie Ford Swayze (Ashland, Kans.: Clipperprint, 1982), 10.

66. *Larned Chronoscope*, January 15, 1886.

67. *Kansas City Times*, January 1, 1946; *Leavenworth Times*, January 7, 1886; *New York Times*, January 7, 1886.

63. *Garden City Irrigator, Supplement*, January 16, 1886.

64. Rister, *No Man's Land*, 51.





Just before the storm broke the weather [in Clark County] was mild and still. As this raging blizzard swept down from the north, hawks by the hundreds and other wild fowl were traveling with all the speed that they possessed to get out of the path of the storm. I can remember so well as we were playing out-of-doors this great black bank approached striking with a bang. It raged all night and the next day and the next night. Snow banks were piled high in great drifts which had been swirled by a fifty mile gale.<sup>68</sup>

Gale force winds struck Dodge City whipping snow before the eyes of those bold enough to venture out and reducing visibility to but a few feet.<sup>69</sup> Temperature dropped like a rock and, a day later, hit -16.2°F.<sup>70</sup> While snow ended in the afternoon of January 7, wind continued to push it into high, hard packed drifts which accumulated to depths of fifteen and twenty feet; elsewhere the Plains were swept bare except for a veneer of wind-burnished ice.<sup>71</sup>

The wind relented in the afternoon of January 8, and visibility improved allowing people to see a parhelion, or sundog, whose great diameter was taken as a sign that ice crystals in the atmosphere were growing smaller and the storm was ending.<sup>72</sup> With the storm's cessation Dodge City, like many another community in Kansas, lay desolate, covered in snow and cut off from its neighbors. Telegraph wires were down, rail and road transportation was halted. Snow plows were rendered ineffective by snow packed so hard it had to be "quarried out with pick and shovel."<sup>73</sup> Three hundred men were employed to open the railroad tracks between Dodge City and Spearville. The snow was eighteen feet deep in some of the cuts along the right-of-way, but the arduous task was completed in four days allowing trains to go through and restoring Dodge City's contact with points east and west.<sup>74</sup>

While the blizzard of January 6-8 was the worst of the weather that winter, high winds, cold, ice, and snow persisted throughout January and into February. Observers at the Dodge City weather station recorded gale force winds on twenty-four days in January and February, below zero temperatures on eleven days between January 7 and February 4, and thirteen inches of snow.<sup>75</sup> A contemporary witness to the weather wrote, "If snow has a commercial value by adding fertility to the soil and hard freezing weather insures a bountiful harvest, the destiny of southwestern Kansas is fixed and her success assured beyond doubt."<sup>76</sup>

The weather for January was summarized by Professor Snow who observed that January 1886 was:

the coldest month by any name upon our nineteen years of record. The minimum temperature was not so low as in two preceding Januaries [1873 and 1874] but the long continued low average temperature was unprecedented. Every day of the month, except the first was a winter day with mean temperatures below the freezing point. The precipitation of snow and rain was double the average amount, and the cloudiness unequalled in any January since 1871.<sup>77</sup>

Snow's scientific observations notwithstanding, it was difficult for promoters of settlement and development to concede that weather in sunny Kansas could be anything less than ideal. The *Lawrence Tribune* reported that "it was a very singular and unsatisfactory sample of Italian climate. There are times we are compelled reluctantly to admit, when a comparison of Kansas weather is quite unsatisfactory with any poetic conceptions we have of an Italian atmosphere."<sup>78</sup>

The winter of 1885-1886 brought death and desolation to the range. Reports of losses varied between 20 and 90 percent, even 100 percent, among some herds depending on range conditions, origin of cattle, and availability of shelter, water, or supplemental feed.<sup>79</sup> One hundred thousand cattle

68. Ford, *The Kid: Lon Ford Story*, 10.

69. U.S. War Department, *Monthly Weather Review* (January 1886), 3.

70. U.S. War Department, Signal Office, *Monthly Meteorological Report: Dodge City, Kansas, January, 1886*, Climatological Record, 1819-1892.

71. *Larned Chronoscope*, January 15, 1886; *Kansas City Times*, January 1, 1946.

72. *Daily Commonwealth*, January 9, 1886.

73. *Lawrence Tribune* quoted in *Dickinson County Chronicle*, Abilene, February 12, 1886.

74. Rister, *No Man's Land*, 50.

75. U.S. War Department, Signal Office, *Monthly Meteorological Report: Dodge City, Kansas, January 1886*, Climatological Record, 1819-1892; *Ibid.*, February 1886.

76. Rister, *No Man's Land*, 51.

77. *Daily Commonwealth*, February 3, 1886.

78. *Lawrence Tribune* quoted in *Dickinson County Chronicle*, February 12, 1886.

79. *Daily Commonwealth*, January 13, 1886; *Globe Live Stock Journal*, January 26 and February 1, 1886; Matador Land and Cattle Company, Ltd., Records, Southwest Collection, Texas Tech University, Lubbock; Gibson, "Ranching on the Southern Great Plains," 149-50.





The severity of two winters, fenced land, and the advancing homesteaders combined to bring an end to the days of the cattleman in western Kansas. "Gone was the range . . . gone was a way of life that could not endure, all swept away in the cold winter wind." The Fall of the Cowboy by Frederic Remington, courtesy Amon Carter Museum, Fort Worth, Texas.

were thought to have perished on the range in the vicinity of Dodge City but where cattle were fed and sheltered, losses were said to have been insignificant.<sup>80</sup> Later, an authoritative report in the *Globe Livestock Journal* stated that between December 1, 1885, and December 1, 1886, total losses from various causes amounted to 272,850 head or 30 percent of all cattle in western Kansas.<sup>81</sup> The death toll was greatest among through cattle but heavy losses occurred in blooded and graded stock as well. Cattle acclimated to the weather survived the winter in greater numbers but many were too emaciated, mutilated by

wolves, or crippled by the freezing cold to be of much value.<sup>82</sup>

A few reports from the range country stated that losses were exaggerated, perhaps deliberately so to cover wrongdoing. The blizzard years provided less scrupulous managers the occasion to reconcile a growing disparity between the book count and the head count of their herds by claiming heavier than actual losses. Some companies on the northern Plains having "overestimated the size of their herds for years took advantage of the opportunity to reduce them to a realistic figure and blame everything on the weather."<sup>83</sup> Among foreign owned

80. *Drovers Journal*, Chicago, February 11, 1886; *Globe Live Stock Journal*, January 19, 1886; *Larned Chronoscope*, January 29, 1886.

81. *Globe Live Stock Journal*, January 11, 1887.

82. W. F. Sommerville to A. McKay, February 5, 1886, Matador Land and Cattle Company, Ltd., Records; *Globe Live Stock Journal*, January 26, 1886.

83. Maurice Frink, W. Turrentine Jackson, and Agnes Wright Spring, *When Grass Was King* (Boulder: University of Colorado Press, 1956), 260.





operations in particular reported losses were found to be two to four times greater than actual losses.<sup>84</sup>

Losses among various types of cattle on southern ranges may have been exaggerated in an attempt to prove local cattle were more hardy than through cattle or to manipulate cattle prices.<sup>85</sup> The *Texas Livestock Journal*, skeptical of alleged losses in different types of cattle on the same range and under the same conditions, stated that "for the purposes of covering up losses in native stock . . . it is considered policy, if dogies don't die, to kill them anyway . . . on paper."<sup>86</sup>

The first reports from western Kansas may have exaggerated losses also. Large numbers of cattle were believed to have perished the first week in January 1886, along the route of the Santa Fe railroad. An agent sent to investigate reported upon his return that he counted only "twenty-nine between Dodge City and Coolidge."<sup>87</sup> It is not certain from the report whether the agent was reporting losses in the blizzard of January 1, or losses that must have been considerably larger in the January 6–8 blizzard. By early February, however, the worst of the weather had ended and the *Daily Commonwealth* assured its readers that, "after the unprecedented storms and blizzards . . . have passed and the clear sky and warm sunshine have succeeded, full reports from every part of the country are in, indicating only a small loss of stock."<sup>88</sup>

As winter yielded to spring, the destruction of range cattle became more apparent each day. Two successive winters of heavy losses brought financial ruin to the range industry and cries for change in the system of cattle herding.<sup>89</sup> While the *Kansas City Journal* called for "radical reform" in the way stockmen herded cattle, the *Wichita Weekly Beacon* foresaw the day when the industry would be dominated by farmers rather than "bloated cattle kings" and added, "these broad prairies and ranges should be thrown open to the hardy settlers who will cultivate

the soil and feed the products of their farms to good stock."<sup>90</sup> "Now is a good time," the *Garden City Irrigator* proclaimed, "to determine on a change. Drive the lonesome cow on the wild prairie into a good barn, couple her with a good bull and if you take care of her a few years, she will not only appreciate the treatment but return you a good percentage of profit for the outlay."<sup>91</sup>

Early in the 1880s, homesteaders were being attracted to western Kansas by an abundance of potentially productive land. Access to the region was facilitated by Kansas land commissioners who, in July 1885, ordered cattlemen to remove fences from previously occupied public land; and by herd laws enacted in June 1886, which prohibited owners in several western counties from allowing cattle and other domestic animals to run at large. By 1885, settlement was proceeding at a rapid pace. Homesteads were being staked out all over the range, and farming communities were sprouting everywhere.<sup>92</sup> Virtually all public land in Clark County was settled by 1886.<sup>93</sup> Farmers plowed the range, grew cereals and feed crops, and raised small bunches of cattle that were placed in enclosed pastures where protection could be provided from the vicissitudes of the "bleak and barren prairie."<sup>94</sup>

Homesteads reduced the open range not only in its extent but also in its capacity to sustain large herds of cattle.<sup>95</sup> In September 1886, it was reported that "the large stock ranges of Kansas have all been settled up."<sup>96</sup> Homesteaders took up the best available land, and many cattlemen found it increasingly difficult to maintain their herds on what remained. Cattlemen were forced to move farther "westward to some other country which was yet unsought for the immigrant of the east," or to stay in place and to change business practices.<sup>97</sup>

Those who remained in business sought to protect their interests from the weather and from the "hardy sons of toil" who were establishing homesteads all about.<sup>98</sup> Land was leased or bought to

84. Brayer, "The Influences of British Capital on the Western Range Cattle Industry," 94.

85. *Morning News*, Dallas, Tex., February 4, 1884; *Daily Gazette*, Ft. Worth, Tex., April 25, 1886.

86. *Texas Live Stock Journal*, Ft. Worth, February 6, 1886.

87. *Daily Commonwealth*, January 12, 1886.

88. *Ibid.*, February 2, 1886.

89. O. P. Beyers, "Personal Recollections of the Terrible Blizzard of 1886," *Kansas Historical Collections*, 1911–1912 12 (1912): 106; Blanchard, *Conquest of Southwest Kansas*, 76; *Wichita Weekly Beacon*, January 20, 1886; *Globe Live Stock Journal*, February 7, 1886; *Drovers Journal*, Chicago, February 12, 1886.

90. *Kansas City Journal* quoted in *Larned Chronoscope*, February 5, 1886; *Wichita Weekly Beacon*, January 20, 1886.

91. *Garden City Irrigator*, February 27, 1886.

92. Blanchard, *Conquest of Southwest Kansas*, 76–77.

93. Dorothy Berryman Shrewder and Melville Campbell Harper, eds., *Notes on Early Clark County, Kansas*, 6 vols. (August 1940–September 1941), 2:77.

94. *Daily Commonwealth*, January 14, 1886.

95. Dale, *The Range Cattle Industry*, 130.

96. *Globe Live Stock Journal* quoted in *Breeder's Gazette* 10 (September 23, 1886): 455.

97. *Ibid.*

98. *Ibid.*



provide a permanent base of operations, and portions of the land were set aside for cultivation of feed crops to store in the event of calamities such as those visited upon the range in the two winters past. The land was fenced to protect grass and water from the incursions of farmers. Herds were reduced in size, if the weather had not seen to it, and upgraded in quality to satisfy a taste for better beef. Shelter was provided. The differences between cattlemen and farmers became less distinct and all but disappeared as stock rearing was combined with crop production.

The problems inherent in the management and methods of cattle herding on the open range were in themselves sufficient to have brought about this change. Time and the inexorable tide of the agricultural frontier flowing into western Kansas made change inevitable. Winter weather hastened it. In June 1886, the *Globe Live Stock Journal* acknowledged what now was obvious, "the old days of the free range are no more."<sup>99</sup> Gone was the range the cattlemen knew, gone were the great herds rustling on it, and gone was a way of life that could not endure, all swept away in the cold, winter wind. KH

99. *Globe Live Stock Journal* quoted in *Garden City Irrigator*, June 12, 1886.





## 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.<sup>1</sup>

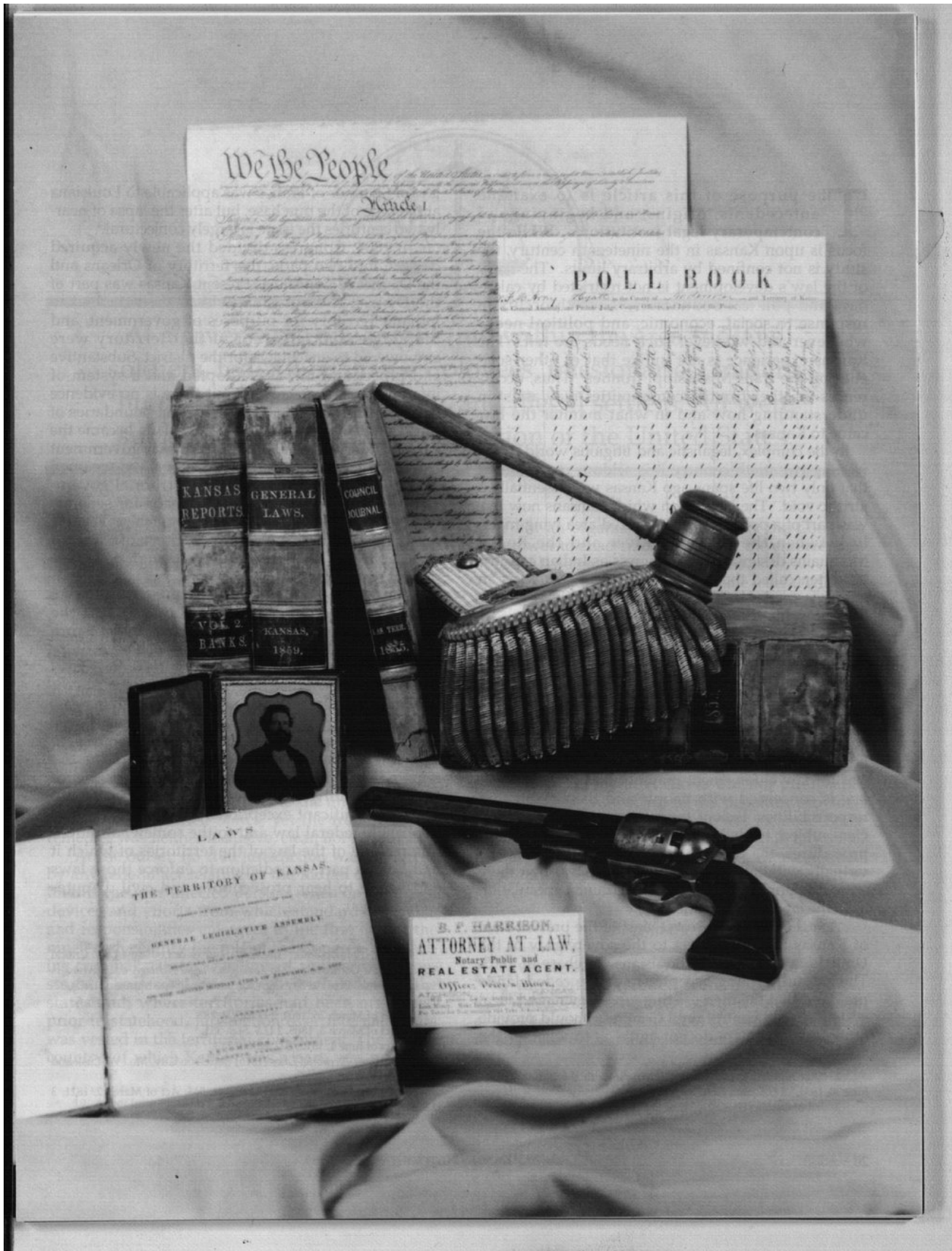
Paul E. Wilson is a 1937 and 1938 graduate of the University of Kansas. In 1940, he received an LL.B. from Washburn University. A longtime member of the Kansas University law school faculty, Professor Wilson is now the John M. and John L. Kane Distinguished Professor of Law Emeritus, the University of Kansas. As the 1990-1991 president of Kansas State Historical Society, Professor Wilson originally prepared this article for presentation at the Society's annual meeting, October 5, 1991.

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 gavel; military epaulet; revolver; and attorney's card. Pictured in the ambrotype is political activist Gaius Jenkins whose murder in 1858 by James Lane, over a land dispute, had major legal consequences.

1. O. W. Holmes, *The Common Law* (Boston: Little Brown and Co., 1881).



[In Progress] Kansas history: a journal of the central plains





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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

In 1804, Congress divided the newly acquired domain into two parts, the Territory of Orleans and the District of Louisiana.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> 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.

4. A. N. Yiannopolous, "The Early Sources of Louisiana Law: Critical Appraisal of a Controversy," in *Louisiana's Legal Heritage*, ed. Edward F. Haas (Pensacola: Perdido Bay Press for Louisiana State Museum, 1983), 87-106.

5. Act of March 26, 1804, 2 U.S. Stat. 283.

6. Act of March 3, 1805, 2 U.S. Stat. 331.

7. Act of June 4, 1812, 2 U.S. Stat. 743.

8. *Missouri Territorial Laws* [1816] (Jefferson City, Mo.: W. Lusk and Son, 1842), Ch. 154.

9. Act of March 30, 1820, 3 U.S. Stat. 545; Act of March 2, 1821, 3 U.S. Stat. 645.

2. "Act regulating trade and intercourse with the Indian Tribes, June 30, 1834," 4 U.S. Stat. 729.

3. Act of October 31, 1803, 2 U.S. Stat. 245.