William J. Stephens: Some cases in point

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by

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This Master's Thesis analyzes the frontier legal practice of William J. Stephens, an attorney who practiced in Missoula County during the last third of the nineteenth century. The practice demonstrably reflected historical influences, including both primitive Anglo-Saxon practice as well as the more erudite teachings of the Inns of Court.

Born in Ireland, Stephens came to America in time to experience the California gold rush. He spent a short time as a miner and as a merchant before taking up the practice of law in 1860. Stephens followed the mining camps, opening practices in Virginia City, Nevada, Idaho City Idaho, and Deer Lodge, Montana before settling in Missoula, Montana.

Missoula County litigation records reveal similarities between the cases Stephens handled and primitive Anglo-Saxon procedure. These include the use of oaths verifying the truthfulness of complaints and answers, an unvarying reliance upon pre-trial seizure of the subject matter, and jury trials. Excepting the last mentioned, these same factors distinguish frontier practice from modern practice. As to jury trials, frontier jurys had more latitude than modern ones.

Stephens handled numerous mining disputes, including matters within the purview of the so-called "miners' codes." Many suits were upon promissory notes, which were used as instruments of consumer credit and contract documents as well as evidences of ordinary borrowing. Many suits were brought upon the "common counts," further evidencing reluctance to employ attorneys as draftsmen. Torts to the person were rare, further distinguishing frontier practice from modern practice after the tort "revolution." The growth of the Town of Missoula in the 1880s is discernable from its litigation records, particularly after the arrival of the Northern Pacific Railroad, in the court cases become lengthier, more complex, more commercial, and concern greater dollar sums in issue.

While other commentators have striven to point out that, allowing for its more colorful vignettes, frontier lawyers demonstrated a degree a care and skill which would belie media impressions. This study takes that observation further. If the aim of litigation is fair, cost-efficient dispute resolution, then practice in frontier Missoula County was superior to modern practice.
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Preface

This Master's Thesis shall study the law practice of William J. Stephens, who practiced law in Missoula County, Montana, in the last third of the nineteenth century. The direction of its narrative will move from the general to the specific, from an outline of the broader influences of the law to a detailed description of these influences in the practice of one lawyer, in one frontier county, in one fragment of time. The choice of Missoula County stems simply from logistic convenience occasioned by the proximity of the Missoula County courthouse to the University of Montana. The choice of Stephens stems from his high level of litigious activity and his relentless character.

This "relentless" element of Stephen's character undoubtedly sprang from many sources. From what is known about his life, one can surmise that his mother's death during his own childbirth, a hearty upbringing in County Dublin, Ireland, and, what he described as his early assumption of "life's responsibilities," forged a strong and resolute man. As a young man, his life intersected another influence: the Anglo-American common law. Through his career, Stephens became something more than another tough, resourceful, nineteenth century immigrant. Beyond being a lawyer, a court clerk, a state representative, and a judge, Stephens emerged as a true man of the law. Like so many others before and after him, Stephens adopted the patterned response to conflict which defines the lawyer, the relentless
dissection of human controversy into correlative rights and obligations. Stephen's practice provides an excellent opportunity to study a lawyer's real usefulness to his clients. He almost never represented a fragmented body of shareholders. Stephens own friends and neighbors felt the impact of the results he obtained in and out of court. Like any lawyer, he had to face his clients' various accusers and tormentors; but he also had to face his clients. Since Stephens practiced in what was then a small, frontier community, his impact can be measured with particular clarity.

I would be remiss in my obligations if I failed to acknowledge the able assistance of Marcia Porter of the Records Management Department of the County of Missoula, as well as her staff, Betty Labelle, Kurt Fuchs, and Beth Sobolik. Each of these people bring an appreciation for the Western Montana's heritage to the efficient discharge of their duties. In another arena, William Jones, Esq., of the law firm of Garlington, Lohn, and Robinson, provided great encouragement and directional assistance. Mrs. Audra Broman of Missoula, Montana, who has accumulated a large body of information concerning early Missoula, graciously opened her files to me, thereby contributing to this effort. Mrs. Broman's records are the fruits of decades of patient compilation, and her efforts have been motivated solely by a love for history. I also have had the excellent good fortune to make the acquaintance of Ms. Heather Hawley of Seattle, Washington. Ms. Hawley is the great-great granddaughter of William J. Stephens. She assumed the duties of family historian and has tirelessly gathered, and graciously made available to me, important information concerning her family. This thesis would be much poorer without her assistance.

I am greatly indebted to Professors Linda Frey, Hayden Ausland, Richard Drake, and
Michael Mayer, each of the University of Montana. Each has taken an interest in my progress, provided encouragement, and personified the best standards of scholarship. Of these, Dr. Mayer deserves a special praise. He has served as my advisor, and has, without exaggeration, set a standard in that capacity. Additionally, he provided vital assistance with this thesis, in the form of invaluable advice, editing, and encouragement. Observing him, I have come to understand that my thesis, or that of any of his students', is also his contribution to the Department, the University, and to our accumulated heritage.

Lastly, I must thank my wife Melissa who, by example, serves as a continuous reminder that we daily preserve or diminish our civilization by the standards we set for ourselves.

It is hoped that my study of Stephens' cases provides some insight into the real world of frontier law, bringing to bear, as it does, my experience as a practicing attorney. In a larger sense, it is also hoped that this study helps to illuminate the functioning and the evolution of the legal process.
Two forces pull the law in different directions. One is populist, for lack of a better word, and the other, also imperfectly labeled, is scientific. The populist thrust is the original legal impulse of the Anglo-Saxon people. This may be best described as custom. It originates from the common understandings and expectations of ordinary people. It articulates the common sense of the people.

The scientific thrust, on the other hand, originates in the perceptions of unusually astute minds. Far from articulating the common sense of the people, it expresses what ordinary people cannot see. This is the elitist tradition in the law. It presumes that long study of legal theory and interaction with the legal process produces a sensitivity that exceeds the boundaries of ordinary common sense. It also presumes to discover and formulate what ordinary people could not discover and formulate. This is the legal "science" of the Inns of Court of the fifteenth century, as well as the legal science of Christopher Columbus Landgell, and, especially, the judicial activism currently in vogue. It exceeds the modest pretensions of the common law judges to discover the law in the minds and hearts of the people; it searches for the law in the recesses of higher science. Unfortunately, this scientific law can only be found in the minds of other lawyers. That this higher science has discovered rights and obligations that common sense never imagined should embolden skeptics. It should also provoke a measure of modesty in legal community. Instead, however, the public's bewilderment only confirms the legal profession's superior assurance.

The diverse social origins of nineteenth century lawyers fed the tensions between
custom and science. Historically lawyers came from the most privileged classes. This was true in late medieval England, as represented at the Inns of Court, and would remain largely true in early America. The nineteenth century, however, witnessed a widening of professional opportunity for persons of modest lineage. Abraham Lincoln, for example, used a law book and a candle to leverage himself into immortality. William J. Stephens also came from humble origins, and the study of law provided him with social prominence, public office, and a fortune in real estate. Like Lincoln, Stephens demonstrated sound business acumen in seeking his legal fortune on the frontier, where the distance between anonymity and community leadership was quite short. Trained in San Francisco, Stephens followed the prospectors to Western Montana, feverishly mined their disputes for legal business, and prudently spent his earnings on real estate and sound, adequately secured loans.

Differences in professional training and admission standards also promoted the gulf between custom and science. In Stephens' day, certification to practice was not predicated upon formal training. Missoula provided an excellent opportunity to study the quality of unschooled practice, its reactions to legal currents, and its value to an infant community. How did the people of Missoula, newcomers all, receive their early lawyers? While this question can never be answered with perfect accuracy, there is no doubt that, whatever their opinions, they rang their lawyers' doors with astonishing frequency.

To put Stephens' career into perspective, the first chapter discusses some of the historical influences which give dimension to a frontier practice. These forces cannot be adequately outlined if ancient forces are ignored. Legal historians agree that all modern institutions have older antecedents. However, most studies focus upon contemporary, or then
contemporary, factors, and ignore ancient origins. At the same time, a thesis centering upon the practice of a nineteenth century Missoula lawyer cannot also serve as a treatise covering two thousand years of legal history. Therefore, these brief remarks are confined to a few observations about Anglo-Saxon common law and the Inns of Court. The former represents the populist tradition, and the latter the elitist. Chapter 1 also presents a short discussion of American legal trends. The second chapter covers the life of William J. Stephens and the development of the town of Missoula.

Chapters 3, 4, and 5 treat the cases litigated by Stephens. Chapter 3, after briefly detailing some of Stephens' early appearances in Missoula County, discusses legal procedure in use in the 1870's. It focuses on highlighting continuities and discontinuities between the procedures in use in the Anglo-Saxon period, in frontier Missoula, and in modern practice. Chapter 4 studies the substantive causes of action themselves, allowing the claims to portray human interaction in a frontier society. Chapter 5 uses cases from the ensuing decade, the 1880's, to demonstrate the evolution of Stephens' practice and the community of Missoula.

The types of cases presented and the incidentals appertaining to these cases demonstrate the usefulness of ordinary litigation records in portraying the life of a community. Litigation files present a uniquely incisive vantage from which to experience the real workings of daily life. These records provide a much more telling picture than other legal records, which tend to serve impersonally as evidence of statistical tendencies. They are more trustworthy than letters and reminiscences, which by necessity are random and unrepresentative. They are the closest thing we have to motion pictures; in fact, the images preserved in the files are more intimate than a camera can ordinarily capture. Furthermore,
the fact that lawyers cost money, while sad for the general public, is a boon for the historian. People do not bring idle chatter to a lawyer; they bring real controversies about real and immediate concerns. Human interaction distills itself into human controversy, and from controversy into litigation records. For all its posturing and abstraction, litigation possesses a wonderful sincerity.

Litigation is a process designed to facilitate the non-violent resolution of human conflicts. Every human community needs an orderly dispute resolution apparatus. Our system is, and always has been, the target of gibes to the effect that it unduly abstracts and complicates disputes. The cases and materials discussed in the following pages draw a picture of litigation that contrasts quite favorably with what we have today. Whatever the costs and frustrations faced by Stephens' clients, they at least had a system that was more about solving, and less about promoting, interpersonal disputes than what we have today.
Chapter 1. Two Vectors

In part, American judicial proceedings trace to the periodic assemblies of the Germanic tribes. Meetings of the "hundreds," the earliest Germanic military and political divisions, date from before the Anglo-Saxon migration to England. They decided all controversies, assessed punishments, and collected dues; in short, they served as the entire judicial machinery.\(^1\) Anglo-Saxon immigrants brought these rude "courts," and the procedures associated with them, to England. In the course of these migrations entire communities came under the direction of their political leaders. Naturally, these migrants sought the comfort of their own customs as they became re-established in a new country.\(^2\)

The "reeve," or, for the shire, scire-gerefa, or shire-reeve, or, finally, sheriff, presided over the meetings of the hundreds.\(^3\) It is the only Anglo-Saxon judicial office that survives in any format.\(^4\) The term reeve applied in both public and private contexts. Wealthy


\(^3\) The relationship of the Shire to the hundred cannot be ascertained with certitude. Generally, however, the shire seems to have been a superior political entity, bearing the relationship to the more local hundreds that, later, a county court would bear to a justice court.

landowners had reeves who collected rents and dues from tenants, and otherwise preserved order on the estate. The term, therefore, connoted an officer vested with duly constituted authority. Of all the reeves, the scire-gerefa was the most prestigious; his power stemmed from the king's authority. Then, as now, the reeve of the hundred, or the sheriff, had little decision making authority. While the position survives to this day in policing districts, serving process, and executing judgements, the sheriff's participation was critical at all stages of civil proceedings in frontier Missoula County, to an extent that would surprise modern practitioners.

The civil procedure in use held to a simple outline. A contemporary of Stephens, Earnest Young, distinguished procedure in his time from the early German period. The procedure of his day, thought Young, should be likened to a syllogism, in which the body of judicial rules is the major, and the declaration of facts the minor premise. That description would satisfy any current practitioner as well. Continuing, Young argued that Germanic pleading was not syllogistic at all, just an unstructured demand for compensation. From there, ancient and modern litigants proceeded down divergent procedural paths of proof, which merged into substantially identical prayers for relief: both sought permission of the court to proceed to execution.

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6The words "prayer" and "execution" are used here in their legal sense. A prayer is the portion of a complaint that specifies the relief requested. Execution, in civil procedure, is the process by which the relief ordered by the court is carried out, as, for example, the seizure and sale of the defendant's property to pay the judgement.
The gross distinctions, and the more subtle, yet profound, threads of continuity between those "divergent procedural paths of proof" provide the most interesting comparison between ancient Anglo-Saxon law and the law of Missoula County. Whereas the courts of Missoula County viewed proofs in terms of modern conceptions of evidence, the Anglo-Saxon courts envisioned something quite different. Nineteenth century courts focused on the weight and veracity of testimony and documents (subject to supervening policy considerations which exclude certain types of evidence or evidence obtained under disfavored conditions). Anglo-Saxon courts, to the contrary gauged only the quality of oaths. The oath of an aristocrat had more probative value, de jure, than that of a yeoman. As a result, Anglo-Saxon evidentiary rules, unlike the rules of pleading, were actually more ritualized than modern ones.

The adduced proof was governed by severe formalistic strictures. Through the scheduling of oaths, according to Young, "the community, perhaps for the first time, placed their wills over the will of the individual." By that, he meant, the community began to resolve the dispute in lieu of the parties. The essence of the judgment answered the question of who should provide oaths, and what they must contain. This usually favored the defendant, for if he could provide the requisite oath or oaths, he prevailed. In an action on a debt, for example, the defendant needed only to provide, in effect, a sworn denial. The power of the proof lay in the fact that the denial was in the form of the oath. No facts were adduced to counter the plaintiff's claim. In an action for possession of movable property, the defendant had to provide, beyond a denial of wrongdoing, evidence of ownership.

The effortless administration of law in pre-conquest England was confounded by the

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7Young, "The Anglo-Saxon Legal Procedure," 186.
fact that cattle, a chief medium of exchange, tended to wander. A strict principle held that
no title could be acquired in stolen property. Hence, more rigorous demands were imposed
upon the parties. Upon the defendant's denial, the plaintiff had to attest to his own good faith
in bringing the action. In turn, the defendant's reply had to be accompanied by a pledge of
security. Some passages in written laws specified the quantity of pledge. These last two
procedures were not only practiced in Missoula County, they were almost invariably relied
upon.

After the Norman invasion, a more sophisticated brand of feudalism took hold,
requiring a more sophisticated body of law for its administration. This required greater
proficiency of those who practiced law. Therefore, lawyers formed into organized bodies to
study the "law of the land," the common law of England. To convenience their studies, these
lawyers acquired properties, the "Inns," a word which then signified a private mansion rather
than a public accommodation. Little remains in the way of description of life in the Inns, or
their curriculum, except to say that "the mode of instruction was principally readings and
mootings."

Sir John Fortescue, nominal chancellor of Henry VI, threw some light on the picture,

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8Ibid., 198-208. "A pledge of security" occurs where a party to a proceeding places
property at the court's disposal to redress violation of an oath. Bail, to secure a criminal
defendant's appearance, is such a pledge.

9H. Munro Chadwick, Studies on Anglo-Saxon Institutions, (New York: Russell &
Russell, 1905, 1963), 134.

10John F. Dillon, The Laws and Jurisprudence of England and America, (New York: Da

11Dillon, 52.
particularly regarding the class of young men attended.

In these greater inns a student cannot well be maintained under eight and twenty pounds a year; and, if he have a servant to wait on him (as for the most part they have) the expence is proportionally more: for this reason, the students are sons to persons of quality; those of inferior rank not being able to bear the expences of maintaining and educating their children in this way.\(^\text{12}\)

However, Wilfrid Prest's study demonstrated that the Inns did not limit attendance to the sons of the aristocracy. Cost, not social ranking, barred the door. Prest concurred that costs were imposing and included a fashionable wardrobe, fees to fencing masters and dancing academies, and plenty of pocket money for gaming, drinking and plays. "[L.]ike the proverbial doors of the Ritz hotel," Prest said, "the Inns remained open to all sorts of men, rich and poor alike, as long as they could foot the bill." In the end, the Inns were actually more exclusive than the universities.\(^\text{13}\)

Wallace Notestein offered a fairly vivid impression of the curriculum. Although the Inns did not mandate a set regime, "there were moots, bolts, imparlances, putting cases, and readings."\(^\text{14}\) Of these, the moots elicited the greatest interest:

...their (the trainees) arguments were...criticized by older men, by Readers and Benchers, perhaps by the Serjeant-at-law, or by a great judge who happened to be in residence...Putting a case was a less formal procedure. As men were at dinner or supper one of the older men might put a case and draw out those at the table....Young men walking about the quadrangles were encouraged to


put cases to one another....Law, said Serjeant Maynard, was a babblative art; men should study all morning and talk all afternoon.15

Roscoe Pound denied that the education at the Inns could be properly called "academic," (an attribute he found commendable.) Neither professors nor jurists comprised the faculty. Instead they were practicing lawyers, "in touch with the law in action, seeking to develop the common law of England as a workable system for meeting concrete problems of adjusting human relations and ordering conduct."16

But just as the Inns produced the law itself, they also served as foundries of the profession of law. Pound continues:

But what is significant for our present purpose is that the English lawyers at the end of the Middle Ages had become a well developed, well organized profession, maintaining a system of societies or associations promoting a professional tradition, providing adequate training of those who were to enter

15Ibid., 88-89. Prest provides an example of an actual moot case, argued at the Middle Temple in 1612.

"[A man has] a bastard elder son and a younger daughter who is within age. The bastard dies having had issue. His father dies. The bastard's issue enters and grants a rent charge. The grantee distrains and has the return 'irreplevisable'. The bastard's issue dies, never having been interrupted in seisin. The daughter being within age, enters. The grantee of the rent charge distrains upon the daughter. The daughter makes a rescue and the grantee brings the assize.

The points:
1. Whether the issue of the bastard, being in without interruption, shall bar the woman who is within age.
2. If such a judgement, that is to say when the grantee has the return 'irreplevisable', amounts to a seisin upon which the other can bring an assize." Prest, The Inns of Court, 108. (The question bears an eerie similarity to modern bar exam hypotheticals.)

the profession, and actively furnishing the development of the law.\textsuperscript{17}

Thus, by the time the of the British colonization of North America, a wealthy, elitist, and self-contained legal profession had emerged.\textsuperscript{18}

The Inns of Court made their impression upon colonial America. In the first instance, early American trained lawyers, such as William Livingston in New York, came predominantly from the Inns.\textsuperscript{19} For a long time, training at the Inns of Court remained singularly prestigious. Virginia, having forbade the practice of law in 1645, by subsequent statute (Act 16 of 1656) regulated admission and specifically admitted barristers trained at the Inns of Court.\textsuperscript{20} In Maryland, membership in the Inns was the most prestigious entrance into the legal profession, and, like Virginia, such membership exempted the member from entrance examination. Even Puritan Massachusetts saw three of its men journey to the Inns before 1706.\textsuperscript{21} The Inns' influence seeped continuously into America's emergent legal community. Although lawyers took the lead in driving the colonies toward revolution, the Inns had served

\textsuperscript{17}Pound, 93.

\textsuperscript{18}Prof Friedman says that "by 1600, English Lawyers were plainly professionals...the bench was recruited from the bar...Lawyers and judges made up a single legal community, with a shared background and common experiences, as they do to this day. They were a cohesive group sharply set off from the public." Lawrence Friedman, The History of American Law, (New York: Simon and Schuster, 1973), 20.


\textsuperscript{20}Pound, 137-8.

to bind them to the mother country, holding the American elites to an English perspective. After all, the Inns did more than offer professional training. Focusing entirely, as they did, upon English legal institutions, English pleading, and English legal suppositions, they walled lawyers off from Roman law and the "continental legal culture."\textsuperscript{22}

Although the law of the Inns was English Common Law, it was certainly not \textit{common} in the ordinary sense of the word. First and foremost, the law taught at the Inns was the law of land tenures (oddly, much the same law that tortures first year law students today). This law, therefore, applied to the landowning elite; so did the pages of Lord Coke's reports, the decisions studied by the law students. The venues of application were the royal central courts. This, then, was the law for "lords and ladies, landed gentry, high ranking clergymen, wealthy merchants... (t)he masses were hardly touched by this system."\textsuperscript{23}

For the rest of the people, the common law was the local, manorial law that governed their daily lives, that maintained and serviced the feudal hierarchy that stretched in a fixed, resplendent order from the child of the poorest tenant to God. The colonists imported this body of populist knowledge as well. It would be actualized in the daily workings of the justices of the peace, whom Kermit Hall has described as "the lowest and most ubiquitous layer of colonial legal institutions."\textsuperscript{24} The justices themselves were usually lay persons, who applied common sense and community standards to the cases that came before them. Manuals such as Michael Dalton's \textit{Countrey Justice} revealed how far this common law

\textsuperscript{22}Friedman, \textit{The History of American Law}, 20.

\textsuperscript{23}Friedman, \textit{The History of American Law}, 21

\textsuperscript{24}Hall, \textit{The Magic Mirror}, 20.
departed, in expression as well as subject matter, from the deeply arcane common law of at the Inns. This populist tradition in American legal history has careened between humble admiration and bitter disdain for its elitist brother.

Colonial America, despite great expenditure and artful posturing, never developed a gentry that could rival England's. Still, such as did exist produced most of America's early lawyers. Seventeenth century "lawyers" in Maryland were actually well-to-do planters and merchants who dabbled in the law as occasion necessitated. When, after 1700, professional lawyers (that is, persons who maintained a regular, extensive practice which provided their principal means of support), began to appear in Maryland, they were drawn from these privileged groups. Similarly, Milton Klein's study of the New York Bar confirms that, while in earliest colonial times persons of common origins made up the rude practice, there would later be no clear line with which to divide merchants or landlords from lawyers. By the mid-eighteenth century, the New York bar was controlled by men "organized to protect their professional interest." The bar association was able to monopolize practice by obtaining from the Supreme Court endorsement of its efforts to regulate admittance. In the years leading to the Revolution, law became the career choice of young men from the wealthiest families. Aspiring lawyers obtained a baccalaureate degree, which had become a prerequisite for a clerkship. There was, said Klein, "scarcely a prominent lawyer in the colony who was not


related by ties of blood or marriage to one of the great landed or mercantile families.\textsuperscript{27} By the Revolution, the profession in New York had achieved a separation from the community which was a "source of pride."\textsuperscript{28} Similarly, John Murrin's study of the colonial Massachusetts bar confirmed that by the 1750s, the sons of some of the leading Boston families chose a career in law.\textsuperscript{29} In 1762, Massachusetts Chief Justice Hutchinson ordered judges and lawyers to wear English robes and gowns (a similar requirement obtained in New York two years later).\textsuperscript{30} In fact, by 1750, in all major communities, "a competent professional bar, dominated by brilliant and successful lawyers...existed."\textsuperscript{31}

The emergent legal professionals flexed their muscles aggressively. Beyond representing clients, they made public policy. This was so, Robert Bell has argued, because the nature of the political process in American required their skills.\textsuperscript{32} As lawyers established public policy, they alone understood the intricacies of the law enacted to effect it. Lawyers became officeholders, community leaders, even celebrities. In any community, the complex issues were submitted to lawyers for solution, almost in the sense that eastern European


\textsuperscript{28}Ibid, 156.

\textsuperscript{29}Murrin, "The Legal Transformation: Bench and Bar of Eighteenth Century Massachusetts," 555.

\textsuperscript{30}Botein, \textit{Early American Law and Society}, 60.

\textsuperscript{31}Friedman, \textit{The History of American Law}, 84.

Jewish communities relied upon rabbis. Somehow, like the Eastern European rabbis, the lawyers possessed a wisdom that transcended classification. In some transcendent sense, they knew how things worked. As Alexis de Tocqueville observed in the early nineteenth century, "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."^34

Daniel Boorstin contended that the law seemed "interfused" with everything else in the community and that "Americans saw the revered legal framework as the skeleton on which the community had grown."^35 This description bears a moment's contemplation. The law had become so integral to society, so identified with the larger phenomenon called life, that, at least according to Boorstin, it actually seemed as though the community developed out of the law. What a stunning reversal! The entire theory underlying the presumed legitimacy of the common law was that it arose from common experience. Instead, by the post-Revolutionary period, the law had a life of its own. The law carried society forward, and

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^33 If this analogy seems excessive, consider some of the rhetoric discovered randomly in researching this paper: Bernard Schwartz called the Bar a "priestly tribe" (The Law in America, New York: McGraw-Hill, 1974); Daniel Boorstin called lawyers the "high priests" of the metaphysics of property (The Americans: The National Experience, New York: Random House, 1966, 416; Hall called the industrial lawyers of the post-civil war era "the 'new high priests'" (The Magic Mirror, 225). Toqueville likened ante-bellum American lawyers to the "hierophants of Egypt" (Alexis De Toqueville, Democracy in America, vol. 1, 289, edited by Philip Bradley, as quoted in George Dargo, Law in the New Republic, New York: Knopf, 1983, 57.) In our own era, the rhetoric is actually understated. Priests, after all, can only appeal to a higher authority. Modern lawyers are not expected to look beyond themselves in solving perceived social ills.

^34 Alexis de Tocqueville, Democracy in America, vol. 1, edited by Phillip Bradley, as quoted in Hall, 86.

not the other way around. The implications for the status of lawyers were great. Lawyers, in the democratic era, became the "highest political class and the most cultivated portion of society."\textsuperscript{36}

The implications for society, however, were far greater. If lawyers had assumed such status and power, then, conversely, the other segments of society had correspondingly diminished. As lawyers became the bones and not the flesh, to follow the metaphor, what check could be placed upon them, what, besides self-discipline, could moderate their impact? Fortunately, the greater community had one established line of defense: its historic mistrust of lawyers.

Boorstin says that the anti-lawyer feeling gained renewed strength in early colonial America.\textsuperscript{37} In New England, puritan immigrants sought a legal system bound tightly to scripture and freed of the complexity of the common law. In Maryland, the Act of 1674 stated that "the good people of this province are much burthened by lawyers." Until 1673, there was no right to practice law in Massachusetts. Pennsylvania legislated simplicity in pleading, a body blow to the development of a legal community. As the profession became more established, "(l)awyers, like shopkeepers, moneylenders, and lower bureaucrats (were) lightening rods that draw rage during storms in the polity."\textsuperscript{38} Rioters in New Jersey in 1769


\textsuperscript{37}Boorstin, The Americans: the Colonial Experience, 197.

\textsuperscript{38}Friedman, The History of American Law, 83.
published pamphlets urging resistance to "this unconscionable set of L--yers." But Boorstin noted a corresponding phenomena: respect for the law rose along with distrust of lawyers. Writing on the colonial bar in New York, Milton Klein noted the juxtaposition of conflicting themes: the bar's gradual rise to political and social importance, paralleled by, and indeed resulting from, its increasing technical competence, along with a steady growth in hostility from the laity.

Boorstin's analysis separated law from lawyers. He saw the public as legally literate, and therefore able to admire law but not lawyers. While the argument contained its own internal logic, it was not very persuasive. It failed to explain Klein's observation that the profession gained social prominence as it accrued public mistrust. The real reason for the parallel rise in prestige and hostility was that the public both feared and respected the lawyers' secret trove of knowledge. Like advanced military technology, the public feared and wanted it, the mix varying against a changing social background.

The profession's prestige plunged after the Revolutionary War, manifesting lingering anti-English attitudes. Lawyers were attacked during Shay's Rebellion and later, under the influence of Jacksonian Democracy, as elitist and anti-democratic. During lean times, lawyers were collected debts for impatient creditors and so became the point of attack for angry debtors. The bar's ubiquitous bag of legal technicalities was always the greatest irritant. "I give my decisions on principles of common justice and honesty between man and man, and

39 Derived from an anonymous broadside entitled "Liberty and Property Without Oppression," as printed in Botein, Early American Law and Society, 124-126.


rely on natural born sense and not on law learning," said David Crockett, "I have never read a page in a law book in my life." No one could have said it better. Maxwell Bloomfield has insisted that antilawyer sentiment before the civil war was a middle-class phenomena as well. Merchants resented the high costs of litigation as their demand for legal services increased with the growth of the business economy. According to Robert Bell, the ante-bellum community in Philadelphia sensed a "conflict of interest" in the fact that the profession which made the laws also profited from them.

Lawyers countered with a barrage of propaganda designed to generate appreciation of the legal profession. Publications sought to portray lawyers as hard-working, self-made, even altruistic. In place of the aloof charlatan, legal publications drew an image of the dedicated intellectual, the conscience of society. By the civil war, the legal profession was broadly respected. Something more than propaganda accounted for this improvement in the public image of lawyers; the profession had become more representative of the society at large.

Kermit Hall noted a trend toward social diversity as the nineteenth century wore on. In the early years, the bar was "inbred," composed primarily of the sons of prominent families.

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42Quoted in Bell, The Philadelphia Lawyer, 91.


44Bell, The Philadelphia Lawyer, A History 1735-1945, 63. As the recipient of an M.S. in Taxation, I would venture the hope that the public will soon extend greater confidence to this perception.

45Bloomfield, 144-147.
By the Jacksonian era, however, entry restrictions had been eased and the bar experienced greater middle class representation. "Diversity in the bar," Prof. Hall said, "was a by-product of urbanization and industrialization." While not directly attacking the democratization of the bar, Pound traced efforts to ease admission standards to fear of legal elitism and the Jacksonian faith in the "natural right of every man to pursue any calling of his choice." Additionally, and for Pound, quite dangerously, the nineteenth century pioneer ethos celebrated versatility and deplored specialization. As a result, "the legal profession was retarded and warped by the frontier spirit...(leaving) a mark upon our law and procedure which we have been striving hard to erase in our present century." Friedman, echoing Boorstin's theme, said that "the doors to the profession were at all times relatively open." Moreover, "(t)he bar became a great avenue of social advancement" and the "vehicle through which poor man's sons sometimes reached wealth and position." The result was a stratified bar. The young lawyer with lucrative connections had a shorter path to financial security. As the century wore on, that path detoured through a law school.

Formal legal education had existed in the United States since the eighteenth century. American law schools had developed organically out of law office instruction, as some practitioners realized that a living could be obtained exclusively from taking in apprentices

46Kermit Hall, The Magic Mirror, 216. Prof. Hall takes care to point out that in the South the law remained insular until "well into the twentieth century."


under a relatively formalized regime. George Dargo identified some thirty-five law schools which came into existence before 1835, most carrying the name of the attorney-founder. Law school education took its present shape after 1870, when Christopher Columbus Langdell became Dean of the Harvard Law School. Langdell initiated the case method of study. Briefly, instead of listening passively to lectures, students were socratically grilled on the contents of selected cases. The underlying theory compelled more interest than the method. Students were not being taught the tools of a vocation, they were being encouraged to investigate the "science of law." Langdell's method implied, and his casebooks expressed, the idea that the law was an accumulating body of scientific knowledge distilled from human controversies, and stored in case reports. A central by-product was the enhancement of the stature of lawyers trained in the law schools. After all, students trained in the case method were men of science. Langdell's methods greatly cleaved the divisions in an already stratified profession.

Langdell's law replicated the law of the Inns. Dry, erudite, logical, it existed above the push and pull of ordinary life. His methods produced learned opponents like Pound, Oliver Wendell Holmes, Jr., and more recently, Morton Horwitz. Lawyers trained in the case method differed appreciably from the lawyers trained more traditionally by apprenticeship. This latter method, called generally "reading the law," consisted of copying out pleadings for, and (ideally) under the supervision of a practicing lawyer. Additionally, such lawyers read


legal treatises to obtain a general overview of legal principles. The purpose of such study was not to perfect an appreciation of legal science. It taught lawyers how to get a defrauded farmer's money back. In the place of science, logic, and erudition, there was form, procedure, and result.

As with lawyers trained at the Inns in colonial times, lawyers trained in the case method possessed the mantle of authority. They occupied the elite wing of the profession. Their practices changed in ways that reflected changes occurring generally in industrialized America. Lawyers became more officebound and administrative. At the same time the apprenticed lawyers disdained the treasure of impractical knowledge gained at the law schools. As the elite bar specialized, the non-elite lawyers remained generalists. Giving ground grudgingly, they took their strongest stand in the frontier regions of the nation.

E. Lee Shepard, in an article concerning new law practices in ante-bellum Virginia, pointed out that a small clique of attorneys controlled the most profitable legal business. The same could (and can) be said for the rest of America. The more established lawyers tended to congregate in commercial centers as, obviously, they still do. For the young lawyer without impressive family connections, or, at least, an intimidating diploma, the frontier had always provided the happiest hunting grounds. The frontier bar was educated "in the courtroom, in the local inn, and by Blackstone." Friedman describes its personnel as "quick-

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witted adventurous young operators."\(^5^4\)

Tending as they do toward over-simplifications, such a picturesque descriptions may obscure as much as they illuminate. Still, there are generalizations which are serviceable. By and large, frontier practice was trial practice. Debt collection and quieting titles were the chief stock in trade. Once an attorney had accumulated an arsenal of forms, he seldom needed legal research, as that term is understood today. A grasp of the subtler, intangible nuances of legal science was virtually useless. On the other hand, a quick wit and an engaging oratorical style were powerful instruments. The client's case proceeded farther along the road to victory when supported by a reference to popular literature, or the classics, or the Bible, than by a case citation. This should not suggest that frontier lawyers were hucksters. No one who actually studies the work product of frontier lawyers can fail to appreciate the sheer legal skill they brought to bear upon the cases they presented, or their knowledge of and adherence to procedure.

Among the young lawyers who set out from an urban center in post-bellum America was William J. Stephens, of County Dublin, Ireland, by way of San Francisco, California. He went to a frontier community where social connections were unimportant and where the competition was thin. There, in Missoula, Montana, he personified and encountered all of the influences which have been thus far catalogued.

\(^5^4\)Friedman, 144.
Chapter 2. William J. Stephens

Anyone seeking to write a biography of a minor actor in history must confront the paucity of sources and materials. This is especially true of William J. Stephens, who operated in the American West during the frontier period. Concerning Stephens, and other peripheral figures in Montana history, the main published sources, apart from newspaper stories, are a series of "who's who" style compilations published in the late nineteenth and early twentieth centuries. The editors of these books would solicit biographical material from notable Montanans, who, in turn, would provide the same in conjunction with money for the purchase of the book. Thus, the editor obtained his profit. The contributor received primarily the satisfaction of seeing his name and life story (and, for a larger fee, his picture or likeness) in print. Apart from the ego gratification, appearance in one of these compilations was probably good advertising, particularly in a state like Montana which had no indigenous aristocracy, or, even, many native born (white) residents. It goes without saying that the material published in these books failed to meet the most modest test of critical historiography. Each short biography was the writer's best impression of his own life, and nothing more. Still, if some of the glowing phraseology is ignored, a body of index information remains which in most cases is reliable.

William J. Stephens appeared in three of these collections. He was introduced as an "attorney-at-law, and ex-Judge of Probate, County Clerk, and Recorder of Missoula County" in History of Montana, as the "distinguished citizen and honored pioneer" in Progressive

Men of the State of Montana\textsuperscript{56}, and as "a prominent member of the bar" in The State of Montana\textsuperscript{57}. Other sources also mention Stephens, a truly accomplished and respected attorney in Missoula County.\textsuperscript{58}

William J. Stephens was born at Kingston, County Dublin, Ireland, on May 30, 1834. His mother died during the birth. Stephens had three brothers and no sisters; at least he mentioned none in any account he gave. He identified his father as Henry A. Stephens, whose fatherly skills the younger Stephens did not describe.\textsuperscript{59} Stephens did assert that he had "early assumed the responsibilities of life."\textsuperscript{60} He attended public schools until he was thirteen years old, at which time he went to sea. According to Progressive Men of Montana, he arrived in the United States in 1847 and lived in Baltimore, Maryland until he learned of the gold strike in northern California. He sailed out of Baltimore on a merchantman, around Cape Horn, and


\textsuperscript{58}I received a body of documentation from Heather Hawley, Stephens' great-great granddaughter, including interviews with her grandfather James Russell Hawley, born 1902, (Stephens' grandson through his daughter Eleanor) who, while still a boy, met Stephens. Heather Hawley also provided me with an interview with her great-aunt Phyllis Turner (also a surviving granddaughter of Stephens), and the written recollection of her other great-aunt, Hope Hawley Ketcham (deceased) dated October 30, 1986. For convenience, the aforementioned written recollection is referred to as the "Ketcham recollection."

\textsuperscript{59}Stephens' Death Certificate names his father as "Edwin Stephens" (Washington State Board of Health, Bureau of Vital Statistics, Certificate of Death Registered No. 4488.) As Stephens provided the information to Progressive Men of Montana, I have selected that account. Mrs. Margaret Stephens, Stephens' second wife, provided the Death Certificate particulars.

\textsuperscript{60}Progressive Men of Montana, 1254.
arrived in San Francisco in July of 1850. He wasted only a few days in that city before proceeding to the gold fields in the State's interior. After trying his hand as a miner for ten days, he worked as a clerk in the general store of Curtis & Chase on the Tuolumne River for one year, after which he engaged in placer mining for eighteen months, and accumulated about $2,000.00 for the effort. Stephens did not live the archetypal miner's life. Instead of spending each day's take on hellraising, he invested his earnings in a grocery store in a Tuolumne County mining town called Poverty Hill, where he worked for five years.

Heckendorn & Wilson's 1856 directory describes Poverty Hill as follows:

This camp is situated five miles south from Sonora, in Tuolumne Co. and adjacent to Campo Seco. It was first settled in 1850, by Wm. Utter, from whom it first derived its name. It was subsequently changed to its present name.

The camp is noted for its surface diggings which were formerly very extensive...It consists of some five or six stores, and about thirty or forty dwelling houses. There are also quite a number of families settled in the vicinity.

Stephens gave no reason why he thereafter returned to San Francisco, but he did say that "he began to study law under Judge Townsend."

The Ketcham recollection varied somewhat from that account. Hope Ketcham agreed

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61 The information that he spent eighteen months mining at the general store on the Tuolumne River, and one year thereafter in mining is from Miller's The State of Montana. This information varied from that given in Progressive Men of Montana, which identified the periods as one year in the general store and two years, thereafter, in mining. The Miller account was published eight years earlier than Progressive Men of Montana. Because the earlier account was closer in time to the actual events, I have relied on it for these particulars.


63 Progressive Men of Montana, 1254.
that Stephens, whom she called "James," (Stephens' middle name) was born in Dublin, but added that his parents were English, who, moreover, were "upper class educated people." Ketcham confirms that he left home at thirteen years of age and took to the sea, but by her account he headed for the Sandwich (Hawaiian) Islands. She said he sailed the South Seas for three years, and, although loving the seaman's life, reflected, gravely one might presume, upon "the class of people who made up the crews." He determined to "get a job and go back to school...he knew he was going to be a mental man." So he left the ship in San Francisco. Hope Ketcham's account indicated that he worked days and studied nights, inferentially in San Francisco, becoming a lawyer in five years. She largely discounted his presence in the miners' world, saying only that he "spent some time, it was short, at the California Gold field."

Hope Ketcham's impulse to recall her grandfather more readily as a hard working law student, and less readily as a miner, is easily forgiven. But the accounts given the "Who's who" publications during Stephens life must be credited. Additionally, extant documentation attests to Stephens' presence in the fields upon an established basis. In 1850, Stephens

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64 An index of Irish names attributes several possible origins to the name Stephens, including "planter English." This would support Ketcham's theory. Edward MacLysaght, The Surnames of Ireland, Sixth Ed. (Dublin: Irish Academic Press, 1985), 279.

65 Very tangential and unintended support for the notion that Stephens arrived from Hawaii or the South Seas was provided in the doctoral dissertation written by Raymond August. Seeking to demonstrate that the law of the mining camps was Spanish in origin, August traced the dissemination of news of the strike at Sutter's Mill in order to determine the origin of the earliest prospectors who arrived from outside of California. These were mostly Hispanic (especially Chilean and Mexican), but the news did reach Hawaii on June 18, 1848, nearly six months after the discovery, but well in advance of the awakening in the Eastern United States. The news trickled out slowly because crews in San Francisco deserted for the American River area. Raymond August, Law in the American West: A History of its Origins and its Dissemination, (Ph.D Dissertation, University of Idaho, 1987), 198.
identified himself to A. W. Tuckett, the United States census taker, as a eighteen year old "Miner." The "Miners (sic) and Business MEN'S DIRECTORY," published by Heckendorn and Wilson in 1856, contained a roster of residents of Tuolumne and other counties. The Poverty Hill Directory identified "Stephens, W. J., Merchant, Ireland." The 1860 Census found Stephens in the Jamestown postal zone of Tuolumne County, having "variety store" as an occupation, possessing $200.00 worth of real estate and $1,000.00 worth of personal property. He had a clerk working for him named Lyman Mason.

By his own account, Stephens remained in Townsend's office until 1861. From there he went to another mining town, Virginia City, Nevada, where he continued to study law in the office of Quint & Hardy (presumably fellow Irishmen) until 1864, at which time he was admitted to the Nevada State Bar. Stephens practiced briefly in Nevada and in 1865 moved

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66 United States Census, Township N-2, Tuolumne County, California. Curiously, the document is dated April 30, 1856. Stephens would have been sixteen in 1850, and, of course, twenty-two in 1856. Teenagers on their own are apt to exaggerate their age.

67 Heckendorn & Wilson, p. 88.

68 United States Census, Township No. 3, Tuolumne County, 1860. Jamestown was apparently named after a Col. George Frederick James, who was the camp's "alcalde," a Spanish administrative post held over for a time while American jurisdiction took hold. James won the affection of his neighbors by his "generosity with liquid refreshment" and his gentlemanly ways. He was also an attorney who traveled the environs with a beautiful, young Mexican lady he always called "la señora," together with a servant who dispensed cash. He lived opulently, affecting the manners and dress of a Mexican hidalgo. However, James proposed a joint venture with his neighbors which went broke. He left Jamestown in a hurray for San Francisco. Carlo M. De Ferrari, "Summary Justice, The Way it Was, A short Account of the Gold Rush Alcaldes of Tuolumne County," (Señora, California: CHISPA, The Quarterly of the Tuolumne County Historical Society, Vol. 32, No. 3, Jan.-Mar. 1993), 1093-1112, 1094.

69 Stephens probably met Quint in Tuolumne County. Leander Quint appeared in the 1860 Federal Census for Tuolumne County as a Lawyer, claiming real estate valued at $9,000.00

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on to Idaho City, Idaho, where he practiced for about a year. Stephens thus had hitched his star firmly both to frontier and to mining towns. By this time, the center of prospecting action had shifted to the what later became the State of Montana.

No one knows precisely when gold was discovered within the present jurisdiction of Montana. The missionary, Father Pierre De Smet, apparently knew of the existence of gold as early as the mid-1840's. Fearing disaster for his Indian converts, however, he kept the knowledge to himself. In the late 1850s there were several minor discoveries. By the early 1860s, the fields in California, Nevada, Colorado, and Idaho were spoken for or spent; but there existed, nonetheless, a large, seasoned, nomadic tribe of American miners fascinated by every rumor. In 1862, in response to a series of important discoveries (especially at Bannack in July), the Montana rush got underway. More important for this story, mining had begun in earnest along Gold Creek. This deposit was located about sixty miles east of present day Missoula, near the important Mullan Road, which connected ports on the Missouri and Columbia Rivers. About twenty miles west of the Gold Creek site was another mining town, Beartown, to which Stephens came in May of 1866.

and personal property worth $15,000.00. A history of the county disclosed that he eventually moved to San Francisco, where he "gained a large practice and achieved honors." A History of Tuolumne County, (San Francisco: B. F. Alley, 1882), 377.


The Ketcham recollection had Stephens going directly from San Francisco to Montana: "I do not ever remember hearing what made him decide to take his knowledge of law and horse to Montana but he did. Riding horseback from S.F. to Billings I believe."
Stephens stayed a year in Beartown, and from there removed about thirty miles southeast (along the Mullan Road) to the town of Deer Lodge. In the February 1, 1868 edition of The Weekly Independent, Stephens advertised his services as an attorney:

"W. J. Stephens
Attorney at Law.
Deer Lodge City, Montana

Will practice in all Courts of the Territory".72

He remained in Deer Lodge for three years. During his second year there, he won election as District Attorney of the Second Judicial District, which comprised Beaver Head, Deer Lodge, and Missoula counties.73 In that capacity, he obtained the first convictions for first degree murder in the history of area which would become Montana. In 1869 he married Miss Emma H. Lebeau, a native of St. Louis, Missouri. Ketcham related the meeting as follows:

James was practicing law at or near Deer Lodge, and had some business with a Mr Thibault. So he rode out to Mr Thibault's house one beautiful spring day morning. In those rather primitive days most people went to the main door of the house which was the kitchen door. Arriving at the door he beheld a girl on her hands and knees scrubbing a wood floor with a strong scrubbrush singing! She having her back to the door knew nothing of his approach, she kept on singing. So he stood there for quite a few minutes watching her and finally said to himself "that's the girl I'm going to marry." He had settled it in his heart before she ever knew he existed!

The Lebeau, or Thibault, or Tebeau, family had a colorful history. The family had come to

72The Weekly Independent (Deer Lodge, Montana), February, 1, 1868, p. 1.

73In 1868, Stephens, running as a Democrat, defeated Republican Clitus Barbour in the election for District Attorney. Stephens polled 1,381 votes to Barbour's 996. History of Montana, 553. In 1869, Stephens again defeated Barbour, this time by a count of 1788 to 1370. History of Montana, 831.
Montana from St. Louis. According to Heather Hawley (Stephens' great-great-granddaughter), Emma's ancestors included a Parisian locksmith who came to Kaskaskia, Illinois (a defunct community formerly located near St. Louis) after disembarking in New Orleans in the 1720's. Another ancestor was a Spanish merchant who arrived in St. Louis, then under Spanish jurisdiction, in the 1770's. The St. Louis Genealogical Society has published a roster of the Spanish militia of St. Louis in 1780. Members included Joseph Alvarez Hortiz, Emma's maternal great-grandfather. The same society also published an index of Catholic marriages in St. Louis between 1774 and 1840. This identifies four Hortiz marriages, the earliest being the aforementioned Joseph Hortiz' marriage to Marguerite Bequet on February 1, 1780. The marriage of Joseph Thibault on April 10, 1804 is noted, as is the September 14, 1833 marriage of Henry Thibault to Adeline Hortiz. Emma was the issue of the latter union. For these reasons, Ms. Hawley believes Emma's family name was Thibault.

The June 19, 1868 edition of The Weekly Independent good-naturedly reported Stephens' marriage.

For some time past, a young man from Deer Lodge has been prowling around this section of country. What his business was no one could tell, but things looked suspicious--something was wrong, but what it was no one could tell until last Wednesday, when one of the most daring robberies was perpetrated

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76 "Catholic Marriages of St. Louis, Missouri 1774-1840", (St. Louis: St. Louis Genealogical Society). Microfiche by the Genealogical Department of the Church of Jesus Christ of Latter-Day Saints, G.S. Call# 6048074.
that it has ever been my duty to record. The invader has captured and will carry off one of Missoula's fair daughters. I allude to the marriage of W. J. Stephens Esq. to Miss Emma Lebeau, which took place at the residence of the bride's father in Grass Valley. "Thad" stood the trying ordeal like a martyr. No doubt his friends at Deer Lodge will be pleased to know that he was well attended to, and that we endeavored to make his last hours as comfortable as we possibly could. After supper was over, dancing commenced, and was kept up without intermission until the light in the east warned us to desist. We have concluded to let "Thaddeus" off, but if any more of you Deer Lodgers attempt to run the blockade,—well, I won't say what we will do, tho' some of the boys say they will retaliate. Hope they may. 77

Mrs. Stephens proved to be talented as well as fair. In 1877, at the Second Annual Fair of the Western Montana Agricultural, Mineral and Mechanical Association, she took prizes for the best "specimen hand tatting," and best "white bed spread," together with a special prize for the "prettiest baby." 78

Stephens was the junior member of the firm of Thornton, Robinson & Stephens when, in 1870, the firm's office burned down, destroying its valuable library. Sensing opportunity to the west in the growing community of Missoula, Stephens and his bride moved there in December of that year. 79

The town of Missoula originated in a manner typical of many Western towns. Frank Worden, a native of Vermont, came to the Northwest where, in 1856 he became a clerk in the Indian Department in the Washington Territory. He opened a general store in Walla Walla with a Mr. Isaacs, who subsequently sold his interest to Christopher Higgins. Worden

77The Weekly Independent, (Deer Lodge, Montana), June 19, 1868, p. 3.

78The Missoulian, October 19, 1877. Ms. Hawley states that hand tatting is "a difficult type of needlework...a cross between crocheting and lacemaking" (letter, January 26, 1995).

79The History of Montana states: "W. J. Stephens came to Missoula and put out his shingle in the fall of 1870" (p. 860.) The December date is from Miller.
knew the bureaucratic ropes in the Indian Department, and so he and Higgins obtained a permit to trade with the Flathead Indians in what was then Washington Territory, later Western Montana. In August of 1860, the two men, together with a pack train of seventy-six animals bearing merchandise, reached the Missoula Valley. They selected a site about four miles west of the current downtown, between the Indian reservations to the north in the Jocko Valley, and the Bitterroot Valley to the south. Additionally, the site was near the Mullan road, handy for all east-west travelers needing provisions or refreshment. Earlier in the year, men from Mullan's company had petitioned the Washington Territorial government for the creation of a new county, since it took two days to ride to the county seat (Spokane County) in Colville. In December, the territorial government created Missoula County, with the County seat located at Higgins' and Worden's trading post. In the following fall (1861), gold mining activity increased along Gold Creek, and by the spring of 1862, there were plenty of new customers for the trading post owned by Higgins, Worden, and, by then, Frank Woody. The settlement surrounding the trading post was called "Hellgate." The discovery of gold in the Kootenai mines to the northwest in 1864 brought more customers through Hellgate. In November of 1864, Higgins, Worden, and David Pattee built a sawmill at the convergence of Rattlesnake Creek and the Clark Fork River; a flour mill followed the next spring. In fall 1865, Higgins and Worden moved the Hellgate store close to their mills, and next door to the property where W. J. Stephens would commence practicing in Missoula a few years later. The re-location of the store killed the small settlement at Hellgate; but just as surely, it gave birth to the town of Missoula. Another gold strike in 1865, this time on the Little and Big Blackfoot Rivers, intensified traffic through the settlement. On December 26,
1865, Granville Stuart drew a sketch of the town, revealing thirteen structures. By 1869, there were fifty structures "including a flour mill, two stores, two large hotels, two blacksmith shops, two livery stables, a billiard room, sawmill, post office and several saloons." On July 9, 1870, Episcopal Bishop Daniel Tuttle came to Missoula and wrote: "In Missoula and all other towns, only the world, the flesh and the devil with many helps [sic] and the Holy Spirit, unhelped are at work." A month after Stephens' arrived, the town plot was drawn up, and the town was officially surveyed.

Attorney Stephens hit the ground running. If he actually did take up residence on December, 1870, then only a couple of weeks passed before his first advertisement appeared on January 5, 1871 in the Missoula and Cedar Creek Pioneer. The Town of Missoula was quite proud of its new resident:

We are pleased to state that Mr. W. J. Stephens, recently of Deer lodge City, will hereafter practice his profession and become a permanent resident, in our midst. Such additions to our community speak more for the future of our town than columns of newspaper inducement. Mr. Stephens has resided in Deer Lodge county since 1866. In his public capacity, as Prosecuting Attorney of that County for several years, as well as in all the private relations of life, this gentlemen has made himself universally respected and esteemed. Indeed, his record is so well known to our citizens, that it is superfluous to say more than merely allude to his intention of locating in Missoula.

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80 Along the bottom of the sketch, Stuart wrote: "Sketched in 12 inches of snow, Thermometer 34 below zero, hence not well finished."

81 Lenora Koelbel, Missoula the Way It Was (Missoula: Gateway Publishing & Litho, 1972) 33.

82 Koelbel, 35.

83 The Missoula and Cedar Creek Pioneer, January 5, 1871, p. 1.

84 The Missoula and Cedar Creek Pioneer, December 29, 1870; p. 3.
Upon completion of the new courthouse in June, 1871, the town held a ball celebrating the dedication. Reporting upon the event, The Missoula and Cedar Creek Pioneer identified the notable attendees, including "the madonna-like Mrs. W. J. Stephens and other ladies of the elite of Missoula society."

Mrs. Stephens' new found celebrity was not difficult to understand. Her husband later reported to Progressive Men of Montana that he had found in Missoula "a large and valuable clientage." Stephens' account to Miller's The State of Montana affirmed that "there was a great deal of legal business over land and mining claims," and that "from his arrival in (Missoula) Judge Stephens enjoyed a large and remunerative practice." Further evidence of Stephens' success appeared in the May 25, 1872 edition of the Pioneer, which reported that Stephens was building a home:

Mr. W. J. Stephens is putting up a substantial residence about one mile below town and informs us that he has a nice lot of fruit trees on the premises which are growing finely. Have you got a watermelon patch? Them's our kind of fruit.

Stephens was not alone--Montana was booming.

Stout's Montana, Its Story and Biography has this to say about legal practice in Montana during this period:

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85 The Missoula Pioneer, June 22, 1871, p. 3.
86 Progressive Men of Montana, 1255.
87 Miller, 323,
88 The Pioneer, May 25, 1872, p. 3. The phrase "below town" meant to the west, i.e. down river.
But though the fees were large, the lawyers, seemed to think the supply inexhaustible....For the number of people in the territory the litigation was very large, owing to the disputes and conflicts concerning mining claims and the appropriation of water; and it is not too much to say that the bar of this period was equal to that of any other country. Notwithstanding the expense and difficulties of transportation, they had fine libraries, and when occasion required would ship large numbers of books at the rate of twenty-five cents per pound to remote countries, to be used there in the trial of cases.\textsuperscript{89}

The same account went on to describe the business before the Montana Territorial Supreme Court during the terms of August, 1871 and 1872. After describing the cases and decisions during the latter term, the text proudly praised the skills of certain lawyers:

It is said that "the briefs and arguments of counsel at that term, for learning and ability, have never been surpassed in the territory or State of Montana, and would have added dignity and strength to any bar in the country; and if the opinions and decisions of the judges were not sound and able, the fault was not with such lawyers as E. W. Toole, W. F. Sanders, Claggett and Dixon, Sharpe and Napton, Chumasero and Chadwick, Joseph K. Toole, Shoper and Lowry, Henry N. Blake, Samuel Word, James G. Spratt, Henry L. Warren, George G. Symes, W. E. Cullen, W. J. Stephens and United States District Attorney Cornelius Hedges." (emphasis added)\textsuperscript{90}

Notwithstanding Stephens billing near the bottom of the list, his mention among the elite lawyers of the territory strongly inferred that his legal skills were well regarded. In a few short years, Stephens would be able to add minor military honor to his growing reputation.

During the summer of 1877, Missoula was threatened during the Nez Perces War. With the nearest telegraph 60 miles away in Deer Lodge, Missoulians had little warning that Chiefs Joseph, Looking Glass and White Bird, along with eight hundred followers were

\textsuperscript{89}Stout, \textit{Montana Its Story and Biography}, (Chicago and New York: The American Historical Society, 1921) 421.

\textsuperscript{90}Ibid., 421-2. The internal quotation is not attributed.
heading up the Bitterroot Valley, southwest of Missoula. A company was organized to defend the town, and Stephens was designated Lieutenant. On about July 25 news came that an advance guard of Chief Joseph's band had reached Lolo. By this time, the white military strength, including the company from Missoula, had grown to about five hundred men. The Missoula contingent included about forty regulars from Fort Missoula. After Chief Joseph passed within three-quarters of a mile of the contingent's entrenchments, he turned up the spur of a mountain and thereby avoided a skirmish. The white companies moved as well, and when they arrived at the Bitterroot, the soldiers and volunteers from outside the area went home, to the dismay of the Bitterroot settlers, who were still in danger. There was, according to Amos Buck, "one exception" to the shameful dispersal: "Judge W. J. Stephens came on up the valley with us and remained with us until he found that no harm was to come to us from the Indians we had been out to fight." Stephens star continued to rise. In 1878 he was a candidate for clerk and probate judge and was elected to the county Democratic central committee. In 1883 he was elected County Clerk and ex-officio Probate Judge. That year, Mrs. Stephens obtained notoriety in her own right.

According to the newspaper account, Stephens worked late on the night of Thursday, April 18, 1883. Around midnight, Emma Stephens, at home with the children, heard someone attempting to enter the house. When Emma warned the intruder, he gave a mocking reply and continued trying the doors and, even, the windows of the house. Thoroughly alarmed, and knowing one entrance was not secured, Emma blindly fired two guns through the

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91 Amos Buck, "Review of the Battle of the Big Hole", Contributions to the Historical Society of Montana, Vol. 7 (Helena: Montana Historical and Miscellaneous Library, 1910), 117-120.
window. She heard no more, and concluded that she had succeeded in frightening the trespasser off the grounds. The next morning, the hired man informed her that a dead man lay at the back gate.

The dead man was Jonnie Baker. He had arrived in Missoula on the 17th of April, and had stabled two horses with C. F. Ledge & Co. The Missoula paper said he was a "hardened sinner" who had been "ordered out of Deer Lodge not a great while ago." The coroner's jury quickly found that the homicide was justifiable. By 1884, Stephens' official duties, together with the demands of his practice, led him to form a partnership with a young attorney named William M. Bickford. Stephens' business ventures and investments grew apace. By 1887 he and Bickford, now collaborating in real estate ventures as well, had purchased sizable blocks of property south of the river. They planned to found a new city, South Missoula, for which they plotted streets running parallel to the wagon road to the Bitterroot. The wagon road ran southwest, thus South Missoula's streets ran diagonally to the section lines. Judge Hiram Knowles last minute maneuvers effectively checkmated Stephens' plan, but the streets he proposed exist today, a half mile square island of streets running diagonally to those in the rest of the city. Even longterm residents find the zone baffling. Stephens and Bickford took on another partner, Frank Higgins (Christopher Higgins' son) in 1887. By then, Stephens' other business interests had taken over his attention, and he retired in 1889.

He continued to appear in the city directory advertisements place by Stephens, Matts, and Denny (a law firm), but just below that ad, his own appeared, as follows:

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92 *The Weekly Missoulian*, April 20, 1883, p. 3.

93 Koelbel, 68.
W. J. STEPHENS,
MISSOULA, - - MONTANA.

I make land entries of all kinds.

I keep correct plats of Government Lands.

I loan money on final proofs made at my office.

I loan money on improved farms.

Borrowers can get their money on the very day they apply.

I keep abstracts of title to all real property.\(^9\)

In retirement, Stephens enjoyed the financial benefits accruing naturally from a productive life. Unfortunately, as his career wound down, his marriage to Emma was imploding. On June 3, 1894, he filed for divorce, alleging that his wife had deserted him the previous May, and further alleging (presumably in support of his request for custody of the three children who were still minors) bizarre, violent behavior on the part of his wife. The court appointed a referee to take testimony and report. The referee was Elmer Hershey, a partner in Bickford's new firm. Hershey took sworn testimony on August 14 and 15 of 1894. After her attorney filed an unsuccessful demurrer, Emma did not again appear. Stephens, and five of his children, however, did. The five were four of the adults, the other adult child being married and in Seattle. Adeline, a fifteen year old minor, also testified. From each account, Emma, the same "Madonna" who graced the ball commemorating the new courthouse in 1871, emerged as a dangerously dysfunctional adult.

\(^9\)Wright & Woodward's Missoula City Directory, 1890, p. 231.
Stephens testified that his wife had twice attempted to leave him before effecting the final break. In 1890, he took her to the West Coast in an attempt to revive the marriage.\textsuperscript{95} The trip, he concluded, made matters worse. They returned on the last day of 1891, and took of residence in the Florence Hotel. Emma's spirits continued to decline, and she began demanding money with which to leave him. She began consorting with a woman possessed of a shabby reputation and refused to desist. To no avail, Stephens urged her to allow him to build a new house for the family. She said that "if I [Stephens] had a spark of manhood I wouldn't want to live with a woman who hated me."

In May of 1893, Emma abandoned the Hotel and went to live in Seattle with the three minor children. Stephens made two trips to urge her return. During the second, in the spring of 1894, the children were allowed to select the parent with whom they preferred to live. Stephens returned in May with the three minors and filed shortly thereafter.

He testified to disturbing incidents in she which attacked him with deadly implements ("she rushed in like a maniac with a carpenter's hammer... and aimed a blow at my head"), cursed him frequently, and spat in his face during the most minor disagreements. Stephens denied marital relations ("cohabiting") over a period of years. Referring to Alice Marguerite Stephens, born May 27, 1890, Emma suggested the child was not his.

Harry A. Stephens, the twenty-six year old eldest son, confirmed his father's version, including the violence, the abusive language, and the absence of provocation. Asked by Hershey which of his parents was best fitted to care for the minor children, Harry replied "the

\textsuperscript{95}The file in another matter, Stephens v. Conant, Case No. 180, reveals that they had gone to California.
plaintiff is. Defendant often treated the minor children cruelly without cause."

Adeline Stephens, aged fifteen, confirmed the desertion, and added that, while in Seattle, Emma had introduced her to a "young man" as her sister. Laura Buckley, the parties' twenty-four year old married daughter, also confirmed the desertion. She told how Emma had, "fully a hundred times," said she hated Stephens, and that she "did not want an old man like plaintiff tagging after her." Laura confirmed the spousal abuse, saying that Emma had an uncontrollable temper, and indulged in rages during which she actually "would foam at the mouth" (Stephens testified to the same phenomena). Laura continued, saying that Emma "scorns at religion...She has said just because one was married to one man is no reason why one must be true to him." Lastly, she related a singularly bizarre incident in which Emma invited her daughter Eleanor's fiance into the bathroom while Eleanor was bathing.

Nineteen year old Alexander Stephens also confirmed Stephens' account. Hershey asked him: "Is it more than probable that a young child would suffer physically from defendant's temper?" Alex replied: "With her temper it would be more than probable that they would get knocked down with a club." Lawrence Stephens also testified on behalf of his father. Hershey's report stated that Emma was not "a fit or suitable person to have the care and custody of said minor children." The Court, not surprisingly, granted the divorce and awarded custody to Stephens.

^ W.J. Stephens vs. Emma H. Stephens, Case No, 1066.

^ The Ketcham recollection is much kinder to Emma. She is there described as a fastidiously neat woman, affectionate with her granddaughter, the writer. Still, "grandma's temper" rates numerous anecdotes.

In February of 1995, Stephens great-great granddaughter, Heather Hawley, conducted tape recorded interviews with two of Stephens' surviving grandchildren, James Hawley and
Emma Stephens remained in Seattle. On February 21, 1898 she married Michael Andrew Reid, who was identified as a "mariner" in the Seattle phone directory of 1918. The family lore includes the story that while Stephens and Emma were in California in 1890, in an effort to resuscitate the marriage, they took a voyage. Reid was the Captain. Emma heard his voice and fell instantly in love. The 1930 Directory identified Reid as a janitor. The Ketcham recollection indicates that Emma's (or "Aimee") second marriage was happier than her first. She died in the early 1930's.

For the remainder of his career, Stephens managed his investments and engaged in the land business. In 1896, he sued Bickford over the disposition of profits from their law and real estate businesses. This was his lowest hour. He accused Bickford of failing to account and misappropriating partnership funds. Like the Stephens divorce, this case was assigned to a Referee. Although represented, Stephens conducted most of the examination of Bickford by himself. Stephens mean-spiritedly badgered his former protege about minor affairs. Aside from some minuscule inadvertences, however, he failed to establish any serious wrongdoing. The Referee found for Bickford.

Phyllis Turner. Both are the issue of Stephens' daughter Eleanor. Phyllis Turner echoed Ketcham's description of a hellcat with a soft heart: "I was scared to death of her...When they [Emma and her second husband Michael Reid] would come [we would ask] 'may we take your coat' [and Emma would reply] 'I'll take my coat off when I get good and ready'...but she would always say to Mr. Reid 'give the girls a dime.'" James Hawley had only positive memories. Emma knew her grandson's affection for french fries, and "always had a pot of deep fat on the back of the stove ready to go" when, as a boy, he visited.

Ms. Phyllis Turner remarked that "Mr. Reid worked for the Alaska Steamship Company" and that he, Reid, "did have a nice, soft, resonant voice." Interview with Heather Hawley, February, 1995.

Stephens served as Missoula's Democratic representative in the Fifth Legislative Session of the Montana House of Representatives (January 4 to March 4, 1897) and the Sixth Legislative Assembly, (January 2 to March 2, 1899). In Polks 1903-4 city directory, Stephens appeared as "President of the Missoula County Abstract Co. and attorney at law." In the 1911 directory, the listing for Stephens specified only his address ("Apt D The Bowland"), omitting any reference to any vocation. The 1915-16 directory included the following: "Stephens Wm J, moved to Los Angeles, Calif."\(^{101}\)

The Ketcham recollection is the only source for his later years (excluding his death certificate and death notices). A granddaughter's memories, it focuses upon his personal rather than his professional life. It stated that:

Grampa lived single for years after the divorce...finally in old age he caught pneumonia ...his doctors advised him to go to Calif...(h)e loved Santa Anna [sic] so at his doctors [sic] advice took one of the nurses with him...

Suddenly, he appeared, together with the nurse, at his daughter Eleanor's home in Seattle.\(^{102}\) He took up residence at the Calhune Hotel. His other daughter, (Alice) Marguerite, visited him a few days later and learned that he had married the nurse. According to Marguerite, as relayed by Hope Ketcham, the nurse threatened to leave Stephens if he did not marry her, saying that otherwise her reputation would be ruined. Something else was ruined instead: the

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\(^{102}\)The nurse's name was Margaret, not to be confused with Stephens' daughter Marguerite.
expectations of Stephens' heirs.

Shortly after, he fell ill again. Marguerite visited and, again, according to Marguerite as relayed in Hope Ketcham's recollection, Stephens suggested that his bride was poisoning him. Then he quickly recanted, admitting a suspicious nature. "Well," Ketcham said, "two days later he was dead." Moreover,

I and the rest of the family were too dumb to be suspicious for quite a long time. But when we learned that in the 3 months of their marriage she had converted over all of his property into other property, trades and sales, she purchased a large block in the Olympic Hotel place, two other very good hotels here in Seattle & sold the tide flat acreage, everything except on the copper mine in Montana which he had purchased as a working mine and closed to be sure to leave at least that to his children...

The family, all branches were so poor those days and copper so cheap Mom & her sisters and brother just let her get away with it. They said, to fight it was throwing money away on a very uncertain future.

Something of Stephens' legal acumen had remained in the family.

Stephens died June 5, 1918 at his home at 943 Twenty-fourth Avenue, in Seattle, survived by his wife Margaret, and eight children.104

Stephens place in Montana history is peripheral, but his memory is esteemed by his family. James Hawley, his grandson, recalled that Stephens was a "prominent man, highly

103 Ketcham recollection. Phyllis Turner heard the rumors as a girl: "he did write a letter to somebody saying he was being poisoned. He was afraid he was being poisoned by the nurse that was taking care of him...he was sure he was being poisoned." James Hawley was disdainful when reminded of Ketcham's accusation: "Sounds like my sister putting the worst possible interpretation on the motives...It seems to me a perfectly logical sequence that some woman who took good care of him and fulfilled his needs in his old age [might be entitled to the inheritance]." (Interviews conducted by Heather Hawley)

104 The Seattle Post-Intelligencer, June 6, 1918.
respected." Phyllis Turner, a granddaughter, recalled that as a young girl she had been "quite in awe of the fact that my mother's father was a judge."\textsuperscript{105}

"I had always heard," said Heather Hawley, Stephens great-great granddaughter, "that one of my ancestors was a Judge in frontier Montana--he was always spoken of with respect."\textsuperscript{106}

That seems only fair enough.

\textsuperscript{105}Interviews conducted by Heather Hawley.

\textsuperscript{106}Letter from Heather Hawley to Kenneth M. Wasserman, February 27, 1995.
Chapter 3. The Early Practice: A Procedural Focus

The first impression of Stephens' practice is that it parallels the assessments made of some of the more notable frontier lawyers, such as Thomas Jefferson, Andrew Jackson, and Abraham Lincoln. Frank Dewey, also a lawyer, did an analysis of Jefferson's eight year legal career and concluded that, while a colonial Virginia lawyer might draw an occasional deed or will, "being a lawyer in those days meant being a trial lawyer."107 Similarly, James W. Ely, Jr.'s study of Andrew Jackson's practice confirms that "Jackson devoted most of his time to trial work....[O]ffice work, such as drafting deeds and wills, was seemingly not a major activity for Jackson."108 John P. Frank said of Lincoln:

At all times, Lincoln was first and foremost a trial and appellate lawyer. His was not the business of incorporating banks or railroads, or drafting contracts, or arranging sales of property. He was a litigation man.109

The sheer volume of Stephens' court work strongly infers that litigation occupied the bulk of his time.

In the first book of the Register of Civil Actions, Second District, Stephens appeared in fully 201 of the 456 actions filed between 1868 and 1878.110 Before moving to Missoula,


110 The word "appear" may seem over used in the text, but as it has a specialized legal meaning it is the proper word. When a lawyer "appears," he has formally undertaken a client's representation in a specific (court) case. A lawyer usually appears initially by signing an initial
he appeared in 9 of the 72 actions filed before December of 1870; afterwards he appeared in 198 out of 384—an astonishing 51.6%. And clients had many lawyers from which to chose.

This chapter presents a procedural analysis of the law practiced in Missoula County in the 1870s. Where appropriate, it will reflect upon procedural differences and similarities between practice in frontier Missoula and Anglo-Saxon practice, and between frontier Missoula and current practice.

Stephens had litigated in Missoula County prior to moving there. His first appearance was as co-counsel with Joseph Rand on behalf of The Territory of Montana and the County of Missoula vs. The Hudson Bay Company. The Territory and the County contended that the defendant had done business outside of the Flathead Indian Reservation without a license, which the defendant denied. On October 2, 1867 Stephens and Rand filed a replication to the defendant's answer, and, concurrently, a Motion to Strike Out a Portion of Defendant's Answer. Functioning as "W. J. Stephens District Attorney Second Judicial District," he prosecuted Charles Cuissin and Janice Gugwaith for adultery on behalf of the Territory. On the eighteenth of October 1868 he appeared alone on behalf of Defendant A. H. Tebeau, pleading.

111, 289. Reference is to transcript and page number, respectively, of the Register of Civil Actions of Missoula County. A "replication" is a reply to an answer. Briefly, a lawsuit begins with the presentation of a grievance in the proper form. This is formally called the "complaint." The party sued, the defendant, files a written response, usually a refutation called an "answer." Occasionally, the complaining party responds to the answer, in a document called a replication.

112, 313-4.
denying that "Said (L. J. Demers) plaintiff is entitled to the possession of nineteen milch cows or Sixteen Calves Known as the Jack Demers Calfes or four milk Buckets or Sixty milk pans or either or any of the above chattels," and alleging affirmatively that his client's possession was lawful, resulting from "an agreement entered into between plaintiff and defendant on the 5th day of April 1868. " The case was settled and dismissed upon the plaintiff's payment of $67.00 in costs. 113 When W. J. McCormick sued David Driscol for "11 oz. 2(? ) and 6 Grns of merchantable gold at $18 per ounce ...for flour sold and delivered to deft. at his Special instance and request," Thornton, Robinson & Stephens appeared for Driscol on June 14, 1869. Driscol's counsel specifically denied McCormick's claim, affirmatively alleged failure of consideration ("said flour was not good or merchantable or of the quality represented"), cross-claimed for labor performed, and, finally, alleged that the plaintiff was not the real party in interest.114 W. J. Stephens duly witnessed Driscol's mark, "X", enabling Driscol to verify the answer.115

Thornton, Robinson & Stephens also represented Defendant O. W. Squires, filing their initial pleading December 14, 1868.116 This was the law firm Stephens would later identify as the one he left when their office burned down, and thenceforth went to Missoula.

1131, 405-10. There is reason to believe that Stephens was representing one of his in-laws in this matter. See pages 35-36.

114 An answer to a complaint almost invariably serves to deny the plaintiff's grievance. If, as often happens, the defendant not only denies the complaint but also alleges some fact in his or her favor (in this example that the flour purchased was of unacceptable quality), that allegation is called an "affirmative allegation," because it is more than a mere denial.

1151, 548-550.

1161, 579-82.
Stephens last case in Missoula County, while still residing in Deer Lodge County, was in his capacity of District Attorney for the Second Judicial District. In it, he represented the Territory against Jane Kirkham and B. Kirkham. One M. B. Harris had been arrested for assault with intent to kill, and had made and jumped bail; the case Stephens prosecuted in Missoula was against the two Kirkhams as sureties on the bail bond.\textsuperscript{117} The People of the Territory of Montana were in good hands, at least when wrongdoers ventured into the Second District.

While the above cases provide solid amusement, containing as they do a travelogue of local color surrounding litigation on the American frontier, those cases and the ones following also provide a compelling picture of the legal procedure then in use. Though it is surprising to see an unrelated cross-claim inserted between a substantive and a procedural affirmative defense in the same pleading, a modern lawyer would find none of the procedures employed by Stephens' abstruse or even unfamiliar.\textsuperscript{118} Moreover, if the procedures employed by W. J. Stephens and his contemporaries anticipated those of the late twentieth century, it is also fair to point out that they reflected shadows cast in King Alfred's day, and before.

The first, glaring facet of nineteenth century procedure that reflected ancient Anglo-

\textsuperscript{117} 711-13.

\textsuperscript{118}See the Driscol case, above.

A "cross-claim" is a subsequent complaint entered in a lawsuit. For example, a defendant may have a grievance against the plaintiff, or a related grievance against a third party. These would be plead as a "cross-complaint." A modern practitioner would have filed Driscoll's answer, which would include any affirmative defenses, in one document, and the cross-complaint (usually filed concurrently with the answer), in another.
Saxon law was the use of verified pleadings. As described in Chapter 1, the early Anglo-Saxon defendant, duly summoned, entered his denial under a rigorous oath. The plaintiff countered with an oath of his own. In Stephens' Missoula County, all pleadings were verified before a notary public. The format of the verification was nearly identical to that used in modern courts, for example:

Territory of Montana
County of Missoula

Philippe Reuss

being first duly sworn deposes and says that he is the plaintiff in the above entitled Cause that he has heard read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated on information and belief and as to those matters he believes it to be true.

The answer was also sworn. Stephens often verified pleadings on behalf of his clients, declaring "that he is the atty of Defendant in the above Cause that he (Stephens) has heard read the foregoing answer...and that he has reason to believe that the matters therein stated are true."

Modern lawyers, under more proscribed circumstances, may also verify pleadings on behalf of a client, but are extremely reluctant to do so, having a sharper eye towards their professional liability. More important, verified pleadings are nowadays required only in extraordinary causes, such as pleas for injunctive relief, and expedited matters such as

\[119\] A "verified pleading" is a complaint or answer to which is affixed the party's sworn declaration that the alleged facts are true. Thus, where a complaint or answer which has been verified contains an alleged fact which the party knows, or reasonably should know, is false, that party is liable for perjury.

\[120\] 116.

\[121\] See, for example, 3, 309-10, Levy vs. Shay.
unlawful detainer. Lawyers now prefer to avoid verifications in the pleading stage because they do not want to tie their clients to one set or description of the facts; rather, they wish to preserve as much room to maneuver as possible for as long as possible. True, legal proceedings were less under God's nose in Stephens' day than in Alfred's; evidence, not oaths, constituted the real essence of litigation. At the same time, the survival of the oath at the pleading stage in Stephens' time, and its demise in our own, indicates that lawsuits are now easier to commence, and that the truth is now less of a barrier to nonmeritorious suits.

Another similarity between the litigation format practiced by Stephens and the pre-conquest Anglo-Saxons is the imposition of prejudgment remedies. In modern litigation, prejudgment attachment (court ordered seizure of the subject matter of the suit before judgment) is a form of extraordinary relief. It is "extraordinary" because the court orders a seizure of the property in question before there has been a trial. Obviously, such a procedure offends ordinary notions of due process—the defendant has his property seized by the sheriff before he has even had a trial, let alone lost the case. The plaintiff must make a strong showing of necessity for immediate seizure, beyond mere entitlement to possession. The plaintiff must show, for instance, that the defendant is about to secrete the property in issue, or dispose of it, or abandon the jurisdiction.

In Stephens' day, however, the plaintiff's counsel routinely obtained a writ of attachment concurrently with the issuance of the summons. Moreover, there was no separate hearing on the attachment, merely an affidavit and a surety bond. The affidavit had requisite

122In such cases, the courts must make relatively rapid determinations affecting rights and property; therefore the danger inherent in frivolous allegations is exponentially greater.
elements: that the claim was upon a contract for the payment of money, that no security had been provided, and that the attachment was not sought to vex legitimate creditors of the defendant (that is, the attachment was not part of a collusive scheme between the plaintiff and defendant). For instance, when Joseph Lamoureaux sued Clement Lamoureaux, claiming an indebtedness of $949.08, Stephens, representing Lamoureaux, applied for a writ by affidavit dated July 13, 1871 alleging that the debt was

upon an express or implied contract for the direct payment of money in the Territory of Montana...(for which) payment has not been secured by any mortgage or lien or pledge upon any real or personal property that it is a bonafide existing debt due and owing from the defendants to this plaintiff that this action is not brought nor is the prosecution of attachment sought to hinder or delay or defraud any creditor or creditors of the defendants.\textsuperscript{123}

In another case, the plaintiffs, T. J. Demers and Wm. McWhirk executed a surety bond, declaring themselves to be "jointly bound to the defendants in the above entitled cause in the sum of $1894.16/100 Dollars to the payment of which sum will and truly to be made bind ourselves our heirs executors administrators and assigns jointly [sic]..." should defendant be damaged by the attachment and prevail, and that each affiant was worth the sum of the bond.\textsuperscript{124} The next day Judge Hiram Knowles issued a Writ of Attachment, filled in upon a preprinted form, confirming that "the necessary affidavit and undertaking herein having been filed as required by law" and commanding the sheriff to "attach and safely keep" nonexempt property belonging to the defendants "unless the defendant give you security, by the

\textsuperscript{123} These bonds are still required in these circumstances, and for the same reasons. Since the defendant is being dispossessed before trial, he has a right to compensated for losses occasioned by the attachment should the attachment subsequently be proven to have been unwarranted.
undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand.\textsuperscript{125} The Sheriff, R. A. Pelkey, returned the Writ on July 17, 1871, confirming that he had "posted notice of attachment" on mining claims 13, 18, 19 20, and 21 in the Barrett District, and requesting fees therefore in the amount of $6.25.\textsuperscript{126}

Attachments were sometimes flawed. In Boneher and Telefir vs. David O'Brian et al., Stephens moved for discharge of the attachment, alleging that the sureties were not in the territory, that the undertaking had been filed ten months prior to the issuance of the Writ, and that the "affidavit does not pretend to show that the demand is on an express contract for the direct payment of money."\textsuperscript{127} In another case, W.R. Post vs. William Stevens (no relation), Stephens, representing Post, had obtained an attachment. The defendant thereafter sought release of the property, requiring Stephens, on June 10, 1872, to bring a motion to "stay the issue of an order for the release of any property levied upon for the plaintiff...the Deft not having given a bond as required by law."\textsuperscript{128} The just described sequences reflect modern procedure for prejudgment attachment, including the defendant's right to preserve possession by bond.\textsuperscript{129} Because of the distance in time, however, the similarity to Anglo-Saxon

\begin{footnotesize}
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\item \textsuperscript{125}Note that the plaintiff's bond was for twice the amount of the claim.
\item \textsuperscript{126}2, 1010-18.
\item \textsuperscript{127}3, 0429-30. There is no record of the result of Stephens' motion.
\item \textsuperscript{128}3,0613.
\item \textsuperscript{129}Montana's statutes concerning prejudgment attachment, contained in Title 27, chapter 18 of the Montana Code Annotated, are typical. Title 27-18-101 provides: "Cases in which property may be attached.(1) Property may be attached in: (a) An action upon a contract, express or implied, for the direct payment of money where the contract: (i) is not secured by any mortgage or lien upon real property; or (ii) is originally secured and such security has,
\end{itemize}
\end{footnotesize}
procedures is far more striking. As mentioned above, in Anglo-Saxon possessory disputes where title was unclear, the plaintiff had to assert good faith, as Joseph Lemoureaux, above, did, and the defendant had to pledge security, which Stevens failed to do.

The most important Anglo-Saxon influence was also the most obvious: the jury. The Anglo-Saxon "popular assembly, parliament, law-court, and army in one" (see footnote 4) decided all judicial disputes. The magistrate, the shire-reeve, was more of a sergeant-at-arms and a master of ceremonies than an arbiter of the law. There were few legal questions; the jury simply resolved the dispute. Although in the nineteenth century, the power of the jury eroded, one searches the court files of Missoula County in vain for much legal argument. Dr. Hall notes that in the eighteenth century, instructions to the jury were "informal and nontechnical." In Stephens day, counsel proposed jury instructions as they do today, and sought every advantage in them. In Cyrus McWhirk and William McWhirk vs. F. L. Worden and C. P. Higgins, plaintiffs alleged that the defendants were the owners of a mill on the bank of the Missoula River (now the Clark Fork) and were in possession of a certain ditch without any act of the plaintiff or the person to whom the security was given, become valueless...

Section 205 of Chapter 18 empowers a judge to issue a prejudgment writ when: "(1) he has received the affidavit described in 27-18-202; (2) he has approved the undertaking required in 27-18-204; and (3) the party seeking attachment has made a prima facie showing: (a) in the case of real property, of his right to attachment and the necessity for seizure; (b) in the case of personal property: (i) of his right to attachment and the necessity for seizure at a show cause hearing before the court with at least 3 days' notice to the defendant...or (ii) of his right to attachment and the necessity for seizure and that the delay caused by notice and a hearing would seriously impair the remedy sought by the person seeking possession. Evidence of such impairment must be presented in open court, and the court must set forth with specificity the reasons why such delay would seriously impair the remedy sought by the person seeking attachment."

which "diverted waters from rattlesnake creek" and "allowed the said ditch to be out of repair...so as to overflow the plaintiffs land." Any flooding of the McWhirks' land was a serious offense. They had surrounded their East Front Street cabin with a large vegetable and flower garden, which was a landmark for travelers entering the Missoula Valley from the east, and it is to their efforts that the appellation "the Garden City," to which Missoulians still cling, can be traced. The Defendants asserted that the plaintiffs' agents placed obstructions in the ditch, causing the overflow. Stephens, for the Plaintiffs, submitted jury instructions, in part, as follows:

The jury are instructed that if defendants owned or used a ditch which passed over the land of plaintiffs, he was bound to use it so as not to injure plaintiffs lands and this irrespective of the question as to which had the older right or title, and if through any fault or neglect of defendant in not properly managing or keeping his ditch in repair, the water overflowed or broke through or seeped through the banks and destroyed or damaged the land of plaintiffs or any goods or property plaintiffs had thereon defendant would be liable for such injury.

In short, the plaintiffs alleged negligence. The Defendants of course submitted their own set of proposed instructions, asking that any contributory negligence on the part of the plaintiff serve as a complete bar to recovery:

If the jury believe from the evidence the plaintiffs by negligence or carelessness in any manner or to any extent contributed to the production of the injury they will find this verdict for the defendants.

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131 Koelbel, 33.
132 3, 0596.
133 3, 0592.
The jury, incidentally, brought in a verdict for the defense. It is difficult to say whether or not these instructions were, in Hall's words, informal and nontechnical, but it can be said for a fact that they were much, much shorter than what one could expect today. In addition, no statutory or decisional authority was submitted in support of the proposed instructions. The jury received a few general common law principles to guide the verdict. Judges did not attempt to micro-manage (as they often do today.) If the jury had less than the near absolute authority of the ancient courts, they had more than they do today. Thus, in many of its fundamentals, the Anglo-Saxon machinery was still alive in Stephens' Missoula.

As the Germanic tribes had no evolved civil procedure before trial, however, any discussion of such found in Stephens' cases must be viewed apart from these older streams of influence. One procedural device found in abundance in Missoula County in the 1870's was the demurrer. Defendants demurred so often that the purpose must usually have been vexatious. Stephens demurred as often as anyone. For example, in Edward St. Germain vs. Brunnet & Ladaux, he alleged in a brief paragraph that "the complaint does not state facts sufficient to constitute a cause of action." Against a plaintiff, Neptune Lynch, who sought to foreclose upon a chattel mortgage executed by defendants Wiles and Decker, Stephens was a bit more prolific:

...the complaint does not state facts sufficient to constitute a cause of action.

\[134\] 0588.

\[135\] A demurrer is a response to a complaint (or answer) which basically says: "Even if I were to admit everything you have said, you still have not offered a legally adequate grievance (or answer)." In a way, it says: "so what?".

\[136\] 0890.
That the complaint is ambiguous uncertain and unintelligible in this

That it does not appear by the complaint whether the action is brought for the payment of certain promissory notes therein stated above or the foreclosure of a certain mortgage therein stated above, or for both.137

Demurrers are now disfavored, even where they are still allowed. In California, some practice manuals advise counsel to append a declaration to a demurrer detailing efforts to resolve the matter informally with the opponent.

Depositions were taken in Stephens day, but not as a matter of course. They occurred in the more protracted cases. In McWhirk vs. Worden and Higgins, Stephens noticed the deposition of a witness as follows:

The above named Defts, or their attorney A.H. Mayhew will hereby take notice that the plffs will take the deposition of A. Hilly as a witness for plffs in the above cause on the 15 day of May 1873 at the office of Thos. M (illegible) Justice of the Peace in the Town of Missoula at one P. M. of that day... 138

This is substantially the language used today. Records of the depositions are difficult to find. One, in Joseph Lorraine et. al vs George M. Windes, suggests that narrative questions139 were more in use than one would expect today, even in deposition ("State what you know concerning a charge against you for the sum of $126 46/100 for goods sold and delivered to you by Plaintiffs as alleged in this complaint").140 This suggests either less skill on the part

1372, 1083.

1383, 0572.

139"Narrative" questions are questions which invite a long answer. They are improper at trial. While allowable in deposition, attorneys often prefer to avoid giving the witness a great deal of latitude.

1403, 1274-5.
of the lawyers, or that the lawyers anticipated less skillful witnesses.

While court records do not contain any documentation of informal conferences and efforts at settlement, they do confirm that a great many cases were settled prior to trial. The stipulation in *Milgreen vs. Doyle* was typical:

...That for and in consideration of the Sum of one thousand dollars in hand paid by the parties of the second part the receipt whereof is hereby acknowledge. The party of the first part does hereby agree to dismiss a suit at law he did commence against the parties of the second part for the recovery of the possession of mining claim fifty-nine (59)...  

Stephens, representing the plaintiff, had a stipulated dismissal entered, on condition of payment of all costs in fifteen days, in the case of *J. H. Hopkins vs. Adam Rutherford et. al.* Always the detail man, he also remembered to enter a satisfaction of judgment in the Lamoureaux matter after receipt of a note for $125.00. Admittedly, a better practice would have been to withhold the satisfaction until the note was paid, for if the note were not in fact paid, the case would have had to have been reopened.

The procedure in use in Missoula County shared some of the devices employed during German pre-history. These included, principally, the reliance upon oaths and the immediate concern with possession. Missoula County also utilized a great body of procedure which is still in use, including, by way of overview, the entire pattern of a court case. Still, the frontier and modern proceedings possess attitudinal differences from one another. In frontier Missoula the courts aimed to get everything gathered up (for example, the subject matter) and

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141, 0156.
142, 0212.
143, 1068.
get the case resolved. In modern courts, resolution is approached with a greater hesitancy.

Legal procedure is not a subject likely to stir the passions of the populace. But procedure is much more than a body of dry legal strictures. Through procedures one can perceive the real workings of the law and what it seeks to achieve. Beyond that, one can trace the treads of continuity between historical periods, as well as the accumulated changes. It is often forgotten that the "Bill of Rights," which Americans cherish so devotedly, and which seems to stand for what is best about the United States, is largely a body of mandated procedure and procedural restrictions.
Chapter 4. The Early Practice: The Substance of the Causes

A survey of clearly identifiable causes indicates that Stephens, in the first ten years of his practice in Missoula County, appeared in better than five times as many commercial (including consumer) disputes as land disputes, a statistic confirming that Missoula in its earliest days was essentially what it remains today: a trading center for Western Montana. Stephens' bountiful harvest of litigation also underscores how little the changes that were affecting the legal profession in urban areas, particularly the rise of the office lawyer, the "counselor" to industry, touched an outpost like Missoula.

Notwithstanding the prevalence of commercial actions, there was no shortage of mining disputes. Milgreen vs. Doyle, was typical. The plaintiff expressed a typical injury, that he had been ejected from his claim, and that the interlopers were busy extracting the gold.

The above named plaintiff complains of the above named defendants that...he is and was the owner and was on or about the 15th day of November 1870 in lawful undisturbed and peaceable possession under the mining laws of Barretts [?] the following described property [lengthy description]

...That on or about 14 day of nov 1870 defendants entered into and ousted this plaintiff therefrom and has ever since withheld and does now withhold the possession of the premises from this plaintiff and use the same for their own purposes...

The land had no value beyond its treasure of ore. As it was being looted and was becoming valueless before the plaintiff's eyes, Stephens requested an injunction:

[if the defendants continue] to extract the gold or other minerals therefrom the

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144 Hall, 212.
injury to this plaintiff will be irreparable and said mining claim will [illegible]
a mass of rubbish and the plaintiff will be remediless at law for all of the Said
defendants are wholly insolvent...

Wherefore plaintiff prays judgment... for the possession of said mining ground
and for the sum of four hundred Dollars damages up to the time of the
commencement of this action and for the Sum of fifty Dollars per day
damages (thereafter)... and that during the pendency of this suit the defendants
their employees and agents and all persons in privity with them be enjoined
and restrained from working the said mining claim or digging or removing the
sand and ground thereof or extracting the mineral substances therefrom or in
any manner molesting or interfering with the same and that at the trial of this
cause the same be made perpetual...

An interesting aspect of this case was that it was premised upon a "miner's code."
Friedman has described these codes as "little bodies of law, adopted as binding customs in
Western mining camps." These ad hoc law codes set up "rough but workable rules and
processes, for recording claims, for deciding whose claim was first, for settling disputes
among claimants, and for enforcing decisions of miners' courts." Raymond August's Ph.
D. dissertation traced the miners' codes to the Spanish Mining Code. While no
incontrovertible evidence of adoption exists, August persuasively contended that Mexican and
Chilean miners poured into the California fields before news of the strike arrived in the United
States. These hispanic miners brought the law that they knew with them. Arriving Americans
found the law entirely serviceable. From California, the miners' codes moved eastward,

1452, 025-7, 22-3 (pages out of sequence in the transcript). Modern practitioners would
readily recognize the elements of injunctive relief, specifically that "irreparable damage"
would ensue if the injunction is not granted, and that a judgment for money would be
inadequate (here, because of the defendant's insolvency).

146Friedman, 319.
following the strikes. The codes became a sort of particularized common law for mining camps all over the Western United States, including Montana. In 1860, the Colorado territorial legislature had expressly ratified the decisions of these courts (although it seems they should have withstood attack in any event, as they were really awards of binding arbitration.)

In another case premised upon miners' law, Stephens represented A. W. Demers in his suit against Eudjor Jencotte, Henry Romaine, and George Ferault. Demers alleged that he had a one-fourth interest as a tenant in common with the defendants in certain mining properties "in San Louis mining districts all within Missoula County Montana Territory under the mining laws thereof"; and for a property in the "Eurtache (?) mining district Missoula County Montana Territory under the mining laws thereof." Although the details are significantly different, the thrust of Demers' Complaint is similar to Doyle's: he had been expelled from his claim (here by co-owners), and the wrongdoers were urgently removing everything of value (the gold) from the claim. Stephens wrote:

That on the 13th day of April aforesaid (1876) the said plaintiff came into and

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149 Similarly, the laws of the Barrett District were at least indirectly enforceable as evidences of commercial practices. "The Mining Laws of the Barrett District Cedar Creek" were recorded in Missoula County on April 1, 1870 (1,1226-1232).

150 Tenancy in Common is a type of joint ownership in which each owner holds an undivided interest in property.
upon the said mining claims for the purpose of representing and working his interest thereon with said defendants. That said defendants would not recognize his title to the interest in the claims...but denied his title and forcibly prevented him from working thereon...That said defendants would give plaintiff no account of the gold extracted.\textsuperscript{151}

The complaint also alleged that once the claims were exhausted the defendants proposed to go to the Black Hills where they would be beyond the reach of the Montana court. Thus, the situation required an immediate remedy. In addition to damages, Stephens asked for the appointment of a receiver to protect the plaintiff's interest.\textsuperscript{152} Accordingly, on May 4, 1876, in chambers, Judge Knowles appointed Hank Nightengale, of Nine Mile Creek, receiver "to take charge of and control the plaintiff's interest in the mining claims in plaintiff's complaint." Knowles ordered Nightengale to "faithfully perform and discharge the duties of such trust" and to post bond.\textsuperscript{153}

The issuance of an injunction (as in Milgreen) and the appointment of a receiver served much the same purpose—to stop the defendants from getting possession of the plaintiff's gold. The injunction in Milgreen halted mining. The receivership in Demers permitted mining to continue, but the preserved the plaintiff's alleged share. In Milgreen, where outsiders had expelled the plaintiff, injunction was the better remedy. Milgreen wanted mining stopped altogether until he was restored to possession. In Demers, however, the defendants had a right to be there and to mine the claim, because they were co-owners. They

\begin{itemize}
\item \textsuperscript{151} 1846-51.
\item \textsuperscript{152} 1827, 1850-52. A "receiver" is a person appointed by the court to take possession of and preserve property or funds of another, pending the outcome of litigation.
\item \textsuperscript{153} 1829-1830.
\end{itemize}
had no right, however, to expropriate the Demers' share. Hence a receivership, pursuant to which a receiver would take possession of, sequester, and preserve Demers' share, provided the appropriate remedy. The Demers defendants could work the claim twenty-four hours a day; and under the aegis of the receiver, Demers' could get his share without getting his hands dirty.

In Hopkins v. Rutherford, an action for Breach of Contract, the plaintiff alleged an agreement under which Rutherford would work Hopkin's claim, and pay him one third of the take. Apparently, even in the rough and tumble mining districts, labor and capital inexorably found their places.

Promissory notes occupied the courts far more often than actions arising from disputed mining claims. The prevalence of notes is explained by the fact that a promissory note was often the only document produced to provide evidence of a credit transaction. Lawsuits against delinquent commercial customers and consumers often stated simply that a note had been made by the defendant and had become past due under its terms. A simple note, then, served where today a more elaborate contract might be expected. This is easy to understand. The language of a promissory note was short, handy, self-explanatory, and sufficient to document the existence of the debt. For example, Thomas Foley sued John Hennessey upon a note in writing which said:

I the undersigned promise to pay the bearer Thomas Foley or order the sum of the sum of Ten [?] dollars on the 20th day of October 1871 which I the undersigned John Hennessey promise to pay for value received from [?] Foley which are the improvements on the Sullivan and Shea Ranch so called with one breaking plough giving my hand and name John Hennessey.\textsuperscript{154}

\textsuperscript{154}2, 2196.
Thus Hennessey was a contractor, engaged to improve agricultural real estate. The agreement was memorialized as a note, instead of, as we would now expect, a contract.

Likewise, merchants often extended credit while requiring the customer to execute a note which recited only "for value received." At the same time, the same customer's ledger might identify a portion of the balance not otherwise documented, requiring the plaintiff to separate his account into two separate causes of action; that is, to sue on one delinquent balance on one theory (default upon the note) and another upon a different theory (for the value of the goods). In the first, the evidence would be the note, in the second, the value of the goods. The distinction may seem elusive to lay readers, but it determined the evidence the attorney had to adduce. If the distinction was lost on the lawyer, he might lose the case. For example, when Stephens represented R. D. Leggett in a suit against John C. McIntosh, he alleged:

That on the 1st day of June 1869 the said Defendant at the County of Deer Lodge made executed and delivered to this plaintiff his certain promissory Note in writing by which said Defendant promised to pay this plff for value received the Sum of $68 40/100 dollars with interest thereon at the rate of 5 per cent per month from date until paid...[the note is then replicated in full]

Plaintiff further alleges as a further and Separate Cause of Action that the said defendant in the year 1870 became indebted to him in the Sum of $58.00 for goods wares and merchandize sold and delivered to the said Defendant by the said plaintiff at the County of Deer Lodge MT. at his the said defendant's special instance and request...155

The first cause of action was on the note. For the second, Stephens was forced to plead a

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1553, 0494-6.
common count for goods sold and delivered. As to the second count, the plaintiff was probably chagrined that he had to forego interest accruing at five per cent per month, and instead settle for the legal rate of ten per cent per year. Perhaps, as a good lawyer, Stephens utilized the opportunity to give his client a brief lecture on the wisdom of written instruments.

T. J. Demers neglected to specify an interest rate on a thirty day note made by Clement Lamoureux in the face amount of $139.24. Stephens could therefore ask only for legal interest in the suit. As to this omission, any admonitions Stephens proffered should have been given lightly. He himself could ask only for the legal rate when he pursued D. K. Butler, after Butler defaulted upon a one hundred dollar note in Stephens' favor.

If creditors were cryptic about the details of the consideration for the debt, they were particular about the details of repayment. Notes unfailingly established the due date and, usually, the interest rates with precision. Further, they particularized the kind and quality of money to be received in payment. The note upon which James Manning sued D. K. Butler, Ben [?] Kennedy, E. D. Barron, Nicholas Barron and James Hayes, in the face amount of $2,000.00, specified that payment was to be remitted in "clean Bankable gold dust or coin." Stephens represented Daniel J Welch against Henry Dunkhern in a suit upon a note "payable

156 The "common counts" are actions alleging that some value or benefit was conferred by the plaintiff to the defendant and that remuneration (being the reasonable value of the goods or services conferred) is due.

157 2, 0979-81.

158 4, 2423.

159 2, 1028-30.
only in Gold coin of the United States of America.\textsuperscript{160}

Stephens always carefully computed the interest so that the terms of the note clearly supported the amounts claimed in the prayer. He represented Hugh Byron against David Cetchan and John M. Barron in an action to collect upon a note in the face amount of $500.00. Although the note was past due, the defendants had made a thirteen dollar eighty-five cent payment. Stephens dutifully asked for interest (two per cent per month) on the sum of $500.00 until March 15, 1872--the date of the payment--and thereafter for interest on $486.15 only.\textsuperscript{161}

Secured notes were common as well. Neptune Lynch complained when F. B. Decker and David Pattee\textsuperscript{162} defaulted upon a series of promissory notes, all executed on August 7, 1872 for a cumulative sum of $2,547.97. After setting forth the notes, Stephens, representing the plaintiff, alleged that the defendants, concurrently with the making of the notes, had delivered a certain Indenture of Mortgage, encumbering "One Steam Saw Mill with steam engine, hooks...(?), files, and tools of every description belonging, or in anyway appertaining to the Said Saw Mill." The Indenture, in turn, had been "duly recorded as a mortgage in the office of the clerk of the County of Missoula on the 7th day of Aug 1870 in Book A of Mortgages at page 216."\textsuperscript{163} Untroubled by the potential conflict of interest, Stephens

\textsuperscript{160} Koelbel, Missoula the Way it Was, 31.

\textsuperscript{161} The case was settled and dismissed (3, 1250).

\textsuperscript{162} Pattee was one of the founders of Missoula and was involved in numerous business ventures during the 1870's. Koelbel, Missoula the Way it Was, 31.

\textsuperscript{163} Most states have since adopted the provisions of the Uniform Commercial Code
represented Daniel J. Welch when he foreclosed upon a chattel mortgage given by the same
Neptune Lynch, this securing a $500.00 note (bearing interest at 4% per month) with

Fifty-four head of stock that is to say, fourteen (14) head of [?] Cows branded with a figure two (2) on the left Hip; also: Six two year old Cows without [?] also, fourteen (14) head of two year old steers and heifers all branded with a circled 2 thus...on the left side; also nine (9) calves belonging to the fourteen (14) head of aged cows; also, four (4) cows with three (3) calves...also two (2) yoke of work oxen...Which mortgage was duly acknowledged...and...afterwards duly recorded on the 9th day of November 1872 in Book A of Mortgages Page 231...164

If anything, modern chattel mortgages are less specific.

Since actions that one would expect to be plead in contract were so often transposed into notes, actions for breach were rare. They usually arose when a disappointed party to a vague agreement managed to find a lawyer to champion his cause. When Nathaniel Layne and John Crutchfield felt aggrieved by L. M. Lafontaine and Louis Celaimant, the firm of Mayhew & McMurtry filed the complaint on their behalf. The lawyers began tentatively enough, claiming: "[t]hat heretofore to wit on the 15th day of February 1871 said defendants made and entered into a contract with plaintiffs which said contract was in substance as follows." From there the lawyers unfolded a tale which required determination to comprehend. The defendants agreed that if the plaintiffs would construct a sawmill and have it ready for machinery to be installed by June 1, 1871, they, the defendants, "would purchase and furnish a saw...and all other necessary machinery to complete the said mill for cutting lumber." Additionally, defendants agreed to provide clothing and provisions for the plaintiffs

("UCC"). Under the UCC, Security interests in personal property are perfected on a form UCC-1, and registered with the Secretary of State.

1643, 1284-5.

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while they were constructing the mill. For their part, the plaintiffs were to pay for part of the machinery and support by supplying defendants with four hundred dollars worth of lumber. "The balance," not specified as to amount or otherwise defined at all, "plaintiffs were to pay when they could." The plaintiffs spent all of their money erecting the mill "and also became involved in debts contracted for the same purpose." Beyond this, they said only that they had "suffered great damage" and prayed judgment in the amount of fifteen hundred dollars and costs. Stephens appeared for the defense. The court file gives no hint of the result, but that fact suggests that the plaintiffs' troubles did not end when they had finally finished the complaint, as questionable causes often die on the vine.\(^\text{165}\)

In another matter, Michael Martin and William Stevens each maintained accounts for moneys owing by one to the other. The arrangement survived for three years, but on May 7, 1872 they held a meeting to net the offsets and settle any remaining balance. Martin alleged that although it had been determined that Stevens owed him $660.50, Stevens had failed to pay. William J. Stephens represented the plaintiff, claiming that the settlement agreement had been breached, and won a judgment for $682.48, inclusive of costs.\(^\text{166}\)

When there was no written contract, lawyers then did what they do now: plead the common count. Stephens represented Hugh McMahon against Larry Keatory \(\text{[?]}\). In the complaint, Stephens alleged that McMahon had worked four months and twenty-two days at the defendant's farm in the Bitter Root valley and that $218.66 was due and owing from the defendant for "work done and performed for the said defendant at his the said defendant's

\(^{165}\)2, 1452-4.

\(^{166}\)2, 0455-6.
special instance and request.\textsuperscript{167}

Stephens represented E.J. Bonner and R. A. Eddy "comprising the firm of R. A. & Co." against Moses Reeves, Louis Brown, and Louis Beaufire (?), alleging that the defendant, Reeves, had become indebted in the sum of "fourteen hundred sixty nine dollars and thirty six cents for goods wares and merchandise sold and delivered." From there, Stephens skillfully sought to set aside a fraudulent conveyance of real estate from Reeves to the other defendants:

Plaintiff further alleges that in the year 1871 he the said defendant Reeves was the owner of property in the County of Missoula Montana of about the value of $10,000 dollars. That the said property would have been more than sufficient to pay all his debts including plaintiff's demand. That on or about the 16th day of May 1871 the said defendant Reeves disposed of all the said property to one Louis Brown and Louis Beaufire (?) and others to whom he was not indebted more than three or four hundred dollars and from whom he received no consideration other that the said amount...

That the said Brown and Beaufire (?) conspired with the said defendant Reeves in order to aid the said Reeves to cheat his creditors and particularly this plaintiff...

Wherefore plaintiff prays judgment against the said defendant Reeves for the said sum...and that the sale made to the said Brown and Beaufire (?) be set aside as fraudulent...\textsuperscript{168}

The case was voluntarily dismissed by the plaintiffs.\textsuperscript{169}

Torts to the person were rare in Missoula County. James W. Ely Jr.'s study of Andrew Jackson's legal career found a paucity of torts on the North Carolina and Tennessee

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\textsuperscript{167}3, 0511-3. Stephens obtained a default judgment. A modern lawyer would have plead a verbal contract and an "implied in fact" contract in addition to the common count.

\textsuperscript{168}2, 0598-60.

\textsuperscript{169}2, 0639
frontiers as well, although defamation was a frequent source of litigation in a region where reputation was treasured. Missoula County residents did not trouble their attorneys about affronts to their honor, but trespasses to land were another matter. For example, as mentioned earlier, Cyrus and William McWhirk sued Worden and Higgins for allegedly flooding their land.

Water rights, always a passionate issue in the American West, were aggressively litigated in Missoula County. C. C. O'Keefe complained against John Roland that the latter had "wrongfully and unlawfully diverted and took and carried away the waters of the said stream by means of artificial canals and ditches." Stephens brought suit on behalf of Michael Gannon against Thomas Foley. Stephens alleged that Foley had "wantonly, wilfully and maliciously...destroyed a No. 8 Sewing Machine of Wheeler and Wilson manufacture" and other personal property belonging to Gannon. As a result, Gannon lost his ability to support his family, "giving him great distress and anxiety of mind rendering his life burdensome...all of which distressed (the plaintiff's) mind to an extreme degree." The prayer asked for the value of the destroyed property ($245.00), plus $500.00 for the "distress, discouragement, anxiety and general unhappiness." The Court instructed the jury that it might award damages for the value of the destroyed property, for loss of use thereof, and for "punitive" damages if it, the jury, determined that the defendant acted "wilfully or maliciously." The Court issued no instructions as to any general (non-economic) damages

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170 Ely, "The Legal Practice of Andrew Jackson," 428.
171 0931,2.
172 5, 1928-30.
for emotional distress, effectively denying the claim as a matter of law. Emotional injuries, therefore, were still considered too ethereal in frontier Missoula. The jury brought in a verdict for $93.00. In general, the tort revolution was the better part of a century away.

Stephens participated in other cases which required a surprising level of sophistication. In 1874, voters repudiated a school tax. The frustrated school board hastily had held another election upon doubtful authority. The tax passed at the subsequent election. The Board's action outraged a number of influential citizens. Stephens and W. C. McCormick represented F. L. Worden, John Higgins, D. J.l Simmons, H. McFarland and E. Hende "on their own behalf, and on behalf of all other taxable inhabitants of School District No. 3" against W. G. Edwards, the County Treasurer and tax collector. The "homespun" quality of some of the other pleadings quoted herein is utterly absent in the seven page complaint Stephens and McCormick crafted. A part-time lawyer, McCormick devoted most of his attention to real estate, the town newspaper (The Missoula Pioneer, which he had owned for a while), and his mill at Fort Owen, which he had bought at the end of 1872. Stephens, on the other hand, was the most active lawyer in the community. Unlike many of his adversaries, including McCormick, he never blurted his facts when drafting a pleading; his counts, even when

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1735, 1955-7. Most tort damages seek to compensate the victim for the harm suffered, as, for example, Gannon was to be compensated for the value of his property which had been wrongfully destroyed, and for the money he would have made but for its destruction. "Punitive" or "exemplary" damages, however, are awarded to punish the wrongdoer, not to compensate the victim. Punitive damages are only awarded where the jury is satisfied that the wrongdoer's behavior was intentional, and not merely careless.

174The Missoula firm of Garlington, Lohn, and Robinson claims to be a successor to the practice W. J. Stephens began in Missoula. It is now the largest and perhaps the most prestigious in Western Montana. Most of their business is insurance defense.
propounding the most pedestrian grievance, were always well crafted. While it is not clear
that Stephens could claim credit for the quality of the pleading, he probably deserved it. He
was certainly much the superior lawyer.\textsuperscript{175} All of that aside, the school tax case was probably
Missoula County's first class action lawsuit.\textsuperscript{176} The Court set a hearing on the requested
injunction on December 8, 1874. That is the last entry in the file.\textsuperscript{177}

Stephens also handled an occasional divorce. \textit{Cecile Stone v. William Stone}, as with
most divorces in Missoula County, alleged desertion\textsuperscript{178} While there was no "no fault" divorce
in Missoula County, policy considerations, that is, the focus of the court's concern, did not
differ from what one would expect today.\textsuperscript{179} \textit{Sophia Sparanburg vs. George William}

\textsuperscript{175}Stephens and McCormick were often adversaries. In \textit{Thos. M. Pomeroy vs. John Brown, J. A. Nichols and W. J. McCormick}, McCormick, represented all defendants (that is, including himself.) Stephens represented the plaintiff. McCormick filed a demurrer, but
neglected to serve Stephens. Stephens promptly obtained the defendants' default, as no
responsive pleading and been duly filed and served. Seeking to set aside the default,
McCormick filed an affidavit insisting that he and Stephens had adopted a "rule" of "accepting
service and waiving copies," which meant that a party would simply review a pleading,
motion, or response for content and waive receipt of a written out copy. The very next day,
June 14, 1871, Stephens filed a counter-affidavit denying that there had been any such "rule,"
and explaining to the court that a custom existed amongst County lawyers where, upon
request, copies were waived, and there had in this instance been no such request. Stephens
style, then, was rigorous, even punctilious, especially when compared with McCormick, who
used words like "rule" with a sloppiness unbecoming a lawyer.

\textsuperscript{176}4, 1698-1705.
\textsuperscript{177}4, 1107.
\textsuperscript{178}1, 414-5.
\textsuperscript{179}Many modern jurisdictions have sought to make divorces easier to obtain and less
acrimonious by the adoption of so-called "no fault" statutes. Before no fault, a party sued for
divorce, alleging some reprehensible conduct on the part of the other spouse, such as
desertion, adultery, etc. In a no fault jurisdiction, the petitioner usually alleges only that
"irreconcilable differences" have arisen which are "irremediable." There is no blame. The
Spandanburg, while outside the time parameters of the chapter, illustrated much about divorce in nineteenth century Missoula, because it was seriously contested, because it contained allegations and cross-allegations which ring familiar to the modern reader, because there was a dispute as to custody of the three children, and because it went to trial. Sophia Spandanburg, through her attorneys Stephens and Bickford, alleged that

that the defendant has treated her in a cruel and inhuman manner...that on the 23rd day of December 1879, the defendant...by threats of violence drove the plaintiff from the shelter of her house and would not for a number of hours allow her to return...she was exposed to cold and inclement weather...

That upon divers occasions, and so frequently as to render the life of plaintiff unendurable and miserable...the defendant used violent, abusive, and scandalous language and accused the plaintiff of conjugal infidelity and adultery without any cause therefore...

...the plaintiff was in fear of great bodily harm and did at divers times sustain...bodily injury being struck and beaten by defendant...

That in the month of February 1884... the defendant came to his house in an intoxicated and drunken condition, and by using violent and abusive language kept the plaintiff awake all night...the plaintiff's life was, and has been rendered miserable by the conduct of the defendant...and this plaintiff is informed and believes,[180] that the defendant] committed adultery with lude [sic] women in the town of Missoula.

Apparently, the very last straw for Mrs. Spandanburg was when her husband placed a legal notice in the "Weekly Missoulian" disclaiming any responsibility "for any bills contracted by Mrs. Sophia Spandanburg." Defendant George William Spandanburg filed his answer, specifically denying all of the misconduct his wife had alleged, except for the legal notice.

petitioner is saying little more than "I do not want to be married anymore."

[180]The use of the phrase "informed and believes" means that the belief is based on hearsay, not personal knowledge. The phrase is frequently used in modern pleadings.
This notice, he said, occurred because

    defendant was mining and operating a mill (in Lolo) ...(and) he leased said mill
to other parties and made his arrangements to move his family to Missoula
when the plaintiff declined to come and told this defendant that she would not
live in town and that she would not live with him any more and that she was
going to put this defendant in debt and break him...

Further, defendant said that he, not she, was the abused party, and that he, not she, was the
suitable custodian for the children: "that the said plaintiff is a women of violent passion and
has...abused this defendant...that (defendant) is able to maintain educate and care for said
children and...said plaintiff would not and could not." On November 17, 1885, after trial and
deliberations, jury foreman Richard Beche presented the Court with a note disclosing the
verdict:

    We the Jury find for the plaintiff and that the plaintiff is the proper person to
have the custody of the children. We also specifically find that defendant is
an able bodied man and can earn three dollars per day.

Accordingly, Judge Gallraill dissolved the bonds of matrimony, awarded custody of the
children to Mrs. Sparanburg, and ordered "said plaintiff have and recover of defendant for her
support and the support of said children, from and after this date the sum of one dollar per
day, for during and until said children arrived at and become of the age of sixteen years."

The parallels with modern family law proceedings are striking, particularly the primacy
of the concern for the best interests of the children, the establishment of a support schedule
based on both the earnings and the earning ability of the payor spouse, and the setting of the
support level at, roughly, half the payor spouse's "spendable income," (a modern, somewhat
fluid term meaning income remaining after due allowance for base living expenses, business
costs, and so forth).\footnote{10, 560-611.}

Stephens handled various other matters, and, of course, he had his own accounts to look after. On November 24, 1874, Stephens wrote the following note:

Marchisault

Dear Sir

Maisset [?] informed me you had funds to pay expenses of suit. My fee for services in the Dist. Court is $50.00.
I already informed Maisset of this when here.

Yours Truly,
W. J. Stephens

At the bottom of the page one finds the notation: "Received payment Nov. 25, 1874 WJ Stephens by Marion."\footnote{182, 556. "Maisset" presumably was an assistant to Stephens.} Stephens was not a man to be put off. When Albert Adkins, Levi Adkins and J. L. Mellgreen sought to avoid his fee, Stephens sued. In a complaint filed July 18, 1871, Stephens alleged that he and the Adkins had entered into a verbal contract by which ...plaintiff was to perform legal services ...in the action of J. L. Mellgreen vs. Thos. Doyle et al...and the said defendants agreed to pay this plaintiff the Sum of $125.00 as an absolute fee therein and in the event of this plaintiff gaining the Suit (?) then to pay him the further Sum of $375.00.

The defendants, Stephens went on, settled the case outside of his knowledge. Acknowledging the receipt of $50.00, Stephens demanded the rest--that is, what would have been due had he tried and won the case: another $450.00. The same day, July 18, 1871, he filed an affidavit stating that the defendants had sold their entire mining interest in Cedar Creek and "are now on their way to the Atlantic states" and thereby obtained the issuance of an arrest warrant.
On July 19, Sheriff Pelkey returned the warrant stating: "I certify that I have served the within writ [?] arresting the within named defendants at Flint Creek in Deer Lodge Co." Pelkey itemized his costs, including $25 for "bringing prisoners." The next entry in the file, October 18, 1871, is to the point: "Cause settled and clerk will please make that entry (signed) WJ Stephens." Stephens was the sort of man who took his obligations seriously; and he expected the same. He was wise to collect his accounts aggressively, for Missoula was soon to encounter hard times.

The Civil Register for the period of 1870-1880 is surprisingly weighted toward the early years. That is, while the population continued to grow throughout the seventies, the litigation decreased. During the period commencing January 1, 1870 and ending December 31, 1873, an average of 46.5 actions were filed per year in Missoula County. During the period commencing January 1, 1874 and ending December 31, 1879, an average of only 36.33 actions were commenced per year (a drop off of about twenty-two per cent). For an explanation one must look beyond the Missoula Valley to the island of Manhattan, where Jay Cooke's bankruptcy had precipitated a national panic. Cooke's casualties included the bankruptcy of the Northern Pacific Railroad in 1873, which dealt a crushing blow to Montana. Cooke's downfall also cost the Missoula National Bank, only thirty-five days old when the disaster occurred, over $8,000.00. It could have been worse. Only the urgent telegrams of cashier Ferdinand Kennett halted another three purses of gold enroute to New

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1831, 1049-1068.
York for deposit with Jay Cooke and Company. Missoula did survive the seventies, however, and by the 1880s, had begun to boom again.

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Chapter 5. The Eighties

In the eighties, Stephens' practice grew along with the town of Missoula. By 1880, Missoula had about 450 residents, a fifty per cent increase in ten years. The town became more commercial, and Stephens' practice involved bigger accounts that involved more money. Stephens was elected County Clerk in 1884, and took on a younger partner to assist him with the growing practice. Over the course of the decade, the litigation in which Stephens was involved became more complex, more protracted, and the industrial world intruded in the form of typewritten pleadings.

The text of his advertisements suggested the changes that Stephens' practice underwent. When he began practice in Missoula, he used the same advertising text he had used in Deer Lodge, with modifications.

W. J. STEPHENS
Attorney and Counselor at Law
MISSOULA, M.T.
Will practice in all the Courts of the Territory and give his undivided attention to collections.185

The only addition to the Deer Lodge advertisement was the inclusion of a specific reference to collection work. In Deer Lodge, his copy asserted only his willingness to present and defend claims in court. In Missoula, he thought to add a particular willingness to pursue debts, reflecting, no doubt, that he had relocated from a mining town to a trading center. In the late 1870's, he again changed his advertising copy, this time more drastically. Thereafter,

185The Missoula and Cedar Creek Pioneer, January 5, 1871, p.1.

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the advertisement read:

W. J. STEPHENS

Attorney and Counselor at Law

Missoula City, Montana

Will give special attention to drawing papers for securing land claims, and entering lands under the Homestead, Preemption, desert land and other U. S. laws relating to lands.

Will secure patents for mineral lands and negotiate sales of mines; will also collect original and arrears of pensions under the old or recent acts of Congress. Conveyances and contracts carefully drawn, in addition to general law practice.186

At first glance, the text, especially the first full paragraph, seemed to resurrect the mining town practice in Deer Lodge. But a closer analysis suggests a different interpretation. Established lawyers did not advertise for elite clients. Local, well-to-do clients knew the local lawyers and their reputations, while substantial clients from outside the area obtained referrals from fellow patricians within the area. "Important" clients (or "big-ticket" clients in modern lawyer's slang), in short, did not find their attorneys in newspaper ads.

The change occurred because, by then, Stephens possessed a larger, more established practice. An established lawyer either ceased print advertising, or, as with Stephens, uses it in a more sophisticated, targeted, manner. Stephens, by the late 1870's, had an active clientele. Further, those Missoulians active in commerce knew where to find him. The advertisements were addressed to the mass-market legal consumer whose need for legal services was occasional, or once, and who might have to search the newspaper to find an attorney. These clients might need help perfecting their homesteads, or gaining their

186 e.g. The Weekly Missoulian, June 11, 1880, p. 1.
pensions. Such a person did not interact with those for whom the courts are an aspect of doing business. Even the most successful lawyer sought this type of client; after all, they "paid the light bills."

Andrew B. Hammond emerged as the main engine propelling Missoula's growth. As a young man he went to work for E. L. Bonner in the Missoula's Bonner & Welch General Store. Hammond ran the store aggressively. In 1876, he was made a partner, and the firm was styled "Eddy, Hammond & Co." Their business soon outstripped that of Higgins and Worden, who had founded the settlement.

The Northern Pacific Railroad entered Montana in 1881. Naturally, the town's merchants eagerly sought to bring it through Missoula. Higgins and Worden donated land for a depot and railroad yard. They were therefore much chagrined to learn that the Northern Pacific had awarded a lucrative contract for railroad ties to Eddy, Hammond & Co. The actual arrival of the railroad affected all Missoulians and provoked much controversy. For Stephens, however, the advent of Eddy, Hammond & Co., and the arrival of the railroad had identical significances. Both meant new, deep-pocket defendants.

Stephens represented James Marsh in a suit against Edward Bonner, Richard A. Eddy, and Andrew B. Hammond, "doing business...under the firm name and style of Eddy Hammond & Co." on August 2 1882. Marsh, a subcontractor engaged to cut ties for the railroad, alleged that he had not been fully paid. Along with Walter Bickford, Stephens

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187 Richard A. Eddy was another partner.

188 Koelbel, 57-59.

189, 1160-1163.
took the Northern Pacific Railroad to the Justice Court of Hellgate Township, on April 29, 1885, when James Miller complained that the Railroad refused to pay on assigned claims. Apparently, Miller operated a kind of frontier check cashing service, purchasing the claims of railroad workers and then claiming their compensation. Stephens and Bickford recovered $65 for their client. The trial record specified that Stephens and Bickford appeared for the plaintiff. However, if the partnership followed the expected pattern, Bickford probably handled the case himself.

Walter Mansur Bickford came to Montana in 1884 after having been educated at Maine Central Institute at Pittsfield and admitted to the Pennsylvania Bar in 1878. In the latter part of his career he would become an "office lawyer." As a "corporation lawyer," he served as vice-president of the Missoula Light and Water Company, the Missoula Street Railway Company, and the Western Lumber Company. He was eighteen years younger than Stephens, and, presumably, when he arrived in Missoula he sought work in the office of an older, established attorney. Coincidentally, Stephens, who had just been elected Court Clerk and ex-officio probate judge, needed the help of a young lawyer to keep the practice going.

This type of partnership was a paradigm for many law partnerships, then and now. The older, established lawyer had the connections in the community, and his time was more profitably spent developing and maintaining those connections, and personally serving the larger clients. Rather than turn away the lesser cases, he found a younger lawyer, one eager for any type of business, and hired him.

190 11, 158-167.
Stephens and Bickford represented James McElroy upon an account stated.191 The complaint was filed August 23, 1884, signed "W.J. Stephens W.M. Bickford Attys for Plaintiff."192 While Stephens name appeared, his flowing handwriting did not. The manner of appearance might have suggested some ambivalence about the partnership; McElroy was represented by two attorneys, rather than a partnership. However, in the nineteenth century, law partnerships were easily formed and ended. Writing of Lincoln's numerous partnership arrangements, John P. Frank contended:

The whole partnership relation was more casual than can be readily understood in the twentieth century. The amount of property jointly owned was trifling and there were none of the complications of accounting required by modern taxes and business methods. Lincoln had perhaps some seventy-five of these special partnership arrangements.193

However startling the idea of seventy-five partnerships, Frank insisted that these were bonafide partnerships, not ad hoc co-counsel arrangements.194 C. Robert Haywood described Dodge City's raucous bar as a "close-knit fraternity" in which "individuals opposed each other

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191 An "account stated" is one of the common counts. Briefly, it alleges that a business account exists and is unpaid.

192 10, 956-958.

193 Frank, Lincoln as Lawyer, 16.

194 Frank describes them as "standing arrangements of some duration" (16). This would serve as rather a loose definition of a partnership. Lawyers frequently have standing relationships with other firms and attorneys. To be sufficiently matured so as to be called "partnerhips", then or now, they would have to so firmed up that had Lincoln elected to handle a case within the purview of the arrangement by himself, the other "partner" could sue and obtain the portion of the profit called for in the "arrangement."
literally dozens of times and were partners about as often.\textsuperscript{195}

Stephens had appeared with numerous other Missoula County lawyers, including Robinson and W. J. McCormick. The arrangement with Bickford, however, was the first real partnership he was involved in after he moved to Missoula. A degree of hesitancy at the outset was to be expected. Later, in 1896, when their partnership was the subject of bitter litigation, Stephens would testify that it was commenced June 24, 1884.\textsuperscript{196} That date would have been just seven days after he proffered a demurrer on behalf of the Belknap Town and Improvement Company et. al. adv. Simon Marks, probably a lucrative case which he did not share with Bickford.\textsuperscript{197} In any event, shortly thereafter Stephens and Bickford appeared as "Stephens and Bickford," advertised as such, set up a concurrent real estate partnership, and eventually brought in another young lawyer on the make, Frank Higgins.

The defendants in the Belknap case were a type of party not seen in Missoula's earlier days—corporations. Kermit Hall has called the corporation "the form of business that carried

\textsuperscript{195}C. Robert Haywood, Cowtown Lawyers: Dodge City and its Attorneys, 1876-1886 (Norman: University of Oklahoma Press, 1988), 62. This is certainly more casual use of the term than that employed by Frank (footnote 194, above.)

\textsuperscript{196}Missoula County Case No. 1291, testimony before D. H. Ross, Esq, Referee. The firm of Garlington, Lohn and Robinson, which claims to be a successor (several times removed) of Stephens practice, reports in its firm history that the partnership began in 1883, which, as above, would have preceded Bickford's arrival in Missoula. The confusion is generated by the fact that the Register of Actions and Fee Book, District Court, Volume 2, page 139, reports that in the case of John Miller v. Joel Catching, Case No. 588, the defendant was represented by "W. J. Stephens & W. M. Bickford," and that the case commenced September 25, 1883. Actually, Stephens undertook Catching's representation by himself on October 17, 1883. Bickford appeared at trial on October 17, 1885.

\textsuperscript{197}9, 1343 et, seq.
the nation into the new economic age. Friedman has pointed out that the corporation met the "overriding need ...for an efficient, trouble-free device, to aggregate capital and manage it in business, with limited liability and transferable shares." Whether or not "trouble-free", or even "efficient," the corporate form proved to be a dynamo when performing the task of aggregating capital.

The Belknap case is also noteworthy in that it involved a suit upon a written contract, having a copy affixed to and made part of the complaint. Thus it had the appearance of a modern contract suit. Simon Marks sued the Belknap Town and Improvement Company and the Belknap Forwarding Company (a consortium of corporations), alleging that the defendants had breached an agreement under which Marks was to provide pack horses and mules on a per diem basis for the purpose of transporting freight and passengers. Despite Stephens efforts, on November 18, 1884, Marks recovered $1,240.00 and costs after a court trial.

Litigation of the 1880s demonstrates that the stakes were getting higher, reflecting the increased prosperity after the arrival of the Northern Pacific. Only after 1883, when Missoula's prosperity had been fully restored, would one find an action such as William Wood vs. Charles W. Berry Sheriff of the County of Missoula Mt., in which Stephens and Bickford, together with Smith and Abbot, complained that $10,000.00 worth of goods had been seized under color of law. The Wood case revealed much about changing legal practice; the file

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198 Hall, 109.

199 Friedman, 178.

200 9, 1382.
itself, as well as the particulars of action, had the aura of modernity. The file contained a Bill of Exceptions prepared by the Court, in the person of the Hon. W. J. Galbraith. Moreover, the Bill was typewritten. To frame the exceptions properly, the Bill provided a summary record of the trial. Wood testified at the trial on June 16, 1886, describing himself as an "expert accountant," having followed that career for "about twenty years as a specialty" in Portland, Oregon. Apparently, through his routine business dealings in Portland, he became aware of a firm styled Savage & Reed, which owned general stores in the towns of Belknap and Heron, Montana. Savage & Reed owed a lot of money to Portland merchants, witnessed by past due notes. Although the notes aggregated to nine thousand dollars, and although some of them had face amounts ranging from $235.19 to $1,493.58, Wood purchased these notes for the proverbial song.

At trial Wood testified: "I bought them on June 4, 1884, in Portland, Oregon I paid one dollar for each claim...There was no understanding that I should pay anyone any part of what I collected; they were placed in my hands without reserve." Wood denied any knowledge concerning the soundness of the notes. Still, he met Reed in Portland the day he made the purchase, and took a train the next day, with Reed, for Heron, Montana. There, he used the notes to purchase the stores, getting nearly the face value of the notes in the exchange. For a few dollars, Wood was the proprietor of two stores and thousands of dollars worth of inventory. When the Sheriff sought to execute on behalf of other creditors of

\[201\text{The notes Wood listed unintentionally observe the presence Jewish entrepreneurship in the old northwest. Those identified are: Wasserman & Co. (no relation to this writer); Fleischner, Mayer & Co.; Boatman & Co.; Tanhauser & Freeman; Jacob Bros.; Goldsmith & Lowenberg; Allen & Lewis; M. Sellers & Co.; and W. & Co. Certainly half, and perhaps all, are identifiably Jewish surnames (excepting, of course, the last).}\]
Savage & Reed, the suit commenced. Wood obtained a verdict for $4,400.00.\textsuperscript{202} The verdict (and the denial of the motion for a new trial) was appealed to and sustained by the Supreme Court of the State of Montana on July 29, 1887, and, upon further appeal (Writ of Error) to the United States Supreme Court, allowed to stand when no transcript was presented when the case was called for hearing.\textsuperscript{203} Again, the Wood case presented the kind of case, and the kind of file, that one would expect to find in a commercial center, not a frontier backwater.

The story of the practice in the 1880's is not a story of picturesque frontier cases. Missoula remained an isolated Western town, but its litigation fit the contours of the increasingly urban, commercial and affluent society that America became after the Civil War. Stephens and Bickford represented Darwin Loveland in a suit against The Missoula National Bank, alleging that the bank had failed to turn over $12,757.89 worth of notes (face value) on demand. The bank disputed Loveland's ownership and the suit was apparently settled. Stephens and Bickford dismissed the case at plaintiff's costs.\textsuperscript{204} The result of the was less important than the magnitude of the sum in question and the nature of the dispute, commercial notes on deposit.

Stephens and Bickford represented the firm of Bass Bros., lumber dealers, in a suit against Henry Lamb and John L. Sloan, after the defendants refused to pay for lumber used to construct a barber shop on the north side of Front Street. As a provider of labor and materials, Bass Bros. was entitled to perfect a mechanic's lien, which they did do, and upon

\begin{itemize}
\item[\textsuperscript{202}] 10, 689-865.
\item[\textsuperscript{203}] No. 174, October Term, 1891.
\item[\textsuperscript{204}] 10,-2055 et. seq. Some pages are not stamped.
\end{itemize}
which Stephens and Bickford sought to foreclose.\footnote{11, 1794-1797. A "mechanics lien" is a lien the law allows to a person or corporation which provides labor or materials to a construction project. The lien attaches to the property which is the site of the construction.} Here again, the litigation lacked the feel of the frontier. It had, instead, the familiar feel of modern litigation and its devices. No case in the 1870s proceeded upon a mechanic's lien.

Thomas Adams got into trouble with the credit department of the Eddy, Hammond & Co., and found himself sued by The Missoula Mercantile Company, "a corporation existing under the laws of the territory of Montana." Eddy, Hammond & Co. had incorporated. Adams retained Stephens & Bickford, who joined with the Woody & Marshall, plaintiff's attorney, in stipulating that the matter be submitted to binding arbitration. At the arbitration, Adams adduced receipts evidencing that he had paid part of the claim; the decision ordered Adams to pay the balance. The stipulation specified that the referee's report would be entered as a judgement, but that did not occur. The file contained a dismissal prepared by counsel for Missoula Mercantile, according to which the plaintiff would bear all costs.\footnote{12, 991-1024.} Perhaps there were further negotiations after the arbitration, and perhaps as well, the store made further concessions to assuage the feelings of its customer. Like the preceding cases, Adams had the aura of modernity. It was not a dispute between neighbors, but rather a suit by a corporate retailer against a defaulting customer.

On February 24, 1887, Stephens and Bickford filed a complaint on behalf of "Frank L. Worden & Christopher P. Higgins partners under the firm name and style of Worden &
It was a simple matter, a suit upon a promissory note in default, made by one John L. Sloane in the amount of two hundred sixty-two dollars. However, Stephens must have been pleased, at last, to represent the town founders. The firm's reputation and experience undoubtedly contributed to its selection. Another reason, however, was suggested at the bottom of the complaint, which was signed Stephens & Bickford F. G. Higgins Attys for Pltffs." The firm was appearing along with another attorney, Frank G. Higgins, son of the town's patriarch and, not coincidentally, one of the plaintiffs. Frank G. Higgins, then, brought to the firm something besides the willingness to work that typified a young attorney; he brought along one of the county's biggest business clients. The complaint, and subsequent cases, inferred that the three were not as yet in partnership. Higgins was identified separately and not as a member of the firm. Perhaps Christopher P. Higgins gave the business to his son and suggested that he get some help from more experienced attorneys. In that way, young Higgins could avoid cutting into his prospective inheritance as he cut his teeth on the law.

Stephens and Bickford kept cases they acquired by themselves to themselves for some months. On May 13, 1887 they represented Orlin J. Luce and Samuel Slife against the Sun Insurance Company of San Francisco, alleging that the carrier had failed to pay on a claim for the destruction by fire of an insured dwelling. The complaint affixed a copy of the policy, which provided some insights into the hazards of the fire insurance business of the nineteenth century ("Kerosine oil may be used for lights in stores and dwellings"). On May 24, 1887

\footnote{12, 2026 et. seq. Frank Worden was improperly identified as a party. He had died nineteen days earlier. His executor was the proper party.}

\footnote{13, 56 et. seq.}
Stephens & Bickford again represented a Higgins' interest, this time representing Christopher P. Higgins alone as "surviving partner of the firm of Worden & Co." Frank G. Higgins did not appear on the complaint or otherwise in the file at all.209

On October 21, 1887 Stephens & Bickford represented the National Fire Insurance Company of Hartford against R. M. Morrison and C. B. Mahoney, alleging in a typewritten pleading that Morrison and Mahoney were insurance representatives for the plaintiff who had failed to transmit received premiums. An out of state institutional client like this plaintiff would have been a feather in the cap of any lawyer. The case indicated the growing reputation of Stephens & Bickford. Such a client surely sought referral to a reputable local firm. An insurance company selling policies in the Missoula Valley would have future claims to defend there as well. Stephens & Bickford did not share this potentially important case with Frank Higgins.210

On November 5, 1887, Christopher P. Higgins, again as surviving partner of Worden & Co., sued John Shaughnessy for defaulting on two notes. Stephens & Bickford and Frank G. Higgins represented Higgins. Again, the arrangement on its face is the firm of Stephens & Higgins as co-counsel with an individual attorney, Frank G. Higgins.211 Frank Higgins was admitted to the firm as a partner in March of 1888.212

\[\text{\footnotesize 209 13, 91 et. seq.}\]
\[\text{\footnotesize 210 13, 91 et. seq.}\]
\[\text{\footnotesize 211 13, 1614 et. seq.}\]
\[\text{\footnotesize 212 Testimony before D. H. Ross, Esq., Referee, Missoula County Case No. 1291, } \text{Stephens v. Bickford.}\]
Frank Higgins was surely on board when the firm defended the Missoula Water Works & Milling Company and the Town of Missoula against the claim of August Scheer in 1888. This was a rare action for personal injury. Scheer alleged that on the night of February 6, 1888, while walking on either Higgins or Pine (the complaint is not clear), he fell into a portion of a ditch which had been opened to either lay or maintain the water pipe. Scheer said he injured his head and his hip and that he could not work for three weeks. He alleged that the water company neglected to light the hole, thereby exposing pedestrians to an unreasonable risk of harm. The answer submitted on behalf of the Missoula Water Works and Milling Company was handsomely typed. It made a marked contrast with the nearly unintelligible handwritten complaint George Reeves had offered on behalf of Scheer. On the folder enveloping the answer was stamped: "Stephens, Bickford & Higgins." After this, Stephens participation in the case, and the existence or non-existence of the firm itself becomes vague. In June of 1890, another attorney, Marshall, asked for subpoenas on the defendant's behalf. Then, on June 13, Bickford applied for a continuance on the grounds of witness unavailability. The defendant submitted proposed jury instructions on November 25, 1890, credited as follows: "Marshall & Crutchfield & F. G. Higgins & W. M. Bickford Attys for Deft." The jury brought in a verdict for the defense.213

The story between the lines was that Stephens was retiring. He continued to practice and the firm of Stephens, Bickford & Higgins still existed on February 15, 1889, when it

213 August Scheer vs. Missoula Water Works and Milling Company, Case No. 1026. At this point documents are no longer identified by transcript number.
represented the McCormick Harvesting Company in a collection action.\textsuperscript{214} In 1890, however, while the Scheer suit was ongoing, Stephens went to California. On November 13, 1890, he sued Milan Conant on a note secured by real property. In the complaint, Stephens stated, through his counsel, that he had mistakenly executed an affidavit indicating that the debt was paid, and releasing the mortgage. The complaint sets forth the affidavit, dated October 8, 1890, and made in San Jose County, California. Stephens was not even in Montana at the time of the Scheer trial; he was in California attempting to save his marriage. More important, a law firm styled Stephens, Matts, and Denny represented Stephens against Conant.\textsuperscript{215} He was no longer associated with Bickford or Higgins.

The testimony in the suit between Stephens and Bickford, in 1896, confirmed that they had severed all ties, including both the law firm and the real estate business they conducted together, at the end of 1889. Why and how Stephens became affiliated with Matts and Denny is unknown. His role was probably to add the prestige of his name to the letterhead. Frank Higgins apparently sided with Stephens. His father, Christopher P. Higgins had died on October 14, 1889. Along with John R. Higgins, George C. Higgins, presumably his brothers, and his mother Julia P. Higgins, Frank was appointed Executor of his father's will. As the lawyer of the family, he probably could have selected any firm in town to represent the estate. When the Executors sued Maurice Holden upon a note in favor of Christopher Higgins, Stephens, Matts, and Denny brought the complaint.

\textsuperscript{214}The McCormick Harvesting Machine Co. vs. Monroe Fulkerson, Case No. 1163. Here they represented another impressive out of state Corporation.

\textsuperscript{215}Case No. 180.
Conclusion

This concludes my efforts to portray a frontier practice in the late nineteenth century, and to anchor it to its many contexts. These contexts have included the Anglo-Saxon folk legal tradition, the elitist influences of the Inns of Court (including the professionalization of the bar), the emerging American legal experience in the colonies and the early republic, the development of a frontier commercial center, and the life of a William J. Stephens. A play cannot commence until the house lights are brought up. While I knew that the presentation of so many contexts would of necessity limit the treatment of each, I expected that each context would light the stage.

A study of the law practiced in frontier Missoula brings many matters to light. It documents the survival of basic procedural objectives from distant times, notably the use of oaths and security pledges to promote veracity. The study also reveals contrasts with modern practice. Students of frontier law are quick to point out that the frontier lawyers were skilled. Modern scholars eschew any overall depiction which, however affectionately, ridicules the old-timers. Rather, they insist that lawyers such as W. J. Stephens were, by and large, good lawyers. Lastly, these writers impress upon us that the frontier bar compares favorably to the present one.  

But I would take this a step further. How well do contemporary lawyers compare

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with their predecessors on the frontier? Certainly modern lawyers are better trained and have many more tools at their disposal. In view of the objectives of the legal process, perhaps we are the ones who should like the comparison.
By the time William J. Stephens ceased practicing law in 1890, the legal profession had entered the modern era. By the time he died, in 1917, case files had forever lost the aspect of the frontier. There were no more handwritten pleadings, no more loans payable in gold dust. At the same time, the legal profession hardly can be said to have entered a static phase. The twentieth century subsequently witnessed vast changes, most particularly the tort and computer revolutions.

The lawyers of Stephens' generation had their own mechanical revolution. The typewriter came into use during the latter part of the 1880's. One of the more interesting questions unexplored by this thesis is the impact of the typewriter. After the general adoption of typewritten documents, court files are considerably thicker. Since the typewriter made legal paperwork less laborious, it should come as no surprise that its advent generated more paper. Moreover, the thickness of the files was attributable to lengthier complaints and other filings, rather than new forms.

The adversarial process of litigation claims to be effective in getting at the truth. A mechanical breakthrough which improved the ability lawyers to wield their truth finding tools in litigation ought to have produced more effective litigation. But did it? That question deserves an exhaustive inquiry. Nothing in the denser files suggested that the public was being more efficiently served.

In our own day we have seen the arrival of the computer. Surely, no one could have thought of an instrument that fitted the administrative energies of a law office more precisely.
After all, law office administration began as form accumulation and copying. Has more paper meant better quality? Few could seriously suggest that it has. If the aim of litigation is efficient, rapid, affordable, and final dispute resolution, modern litigants, once again, ought to envy the world of frontier Missoula.
Bibliography

Primary Sources

Register of Civil Actions, Second District, Missoula County Montana.

The Weekly Independent (Deer Lodge, Montana), February 1, 1868, p. 1.
The Weekly Independent (Deer Lodge, Montana), June 19, 1868, p. 3.
The Missoula and Cedar Creek Pioneer, January 5, 1871, p. 1.
The Missoula and Cedar Creek Pioneer, December 29, 1870, p. 3.
The Missoula Pioneer, June 22, 1871, p. 3.
The Pioneer, May 25, 1872, p. 3.
The Missoulian, June 19, 1877.
The Weekly Missoulian, April 20, 1883, p. 3.
The Seattle Post-Intelligencer, June 6, 1918.


United States Census, 1850, 1860, 1870.

Written personal recollection of Hope Hawley Ketcham, October 30, 1986.

Heckendorn & Wilson, Miners & Business Men's Directory..., 1856.

Letter, Heather Hawley to Kenneth M. Wasserman, February 27, 1995.
Tape recorded interviews of James Hawley and Phyllis Turner, conducted by Heather Hawley, February, 1995.


*Wright & Woodward's Missoula City Directory*, 1890.

Secondary Sources


Historical Society, 1921.


Reference Works


*A History of Tuolumne County*. San Francisco: B. F. Alley. 1882.
