



IDAHO  
LEGAL  
HISTORY  
SOCIETY  
EST. 2005

## CALENDAR

### Idaho Legal History Society Full Meeting

Friday, March 9, 2012, 3:00 pm  
5th floor Judges' Conference Room  
Federal Courthouse  
Boise, Idaho

See the:

Idaho Legal History Society  
Legal History Display  
at  
Concordia University  
School of Law  
501 West Front Street  
Boise, Idaho

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# SHEEP v. CATTLE ON IDAHO'S RANGE

*Idaho's public rangelands* were the center of violent conflicts in the 1870s as sheepherding moved into what had been almost exclusively cattle country. Cattle interests in Idaho were so strong that in 1875 the Idaho Legislature passed a law prohibiting sheepherding within 2 miles of any human habitation or cattle range.

Violators could be punished for trespass and liable for damages caused by the grazing sheep. Originally, the legislation covered grazing lands in Alturas, Ada, and Boise Counties. Later Nez Perce, Idaho, and Cassia Counties were added. In 1887, the Legislature extended the rule to all Idaho counties.

The "Two-Mile Statute" was attacked as unconstitutional in 1901 (*Sifers v. Johnson*) in a case in which sheep had trespassed on lands owned by the plaintiff, rather than only grazing on public rangeland. Justice Ralph P. Quarles wrote the decision sustaining the constitutionality of the law. He found that the Idaho Legislature was justified in making

a distinction between range animals that could be contained by fences (cows and horses) and those that could not (sheep and hogs). In so doing, he rejected the argument that all livestock had the right to pasture on public lands.

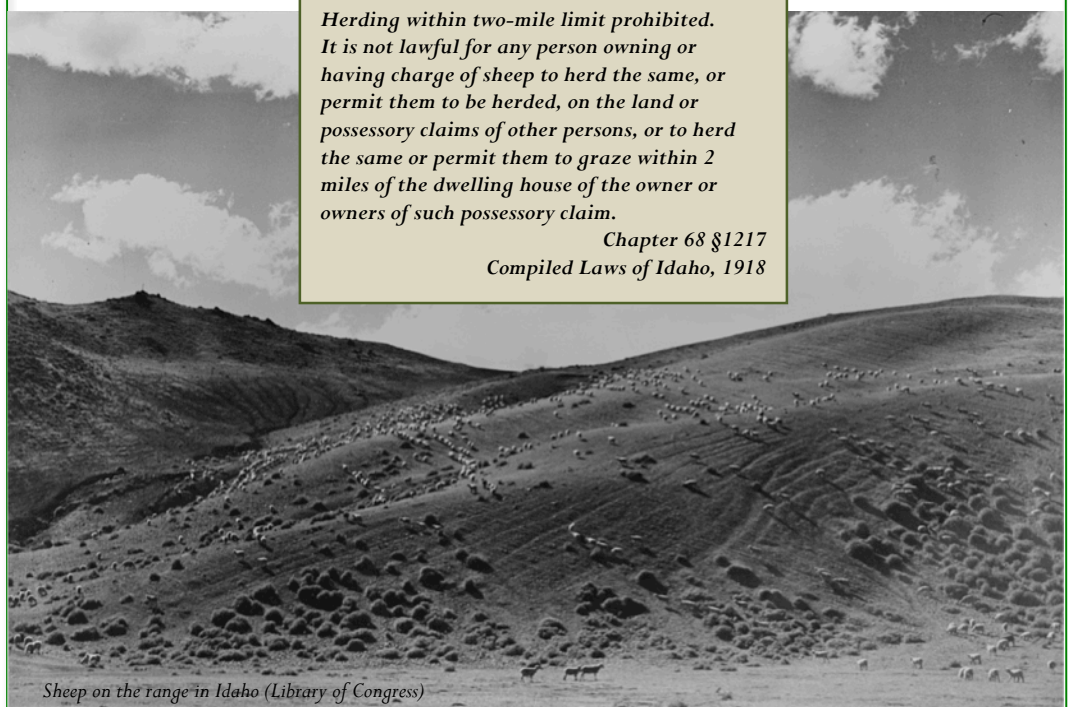
The issue came up again in 1902 with the question of whether an activity could be prohibited simply because it occurred within 2 miles of a human habitation (*Sweet v. Ballentine*). Justice Quarles and Justice Isaac N. Sullivan were in the cattlemen's camp, while Justice Charles O. Stockslager dissented on the grounds that neither the resident nor the stock man has ownership of the grass on a public range, a decision that may have contributed to his defeat when he ran for governor in 1906.

More than 10 years later, challenges to the law continued. In 1914, Owyhee County Probate Court received a complaint that a Basque sheepman, Secundio Omaechevarria, an employee of R.F. Bicknell of Boise, had

*continued on page 4*

*Herding within two-mile limit prohibited. It is not lawful for any person owning or having charge of sheep to herd the same, or permit them to be herded, on the land or possessory claims of other persons, or to herd the same or permit them to graze within 2 miles of the dwelling house of the owner or owners of such possessory claim.*

*Chapter 68 §1217  
Compiled Laws of Idaho, 1918*



*Sheep on the range in Idaho (Library of Congress)*

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## A Message from the President Scott W. Reed

In *Sifers v. Johnson*, 7 Idaho 798 (1901), the plaintiff commenced a lawsuit in Blaine County complaining that the defendant, who was running five herds totaling about 10,000 sheep, had destroyed his pasture. The jury awarded \$100. The defendant appealed contending that the Two-Mile statutes amounted to a taking without due process. Justice Quarles rejected this argument:

*Citizens graze their stock upon the public domain by sufferance of the general government, and not by virtue of any vested right. (p. 803).*

The next challenge was again from the \$100 jury verdict, but the opinions on appeal were a much more detailed analysis of the Two-Mile statutes. *Sweet v. Ballantyne*, 8 Idaho 431 (1902.) Justice Quarles found the Two-Mile statutes to be an absolute necessity to save the state:

*Nullify the statutes in question . . . and the result will be, in the end, that isolated settlements must be abandoned, and the land in the state become one immense sheep pasture, to the detriment of the farming and mining interests . . . (p. 436-37).*

The opinion fits the statutes into the definition of nuisance and takes judicial notice that sheep stink:

*It is a matter of common experience that a large band of sheep to the windward affects one's sense of smell when at a considerable distance away. (p. 439)*

Subsequently in denying a petition for rehearing, Justice Sullivan opined that there were 3,000,000 sheep being herded in Idaho with 600,000 assessed in Blaine County alone. In a strong dissent, Justice Stockslager described the Two-Mile statutes as “. . . the most vicious form of class legislation . . . (p. 444). Public lands and the grass growing thereon should be as open to sheepherders as it is for everyone else.

Skip ahead 90 years. The pathway that sharp-hoofed sheep dug into the Sun Valley hills on their way to Twin Falls is still visible. Today, small bands of sheep are welcomed annually in the autumn “Running of the Sheep Festival” in downtown Ketchum.

In *Payne v. Skaar*, 127 Idaho 341 (1995), the livestock smell from a large feed lot concentration of 3,500 cattle was held to be an actionable public nuisance under the same statute cited by Justice Quarles. Afterwards, the Legislature reacted to provide a variety of defenses to the livestock owners by amendments to the Right to Farm Act. After one year, an agricultural operation cannot be a nuisance (I.C.§22-4503), and no political subdivision can declare an agricultural operation to be a nuisance (I.C.§22-4504).

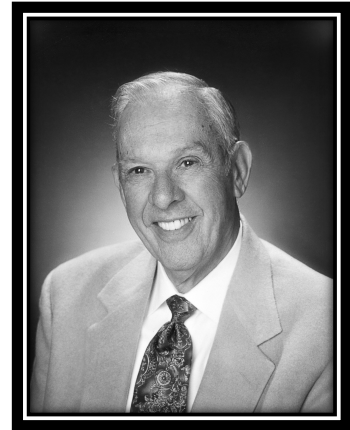
The frequent conflicts that occurred between sheep and cattle men “. . . in which many human lives have been lost” that worried Justice Sullivan are no more. In Idaho, the citizens and the Legislature have chosen to lie down with the lambs.

## ILHS MISSION STATEMENT

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

**20<sup>th</sup> Century Profile:**  
**Eugene L. (Gene) Miller**  
 ~in the words of his son~

*Gene Miller was admitted to the Idaho State Bar in June 1949 and first went into practice with Bill Hawkins (Hawkins & Miller) at Coeur d'Alene, Idaho. His son, Patrick E. Miller, later joined the practice. Gene Miller received the Idaho State Bar's Distinguished Lawyer Award in 1995. Patrick Miller shared these memories of his father with the Idaho Legal History Society Oral History Project in August of 2011.*



*Eugene L. Miller*

"I remember about lots of cases because I remember Dad as he'd tell his stories—first of all, he liked people. He just really liked people and he respected people.

"He told me after he passed the Bar [that] it seemed like so much effort was spent in law school on how to stay out of court or get out of court fast, that he decided he wanted to be good in court.

"The thing that always amazed me about Dad was that there wasn't one area of law [for him]. [In addition to mining,] he also worked on trusts. He handled divorce cases, lots of divorce cases for . . . a hundred dollars or so."

***Gene Miller worked on cases in the days before computers. As Patrick Miller later told it, there were:***

". . . just papers everywhere, pre-computer. And four copies of everything, indexed different ways, so you [could] find everything no matter how you thought about it . . . Growing up as a lawyer's son, in the days before cell phones, there were those days when Dad was in trial and nobody touched or got near the phone while he was waiting for a jury verdict.

". . . in the early days, I remember, like all lawyers back then, he took things in trade for fee. At one point he had taken three unfinished wooden boats in trade for some legal work. And I still remember the picture of my dad and my mom out there [in the garage] sanding, fiberglassing, painting these boats so he could sell them to get money.

". . . one time a client offered him an acre of land on the shore of Coeur d'Alene Lake in payment of a fee. And Dad's story was he told the guy, 'I can't feed my family with that.' So he didn't take the acre of land. [North Idaho resort and newspaper entrepreneur] Duane Hagadone liked that story. When my dad got the Distinguished Lawyer Award, he made the presentation [and] said, 'I've done pretty good with my acre.'"

***Miller was a big man with a powerful voice and a big presence in the courtroom. Fellow lawyer Scott W. Reed noted that, "Gene Miller . . . was far and away the best trial lawyer in North Idaho during the time that I practiced." Miller practiced his closing arguments in front of a mirror at home.***

". . . what helped Dad was his command of language. He read

all the time. As a kid, I can remember he would just pick and read sections of the *Encyclopedia Britannica*, or there would be nights that he would come home and I would see him with the *Idaho Code*, and he would read that page by page.

"He paid attention to language, too—how to say things, what they meant, the grammar of a sentence. That's the one thing he really taught me to pay attention to, that you really do need to listen to the high school English teacher because sentence structure means something in the contract or anything else.

". . . I observed about my dad that a litigator tries to make things more complicated; a trial lawyer makes them more simple. And to me, that was what Dad did. You got to the essence of the issue and addressed it that way and the rest it was fluff and you didn't need to fuss with that . . .

"One time he was in trial in St. Maries and he was out of peremptory challenges. And there was one woman that he just sensed he didn't want on the jury, but he's out of peremptory challenges, and so he said he walked up there and said, 'How are you, Mary?' She said, 'I'm fine, Mr. Miller.' And he walked back and sat down and the other lawyer used the preemptory challenge on her."

***The reach of Gene Miller's reputation was felt by Patrick Miller as a young man.***

". . . when I was working—after I turned 21, Dad heard that they were hiring for marine deputies for the sheriff's office. The sergeant took me around to show me how to deal with this and how to write a ticket and had me memorize the Code. And something happened on Hayden Lake [where] this boat went too close to skiers or something. So I stopped this guy and I was writing a ticket. He was really mad about this ticket. I think I was writing inattentive driving or something. It was one of the more serious boating tickets.

"And this guy started yelling at me saying his lawyer was going to rip me apart. He was calling his lawyer, Gene Miller, and Gene Miller was just going to rip me apart, and I said, 'Have him call me.' I went home that night and told Dad. He says, 'Well, obviously, I'm not taking that one.'"



## IDAHO JUSTICE “STOCKY” STOCKSLAGER

*Charles O. Stockslager* was born on a farm on the Indiana frontier in 1847. As a youth, he split fence rails and cut cordwood for sale to the steamboats on the nearby Ohio River. Stockslager later observed that he had, “. . . split more rails than Abraham Lincoln ever did, but I have not received as much publicity for it.”

After a year-long river trip on the Mississippi and Ohio Rivers, he taught school and studied in his brother's law office. In 1871, Stockslager moved to Kansas where he was admitted to the Bar in 1874 and served as Clerk of the District Court, County Attorney, and Mayor of the City of Galena, Kansas. A battle with malaria eventually led him to move west to Hailey, Idaho, in 1887. That year, President Grover Cleveland appointed him Receiver for the U.S. Land Office at Hailey, accepting fees from homesteaders when they claimed public land.

In 1890, Stockslager was elected Fourth Judicial District Judge. He was re-elected in 1894 and 1898. While on the Bench, he presided at the 1897 murder trial of Diamondfield Jack Davis, a hired gunman for the Sparks-Harrell cattle operation. Stockslager later heard the appeal of the same case as a Supreme Court Justice.

Idaho newspapers reported that “Charley” Stockslager was “not a pretty man.” He lost his left eye in a hunting accident and wore an eye patch. He was a bulky man, known by the nickname

of “Stocky,” who wore the same scruffy black coat all the time. He was said to enjoy liquor and his water pitcher on the judicial bench was found to contain almost straight gin. Nevertheless, he was a popular campaigner and said to be the “best hand shaker” in the State.



Justice Charles O. Stockslager

Stockslager was heavily involved in the 1906 investigation of the assassination of Idaho's former Governor Frank S. Steunenberg, with its swirl of political intrigue. He brought in the Pinkerton detective hired to lead the investigation into the murder, finding no conflict between his judicial duties and behind-the-scenes involvement in the criminal investigation. Then, as a Supreme Court Justice, he denied union leader William D. “Big Bill” Haywood's *habeas corpus* petition.

Stockslager served on the Idaho Supreme Court from 1900 to 1906. Among his decisions was his support of the right of sheepherders to graze on public lands. In 1906, he was the Democrat's candidate for governor, losing to Republican Frank Gooding.

When the Idaho Legislature created a new judgeship for the Fourth District in 1911, he was appointed by Governor James H. Hawley to fill the post. After leaving the Bench in 1915, Stockslager returned to private practice at Shoshone, Idaho, where he died in 1933.

Sources: *Big Trouble*, J.A. Lukas, 1997;  
*Illustrated History of the State of Idaho*, Lewis Publishing Co., 1899;  
 “Personalities Behind the Bench,” R. Stapilus, *The Advocate* 34:2, 1991.

## Basque Sheepman Guilty of Using Cattle Range

*continued from page 1*

grazed a band of 2,000 sheep on public land previously used by George Swisher to graze cattle. Omaechevarria, whose name was often misspelled in court documents, was found guilty and fined \$150 plus court costs. His attorneys Benjamin W. Oppenheim and Shadrach L. (Shad) Hodgkin appealed the case in Third Judicial District Court. William Healy was appointed Associate Counsel for the State in the case.

Among other issues, the defense argued that it had not been proven that there were clear boundaries on the public lands or that the sheepherder knew of the existence of the cattle range. Swisher expressed his disapproval of Omaechevarria and other Basque sheepherders, noting that he had not marked the boundaries of his cattle range because, as he put it:

*It wasn't necessary. Sheepmen respected it without. Sheepmen that were in that time were a different class than there is now.*

*They were white men and they could understand English.*

The District Court trial, too, resulted in a guilty verdict for Omaechevarria. He appealed to the Idaho Supreme Court in 1915, arguing that the law was a violation of the Equal



Oneida County sheep ranch. (Library of Congress)

Protection and Due Process clauses of the 14<sup>th</sup> Amendment. The Idaho Supreme Court upheld the District Court's decision. On appeal to the U.S. Supreme Court, Justice Louis D. Brandeis' opinion upheld the Idaho Supreme Court decision.

The law restricting sheep grazing remained in effect in Idaho for 50 years until 1934 when Congress passed the Taylor Grazing Act, giving cattlemen and sheepmen the same status.

Sources: “Cattle v. Sheep: The Idaho Experience,” J.J. Hasko, *The Crit* 3, Summer 2010;  
 “Turn of the Century,” S.W. Reed in *Justice for the Times*, ed. C.F. Bianchi, 1990.

*Jackson Lee "Diamondfield Jack" Davis was a gunman for the Sparks-Harrell cattle operation and a notorious braggart. In the 1890s, he was hired to keep sheepherders from accessing the company's Idaho and Nevada rangelands and had several encounters with sheepmen in which he regularly threatened whomever was not present at the time.*

Davis was accused of murdering two sheepherders, John Wilson and Daniel Cummings, who were found dead in their camp in 1896 in what later became Twin Falls County, Idaho. He was set to be tried at Albion, Idaho, beginning a legal battle between two of Idaho's most renowned attorneys.

Sparks-Harrell hired James H. Hawley, William Puckett, and Kirtland I. Perky (who was once the law partner of William Jennings Bryan) to defend Davis. Cassia County hired William E. Borah as a special prosecutor in the case, along with its County Prosecutor John C. Rogers and Utah attorney Orlando W. Powers. District Court Judge Charles O. Stockslager presided at the trial. Stockslager would later also hear an appeal for this case as an Idaho Supreme Court Justice.

The jurors were selected quickly. All were said to be sympathetic to the sheepmen. Crowds came to the courthouse to watch Hawley and Borah go at it and were rewarded with verbal fireworks between the two attorneys. The case went to the jury on April 15, 1897 after seven days at trial. Three hours of deliberation later, the jury returned a guilty verdict, surprising both sides in the case. Judge Stockslager sentenced Davis to hang on June 4, 1897.

Hawley and the defense team felt that the conviction would likely be reversed on appeal and they moved for a new trial. Judge Stockslager overruled the motion in early 1898, so Hawley filed two simultaneous appeals with the Idaho Supreme Court, one on the denial of a new trial and one on the conviction.

Hawley's arguments included the fact that Davis was not known to have been present at the crime, that the time of the killing was not shown by the evidence, and that the horse ride need to put Davis at the scene would have been impossible. However, the Supreme Court decision in June of 1898 upheld Stockslager on both appeals and sentenced Davis to hang on October 21,

1898. Hawley filed for a rehearing, which was denied, and then submitted an application for a pardon to the Board of Pardons.

Meanwhile Perky had the task of placating Davis who accused his lawyers of deserting him and botching his defense, and had the delusion that he would soon be leading a revolution in Mexico. According to Perky, "He is the most disagreeable client to manage I ever came in contact with."

While waiting for the Board of Pardons to rule, Hawley became increasingly convinced that the superintendent of the Sparks-Harrell ranches, James E. Bower, had some involvement in the murders. He wrote to Bower in the fall of 1898 with that accusation.

Surprisingly Bower made a written deposition describing in detail his presence at the scene of the shooting, along with Jeff Gray who he said had shot the sheepmen when they attacked Bower. Gray confirmed the deposition. Bower and Gray, also defended by Hawley, were tried for the murders and acquitted on the grounds that the shootings were in defense of Bower.

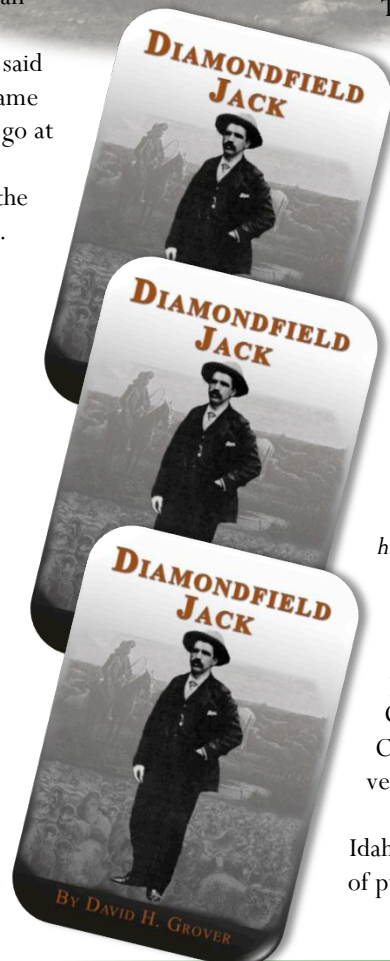
The Board of Pardons examined this new evidence, along with an array of petitions from locals who felt that justice had not been done. The Board offered a reprieve to Davis until December of 1898 so they could hold hearings on the new evidence. They then granted another reprieve until February 1, 1899.

Davis testified before the Board in January of 1899, making an angry rambling speech in which he attacked nearly everyone, including his lawyers, and changed certain aspects of his original story. After his inflammatory speech, the Board denied his pardon application and re-sentenced him to hang on February 1, 1899.

At that point, Hawley filed for a writ of *habeas corpus* in U.S. District Court, was denied, and appealed the denial to the U.S. Circuit Court of Appeals. Judge James H. Beatty stayed the execution while the appeal was pending. The writ was denied in U.S. Circuit Court and in early 1900, the U.S. Supreme Court accepted the case, later affirming the verdict of the Circuit Court.

Meanwhile, the case became intertwined with Idaho politics and was heatedly debated in the court of public opinion, particularly in the Boise

## JUSTICE ON THE RANGE "Diamondfield Jack" Davis



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## Eight Stays of Execution, Commuted Sentence & Pardon

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newspapers. Petitions and letters poured into the offices of the Board of Pardons, most in favor of Davis.

Hawley moved for a new trial in District Court in April of 1901. This time the motion was denied by Judge George H. Stewart on the grounds that the law required such motions to be made within 10 days of the original conviction. Stewart did not note that the rest of the statute read “. . . unless the court or judge extends the time.” He sentenced Davis to hang on June 21, 1901.

At that point, Hawley applied to the Idaho Supreme Court, which now included Justice Stockslager, for a Certificate of Probable Cause for an extension of time, but the Court declined to intervene.

In the meantime, the Board of Pardons changed the date of Davis' execution to July 3, 1901 so they could review the new letters and depositions, including a 93-page letter from Davis to the Governor, filled with his usual accusations. The correspondence also included letters from the two former prosecutors in the case, Rogers and Powers, and Perky who was by now a district judge. They were convinced by the confessions of Bower and Gray that Davis was innocent.

The Board of Pardons granted Davis an eighth stay of execution on July 17, 1901 while it reviewed the new materials. Finally, on July 16, 1901, with no mention of Bower's and Gray's confessions, the Board commuted Davis' sentence to life in prison at the Idaho

State Penitentiary. As one historian put it,

*In essence the board was saying, "Since Diamondfield Jack could not have killed the herders, we will now commute his death sentence to life imprisonment."*

Hawley was again before the Idaho Supreme Court on the matter in late 1901, arguing ironically that even if the sheepherders were to turn up alive at that point, the courts would do nothing to change the conviction. Unfortunately, the Court agreed with the argument and sent him back to the Board of Pardons.

By now all of the attorneys on both sides of the case felt that Davis was innocent—that is, all except Borah who continued to maintain Davis' guilt. Borah wrote, “. . . I have not at this time one particle of doubt as to the fact that Jack Davis murdered Cummins [sic] and Wilson.”

Davis was finally pardoned on December 17, 1902, much to the dismay of the *Idaho Statesman*, which called the decision “a menace to our institutions” and ran a copy of Borah's letter to the Board of Pardons.

After six years in jail, Davis returned to his old hangouts in Nevada. There he became a successful mine operator, founded the mining camp of Diamondfield, and lived out his life as a local celebrity. He died in 1949 after being hit by a taxi in Las Vegas.

Source: *Diamondfield Jack: A Study in Frontier Justice*, D.H. Grover, 2008.



*Mining stock certificate signed by Jack Davis.*

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