

# Contents

List of Illustrations . . . . .	viii
Preface . . . . .	xi
Acknowledgments. . . . .	xvii
Prologue: <i>State of Nebraska v. John Burley</i> . . . . .	1
1. Buffalo Bill's Country	
<i>Lincoln County, Nebraska, and Its Crime</i> . . . . .	19
2. Conservators of the Peace	
<i>Sheriffs, Deputies, and Railroad Detectives</i> . . . . .	53
3. Receptacles of Crime	
<i>Jails, Reformatories, and the State Penitentiary</i> . . . . .	80
4. Regulating a Great Plains Railroad Town	
<i>Police Courts, Municipal Ordinances,</i> <i>and the North Platte Police Force</i> . . . . .	110

5. Temples of Justice  
*Criminal Courts and Their Officers* . . . . . 141

6. Hanging Out the Shingle  
*Lawyers and Legal Communities  
on the Great Plains* . . . . . 181

Conclusion  
*Law and Order in Buffalo Bill's Country* . . . . . 210

Notes . . . . . 219

Bibliography . . . . . 243

Index . . . . . 253

## Illustrations

*Following page 140*

1. North Platte in the early 1870s
2. Union Pacific Hotel
3. U.S. Army barracks in North Platte
4. Looking east on Front Street
5. Judge Lorenzo Crouse
6. Beach Hinman
7. Sheriff William Woodhurst
8. Lincoln County Courthouse
9. Panoramic view of North Platte
10. Plat map of North Platte
11. Judge William Gaslin
12. Judge Francis Hamer
13. Hanson Grimes

14. William Neville
15. Alonzo "Lon" Church
16. Union Pacific roundhouse and rail yards
17. Union Pacific depot
18. Mike Fillion and Harry Smalley
19. Texas Charley Fugit
20. William Spellman
- 21 Charlie Brooks

## Preface

North Platte, Nebraska, is one of those Great Plains communities—like Dodge City, Kansas, or Deadwood, South Dakota—that popular culture points to as an example of a once “wild and woolly” frontier town. Founded in the fall of 1866 near the confluence of the North Platte and South Platte rivers by the Union Pacific Railroad as it laid its tracks across the Great Plains, North Platte during its infant years was purportedly infested with thieves, thugs, and murderers of the worst kind. “At the close of 1868, and well into the seventies,” wrote an early historian, “North Platte was a pretty tough town, and very indifferently equipped to enforce the law and maintain order. It had no jail, and on this account crime often went unpunished.”<sup>1</sup> Another early description reported that North Platte “was made infamous by deeds of violence and disorder . . . [and] the better element was powerless to enforce law and order. Neither property nor life was safe [and] murder and robbery were of frequent occurrence.”<sup>2</sup> According to these views, North Platte was a lawless frontier community without a criminal justice system to safeguard the citizenry. Fisticuffs, strong-armed robberies, shoot-outs, and lynchings were simply part of everyday life, and families and

respectable citizens needed to stay clear of North Platte and towns of similar ilk.

This image of the Great Plains frontier has been fueled for more than a century by historians—both amateur and academic—and by various avenues of popular entertainment, including dime novels, Wild West shows, Hollywood Westerns, and the 1950s-era television Western. In the twenty-first century, Great Plains communities continue to perpetuate this image with tourist attractions and summertime events that pay homage to the wild and lawless “frontier” past. At Deadwood or Dodge City, tourists can visit “boot hill” graveyards where gunmen and their victims lay buried with their boots on. At the annual “Wild Bill Days” in Deadwood, tourists can participate in “quick-draw” contests, and while attending the “Dodge City Days” the Boot Hill Bed & Breakfast will provide overnight accommodations. In North Platte, tens of thousands of visitors arrive every summer for the Nebraskaland Days, where they are entertained by staged gunfights and other activities from the frontier past, including a visit to Buffalo Bill’s Scout’s Rest Ranch.<sup>3</sup>

William “Buffalo Bill” Cody, who helped romanticize the Great Plains frontier through his Wild West shows, called North Platte home for much of his adult life. During the late 1860s and early 1870s he scouted for the military out of Fort McPherson, and in 1872 he won the Medal of Honor for his part in a skirmish against Indians. During the 1870s he operated one of the largest cattle operations in western Nebraska out of “Scout’s Rest,” his ranching headquarters located on the northern edge of present-day North Platte. By the mid-1870s Cody had earned national fame, largely because of semi-fictional accounts of his frontier exploits and his work as a stage actor. It was while living in North Platte that Cody conjured up the idea for his Wild West Show, an extravaganza that highlighted horsemanship, shooting and roping, Indian attacks, and gunfights. During the summer of 1882 the people of North Platte witnessed “The Old Glory Blowout,” Cody’s first Wild West Show and the prototype for all future western shows.

For the next thirty years Buffalo Bill toured the nation and the world with his Wild West shows, burning an image in the collective memory of the American public (and beyond) that the frontier was a lawless and dangerous region where justice was administered by six-shooters and vigilantes rather than judges and juries.

This book does not contend that violence and extralegal movements did not exist in the American West. Violence permeated post-Civil War America, whether it was urban New York, the rural South, or the American West. There is plenty of evidence to prove that the American West experienced high rates of homicide, and there are numerous examples of citizens taking the law into their own hands with extralegal justice. Roger D. McGrath, for example, has meticulously recounted the high homicide rates in the Sierra Nevada mining communities of Bodie and Aurora, where willing combatants gunned, knifed, and beat one another to death with regularity. Clare V. McKanna's extensive publications on homicide indicate that there were enclaves of violence in the American West where variables such as boom economies, transient populations, ethnic diversity, availability of deadly weaponry, and heavy alcohol consumption came together. Lincoln County, Nebraska, was not completely immune from violent crimes either. During the 1870s the county witnessed at least seven homicides, including three committed by vigilantes. Admittedly, enclaves of violence existed in the nineteenth-century American West, but these seem to be the exception rather than the rule.

Several scholars have shown how nineteenth-century migrants to newly settled regions such as Lincoln County carried with them a legal culture, or a working knowledge of the law and its applications that helped establish legal institutions and promote law and order. Studies on the overland trail, justices of the peace, and the Kansas cattle towns demonstrate the high degree to which everyday nineteenth-century Americans understood the law and its functions. In his two books on the overland trail, John Phillip Reid thoroughly discusses the con-

cept of a carried legal culture among overland migrants. He argues that nineteenth-century Americans had a keen understanding of the law and its functions, and they brought this understanding with them when they migrated across the continent. When a murder occurred on the overland trails, wagon trains came to a stop to administer justice; trials were not always procedurally flawless, because this was law as overland migrants remembered it in the communities from which they had recently migrated. Nonetheless, criminal trials were administered for the accused. Hundreds of miles from the nearest courtroom, overland travelers held criminal proceedings in which someone (a lawyer if available) defended the accused while another served as the prosecutor. A judge or judges were selected to watch over the proceedings while juries (oftentimes drawn from other wagon trains) weighed the evidence and passed judgement on the accused. Reid argues that the presence of a shared legal culture among nineteenth-century Americans allowed migrants to administer justice far away from established courts, judges, and law enforcement. The early years of Lincoln County, Nebraska, were no different. The early residents of North Platte, a newly settled community on the Great Plains frontier with no visible criminal justice system, turned to the law to handle criminal matters because it was part of the cultural baggage they carried from their New England and midwestern homes.

The early settlements on the Great Plains were never without law. Western settlers quickly established courts, appointed or elected judges, and adopted legal codes and statutes similar to those they had known in their eastern communities. Trained and ambitious lawyers, hoping to establish lucrative law practices, quickly moved into newly settled communities, thereby allowing the criminal justice system to function immediately. Efficient law enforcement bodies—both public and corporate—also appeared in new communities. Although jails required time and money to build, most counties constructed such legal institutions within a year or two of settlement. In short, the central plains were

settled by law-minded Americans who quickly reconstructed criminal justice systems like those they left when they moved westward.

The idea of a lawless American West, or frontier, has largely been the product of popular culture and historical assumptions based on thin empirical evidence. More books, for example, have been published on western vigilance committees than on western courts, judges, and lawyers. The lives and careers of popular western lawmen like Wild Bill Hickok and Wyatt Earp are oftentimes thought to exemplify western law enforcement, when in reality they had very little impact on the development of such legal institutions. Their names have become household names simply because they participated in celebrated western gunfights. Such an unbalanced treatment has fueled the idea of a lawless and disorderly American West.

Surprisingly, historians have mostly ignored the development of law and legal institutions on the Great Plains. While books and articles on the legal culture of New England, the South, and to a lesser degree the Rocky Mountain and Pacific West continue to appear, legal scholarship on the Great Plains hardly exists. This dearth is one reason why the American frontier is typically viewed as lawless and violent. If we know only about gunfighters and vigilantes and know nothing about lawyers and courts, then the Great Plains will remain a lawless and disorderly frontier in the historiography. As legal scholar Kermit Hall noted in a 1992 essay, "scholarship about the region's legal culture has never even taken off . . . to find out [about the region] we must learn more about law on the Great Plains."<sup>4</sup> This book is an effort to address Hall's suggestion about delving into the region's legal culture. An examination of Lincoln County's legal institutions and their development over the last quarter of the nineteenth century suggests that those people who migrated to the railroad towns on the central plains had an understanding of the law and its institutions that helped build stable and prosperous middle-class communities.

## Prologue

### *State of Nebraska v. John Burley*

When Buffalo Bill arrived in Lincoln County, Nebraska, during the late 1860s, the county had only recently been organized, and it was sparsely settled with few communities. North Platte had few permanent structures other than buildings and facilities owned by the Union Pacific Railroad. The town had no visible criminal justice system other than an elected county sheriff, a justice of the peace, and a single resident lawyer. The county had no courthouse or jail, and a criminal trial had yet to be held. These were the conditions on the evening of November 7, 1868, when at a small cabin southeast of North Platte, John Burley, an eighteen-year-old employed as a wood chopper, reportedly pulled a .36 caliber revolver from his coat and shot Charley Colleton in the face. The ball entered under Colleton's left eye and tore through the back of his head, killing him instantly. Robbery was the apparent motive for the attack, since immediately before the shooting, at their evening meal, Colleton revealed to Burley and fellow workers that he had in his purse eight hundred dollars that he planned to spend on a team of mules and wagon. When friends found Colleton's lifeless body, the purse was empty and John Burley was nowhere to be found.<sup>1</sup>

Shortly after the murder, a rider from Burke's Ranch—the site of the murder—arrived in North Platte with a message for Sheriff O. O. Austin. The note, written by ranch foreman Ben Ogle, was short and to the point: "Sheriff of Lincoln County. Get out the necessary papers to arrest a man for murder . . . come down immediately . . . bring coroner." Sheriff Austin scrambled around town, gathering together county officials and the appropriate legal documents to investigate the reported murder. He first went to the probate judge, Washington Hinman, to get an arrest warrant. Because he did not know the name of the murderer, the warrant called for the arrest of "unknown person." Next, Sheriff Austin deputized Oscar Filger and Nathaniel Russell and called on Coroner F. N. Dickey and Justice of the Peace R. C. Dougherty. The five men then traveled by horseback to Burke's Ranch, about twelve miles southeast of North Platte.<sup>2</sup>

It is commonly believed that "rough and tumble" frontier communities such as North Platte called on the services of hired gunmen to help preserve law and order. Although some Kansas cattle towns found it necessary to temporarily hire trained gunfighters—such as Wild Bill Hickok or Wyatt Earp—as law officers, most Great Plains communities had little use for such men. Instead, they elected respected members of their own communities. Austin worked as an engineer for the Union Pacific and attained his position by popular election, not because he was good with a gun. Towns such as North Platte simply had no need for a gunfighter-sheriff, because crime and violence was never a serious issue.<sup>3</sup> Austin was neither a trained law officer nor a gunslinger, and he never battled rowdy cowboys or pistol-wielding gunmen while in office. The historical record, for example, fails to turn up a single instance of Sheriff Austin or any other Lincoln County law officer facing down a gunfighter in North Platte's saloons or on the streets. In reality, the job was uneventful. After serving a two-year term, Austin went back to his job with the railroad. The next five sheriffs elected by Lincoln County voters all had similar backgrounds as either railroad employees or North Platte businessmen, and only one ever sought reelection.<sup>4</sup>

Once Sheriff Austin and his companions arrived at Burke's Ranch, they called together a coroner's jury to investigate the crime scene. During the nineteenth century, a coroner's jury—usually composed of the coroner or a physician, a law officer (preferably the sheriff), and three to seven citizens—investigated suspicious deaths, particularly homicides. The coroner's jury had the power to call witnesses and draw its own conclusions about the cause of death and who, if anyone, was the killer. The coroner then handed over the coroner's report to the district attorney, who used it as evidence to gain a grand jury indictment. The coroner's jury that investigated Colleton's death concluded that Colleton had been killed by a leaden ball fired from a revolver in the hands of John Burley.<sup>5</sup>

With a name now on his warrant, Sheriff Austin and his deputies combed the countryside for signs of the fugitive while the coroner and justice of the peace returned to North Platte. The search did not last long, because Burley made no effort to escape or even remain inconspicuous. Instead of leaving the vicinity, he wandered into North Platte and visited saloons along Front Street. Dougherty, the justice of the peace, must have been surprised when he returned from Burke's Ranch to find the fugitive sitting in a saloon. Dougherty arrested Burley and guarded him until the sheriff returned. Upon returning to North Platte, Sheriff Austin took charge of Burley and escorted him to Judge Hinman for a preliminary hearing. The prisoner waived his right to an exam and the county judge wrote out the proper legal documents, placing Burley in the custody of the sheriff and binding his case over to the district court.<sup>6</sup>

Because Lincoln County did not yet have a jail, the sheriff made arrangements with the military and lodged Burley in the guardhouse at nearby Fort McPherson, about twelve miles east of town. Because of the time and expense required to construct such buildings, newly settled Great Plains communities rarely had jails during the first few years of their existence. Despite the absence of jails in frontier com-

munities, local law enforcement officials in Lincoln County and other western Nebraska counties found places to confine their prisoners. Military installations, private homes, and jails in established counties in the eastern portion of the state all held prisoners for western counties without local lockups.<sup>7</sup>

While Burley sat in the guardhouse at Fort McPherson, North Platte bustled with talk about the recent murder and the suspected shooter. Nearly everyone in and around North Platte believed Burley was responsible for Colleton's homicide. Witnesses reported that he and the deceased had been drinking together moments before the shooting and that Burley quietly slipped away following the murder. More damaging, when arrested Burley had hundreds of dollars in his possession. At least a few people were so convinced of his guilt that they talked openly of extralegal violence as a way of dispensing justice.<sup>8</sup> Lincoln County authorities, however, quickly extinguished such ideas by demanding that the case be handled by the law. John Burley's November 1868 murder indictment would be the first criminal action before the Lincoln County District Court.

It is popularly assumed that in frontier regions, where the law and legal institutions were scarce, incidents such as the murder of Charley Colleton would have sparked extralegal violence. Conventional wisdom holds that in the absence of a criminal justice system, law-abiding citizens in frontier regions oftentimes turned to vigilantism so that the guilty would not escape punishment. This was certainly true in mining districts throughout the nineteenth-century American West. It has been well documented that vigilance committees operated in California during the 1850s gold rush and in Montana's mining regions during the 1860s.<sup>9</sup> Nebraska also witnessed vigilantism. Richard Maxwell Brown has identified at least sixteen vigilante movements in Nebraska that killed no fewer than twenty victims.<sup>10</sup>

Burley was most likely guilty of an unprovoked murder, and Lincoln County had no visible criminal justice system: hence the conditions

were perfect for extralegal justice. Why, then, was he allowed to escape extralegal retribution? The answer is really quite simple. Lincoln County's citizens did what was most familiar; they followed the letter of the law. They had no experience in extralegal methods. Few, if any, had ever shot or hanged another person, and most had probably never been part of an extralegal mob. Most of those living in Lincoln County in November 1868, however, would have been familiar with the legal procedures surrounding a criminal trial. After all, the citizens of Lincoln County had only recently moved from established communities in Iowa, Illinois, Ohio, and other midwestern and New England states, where they would have participated in the legal system by serving on juries, filing lawsuits, or following coverage of court proceedings in their local press. Lincoln County's citizens, therefore, were more prepared to use legal justice than extralegal justice.

Burley's ensuing legal struggle reveals a great deal about the nature of the criminal justice system in a recently settled region of the Great Plains. At the time of Burley's capture and trial, Lincoln County essentially had no visibly functioning criminal justice system. The county had only recently been organized after the Union Pacific Railroad pushed through the Platte Valley during the winter of 1866-67, and it was sparsely populated. County officials had held their positions for less than a year before Colleton's murder, and the county seat was in the process of being moved to North Platte from its previous location at Cottonwood Springs (present-day Maxwell). Sheriff Austin, the only lawman in the county, had held his position for less than a year before investigating Colleton's murder. The county had no jail and no courthouse, and a criminal trial had not been handled. Despite these rustic legal conditions, the people of Lincoln County went to great lengths and expense to ensure that John Burley was provided with all the legal trappings he was entitled to under Nebraska's statutes.

Although Lincoln County had established few legal institutions by 1868, the county was not devoid of a criminal justice system. Nebraska's

statutes, for example, provided for the introduction of courts and judicial officers to newly organized counties. If they did not already know how to handle criminal matters, the county commissioners simply had to open up their copy of Nebraska's statutes for an answer. There they would find that Lincoln County, the westernmost county in 1868, was part of the existing Third Judicial District, which was presided over by a Nebraska Supreme Court justice who served double duty as a district court trial judge. Because newly organized counties and unorganized regions of the state were placed into a preexisting judicial district, all of Nebraska—whether a courthouse existed or not—had a means to prosecute criminal trials. With the touch of a telegraph key, Lincoln County could request a special session of court to handle criminal matters.

Lincoln County could also get legal advice from Beach Hinman (brother of county judge Washington Hinman), the county's lone resident lawyer. Having a resident lawyer meant that the county could call on him for legal service and that criminal defendants had legal representation. It was no coincidence that Hinman, a lawyer with ten years of legal experience, was living in a newly settled community in the Great Plains. As the Union Pacific pushed across the plains, new towns appeared every seven to twelve miles, and communities of potential significance, such as North Platte—where the railroad built depots, machine shops, storehouses, and hotels—emerged every fifty to seventy-five miles. In Nebraska these communities were, from east to west, Columbus, Grand Island, Kearney, Plum Creek (present-day Lexington), North Platte, Ogallala, and Sidney. Young and ambitious lawyers living in Illinois, Iowa, and other midwestern states migrated to these towns and opened law offices, oftentimes before a town had been officially organized. Francis Hamer, for example, who served on the Nebraska Supreme Court from 1911 until his death in 1918, arrived in the present-day city of Kearney in 1872. Knowing that the Burlington Railroad planned to junction with the Union Pacific at this location, Hamer traveled from the capital city of Lincoln, where he already had

a small legal practice, filed a claim on a quarter section of government land, and opened the first law office in the area months before the town even existed. In recently settled railroad towns like North Platte and Kearney, ambitious lawyers could quickly climb the legal ladder and make a name for themselves in an emerging Great Plains community. Although Hinman was the only lawyer in the county in November 1868, within a year two others opened law offices in North Platte, and by 1875 a vibrant legal community of ten to twelve lawyers provided legal services for the region.<sup>11</sup>

Burley had been in the guardhouse at Fort McPherson for less than a week when county authorities began making arrangements to hold a special session of the district court in North Platte. The county commissioners telegraphed Judge Lorenzo Crouse—a Nebraska Supreme Court justice and the trial court judge assigned to the Third Judicial District—and requested that he hold a special term of court in North Platte. Judge Crouse quickly responded and set November 25 for the opening of the first session of the district court. Sheriff Austin did his part by scouring the county for eligible citizens to serve as jurors. Locating a sufficient number of jurors—about sixty men—posed a challenge, because both the grand jury and the trial jury needed to be filled, and few Lincoln County residents were eligible; only twenty-one votes had been cast at the county elections one year earlier. Much of Lincoln County's population was made up of military men, young railroad laborers under the age of twenty-one, and transient laborers who had not established residence in the county.

While the sheriff attempted to fill the jury panels, the county commissioners searched for a suitable building in which to hold court—not an easy task, since North Platte had very few permanent structures in November 1868. The commissioners finally leased a one-room log cabin for three hundred dollars per year and then hired a carpenter to outfit it with tables, chairs, and a makeshift bench for the judge.<sup>12</sup> To have such a structure as a county's first courthouse was not unusual.

Other Nebraska communities used improvised courthouses when necessary, including hotels, depots, opera houses, and sod buildings. A courthouse did not have to be an ornate, awe-inspiring building to conduct trials.<sup>13</sup>

On November 25, just eighteen days after Colleton's murder, Judge Crouse, District Attorney E. F. Gray, and several lawyers who hoped to pick up some quick legal business arrived by train at North Platte. The judge and lawyers, who lived in the eastern part of the state, must have been shocked by North Platte's rustic conditions. Few permanent buildings stood in North Platte, and accommodations such as hotels and eating establishments were few and rough around the edges. Oftentimes in formative Great Plains communities such as North Platte, local citizens and fellow lawyers provided living quarters for visiting court officers. According to George Norris, a Nebraska district court judge and future U.S. senator, "kind hearted citizens" offered "western hospitality," food, and housing for visiting lawyers, judges, and court personnel.<sup>14</sup> Because North Platte did not have sufficient services in late 1868, the citizens of North Platte more than likely provided accommodations for Judge Crouse and the visiting lawyers.

Judge Crouse opened the session of district court by swearing in the grand jury and informing them of their legal duties and obligations. Because many of the grand jurors had been excused earlier in the day for various causes, the district attorney transferred seven members of the petit jury panel over to the grand jury. This was a clear legal error that either the judge or the district attorney should have identified. To fill vacant seats on the grand jury, Nebraska's statutes required the sheriff to summon additional citizens to jury duty. Perhaps in the rush to get the legal proceedings under way, or because insufficient jurors could be located, this technicality was overlooked. Nonetheless, the grand jury proceeded with its business. District Attorney Gray presented the evidence from the coroner's jury and called on several witnesses who had been with Burley and Colleton prior to the murder. The report

from the coroner's jury played an important part in gaining an indictment. Combining this report with the testimony of three witnesses who put Burley and Colleton together moments before the shooting, the grand jury indicted Burley on first-degree murder charges.

With the work of the grand jury completed, the judge was ready to begin the trial phase of the criminal proceedings. Judge Crouse opened the district court session by admitting out-of-town lawyers C. P. Hall and Adolpheus Burges to the bar. Burges immediately picked up work as a court-appointed defense lawyer, while the judge appointed Hall to assist the district attorney.<sup>15</sup> Crouse then quickly dispensed with several other felony cases, sentencing a horse thief to three years in prison and fining another defendant \$250 for an assault with a deadly weapon.<sup>16</sup> The court then turned to Burley's murder trial. Unable to afford counsel, Burley filed a legal document with the court known as an "indigent affidavit," which allowed Judge Crouse to appoint counsel—at the expense of the county—for the defendant. This was not an unusual practice. Court records indicate that between 1868 and 1900 at least 63 percent of all defendants who came before the Lincoln County District Court filed indigent affidavits.<sup>17</sup> The court even allowed some defendants to select their own attorney. Michael Fillion, on trial for murder in 1876, filed an indigent affidavit and asked the court to appoint C. A. Baldwin as his defense attorney. Judge William Gaslin granted his request, and the county picked up the bill.<sup>18</sup>

Judge Crouse appointed Beach Hinman and C. H. Brown to defend Burley. Both were well-respected attorneys with ample legal experience in the courtroom. Although living in North Platte on the far reaches of Nebraska settlement, Hinman was an accomplished lawyer with ten years of legal experience in Pennsylvania, Wisconsin, and Montana Territory. He had also served a term as district attorney for Cass County during Nebraska's territorial period.<sup>19</sup> C. H. Brown, who traveled with the court officers from Omaha to provide legal services for Burley and other defendants indicted on various criminal charges,

was also an experienced trial lawyer. He was admitted to the New York bar in 1860 and then migrated to Omaha, where in 1862 he was elected prosecuting attorney for Douglas County. In 1867 he was the mayor of Omaha and presided over the city court, where he tried more than four thousand cases.<sup>20</sup> Burley could not have done much better even if he had money to pay for the best defense team money could buy. Evidence from *State v. Burley* trial records suggests that Great Plains lawyers like Hinman and Brown were well-trained and highly competent professionals who brought to the courtroom a thorough understanding of the law, allowing the criminal justice system to function even where it appeared not to exist.<sup>21</sup>

At his arraignment, Burley pled not guilty and then, through his lawyers, asked that the indictment be quashed for lack of jurisdiction. His lawyers argued that Lincoln County was not part of the Third Judicial District and therefore did not have jurisdiction. Judge Crouse recognized that this motion was nothing more than a delay tactic and quickly overruled it, pointing out that he was the district court judge of the Third District and that Nebraska's statutes placed new counties such as Lincoln County within his district. Arguing that Burley might not be able to receive a fair trial in North Platte so soon after Colleton's murder, his lawyers then requested a change of venue, claiming that the county did not have enough eligible jurors who had not already formed an opinion. Burley and his defense team were particularly worried about the talk of extralegal retribution that could be heard in conversations in and around North Platte. Here Burley's court-appointed legal team hit on a serious problem in frontier criminal justice. Lincoln County was sparsely settled in 1868; probably less than one hundred of its citizens were qualified jurors, and some had openly supported extralegal violence. This is why the court officers had such a difficult time filling both jury panels, forcing them into a legal error by transferring jurors from one panel to the other. Judge Crouse, after conferring with the defense and prosecution, granted a change of venue to Dodge County, a Third District county located in the eastern part of the state.<sup>22</sup>

Burley had succeeded in the first stage of his legal battle. Shortly after Judge Crouse's decision, Sheriff Austin boarded an eastbound train and escorted the defendant to Fremont, the county seat of Dodge County, where on December 28 a special term of the district court convened. The evidence presented at the trial was essentially the same that the grand jury had used to indict Burley. Testimony indicated that on the evening of the murder, the deceased, along with Burley, John Rice, John Fritchie, and several unnamed individuals, took their evening meal and consumed liquor together at a small shanty southwest of Fort McPherson. During the meal Colleton reportedly pulled a fifty-dollar note from his pocket and told his fellow workers that he intended to buy eight mules and a wagon. According to testimony by Rice and Fritchie, Burley took the bill from Colleton, examined it, and then "with a sinister grin" asked the deceased if he had more. Colleton replied that he had eight hundred dollars in his purse. Immediately after finishing their meal, all but Burley and Colleton went back to work chopping wood some four hundred yards from the shanty. Moments later the woodchoppers heard the report of a gun and ran back to the dwelling, where they found Colleton lying in a pool of blood with a mortal head wound. After a quick search of the area they found Colleton's empty purse, but Burley had vanished from the crime scene.

Further incriminating Burley was a letter he wrote to friends while he sat in jail. In this letter, which was either intercepted by authorities or handed over by those who received it, Burley pleaded with his friends to "dispose of the witnesses" who would testify at his trial.<sup>23</sup> After a three-day trial the jury brought in a guilty verdict, and on January 1, 1869, Judge Crouse sentenced Burley to death.<sup>24</sup>

Burley's lawyers immediately began working on an appeal to the Nebraska Supreme Court. Nebraska had only been a state since March 1, 1867, and Burley's appeal would be the first criminal case reviewed by the supreme court. Because Justice Crouse had been the trial court judge in *State v. Burley*, he recused himself from the legal proceed-

ings, leaving the review to Justices Oliver P. Mason and George B. Lake. Burley's legal team prepared a detailed bill of exceptions, arguing that the lower court made seven errors in *State v. Burley*.<sup>25</sup> Several of the purported errors were frivolous, and the justices quickly overruled them. For example, Burley's indictment read "The People of the State of Nebraska v. John Burley," when the correct wording should have been "The State of Nebraska v. John Burley." Three other errors, however, caused concern with the high court. First, the trial court records did not indicate that Burley was present at his trial, verdict, or sentencing. It would have been a clear legal error if he had been denied the right to confront his accusers. The justices knew that Burley had been present at his trial and sentencing and that this was nothing more than a clerical error in which the court clerk failed to write the information into the court transcript. However, it was a legal error that Justice Mason could not overlook. "He may have been [in court]," wrote Justice Mason, "but it is not here a question of fact whether he was or not, but only a question whether the record shows his presence."<sup>26</sup> The court also reviewed the exclusion of a portion of Fritchie's and Rice's testimony. Both testified that they had been drinking whiskey with Burley and Colleton prior to the murder, but the prosecution objected, the court sustained, and this important testimony was stricken from the record. The justices viewed this exclusion as an error, declaring that "it is always of vital importance to ascertain the exact condition of mind of a witness at the time of a transaction or conversation about which he is testifying . . . and if for any reason, such as imbecility or excessive intoxication . . . the court and jury should know it."<sup>27</sup> Finally, the justices determined that the court had also erred when it permitted the transfer of petit jurors to the grand jury. Justice Lake acknowledged that the transfer of jurors did not influence the verdict, but he was careful to point out that such an action, if allowed to stand, "would be a most dangerous precedent." Burley's conviction was reversed, and his case was remanded to the Lincoln County District Court.