



## JUSTICE OF THE PEACE WELLS W. SPICER

# Wyatt Earp, Doc Holliday & the Tombstone Judge

BY HON. GERALD A. WILLIAMS



USED BY PERMISSION, UTAH STATE HISTORICAL SOCIETY. ALL RIGHTS RESERVED.



In October 26, 1881, Wyatt, Morgan and Virgil Earp and Doc Holliday met Ike Clanton, Billy Clanton, Frank McLaury and Tom McLaury on Fremont Street in Tombstone, Arizona. After 30 seconds of gunfire, in an area as small as most modern family rooms, three men were killed and three were wounded. Wyatt Earp was the only person not shot.

This well-known gunfight has become the source of legends. It is known as the Gunfight at the O.K. Corral, even though the actual O.K. Corral was about half a block away. However, in all fairness to Hollywood, there would likely be limited demand for a movie called “The Gunfight Across the Street from Addie Borland’s Dressmaking Shop.”

A key player in this historical drama was not a gunfighter. Instead, he was a lawyer and a justice of the peace. His story will never become a movie, but it is just as critical.

### Lawyer Wells Spicer

Wells W. Spicer apparently studied law in Tipton, Iowa, under William H. Tuthill, who was also a merchant, a judge and a newspaper owner.<sup>1</sup> In 1853, Spicer was admitted to the Iowa bar.<sup>2</sup> He eventually became a sole owner of a newspaper and proclaimed its editorial policy as being, “Independent In All Things—Neutral In Nothing.”<sup>3</sup> After losing an election in 1854 as a Democrat seeking the position of county prosecuting attorney, he became a delegate to the Iowa Republican Convention.

In 1856, he was elected a county judge.

He continued to seek both fame and fortune and ended up heading west to Utah. While there, he was appointed a U.S. Commissioner, a position somewhat similar to a modern federal magistrate judge.<sup>4</sup> He also specialized in mining law.<sup>5</sup>

On September 7, 1857 (and while Spicer was still in Iowa), 140 Arkansas and Missouri emigrants were massacred at Mountain Meadows, Utah.<sup>6</sup> From 1875 to 1876, Wells Spicer continued seeking out mining claims and defended John Doyle Lee, who was accused of murder in connection with those events.<sup>7</sup> He was eventually found guilty at a trial in Beaver, Utah, and was executed on March 23, 1877.<sup>8</sup>

When news of a silver strike in Tombstone was reported in the summer of 1878, Spicer decided it was appropriate to head south.

### Tombstone Develops


In 1878, U.S. Army soldiers at Camp Huachuca told prospector Ed Schieffelin that if he went into a nearby wilderness, the only thing he would find was his tombstone. Ignoring the soldiers, he went into the desert area, which was still inhabited by Chiricahua Apaches, and eventually found what would become the largest silver strike in Arizona history.<sup>9</sup> He named the area “Tombstone.” Within three years, it grew to a population of between 10,000 to 12,000 people. Tombstone, and to some extent its judicial system, made itself up as it went along.

On January 3, 1880, Wells Spicer was published in the *Arizona Daily Star* for one of the first times.<sup>10</sup> On February 29, 1880, his column described Tombstone as “a population of 1,500 people, with two dance houses, a dozen gambling places, over twenty saloons and more than 500 gamblers. Still there is hope; for I know of two Bibles in town, and I have one of them (borrowed).”<sup>11</sup> It was also a place where it was common to find individuals with more than one occupation, like a gambler who was also a lawman, a judge who was also a prospector and a well-known gunslinger who was also a dentist.<sup>12</sup>

Adding to the chaos in Tombstone was a sort of gang or criminal enterprise known as the Cowboys. They were notorious for rustling cattle from Mexico and were loosely allied with a land speculator named James Clark, who apparently was able to obtain various land titles even though others already occupied those lots.<sup>13</sup> Attempts to collect rent from people who believed they already owned their houses were met with predictable resistance.

A state of general lawlessness increased after the Mexican government sent soldiers in response to the cattle raids, because it forced the Cowboys to shift all of their activity to be within Arizona.<sup>14</sup> They were led by Curly Bill Brocius. Other significant Cowboys included Ike Clanton and gunfighter Johnny Ringo. Frank and Tom McLaury acted as middlemen between the Cowboys and local merchants.<sup>15</sup>

In 1880, Pima County included Tombstone and all of the area that is current-



**JUDGE GERALD A. WILLIAMS** is the Justice of the Peace for the North Valley Justice Court in Maricopa County. He serves as a faculty member for the Judicial College of Arizona. Prior to becoming a judge, he was the Staff Attorney for the Arizona Commission on Judicial Conduct.

ly Cochise County. In that year's election for sheriff, Republican Robert Paul ran against Democrat Charlie Shibell. Wyatt Earp supported Paul. Democrat John Behan, who had represented Yavapai County in the Legislature, supported Shibell. The election was extremely close, and the San Simon voting precinct would prove to be critical.

The San Simon polling place was moved because it was unclear whether its first location was in Arizona or in Mexico.<sup>16</sup> Ike Clanton and Johnny Ringo served as election officials for this precinct.<sup>17</sup> Although there were no more than 12 registered voters in that precinct, 104 votes were cast—103 of those for Shibell.<sup>18</sup> Perhaps not surprisingly, the election was challenged.<sup>19</sup>

When it became known that Cochise County was going to be created, both Republican Wyatt Earp and Democrat John Behan sought the appointment as sheriff.<sup>20</sup> Wyatt Earp was well known and had served as a Pima County Deputy Sheriff from July 27, 1880, until November 9, 1880.<sup>21</sup> However, in 1881, Behan became the first Cochise County Sheriff. As if this was not enough for a conflict, Wyatt Earp essentially stole John Behan's girlfriend, Josephine Sarah Marcus.

### **Spicer Becomes a Judge**

Wells Spicer was admitted to the Arizona bar in 1880 and announced the opening of his law practice with an advertisement in the *Arizona Daily Star* on March 10 of that year.<sup>22</sup> He stuck with the Republican Party

and quickly became influential in the business community. In December 1875, President Ulysses S. Grant nominated Spicer's friend as both the Chief Justice of Arizona and U.S. Court Commissioner.<sup>23</sup>

This friend, Charles G. W. French, who had served in the California Legislature, appointed Spicer the justice of the peace of the First District Court of the Territory of Arizona. However, unlike a modern Arizona justice of the peace, Spicer also had some federal criminal authority and could even hear cases involving violations of internal revenue and customs laws.<sup>24</sup>

In his position, Spicer could not conduct a trial in a murder case. But in the case that would establish his name in history, he could certainly hold a preliminary hearing on a murder charge. His jurisdiction was also perhaps clear because, in addition to being the Chief of Police, Virgil Earp was also a deputy U.S. Marshal.

### **Murder Charges Are Filed, A Hearing Is Held**

After an inconclusive coroner's verdict,<sup>25</sup> Ike Clanton filed murder charges against Wyatt, Morgan and Virgil Earp and Doc Holliday. Morgan and Virgil Earp were not served with the criminal charges because they were still recovering from gunshot wounds. Judge Spicer initially denied bail for Wyatt Earp and for Doc Holliday, but then set it at \$10,000 each.<sup>26</sup> They had no trouble raising



## Justice of the Peace Wells W. Spicer



Charles Shibell



Frank McLaury



Tom McLaury



Billy Clanton



Ike Clanton

bail money, and Wyatt Earp even contributed funds for Doc Holliday's release.<sup>27</sup> The largest contribution came from Tom Fitch, who would become Wyatt Earp's criminal defense attorney.<sup>28</sup>

Tom Fitch was well aware of Judge Spicer's involvement in the Mountain Meadows trials and believed that he knew how to try a case before him.<sup>29</sup> Fitch had served as counsel to Brigham Young and had handled all litigation on behalf of the LDS church. His unique background also included serving as a member of the California Legislature and as a U.S. Congressman from Nevada. When the hearing began, Fitch actually tested the judge with a series of seemingly minor objections; in that way, Fitch could see whether Judge Spicer strictly enforced statutory language.<sup>30</sup>

### The Prosecution and Its Case

Like the rest of the case, the prosecuting attorneys were unique. District Attorney Lytton Price had only been in office a few weeks. He was a strong supporter of Marshal Virgil Earp and risked angering his Republican supporters by moving forward with the case.<sup>31</sup> Former Confederate Officer Ben Goodrich, who had built a legal reputation defending Cowboys, was added as a prosecutor.<sup>32</sup> After the hearing started, attorney William McLaury arrived from Fort Worth to look into the death of his brothers. He was immediately added to the prosecution's team.<sup>33</sup>

Although the Earps and Doc Holiday were initially considered to be heroes, the

Anyone who had been in the middle of events that led to the death of friends and family would have a motive to bend the truth. Ike Clanton went somewhere well beyond that.

prosecution's witnesses did well, and public opinion quickly turned against them. *The Arizona Star* editorialized:

The killing of the McLaurys and Clanton at Tombstone seems more dastardly day by day as the evidence is brought before the public. What justifiable excuse can be raised to explain the killing is hard to surmise. It is hoped, however, for the sake of the good reputation of our neighbor that the absence of malice and premeditation upon the part of the slayers may at least be established.<sup>34</sup>

In fact, the prosecution's case appeared to be going so well that they moved to revoke the defendants' bail. The defense argued that once bail was granted it could not be revoked. Judge Spicer ruled that he

had ongoing jurisdiction to determine bail and revoked it.<sup>35</sup> Thus, Sheriff Behan took Wyatt Earp and Doc Holliday to his jail. However, the prosecution's case had essentially turned into one of first-degree murder or nothing.<sup>36</sup> There seemed little chance of a lesser-included offense being involved.

Another problem for the prosecution was the lack of a clear theory. Unlike most cases, where a fact finder must determine what happened, in this case, the only question was why. The facts were almost undisputed. The prosecutors had essentially committed to a theory that Doc Holliday fired first and that he did so with a pistol. This would become a problem,

because it would have been nearly impossible for him to have done so and to kill Tom McLaury with a shotgun at virtually the same time.<sup>37</sup> The prosecution also had a problem controlling one of their witnesses.

Anyone who had been in the middle of events that led to the death of both friends and family members would have a motive to at least bend the truth. Ike Clanton apparently went somewhere well beyond that.<sup>38</sup> His undisputed status as a member of the Cowboys also likely did not play well with Judge Spicer.

### The Defense Strategy

At the close of the prosecution's case, the defense team had to make a difficult tactical decision. They could either litigate everything before Judge Spicer or wait and put on their case at trial. If the defense put on a complete case, and the case went forward to a



Doc Holliday



Sheriff John Behan



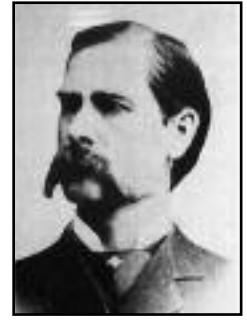
Thomas Fitch



Morgan Earp



Virgil Earp



Wyatt Earp

jury trial, then the Cowboys had a hit list, although both sides were apparently concerned that their witness might be murdered prior to a trial.<sup>39</sup> Ultimately, the defense decided to try to win the case at the preliminary hearing, in part because they believed that they might get better treatment from Republican Judge Spicer than from a jury, which could have been composed of rural Democrats and even Cowboy sympathizers.<sup>40</sup>

During the defense case, Judge Spicer made several especially significant rulings. At the beginning, he allowed Wyatt Earp to read a lengthy prepared statement into the record without being subject to cross-examination. Procedural guidance at the time was statutory, and while the custom may have been for an accused to make a brief oral statement, the actual statute contained no such limitations.<sup>41</sup> Judge Spicer overruled the prosecution's objections and the case started to turn toward the defense.<sup>42</sup>

Wyatt Earp's prepared statement detailed how the defendants had been confronted by a band of outlaws who had been threatening them for approximately a year. In the confrontation, he said, "The first two shots were fired by Billy Clanton and myself, he shooting at me, and I shooting at Frank McLaury. I don't know which was fired first. We fired almost together."<sup>43</sup>

In a manner similar to a closing argument, Wyatt Earp, through this prepared statement, also summarized legal points establishing justifiable homicide with sentences like, "I did not intend to fight unless it became necessary in self-defense and in the performance of official duty. When Billy Clanton and Frank McLaury drew their pistols, I knew it was a fight for life, and I drew in defense of my own life and the lives of my brothers and Doc Holliday."<sup>44</sup>

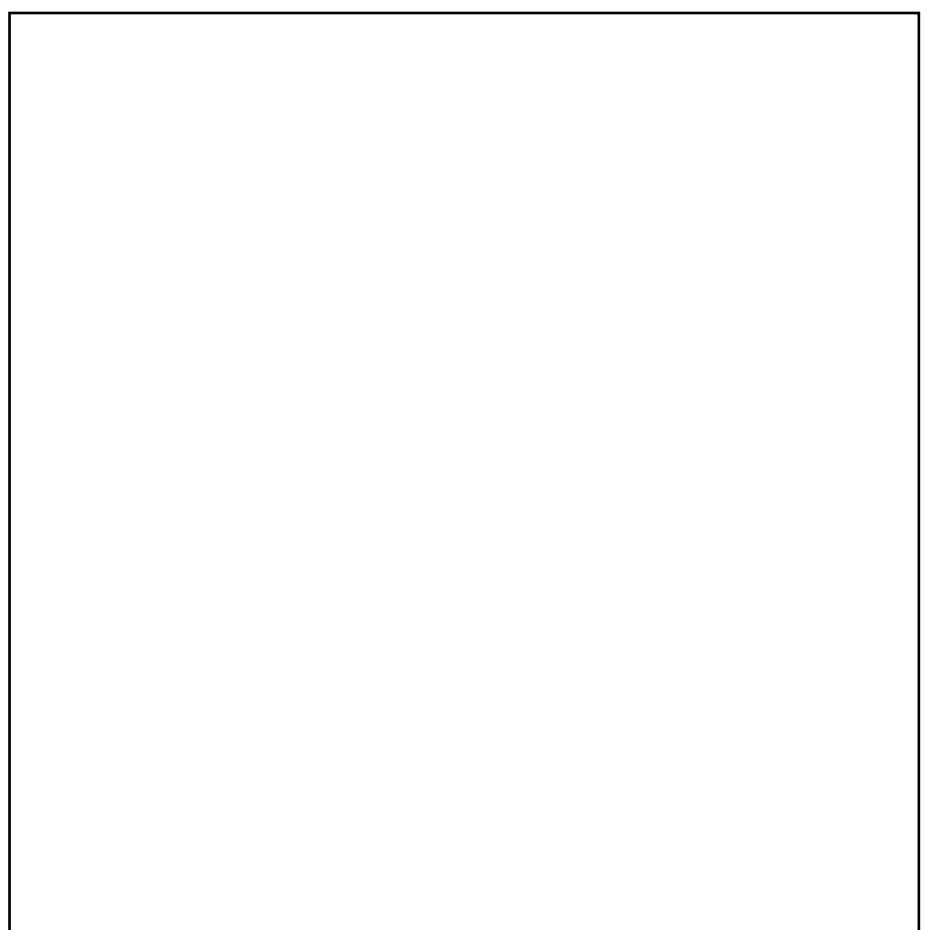
In addition to this prepared statement, the defense team had another trick up their sleeve.

The defense offered two sworn statements from the citizens for Dodge City and Wichita, Kansas. Both attested to Wyatt Earp's reputation for integrity. The document from Dodge City contained 62 signatures and was signed by the mayor, four members of the city council, other political leaders and various businessmen.<sup>45</sup> Judge Spicer admitted both affidavits over the prosecution's objection.

Judge Spicer initially excluded and then allowed the testimony of Ned Boyle. The defense called Boyle, a bartender at the Oriental saloon, to establish that Ike Clanton had threatened the Earps and Doc

Holliday. Spicer first concluded that any such threats were irrelevant because Ike was unarmed during the actual gunfight. However, he changed his mind after hearing the testimony of a genuinely neutral train engineer, who just happened to be in the area. By the end of this additional testimony, it seemed less likely that the Earps had fired on men surrendering with their hands in the air.<sup>46</sup> Judge Spicer also again reconsidered his position on bail; after 16 days in jail, Wyatt Earp and Doc Holliday were released in time for Thanksgiving.<sup>47</sup>

Toward the end of the defense's case, in a move that would not survive modern





JEFFREY M. FRANK @SHUTTERSTOCK.COM

### Excerpts From Judge Spicer's Tombstone Case Opinion

"Was it for Virgil Earp as chief of police to abandon his clear duty as an officer because its performance was likely to be fraught with danger? ... There can be but one answer to these questions, and that answer is such as will divest the subsequent approach of the defendants toward the deceased of all presumption of malice or of illegality."

"When, therefore, the defendants, regularly or specially appointed officers, marched down Fremont Street to the scene of the subsequent homicide, they were going where it was their right and duty to go; and they were doing what it was their right and duty to do; and they were armed, as it was their right and duty to be armed, when approaching men they believed to be armed and contemplating resistance."

"Considering all the testimony together, I am of the opinion that the weight of the evidence sustains and corroborates the testimony of Wyatt Earp, that their demand for surrender was met by William Clanton and Frank McLaury drawing or making motions to draw their pistols. Upon this hypothesis, my duty is clear. The defendants were officers charged with the duty of arresting and disarming armed and determined men who were expert in the use of firearms, as quick as thought and as certain as death and who had previously declared their intention not to be arrested nor disarmed. Under the statutes, as well as the common law, they have a right to repel force with force."

"In view of all of the facts and circumstances of the case, considering the threats made, the character and positions of the parties, and the tragic results accomplished in manner and form as they were, with all surrounding influences bearing upon res gestae of the affair, I cannot resist the conclusion that the defendants were fully justified in committing these homicides—that it is a necessary act, done in the discharge of official duty."

"The evidence taken before me in this case, would not, in my judgment, warrant a conviction of the defendants by trial jury of any offense whatever. I do not believe that any trial jury that could be got together in this territory, would, on all the evidence taken before me, with the rule of law applicable thereto given them by the court, find the defendants guilty of any offense."

scrutiny, Judge Spicer visited a witness on his own at her home and then recalled that witness during the hearing.<sup>48</sup> The witness was dressmaker Addie Borland. In response to the judge's questions, she testified that both sides were firing at the same time, and if anyone had been standing with their arms upraised, then she would have seen it.<sup>49</sup>

Somewhat remarkably, the prosecution called no witnesses in rebuttal after the defense rested.

### Judge Spicer's Findings and Conclusions

Testimony had ended on November 29, 1881, but on November 30, Judge Spicer read in court his extensive written decision. It was published in a local newspaper on December 1. The law at the time required a magistrate to order a defendant "to be held to answer" if it appears "that a public offense has been committed, and there is sufficient cause to believe the defendant guilty."<sup>50</sup> It was obviously undisputed that three men were dead, and Judge Spicer's ruling focused on whether the shooters had the requisite intent to commit a crime.

In contrast to Arizona's current firearms laws, in 1881, Tombstone had a



Boot Hill Cemetery, Tombstone, Ariz.

city ordinance declaring it unlawful for a person to carry a deadly weapon within the city limits without a written permit. Judge Spicer noted and considered important Ike Clanton's threats to kill the Earps, the efforts by Virgil and Morgan Earps to arrest and disarm him, and Ike Clanton's conduct during his subsequent court appearance. Spicer detailed other threats, and the fact that they continued. However, his opinion was not one-sided.

Judge Spicer was also extremely critical of Virgil Earp and wrote that given the background and ongoing hatred between the parties, that Earp, in his capacity "as chief of police, subsequently calling upon Wyatt Earp, and J.H. Holliday to assist him in arresting and disarming the Clantons and McLaurys—committed an injudicious and censurable act."<sup>51</sup> However, given the general state of threats and lawlessness, Judge Spicer held he could "attach no criminality to his unwise act. In fact, as the result plainly proves, he needed the assistance and support of staunch and true friends, upon whose courage, coolness and fidelity he could depend in case of an emergency."<sup>52</sup>

To this day, there is a dispute as to whether Tom McLaury was armed. Judge Spicer noted this fact, but he did not consider it noteworthy, perhaps because Wyatt

Earp stated that if Tom McLaury was unarmed, nothing he did or said so indicated. On this point, Judge Spicer wrote, "There is a dispute as to whether Thomas McLaury was armed at all, except with a Winchester rifle that was on the horse beside him. I will not consider this question, because it is not of controlling importance."<sup>53</sup>


Read more highlights of Judge Spicer's eloquent opinion in the sidebar on page 16.<sup>54</sup>

## Final Thoughts

While some of the people in this story remain almost mythical in stature, events

often duplicate themselves with only the names changing. One historian noted, "It is a classically American story. The town complains about crime, the police overreact, and the citizenry turns against the law enforcers. It has been played out time and again in U.S. history, and the pattern keeps repeating."<sup>55</sup>

As for the Earps and Doc Holliday specifically, another historian said it best when he noted, "They may not have been completely blameless, but they turned out to be just innocent enough."<sup>56</sup>

In 1882, Judge Spicer's term as a justice of the peace expired. He did not seek reelection. 

## endnotes

1. LYNN R. BAILEY, A TALE OF THE "UNKILLED": THE LIFE, TIMES AND WRITINGS OF WELLS W. SPICER 11 (1999).

2. *Id.* at 12.

3. *Id.* at 13.

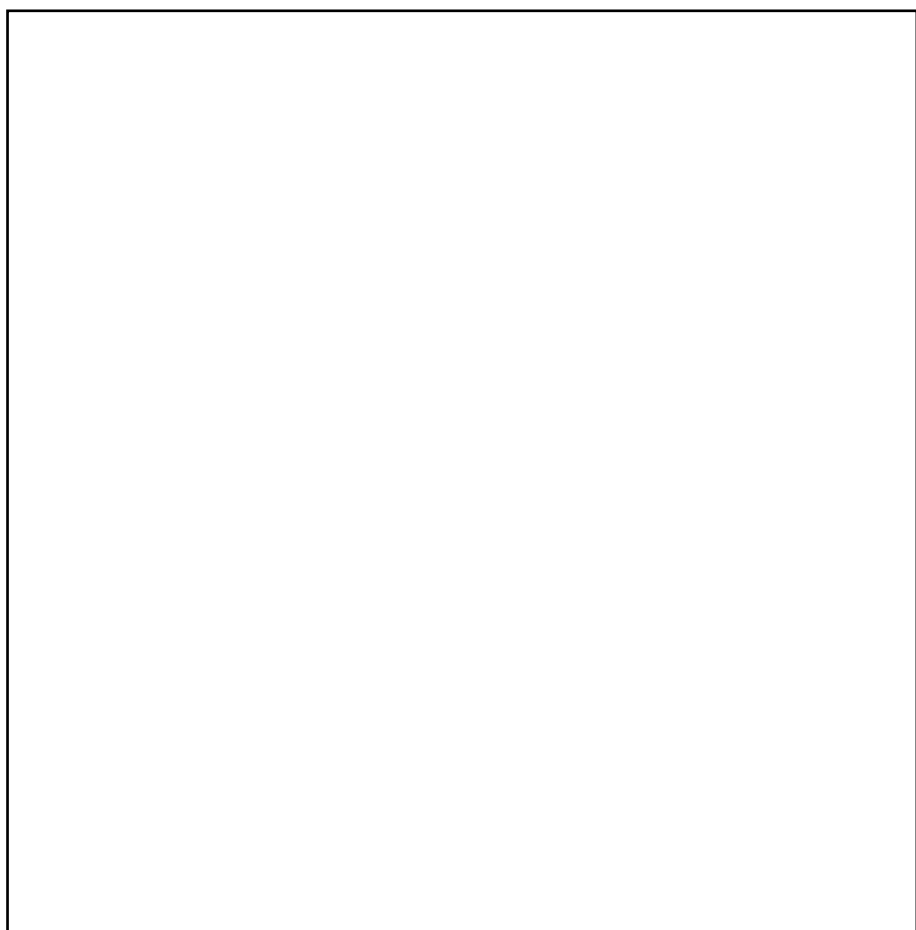
4. *Id.* at 37.

5. *Id.* at 48.

6. Some in the area, and one newspaper, blamed

the Mormon Church for the killings. Others blamed local Indian tribes. According to Rachel Lee, the defendant's wife, the emigrant settlers angered the Indians by poisoning a spring. *Id.* at 56–62. Spicer made sure her detailed account and defense of her husband appeared in the local paper. *Id.* at 57.

7. After deliberating for four days, the jury was ▶



# AMERICAN ARBITRA- TION ASSOCIATION