

EMMA COX & THE STAGECOACH

PERSONAL INJURY IN THE 19TH CENTURY



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Idaho Falls, Idaho*



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One day in the fall of 1870 Emma Cox, a young woman from Silver City, decided to take a free ride on a stagecoach. The 18-year-old was not listed as a passenger because she had not paid. The driver offered to let her ride free, up on top with him, as far as the next stage station.

During the ride, the stagecoach somehow overturned, and Emma rolled down an embankment, injuring her hip and fracturing her thigh bone.

Cox was brought to Boise for medical attention. Eventually she asked the stage company to pay her medical expenses and the cost of her stay at a Boise hotel, Hart's Exchange.

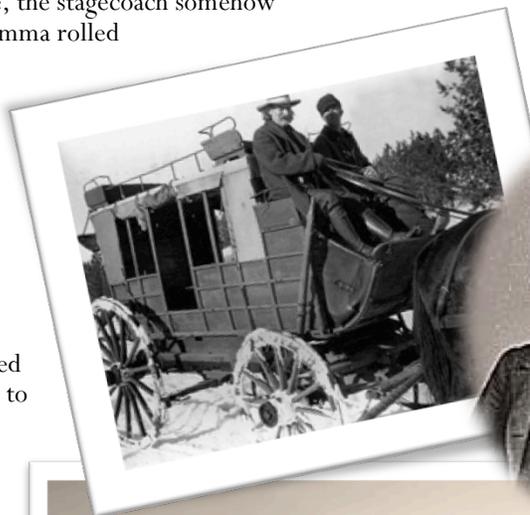
When the company refused to pay, Emma filed suit against the Northwestern Stage Company. Former chief justice John R. McBride, considered to be the best trial attorney in the territory, served as her counsel, seeking damages of \$20,000 on her behalf.

The stagecoach company was represented by two well-known Boise attorneys, who were thought by some to have only moderate courtroom skills: Henry Prickett and H.L. Preston. Judge Joseph R. Lewis presided at the trial in November of 1870.

In court, Cox's attorney graphically illustrated Emma's injuries using the femur and pelvic bones of a Native American woman apparently retrieved from a burial in the Boise foothills. He also tried to have the jury visit Emma in her sickbed at the hotel to see her condition first-hand.

Prickett and Preston resisted this move, knowing the damage it could do to their case. They chose instead to accept Emma's written statements about the extent of her injuries.

The stage company sought to prove that Emma Cox was not a paid passenger and had distracted the driver, thereby causing the accident. However, the jury of mostly single men were said to be clearly



The road from Silver City.



Emma's attorney, former Chief Justice John R. McBride.

sympathetic toward the young woman. She was thought to be very marriageable if she were to receive a large settlement in the case.

After several days of trial, the jury awarded Cox the unexpectedly large sum of \$14,000 in damages, an award that was upheld by the Idaho Supreme Court in 1871.

Following the Supreme Court decision, Henry Prickett attempted an intricate legal maneuver that involved getting the clerk of the court, Thomas Donaldson, to unlawfully issue a *supersedeas*. Donaldson refused and the ruling stood.

Northwestern Stage paid the judgment and Cox's attorneys received half of the sum awarded. Emma Cox was said to have quickly spent her share of the settlement purchasing new

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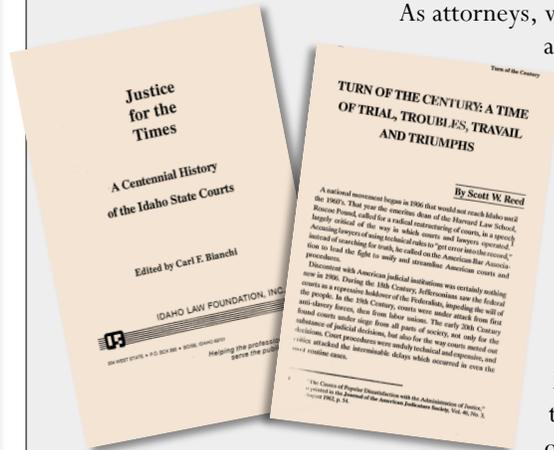
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A Message From the President

Scott Reed

I was privileged to be one of the authors of the non-best-selling *Justice in Our Times* (1990), which gave a 100-year history of the courts and the bar in Idaho. When Chief Judge B. Lynn Winmill and others put forth the idea of an Idaho Legal History committee, I volunteered eagerly. Being elevated to President was a totally unexpected plum, especially since little note is usually taken down south of anyone north of the Salmon River.



As attorneys, we rely more on history than almost any other recognized profession. We pay heed to changes in statutes and regulations and we very often, in briefs during litigation, look to the past, which we call precedent. Sometimes it is long past.

In the Sanders Beach case [143 Idaho 443 (2006)], John Magnuson and I fiercely debated the binding effect on littoral rights of an 18th century English House of Lords decision [*Blundell v. Catteral*, 106 Eng. Reprint 1190, House of Lords 1821]. By a three to one vote the Lords favored the plaintiff, Lord of the Manor of Great Crosby, who prohibited a lowly servant from driving a "bathing machine" for a fee to allow hotel guests to swim along the river shore.

Our Idaho Legal History Society efforts have been largely devoted to putting a human face on the law by interviewing elder retired attorneys, judges and justices. Our collective interviews are a rich source of the past. Some of these, such as that of Allyn Dingel, are both priceless and hilarious. It is simultaneously humbling and inspiring to read these recollections.

Occasionally we get absolutely conflicting accounts by opposing attorneys upon some case very important to them, and now long since forgotten by everybody else. Oral history can be more creative than factual.

ILHS MISSION STATEMENT

- (1) To foster and promote public knowledge of, and interest in, Idaho's legal history;
- (2) To promote and encourage research of Idaho's legal history;
- (3) To collect and preserve records, relics, oral histories and other things of interest to Idaho's legal history, and to make the same accessible for public examination;
- (4) To encourage interest in Idaho's legal history through meetings, presentations, lectures and other public forums; and
- (5) To procure or publish and distribute historical material for educational purposes, the proceeds of which, if any, are to be used exclusively for the express purposes of the Association.

NED CURTIS

GOVERNOR/LAWYER/LIBRARIAN



Like many of Idaho's early lawyers,

Edward J. Curtis got his start in the mining towns that spurred the settlement of the territory. He came to Idaho in 1864 with

Richard T. Miller and they set up a law office together in the mining boomtown of Silver City. Curtis was admitted to practice law before the Idaho Supreme Court in 1866.

A Princeton graduate, Curtis was born in Massachusetts in 1827 and studied law under the celebrated jurist Rufus Choate. He headed west in 1849 following the news of gold for the taking in California.

After a short-lived mining experience, he resumed his legal studies, worked as a newspaper editor and was elected to the California state legislature. Curtis was admitted to the California bar in 1856 and set up practice. He also served as judge of the Court of Sessions for two years.

During a brief travel stop in southern Oregon in 1856, he spoke at the local Democratic Convention and "so electrified the convention that although a non-resident, and a Republican, he was nominated for the Oregon legislature, stopped over and made the campaign, was elected and served the term."

In 1869, Curtis was appointed Secretary of Idaho Territory and moved to Boise City. Under Idaho's *Organic Act*, the secretary of the Territory acted as governor whenever a vacancy existed in the governor's office or when the governor was absent. Since the first few men appointed as governor of the Idaho Territory failed to take office, Curtis held the office of governor longer than any of the official

appointees.

He was appointed a delegate to the Republican national convention in 1872; served as adjutant-general of the territory during the Indian War (1877 to 1878); and was again appointed secretary of the territory by President Arthur in 1885 and by President Harrison in 1889. Curtis held this office until Idaho



Silver City Hotel, residence of many lawyers in the early days.



E.J. Curtis monument

became a state.

Ned Curtis was also known for his efforts to establish some of the first libraries in Idaho. Lawyers often had extensive book collections that were sometimes loaned out. Curtis had a valuable law library that was, unfortunately, destroyed in a fire in 1882. Always an advocate of libraries, he not only secured a \$5,000 appropriation to found the Idaho Law Library, but also donated a book collection in 1886 to start the territorial penitentiary's first library, at a time when the penitentiary was filled with prominent Mormon leaders imprisoned for unlawful cohabitation with plural wives.

Governor James H. Hawley referred to Curtis as "one of the most distinguished members of the early Idaho bar." Curtis passed away in 1896 and was buried in Boise's Pioneer Cemetery.

*Sources: The First 50 Men in Idaho Law, D. Kristensen 2010;
History of Idaho, J.H. Hawley 1920;
Idaho's Early Libraries, Idaho State Historical Society 1993*

Idaho Bar One of the First to Self-Regulate

Idaho was the third state in the U.S. to legislate a self-governing, self-regulating state bar association. The drive for self-regulation of lawyers after World War I was spurred by the large number of applicants to practice law at that time. Established lawyers wanted to regulate competition and fees, and maintain the overall status of their profession.

However, engaging Idaho's attorneys in a state bar association was difficult due to regional differences. By 1921 there were about 600 lawyers in Idaho, 187 of whom were members of the voluntary bar association, most of those from southwestern Idaho.

Bar officers worked tirelessly to convince lawyers in all parts of the state that the association provided benefits to them, emphasizing the common concerns of all lawyers including the need for quick, impartial justice; untrained "lawyers" in legal practice; and the decline in the image of lawyers.

A bill for self-regulation was proposed to the Idaho state legislature first in 1921. Bar members discussed and endorsed the Act, sending it back to the legislature where it

died in committee. In 1923, Bar members seeking another sponsor for the bill found the chairman of the Senate Livestock Committee, John McMurray, a powerful supporter. McMurray was said to have agreed to sponsor the bill because his committee "had jurisdiction over all predatory animals."

The bill finally passed the Senate by a narrow margin and was sent to the House where it passed easily.

The Idaho statute was based on the *Goodwin Model Act* developed by the American Judicature Society for the purpose of

*Senate Livestock Committee chairman
John McMurray agreed to sponsor the bill to regulate
legal practice because his committee
"had jurisdiction over all predatory animals."*

incorporating state bar associations as self-governing and self-disciplining entities.

The Act called for the election of a three-member Board of Commissioners by bar association members. The new Commissioners took on the tasks previously conducted by the Idaho Supreme Court such as examining applicants, developing rules of professional conduct and taking disciplinary action against attorneys, including disbarment. All higher court judges were made permanent members of the bar association for as long as they remained in office.

Source: Building a Profession, Buckendorf 1992

Emma Gets an "Average" Award

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clothes and jewelry for herself and her friends. Her leg injury did heal, although one leg was left shorter than the other.

One of the jurors later recounted how they had arrived at the amount of damages. They knew Cox had to pay attorney fees, medical costs, and a large hotel bill owed to one of the jurors. So, they took an informal ballot to see how much each juror thought she should get for her injuries. The amounts ranged from \$500 to \$5,000.

The jury then agreed to take a final ballot, divide the sum of the balloted amounts by 12 and let the average be the verdict. However, on the second ballot, the jury

men changed their numbers dramatically, voting for awards from \$5,000 to \$100,000. These new numbers produced an average of \$14,000, the final amount of the award.

One of the jurors was later reported to say:
...I wish I had voted for a million dollars damages. I married after the Cox case was settled and have one child and I know that a husband needs all the money his wife might get from a stage company or any other source.

*Sources: Idaho of Yesterday, T.C. Donaldson 1941;
Idaho Statesman November 1870, February & March 1871*

Humor about legal practice has a tradition spanning centuries in the western world. Late 19th century jokes about the law and its practitioners in the American West increased with a growing frustration about unregulated law practice and its identification with big money. One U.S. movement at the turn of the 19th century worked to abolish lawyers in favor of paternal judges who would hear evidence and instruct the juries. A pundit in the late 1800s observed that, "all Western lawyers browbeat the jury as well as the witnesses, and all cases end in free fights and bloody noses."

Inside the profession, books dedicated solely to

legal humor and written with a law audience in mind began appearing in the late 1800s, including some offering self-deprecating jokes to tell juries in the courtroom. Humorous tales ranged from the true and unusual to a mixture of fact and fiction designed to release tension among judges, lawyers and their clients.

Renowned Massachusetts lawyer Rufus Choate, under whom some of Idaho's early lawyers studied, was a colorful character who dazzled juries with his rhetoric and won some of the most important criminal cases of his time. A story about Choate recounted that he instructed the clerks in his office never to accept a client without a retainer of \$100 (a princely sum in the mid-1800s). When a clerk was once chided for having secured only \$75 from a client, the clerk defended himself by saying that he had taken all the money the man had. To which Choate replied, "That entirely alters the case – to take all a man has is quite professional."

Another inside joke was told of Colonel T., a lawyer and high-ranking federal official in California who was in the mining town of Yreka when a heavy poker loss left him without money

to pay his bills or leave town. He remained in his hotel bed late in the morning, depressed about the situation.

That same morning a man came to the hotel asking for a first-rate lawyer to take an important case for him. The hotelkeeper told him that a celebrated San Francisco lawyer was upstairs, and showed him up to Colonel T., who listened eagerly to the man's story.

A neighbor had a pet rattlesnake that escaped from its cage and bit the complainant's horse. The horse died and the man wanted to prosecute for damages.

"How much was your horse worth?" asked the Colonel.

"Five dollars," the man replied.

"I am very sorry," said Colonel T., "that I can't serve you. I am retained for the snake."

Judges, too, provided fodder for humorous tales, usually told by lawyers. One 19th century judge was renowned for his ferocity on the bench. While waiting for this judge to appear in court on the circuit, a lawyer was asked if the judge was just behind.

"I don't know," he responded, "but if he is, I am sure he was never just before."

The occasional humorous opinion, sometimes written in rhyme, is a longstanding tradition among American judges that continues into this century. Attorneys, too, have been known to rhyme. In 1975, a prosecutor used as his closing argument a rhyme that began:

*'Twas the night before Christmas, when all through the jail
Not an inmate was stirring, they couldn't make bail.*

Twentieth century lawyers began to write humorous pieces for the sake of being funny. That tradition continues today in a wide array of Internet humor collections, including some offered by law schools. However, attorney Marcel Strigberger, of the website LegalHumour.com, says his site has no lawyer jokes because "lawyers don't think they're funny and laymen don't think they're jokes."

*Sources: Bench and bar: a complete digest of the wit, humor, asperities, & amenities of the law, L. J. Bigelow 1871;
Legal laughs: a joke for every jury, G.C. Edwards 1914;*

Laughing Inside the Law

*When the nervous young lawyer rose to begin his maiden address to the jury he stammered out:
"My unfortunate client " And there he stuck. He tried again, and, in a shaking voice, he managed to say,
"My unfortunate client," and could get no farther.
Clearing his throat, he had another try, and for the third time he quavered out,
"My unfortunate client " and again his voice failed.
"Come, come, Mr----," interrupted the judge, "proceed with your statement. So far the Court agrees with you!"*

G.C. Edwards 1914

A Reno man told of a murder trial in Nevada wherein the defendant, formerly a barber, had been condemned to death. Just before the pronouncement of sentence the judge said to him:

"You have the legal right to express a last wish, and if it is possible it will be granted."

"I should like," said the prisoner, "once more to be allowed to shave the district attorney."

G.C. Edwards 1914

