Fall 1992

Populism, Law, and the Corporation: The 1897 Kansas Supreme Court

James L. Hunt

Populism, Law, and the Corporation: The 1897 Kansas Supreme Court

JAMES L. HUNT

American Populism is irritatingly elusive. Over the past sixty years, since the publication of John D. Hicks' seminal *The Populist Revolt,* historians have offered a wide variety of interpretations of its ideological thrust, its relationship with previous and subsequent political developments, and its dramatic rise and equally dramatic failure.[1] Nonetheless, the broad boundaries of historiographical agreement and disagreement, especially on the question of the reform intent of the movement, can be defined with some precision. Historians generally agree that Populism articulated a comprehensive program of change. They also agree that the fundamental political message of Populism was the Omaha Platform, a document drafted at the party's 1892 presidential nominating convention. The Omaha Platform endorsed sweeping reform in three areas: land, transportation, and finance. Populists wanted large corporate grants from the government to railroads reclaimed and distributed to individuals; government ownership of "natural monopolies" such as railroads, telegraphs, and telephones; and government control of the supply and quantity of money. This last issue became the party's most significant political demand. It meant an end to the prevailing gold standard and dramatic inflation. Congress, not New York bankers, would henceforth determine the amount of money in circulation.

Historical consensus weakens, however, once one attempts to gauge the implications of the Omaha program. This is particularly true regarding evidence of how Populism relates to the development of modern corpo-

JAMES L. HUNT is an LL.M. candidate at Harvard Law School.

1. An excellent survey of recent scholarship is William F. Holmes, "Populism: In Search of Context," *Agricultural History* 64 (Fall, 1990):26.

agricultural history volume 66 · number 4 · fall 1992. © agricultural history society

rate capitalism. Some writers have viewed the Platform and other activities of Populists, such as cooperative marketing of agricultural goods, as evidence that Populism was anticorporate and anticapitalist. According to Steven Hahn, "To the hegemony of the marketplace, Populism counterposed the vision of a producers' commonwealth achieved through cooperative enterprise and the public regulation of exchange." Similarly, Lawrence Goodwyn has suggested that cooperatives allowed Populist farmers to reject the "prevailing forms of American finance capitalism." Indeed, "The collapse of Populism meant, in effect, that the cultural values of the corporate state were politically unassailable in twentieth-century America." Others, however, do not believe the Populist challenge ran quite so deep. Bruce Palmer adopted a middle ground by stating that while Populists did not "question the fundamental tenets of the American economic system as they understood them—the market, supply and demand, private ownership and profit, and the beneficence of economic competition between small economic units," they also "realized that a social order which set every person against every other, each group and class against every other, the Devil take the hindmost, represented only exploitation to most of its members and would very likely destroy itself eventually." Similarly, Norman Pollack has recently suggested that Populism *was* capitalism, or at least a "democratic" form of capitalism. He has written that "By incorporating a moral-legal influence into the structure of society, Populists believed it would be possible for capitalism to realize the potential for abundance . . . in America."[2]

One generally neglected aspect of the People's Party that provides a new perspective on this continuing debate is the relationship between Populist proposals and the existing "private law" rules of state law. In an era before the general application of federal constitutional rights to states, this massive body of judicially administered authority identified the principal economic relationships and obligations among individuals and corporations. State law, therefore, was as much a concrete expression of government power and values as more publicly contested issues of national policy such as the tariff or the national banking system.[3] Populist attitudes

2. Steven Hahn, *The Roots of Southern Populism: Yeoman Farmers and the Transformation of the Georgia Upcountry, 1850–1890* (New York: Oxford University Press, 1983), 282; Lawrence Goodwyn, *Democratic Promise: The Populist Moment in America* (New York: Oxford University Press, 1976), 142, 537; Bruce Palmer, *"Man Over Money": The Southern Populist Critique of American Capitalism* (Chapel Hill: University of North Carolina Press, 1980), 205, 221; Norman Pollack, *The Just Polity: Populism, Law, and Human Welfare* (Urbana: University of Illinois Press, 1987), 343. A helpful discussion of the debate as it relates to the Populists is Holmes, "Populism," 39–45. Allan Kulikoff, "The Transition to Capitalism in Rural America," *William and Mary Quarterly* 45 (January, 1989):120, provides a more general evaluation.

3. Two introductory works suggesting the connections between American law and political development are Lawrence M. Friedman, *A History of American Law* (New York: Simon and

toward the law directly reflect the context in which the Omaha platform was offered and given meaning.

Historians have not entirely ignored the legal attitudes of Populists. Some have suggested that Populists disagreed with prevailing rules. Over fifty years ago C. Vann Woodward noted that the Georgia Populist, Thomas E. Watson, an attorney, denounced the current state of law and described the ancient English common law as a "brutal code of half-naked savages."[4] Condemnation of the celebrated 1890s Supreme Court decisions in *Pollock* v. *Farmers' Loan and Trust Co., United States* v. *E.C. Knight and Co.,* and *In Re Debs,* which showed the high Court's willingness to overturn legislative reforms, sanction the development of trusts, and thwart the goals of organized labor, has been cited, as has Populist criticism of the excessive use of injunctions against unions in labor disputes and the importance of the perceived fealty of the Supreme Court to monopoly in the presidential election of 1896.[5] It is also well-known that the Farmers' Alliance, the organizational precursor of the Populist party, specifically excluded attorneys from membership and demanded simplification of local rules of litigation, usually with the aim of reducing the likelihood of lawyerly artifice.[6]

Yet the work of other historians indicates a more ambivalent attitude. Norman Pollack and Michael Brodhead have argued that fundamental legal rules were not understood by Populists as conflicting with the party's legislative proposals. In fact, they have indicated that Populists often portrayed the changes offered by their movement as efforts to preserve, not destroy, ancient principles of government, including presumably fair rules of law.[7]

One limitation of earlier Populist legal studies, including those of Pollack and Brodhead, is that they are based primarily on the traditional sources of Populism: speeches, newspaper editorials, and election material. As a result, they tend to shed light on Populist criticism, not context. Moreover, the

---

Schuster, 2d ed., 1985) and Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989).

4. C. Vann Woodward, *Tom Watson: Agrarian Rebel* (New York: Oxford University Press, 1963), 171–73.

5. Alan J. Weston, "The Supreme Court, the Populist Movement, and the Election of 1896," *Journal of Politics* 15 (February, 1953):3.

6. Hicks, *Populist Revolt,* 112; Lala C. Steelman, *The North Carolina Farmers' Alliance: A Political History, 1887–1893* (Greenville, North Carolina: East Carolina University Publications in History, 1985), 161.

7. Pollack, *The Just Polity,* 141; Michael Brodhead, *Persevering Populist: The Life of Frank Doster* (Reno: University of Nevada Press, 1969), 114. See also James C. Malin, *A Concern About Humanity: Notes on Reform, 1872–1912, At the National and Kansas Levels of Thought* (Lawrence, Kansas: The Author, 1964), 132–55.

work that has been done with traditional legal sources, such as the decided opinions of a state supreme court, has focused on Populist judges' interpretations of more obviously political concepts such as voting statutes and constitutions.[8] However useful this kind of analysis may be, it cannot explain Populist attitudes toward rules governing private relations—the dominant concern of state law.

Measuring Populism through judicial opinions presents some methodological complexities not encountered in evaluating Populist legislators or polemicists. The central problem is that the nature of American judging confronted Populist judges with two potentially contradictory bases for decision-making: existing law, or precedent, and the reform agenda of Populism. Moreover, neither contemporary judges and legal scholars nor modern legal historians have provided a clear description of just what the non-Populist law was in the 1890s, or more important, what it intended to accomplish. Regarding the impetus for the development of legal rules, for example, some have argued that there is evidence that two leading areas of the common law, the imposition of liability for negligent acts and the enforcement of contracts, were characterized by judicially imposed harshnesses that subsidized capital and aided the growth of industry while imposing costs on workers. Others maintain that the evidence for subsidy is either limited or nonexistent. They suggest judges were more even-handed in distributing the costs of accidents and bad bargains among competing economic groups. The legal historian of Populism is thus confronted with an absence of authority indicating how to make a detailed comparison of Populist legal attitudes with non-Populist legal attitudes.[9]

8. See Michael Brodhead, *Preserving Populist;* Michael Brodhead, "Populism and the Law: Some Notes on Stephen H. Allen," *Kansas Quarterly* 1 (Spring, 1969):76; R. Douglas Hurt, "The Populist Judiciary: Election Reform and Contested Offices," *Kansas History* 4 (Summer, 1981):130; Brian J. Moline, "The Populist Court: Frank J. Doster and Stephen H. Allen," *Journal of the Kansas Bar Association* (October, 1989):23.

9. Prominent histories of early negligence law reflecting fundamental disagreements over how and why negligence law developed and the extent to which developing industry benefitted from the path the law took are Charles O. Gregory, "Trepass to Negligence to Absolute Liability," *Virginia Law Review* 37 (April, 1951):359; Lawrence M. Friedman and Jack Ladinsky, "Social Change and the Law of Industrial Accidents," *Columbia Law Review* 67 (January, 1967):50; Lawrence M. Friedman and Thomas D. Russell, "More Civil Wrongs: Personal Injury Litigation, 1901–1910," *American Journal of Legal History* 34 (July, 1990):295; Lawrence M. Friedman, "Civil Wrongs: Personal Injury Law in the Late Nineteenth Century," *American Bar Foundation Research Journal* 1987 (Spring-Summer, 1987):351; Gary T. Schwartz, "The Character of Early American Tort Law," *UCLA Law Review* 36 (1989):641; Robert J. Kaczorowski, "The Common-Law Background of Nineteenth Century Tort Law," *Ohio State Law Journal* 51 (1990):1127; Gary T. Schwartz, "Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation," *Yale Law Journal* 90 (July, 1981):1717; Robert L. Rabin, "The Historical Development of the Fault Principle: A Reinterpretation," *Georgia Law Review* 15 (Summer, 1981):925. For a suggestion that Populist politics influenced negligence case results in one state, see Note, "Private Law and Public Policy: Negligence Law and Political Change in Nineteenth-Century North Carolina,"

As a result this study is less an inquiry into the doctrinal specifics of Populist law, and how that law might differ from non-Populist decisions, than it is an attempt to discern the relationship between the Populist legislative program and a select group of appellate opinions. Doctrinal development necessarily received considerable attention, but the emphasis was on developing a form of analysis that would test the validity of conflicting schools of Populist historiography.[10] Simply stated, if historians Hahn and Goodwyn are correct, the fundamental radicalness of Populism should have impelled efforts to formulate or find law that would punish and destroy corporations. Populist judges should have been more eager to use law as a device to improve the condition of Populism's producer constituency and to harm its corporate opponents. On the other hand, less revolutionary decision making, with a general respect for the prerogatives of private property and the corporate form, might lend credence to the writings of Bruce Palmer and Norman Pollack. Such holdings would suggest that the Populist reform program was not a general assault on corporate capitalism, but instead was offered in the context of a general acceptance of a system of private ownership, market-based exchange, corporate activity, and predictable legal process.

The rather esoteric nature of legal learning indicates that inquiry into fundamental Populist legal thought must start with Populists who were most knowledgeable about existing rules. Such persons were more likely to confront fully the relationship between the law and their reform beliefs. Similarly, one should consider the actions and thoughts of Populists who had the greatest opportunity and freedom to write about and shape a state's law.

With these considerations in mind there can be no better source than the

---

North Carolina Law Review 66 (January, 1988):421. Two prominent works offering contrasting views about the social winners and losers in nineteenth-century contract law and contract law's relation to modern capitalism are Morton J. Horwitz, "The Historical Foundations of Modern Contract Law," *Harvard Law Review* 87 (March, 1974):917; A.W.B. Simpson, "The Horwitz Thesis and the History of Contracts," *University of Chicago Law Review* 46 (Spring, 1979):533.

10. This study is therefore analogous to the work of those historians who have attempted to gauge the movement by analyzing Populist legislative behavior. See, for example, William F. Holmes, "The Georgia Alliance Legislature," *Georgia Historical Quarterly* 68 (Winter, 1984):479; O. Gene Clanton, " 'Hayseed Socialism' on the Hill: Congressional Populism, 1891–1895," *Western Historical Quarterly* 15 (April, 1984):139; Allen W. Trelease, "The Fusion Legislatures of 1895 and 1897: A Roll-Call Analysis of the North Carolina House of Representatives," *North Carolina Historical Review* 57 (Summer, 1980):280; Peter H. Argersinger, "Ideology and Behavior: Legislative Politics and Western Populism," *Agricultural History* 58 (January, 1984):43; Peter H. Argersinger, "Populists in Power: Public Policy and Legislative Behavior," *Journal of Interdisciplinary History* 18 (Summer, 1987):81.

Populists who served on the supreme court of Kansas. To be sure, Populists or near Populists were elected to courts in several states. But only in Kansas, in 1897–1898, did the party obtain a majority on a high court. In fact, the Kansas Supreme Court of those years was potentially the most radical appellate court in American history. The men who made up its Populist majority were Stephen Allen and Frank Doster. The third member of the court was William Johnston, a Republican. In order to determine Populist legal attitudes, it is most important to analyze how these judges ruled in cases involving corporations. As a result, all opinions of Doster and Allen that related to disputes involving incorporated associations, partnerships, or other organized forms of business in 1897 were evaluated. The year 1897 was chosen because Populism was still a potent political force and because the Populist majority on the court was new and presumably eager to rule. During 1898 both national and Kansas Populism suffered fatal setbacks; Allen was defeated for reelection and spent part of the year as a lame duck. Moreover, by 1898 potential litigants had an opportunity to decide if they wished to appear before a Populist court. As a result, the 1897 cases should have presented the purest form of Populist jurisprudence.[11]

Allen and Doster achieved seats on the supreme court as a result of the tremendous groundswell for Kansas Populism. Beginning in the late 1880s, drought, the collapse of grain prices, the influence of the Farmers' Alliance, and the unresponsiveness of Republicans to rural problems produced the earliest and strongest local organization in the nation. The substance of Kansas Populism is traced to the preachings of the Farmers' Alliance. The party's first platform, in 1890, repeated earlier Alliance demands for abolition of national banks, free silver, paper money, and government ownership of railroads and telegraphs. In the campaign that followed the Populists won control of the legislature. Two years later, after forging an agreement with Democrats, the party elected the governor, a host of state officials, and five Congressmen. Among the chosen in 1892 was Stephen Allen, who won a six-year term on the state supreme court. Although the party refused to make common cause with Democrats in 1894, and suffered serious losses, cooperation sentiment was once again dominant in 1896. Populists and Democrats won a substantial victory, taking all of the important state offices, including the governorship, the legislature, and six seats

11. The sad but true fact is that the relatively small number of decisions rendered in Kansas in 1897 are and will remain the purest grain from the Populist legal mill. Although I systematically reviewed the decisions of Doster and Allen for several years before and after 1897, the circumstances of Kansas Populism and the non-Populist character of the Kansas court introduced complexities into the context of decision-making that could have diluted expressions of Populism. Populist judicial thought, if it was ever manifested, would have appeared in 1897.

in Congress. A principal beneficiary of the 1896 triumph was Frank Doster, who was elected chief justice of the supreme court.[12]

Stephen Allen's ascent to the bench was an archetypal story of western success. Born in 1847, he grew up in modest circumstances in upstate New York. Allen's family conditions were such that he worked odd jobs during his teens and was deprived of an extensive formal education. In the late 1860s, however, he managed to study law in the office of a local practitioner and gained admission to the bar. Allen then headed West. After a brief period in Missouri he settled in Pleasanton, Kansas, a small town about 70 miles south of Kansas City. There he developed a winning practice, entered local politics, and served two terms as the Democratic county attorney. Allen's Populist education had begun by 1890, when he was elected district court judge as a Democrat with Populist endorsement. His subsequent elevation to the supreme court also reflected the delicate balance of interests in Democratic-Populist cooperation politics. At the Populists' June 1892, state nominating convention, he defeated Democrat John Martin, but Allen himself was only a recent convert from Democracy.[13]

Stephen Allen was a sincere advocate of Populist principles who aired his reform ideas during his years on the bench. In 1897 he endorsed such eminently Populist proposals as a graduated income tax and government ownership of railroads. After his court years, between 1899 and his death in 1921, the former justice engaged in wide-ranging discussions of political and legal issues. Allen still supported government ownership of railroads, an income tax, low tariffs, a flexible, irredeemable national currency, and a law allowing the federal incorporation of private companies. He also published articles on administrative law, civil procedure, criminal law, and law and ethics. A devoted Wilson Progressive who favored the League of Nations, Allen wrote two large volumes on comparative and international law.[14]

The substance of Allen's legal reform was a broad-based challenge to the status quo. He criticized the excessive use of injunctions against striking labor organizations. He denounced the complexity of civil pleading rules. He advocated more compassion in the criminal law. Rehabilitation,

12. The literature of Kansas Populism is large and ever expanding. See especially Walter T.K. Nugent, *The Tolerant Populists: Kansas Populism and Nativism* (Chicago: University of Chicago Press, 1963); Peter H. Argersinger, *Populism and Politics: William Allen Peffer and the People's Party* (Lexington: University Press of Kentucky, 1974); O. Gene Clanton, *Kansas Populism: Ideas and Men* (Lawrence: University of Kansas Press, 1976); Scott G. McNall, *The Road to Rebellion: Class Formation and Kansas Populism, 1865–1900* (Chicago and London: University of Chicago Press, 1988); O. Gene Clanton, *Populism: The Humane Preference in America, 1890–1900* (Boston: Twayne, 1991).

13. Brodhead, "Stephen H. Allen," 77; Moline, "The Populist Court," 24–25.

14. Brodhead, "Stephen H. Allen," 81–84.

not punishment, was desirable, and the death penalty was wrong. Moreover, the law needed to seek out and condemn new classes of wrongdoers. "Reckless automobile drivers," irresponsible "Captains of Industry," and the dishonest merchant threatened the well-being of society as much as the more traditional burglar or murderer. The former judge also had much to say about judicial reform. He thought voters ought to be able to "recall" erroneous decisions, and, more generally, that less judges should be "recruited from the law departments of the railroad companies." Underlying these proposals was the broad assumption that modern government should undertake new responsibilities.[15]

The relationship between these views and Allen's judicial decisions was suggested in roughly 30 business-related opinions in 1897. Although the decisions naturally involved several categories of legal issues, for the purposes of this analysis the dominant concern was used to classify each dispute. The cases fell into four common law dominated areas: negligently inflicted personal injury or property damage, intentional wrongdoing, ownership of real property, and a wide variety of disagreements over the enforceability of contracts.

Perhaps no area presented a greater opportunity to reshape the law in a Populist direction than liability for injuries caused by negligent acts. Modern negligence rules were almost entirely court-created, and were only about as old as Kansas itself. More important from a political perspective, defendants in Kansas negligence cases were overwhelmingly railroads, one of the great objects of Populist reform. Plaintiffs, on the other hand, were individuals, passengers injured en route, pedestrians run over at crossings, or railroad workers mangled or killed on the job. And Kansas Populists certainly believed that the monopolistic lines should provide safe service or employment; increased railroad safety was endorsed expressly by their party.[16]

From a judicial perspective there was much room for maneuver. Rules relating to the existence of "negligence" were vague, turning on whether a defendant had acted without "due care." Whether a plaintiff was "contributorily negligent," thus barring recovery even when the defendant was at fault, further complicated attempts to devise mechanical rules of application.[17] To be sure, by 1897 there were hundreds of railroad-related personal injury decisions in Kansas and other jurisdictions that sought to identify the

15. Brodhead, "Stephen H. Allen," 81–84; Moline, "The Populist Court," 28.

16. Clanton, *Kansas Populism,* 61.

17. Negligence was defined broadly as "the neglect of the use of ordinary care or skill." Contributory negligence, similarly, occurred when the person injured by another's negligence "contributed to the injury by his want of ordinary care." Christopher Stuart Patterson, *Railway Accident Law* (Philadelphia: T. & J.W. Johnson & Co., 1886), 7, 45.

respective duties of railroads, employees, and pedestrians crossing railroad tracks. Negligence law was not boundless. Nonetheless, changing technology, varying sympathies of judges and juries toward railroads and other industries, as well as the inherent impossibility of formulating absolute rules of "due care" for every conceivable form of accident produced uncertainty and contradiction in rules and in application.[18]

Allen's negligence decisions showed a greater concern for safety than for railroad company profits. All seven of his negligence cases involved railroads as defendants, and five went against the lines. More important, favorable results were obtained by recognizing that railroads had extensive duties to protect the safety of employees and pedestrians and by giving wide authority to notoriously proplaintiff juries as fact finders. A particularly illustrative case was *Bradshaw* v. *Chicago, Rock Island & Pacific Railroad Company,* which involved an injury to an employee engaged in uncoupling moving cars. The principal issue was the legal effect of the defect in the couplers that caused the injury. The plaintiff testified that he was unaware of the defect, but the company introduced evidence that it had existed for more than a month before the accident. The established rule was that an employer would not be liable if the employee continued to work with knowledge of such a defect. Resolving the factual contradiction against the plaintiff, the trial court had dismissed the case by finding that because the defect was preexisting, the plaintiff had been contributorily negligent. Allen reversed, without citing precedent, holding that there was enough of a factual dispute that only a jury could make such a determination.[19]

Allen's decisions indicated railroads had other specific duties. He wrote, for example, that an injured bridge builder had "a right to rely on the foreman and the men working under him to construct a safe support before ordering him to go upon it." In another case he stated it was "unreasonable for [the railroad] to keep its trains standing across all the streets of a town for so long a time and deny the public any opportunity to cross." Such practices had led to the crushing death of a thirteen-year-old boy. Similarly, an urban railway was castigated for the death of a nine-year-old

18. Contemporary attempts to describe the law that were helpful to this study included Patterson, *Railway Accident Law;* Thomas G. Shearman and Amasa A. Redfield, *A Treatise on the Law of Negligence* (New York: Baker, Voorhis & Co., 5th ed., 1898) (Tellingly, the preface noted disagreement among courts and indicated that judges maintained a bias in favor of corporations by denying liability.); Thomas M. Cooley, *A Treatise on the Law of Torts,* (Chicago: Callahan and Co., 2nd 1888); and William B. Hale, *Hand-Book on the Law of Torts* (St. Paul: West Publishing Co., 1896). Lawrence Friedman has remarked that such treatise writers, who were trying to make sense of complex and rapidly evolving doctrine, admitted that in 1900 the law of industrial accidents was "wildly nonuniform, full of 'unpardonable differences and distinctions'." Friedman, *History of American Law,* 484.

19. *Bradshaw* v. *Chicago, Rock Island and Pacific Ry. Co.,* 58 Kansas 618 (1897).

on his way home from school: "It would be difficult to conceive a more reckless act than that of driving a street car at the rate of twelve miles an hour into a swarm of school children just as they are leaving school." The legal reasoning underlying these decisions was not a radical departure from existing rules about railroad obligations to employees or to persons crossing tracks. Allen's decisions harmonized with general principles of late-nineteenth century negligence law. Nonetheless, his opinions clearly emphasized deference to juries and rejected inordinate attachment to procedural or damages rules that would work in favor of railroads. Of particular significance was Allen's tendency to focus on supposedly unique facts, and to decide the cases with few, if any, citations to previous authority, particularly from states other than Kansas.[20]

Still, and congruent with Allen's faithfulness to precedent, there were limits to his willingness to impose liability. In *Atchison, Topeka, and Santa Fe Railroad Company* v. *Whitbeck,* he reversed a judgment for a nonemployee plaintiff on the ground that instructions given by the trial judge to the jury were erroneous:

> [The instructions] base liability on the maintenance by the Company of dangerous conditions in its yard, and its failure to protect the plaintiff therefrom. This is a novel theory of the law. The tracks and yards of railroad companies, over and through which cars are propelled, are, of necessity, places of danger; and the companies are not chargeable with any guilt or wrong whatever merely because a railroad yard is dangerous, for danger is necessarily incident to railroad service, as now developed and understood. To impose liability on the Company, something further must be shown. It must appear that it has done what it ought not to have done, or has neglected to do what it ought to have done, and has thereby unnecessarily increased the danger and caused injury to plaintiff. This idea is entirely excluded from the instructions asked and given.

Allen denounced the trial court's suggestions that "the Company was bound to guarantee the public safety while engaged about the stockyards" adjacent to the rails. He also attacked the notion that contributory negligence, if found, would bar the claim, because the company's wrongdoing was so egregious. Allen's opinion represented a direct assault on the trial court's attempt to stray from existing law and impose an absolute duty on railroads. In sum, Allen's negligence opinions indicate that although he believed railroads and other businesses had extensive public

20. *Kelly* v. *Union Pacific Ry. Co.,* 58 Kansas 161 (1897); *Atchison, Topeka & Santa Fe R.R. Co.* v. *Cross,* 58 Kansas 425, 427 (1897); *Consolidated City & Chelsea Park Ry. Co.* v. *Carlson,* 58 Kansas 62, 64 (1897).

duties, he also thought this area of law should not be used to satisfy general grievances against corporations.[21]

The nature of Allen's reform jurisprudence was restated in slightly different form in two opinions regarding intentional, as opposed to negligent, civil wrongs. *Wichita and Western Railway Company* v. *Quinn* was prompted when one W.J. Quinn, angered by the failure of a railroad to pay him for land condemned for a right of way, proceeded to take a rail out of track adjacent to his land. He was arrested after complaint by the railroad. Because of the unpaid debt, Quinn sued the railroad for malicious prosecution, and a sympathetic jury awarded him $2,600. Under existing law liability hinged on the existence of a criminal prosecution against the plaintiff, a judgment exonerating the plaintiff from criminal wrongdoing, lack of probable cause for the criminal prosecution, and maliciousness or ulterior motive by the party instigating the criminal action.[22] Allen reversed the jury's finding, holding that a Kansas statute making it a crime to destroy tracks provided at least probable cause for the arrest. The justice was entirely unmoved by the debt claim, concluding that it could not form the basis for damages even if Quinn's "good faith" might prevent his criminal conviction.[23]

Even more telling was *Drumm* v. *Cessnum,* in which a jury awarded the plaintiff the enormous sum of $8,000, also for malicious prosecution. The plaintiff had been arrested and charged with taking money from the defendant firm, perhaps a lender, by false pretenses. Once again, Allen reversed the verdict. He noted evidence that "the jury was prejudiced against the defendants, or their business," and suggested that this had distorted the result. In sending the case back for a new trial he wanted the jury to render a decision based only on legally relevant facts, and not on the status or reputation of the defendant. Like the negligence opinions, Allen's intentional wrong decisions suggest an assumption that law should not be used to express militant anti-corporatism.[24]

Another area of business litigation arose out of statutory rights to real property. Allen's ordinary, if mildly reformist, attitudes on this subject were displayed in two cases concerned with ownership and condemnation of real property. The first involved a dispute between the Union Terminal Railroad Company and a soap manufacturer over the amount of compensation to be paid by the railroad in a condemnation proceeding. It raised the question of whether evidence of the possible use of the condemned tract for a future addition to the soap factory was admissible. Without citing precedent, Allen adopted an expansive view of what testimony

21. *Atchison, Topeka & Santa Fe R.R. Co.* v. *Whitbeck,* 57 Kansas 729, 733–34 (1897).
22. Cooley, *Law of Torts,* 208.
23. *Wichita & Western Ry. Co.* v. *Quinn,* 57 Kansas 737, 743 (1897).
24. *Drumm* v. *Cessnum,* 58 Kansas 331 (1897).

could be heard. Discussions of the planned addition did not necessarily suggest wholly speculative profits, he thought, but helped identify the land's present market value. Given that railroads were a principal private holder and user of eminent domain, and that Populists believed railroads had already acquired too much land through public grants as well as eminent domain, the decision should have pleased Allen's party.[25]

Southern Kansas Railway Company v. *Showalter* addressed the ownership of a vacated street in the tiny town of Wellington. The railroad, which owned lots on the north side of the street, claimed the property based on a state law that provided that owners of adjacent property to vacated land could claim title. Showalter, on the other hand, argued that according to the same law, as owner of lots on the south side of the street, she was entitled to half the vacated street. Allen wrote an opinion that decided the case against the railroad. It did not matter that Showalter's property was not originally in the town, and that the creation of the street probably prevented the railroad from obtaining the land through eminent domain in the first place. Allen, without citing precedent, concluded simply that, according to the language of the statute, because the land had not actually been taken from the railroad, it should be divided equally among abutting landowners.[26]

Despite the importance of personal injury and property disputes, the largest number of Allen's opinions involving businesses related to contract rights. Fittingly, while negligence and property questions often involved railroads, contract litigation frequently asked the court to address the other primary economic relationship that concerned Populists: the rights of creditors and debtors, particularly real property mortgagors and mortgagees. Contract law in the 1890s was dominated by judge-made rules. There were relatively few statutory interferences with contract law, including protections for consumers or employees. The basic legal issues in contract cases were whether there was a binding agreement, and, if so, what rights or obligations were thereby conferred upon the parties.[27]

Contract cases naturally involved quite different factual circumstances. There were disputes over employment terms, mortgages on real and personal property, cash debts, and what competing creditor could seize the

25. *Union Terminal R.R. Co.* v. *Peet Brothers Manufacturing Co.,* 58 Kansas 197 (1897). The Kansas eminent domain statute appeared in *General Statutes of Kansas, 1897* (Topeka: W.C. Webb, 1897), c. 68.

26. *Kansas Pacific Ry. Co.* v. *Showalter,* 57 Kansas 681 (1897). The statutory provision is in *General Statutes of Kansas, 1897,* s. 811.

27. Contemporary attempts to expound contract rules that were useful to this study included Francis Wharton, *A Commentary on the Law of Contracts* (Philadelphia: Kay & Brother, 1882); Theophilus Parsons [Samuel Williston, ed.], *The Law of Contracts* (Boston: Little, Brown & Co., 1893); and William L. Clark, *Hand-Book of the Law of Contracts* (St. Paul: West Publishing Co., 1894).

meager assets of a bankrupt. Each of these conflicts could and did pose a number of legal issues for the court, some of which involved legal principles only partly incorporated within the general law of contract. For purposes of this analysis, the contract cases were arranged into three categories: disputes over "pure" debts for cash or real property, including mortgages, disputes over business arrangements such as employment, insurance, and leases, or the sale of personal property, and disputes among creditors for the property of a mutual debtor. These groupings do not reflect traditional categories of legal analysis. Rules purporting to govern secured debts for real property, for example, were quite distinct from those which addressed other kinds of debts. Instead, it was hoped that something could be learned about Populism by systematically grouping and considering the treatment of certain classes of parties.

The most likely area of Populist influence should have been in cases concerned with contests over debts for cash or for money loaned to purchase real property. After all, much party spleen was directed at the greed of lending banks and land companies. The precursor to the party, the Farmers' Alliance, diligently sought to alter existing credit relationships, especially those related to the mortgage. Moreover, Allen had considerable opportunity to push the law in a Populist direction. Of the five cases of this kind assigned to him, all included either a bank or an investment company against an individual or individuals.

Significantly, however, Allen failed to create new legal barriers for this variety of creditors. A good example was *Teats* v. *Bank of Harrington,* in which the bank received a cash judgment against Teats. When Teats refused to comply with an order to appear in court and provide answers as to why the judgment had not been satisfied, the presiding judge had her arrested in another county. After the arrest an examination of the debtor's property was made and an order to use the property in settlement of the debt issued. Teats appealed on the ground that the arrest was illegal and thus the subsequent judgment was invalid. Allen held for the bank, stating that it did not matter if the arrest was invalid, because the trial court had jurisdiction over the debt regardless of where Teats resided. Certainly one legal effect of the holding was not pathbreaking; Kansas trial judges obviously had broad powers to enforce orders. Nonetheless, Allen's opinion could hardly give solace to Populist debtors, because it meant their person might be forcibly detained as long as a court had authority to determine the fate of their property.[28]

28. *Teats* v. *Bank of Herrington,* 58 Kansas 721 (1897). On judges' contempt powers, see *General Statutes of Kansas,* c. 85, s. 2 (1897).

Even more revealing was *Thomas* v. *Owen,* which involved a foreclosed piece of land in Emporia. The mortgagee, or the entity that loaned money for the property, was a Wisconsin insurance company, and it achieved the foreclosure and subsequent sale in federal court. Owen, the displaced mortgagor, claimed that he had never received a summons relative to the federal case, thus making the sale illegal. A Kansas jury agreed and awarded him $3,600. However, relying on earlier Kansas precedent and cases from Indiana, Alabama, and Pennsylvania, Allen reversed, finding that the federal magistrate's statement that a summons had been served was conclusive as a matter of law. There could not be a later inquiry into whether the federal court had jurisdiction. Once again, the ruling was in harmony with persuasive non-Populist precedent. The decision certainly should have erased conservative fears that judgments of Republican-dominated federal courts, even when the rights of an out-of-state lender were asserted, would be nullified by Populists.[29]

Yet the best example of Allen's solicitude for owners' and creditors' legal rights is *Marysville Investment Company* v. *Holle.* It was a complicated dispute, involving claims between settlers and the company over title to land in Marshall County. The principal question was whether the settlers' presence on the land over many years prevented the company from claiming title, despite the fact that it appeared the company possessed superior written contract rights. A jury, acting on instructions from the trial judge, found that the land belonged to the settlers. Allen, however, reversed and remanded for a new trial. He thought the evidence demonstrated that legal title passed from the government through several written transfers to the company. This result was necessary even though "the plaintiff corporation appears somewhat in the attitude of a speculator in stale titles." Moreover,

> We are well aware that the law relating to title to land falls far short of effecting an equal, or seemingly equitable, distribution of the face of the earth among the people. Arbitrary rules, often exceedingly harsh, fix the rights of parties. Courts are not at liberty to take from one and give to another whom they deem more worthy, unless the established rules of law sustain his right. In the eye of the law, the need of one weights nothing against the strict right of another, who may have absolutely no apparent use for the property in controversy. It is better that we should adhere to and enforce the law as we find it than be guilty of any disregard of its principles for the purpose of attaining what, to us as individuals, may appear better justice.

29. *Thomas* v. *Owen,* 58 Kansas 313 (1897).

Allen's statement suggests a conservative attachment to existing law. In short, Justice depended on fealty to clearly stated rules, even when the immediate result might be to injure a Populist constituent.[30]

Allen's record in the employment, insurance, and lease disputes was largely conventional, although, much like in the negligence cases, he tended to obtain results against corporations. In *Cunningham* v. *Colonial and United States Mortgage Company,* the trial court had summarily found on the company's motion that a loan collector employee owed the company several thousand dollars. When the amount was not paid, the Court had the employee thrown in jail. Allen disagreed, without citing precedent, finding that there were disputed issues of fact and that under the circumstances the jailing of the employee for failure to pay the debt was contrary to law. Allen also wrote an opinion denying claims by a fire insurance company that a foreclosure on insured real property terminated its contractual obligation. He believed the insurer could not avoid liability simply because the beneficiary of the policy was the mortgagee. He later authored an opinion that held that state courts had extensive jurisdiction to determine the contract obligations of out-of-state corporations even when their contracts were not entered into in Kansas and when the presence of the company there was limited to an insurance sales agency.[31] The significance of these decisions is not that they were expressions of a new Populist law; they were not. For example, it was accepted that ambiguities in insurance contracts were to be construed in favor of the insured. Nonetheless, the results clearly protected persons from inequitable avoidance of contract obligations by corporations.

A more persuasive indication that Allen had a special aversion to equitably unjust refusals to perform appeared in two cases involving land leased from Indians. In *Kansas and New Mexico Land and Cattle Company* v. *Thompson* he wrote an opinion that stated that if an individual leased Indian land with consent, the individual could agree to let others use the land as pasture and then collect from the users the value of the grazing. The company had argued that a federal law prohibited the Indians from leasing the land, thus making any subsequent contract unenforceable. Although conceding the illegality of the original lease, Allen emphasized the inequity of allowing the cattlemen to use the land and then avoid

30. *Marysville Investment Co.* v. *Holle,* 58 Kansas 773 (1897).

31. *Cunningham* v. *Colonial and United States Mortgage Co., Ltd.,* 57 Kansas 678 (1897); *Lancashire Insurance Co.* v. *Boardman,* 58 Kansas 339 (1897); *German Insurance Co.* v. *First National Bank of Boonville, New York,* 58 Kansas 86 (1897). On the constitutional prohibition against imprisonment for debt, except in cases of fraud, see Kansas Bill of Rights, s. 16.

payment. More revealing, however, was that this case led to a subsequent dispute between the Indians and the lessee, the victor in the earlier supreme court opinion. The winner now refused to pay the Indians on the ground that the lease was invalid. On this point, however, Doster and Johnston held that the Indians had no rights. They distinguished the earlier case on the theory that rights were based on an agreement between the lessee and a third party that was not prohibited by law. In contrast, the agreement between the Indians and the lessee was barred by statute and was thus unenforceable. Allen dissented. He thought Congress wanted to protect, not punish, Indians, and that the Court's ruling had the effect of "turning legislation intended as a shield for the weak and unsuspecting into a sword in the hand of their enemies." As in the earlier decision, he wanted the court to utilize equity to prevent the unjust enrichment of a party that had benefitted from the use of the Indians' land.[32]

The third and final type of contract matters Allen faced were disputes among creditors. Generally, they arose when a debtor slid into insolvency and only limited assets remained. The creditors' lawsuit was a scramble over what was left. The disputes might take place in the context of Kansas' statute that prohibited transfers from debtors in order to defraud creditors.[33] Questions as to whether debtors were hiding assets and as to the effectiveness of liens and attachments were also quite common. Because these legal battles tended to become intercorporate affairs, they failed to present some of the stark class confrontations of other contract cases. Accordingly, they were analyzed to determine Allen's general attitudes toward corporations and creditors.

The outstanding policy theme was not leniency toward debtors. In fact, Allen consistently denounced attempts to escape just debts, particularly by fraudulent transfers. In *Watson* v. *Holden,* creditors of a fallen bank argued that the bank, in its waning days, had created paper companies to hide ownership of mortgages on real property. Although deciding the dispute on other grounds, Allen agreed there was a scheme to conceal:

> [t]hese companies were unsubstantial, if not mythical entities . . . [t]hey had no property except such as the bank gave them. . . . Courts do not hesitate to break through and brush away such figments, and treat that as fraudulent which deceives the creditors and conceals from them the true situation of the debtor's property.[34]

32. *Kansas & New Mexico Land and Cattle Co.* v. *Thompson,* 57 Kansas 792 (1897); *Mayes* v. *Cherokee Strip Live Stock Association,* 58 Kansas 712, 720 (1897) (Allen, J., dissenting).

33. *General Statutes of Kansas, 1897,* c. 111.

34. *Watson* v. *Holden,* 58 Kansas 657, 664 (1897).

In another appeal, Allen chastised a merchant for hiding the assets of his declining business. His incorporation of a separate company was "a paper scheme devised in his own interest," and the trial court correctly nullified the "elaborate fabrications of charters, by-laws, and paper transfers."[35] Similarly, he reversed a jury verdict for a debtor because of erroneous anticreditor instructions. He thought there had been a fraudulent attempt to avoid the grasps of an encircling hardware supplier when the merchant transferred his stock to his brother.[36]

Moreover, Allen was not interested in limiting remedies available to corporate creditors. In a claim by a corporation holding a mortgage on cattle, he held, despite an unusual arrangement with a third party regarding the ownership of such mortgages, that the corporation had priority over an individual claiming the same property.[37] The point was made even more clearly by the only case in this study which generated a dissent from Johnston, the Republican justice. *Standard Implement Company* v. *Lansing Wagon Works* was a fight among three corporate creditors for the assets of a farm implement dealer debtor. The extent of difference between Johnston and the Populist was that Allen's opinion was implicitly more hostile to lienholders seeking to overturn an attachment order in favor of an earlier creditor. Johnston wanted to give subsequent creditors a better opportunity to attack the previous judgment. The narrowness of the legal dispute, which concerned only the "scope of inquiry" in determining whether the prior attachment could be overturned, indicated that there was no fundamental difference among the justices regarding the general rights of corporations as creditors. In sum, Allen's opinions were neither anticorporate nor anticreditor.[38]

Kansas' other justice, Frank Doster, was among the nation's most prominent Populists. Born in what is now West Virginia in 1847, his western experience began quite early, as he moved to Indiana and then to Illinois while still a boy. It is unlikely that his family possessed significant wealth. Doster's first great adventure came when he joined an Indiana calvary group in 1864, and, for the remainder of the Civil War, served in Tennessee and Mississippi. After Appomattox, his unit was sent to the Kansas frontier, where it performed duties along the Santa Fe Trail. Doster subsequently returned to Indiana and Illinois for formal education. He attended various schools in the mid- and late 1860s, including Indiana University,

35. *Kellogg* v. *Douglas County Bank,* 58 Kansas 43, 50–51 (1897).

36. *Morse* v. *Ryland,* 58 Kansas 250 (1897).

37. *Ketcham* v. *Barse Live Stock Commission Co.,* 57 Kansas 771 (1897). Doster only decided one case of this variety, *McDowell* v. *Gibson,* 58 Kansas 607 (1897), which also failed to demonstrate any overriding bias against creditors. It merely encouraged the finality of original judgments against attacks from subsequent claiming creditors.

38. *Standard Implement Company* v. *Lansing Wagon Works,* 58 Kansas 125 (1897).

Illinois College, and the Benton Law Institute. Doster had been impressed by the openness of the Kansas plains, still largely unsettled, while in the Army. In 1871 the newly licensed lawyer decided to return and settle in Marion, a small town in central Kansas.[39]

Over the next 60 years Doster achieved a successful law practice and considerable political prominence. Involved at first in Republican politics, he made a successful run for the state legislature in 1871. The subsequent rise of reform third parties dramatically altered his future. In 1878 he abandoned the Republicans in favor of the new Greenback Party. By 1890 he was among the early converts to Populism. Throughout the early 1890s Doster was a devoted party advocate, providing legal representation to Populists in contested elections, making speeches, and participating in party leadership. Of course, such activities were curtailed after his elevation to the supreme court, and by the time his term expired in 1903 Populism had faded from the landscape. For the remainder of his life, with the exception of a failed bid for the United States Senate in 1914, he conducted a Topeka law practice, published essays, and made speeches for reform causes.[40]

Doster's active political engagement between 1890 and 1896 produced many revealing statements of faith. In 1891 he created a furor among Kansas Republicans by stating that "the rights of a user of a thing were paramount to the rights of its owner." This revolutionary concept of property derived from Doster's reading of contemporary reform thinkers, including Henry George and Edward Bellamy. Doster also questioned the ability of laissez-faire to achieve social justice. Society was too interdependent, power too easily concentrated, for fairness to emerge under the old economic dogma. Instead, he supported government action to prevent the negative effects of personal greed and to mitigate inherent conflict between capital and labor. Populist remedies of more currency and government ownership of railroads could help bring about a desired "equality of human brotherhood."

These ideas naturally affected his attitude toward the law. He disliked the reigning judicial activism of the federal Supreme Court, particularly the use of the Fourteenth Amendment to shield private property. He considered the legislature, and not courts, as the superior law maker. Indeed, he repudiated altogether the ability of courts to review statutes for constitutionality. Yet Doster did not reject existing private law. Believing recent judicial tendencies had merely distorted its original function, he thought

39. Doster's public career has received considerable attention. See especially Brodhead, *Persevering Populist;* Moline, "The Populist Court"; Malin, *A Concern About Humanity,* 132–55; Clanton, *Kansas Populism,* 106–10; Pollack, *The Just Polity,* 136–45.

40. See generally Brodhead, *Persevering Populist.*

that law, including the common law, was a necessary means of achieving justice. His support for tradition and change were merged in an 1896 campaign promise to "diligently search the books and find some law through which the interests of the common people will be served."[41]

In 1897 Doster wrote about 30 business-related opinions. Not surprisingly, he addressed issues similar to those considered by Allen. Negligence claims against railroads and disputes over contractual rights predominated. Intentional wrongs and controversies relating to the organization of corporations received more limited attention. However, as chief justice, Doster was able to choose which justice would author an opinion. He used this prerogative to give himself some especially important cases. His control even extended to writing for the majority on points with which he personally disagreed.

Negligently caused personal injury was the second most frequent subject of his opinions. Doster authored eight such decisions, and all except two involved railroads as defendants. Generally, his legal conclusions placed high burdens on the lines. Doster, in fact, was even more willing than Allen to express openly the policy goal of public safety. His sentiments appeared most plainly in discussions of a few crucial legal principles. One particularly persistent device was deference to proplaintiff juries. In *Atchison, Topeka, and Santa Fe Railroad Company* v. *Swarts,* despite overwhelming evidence in favor of the company's version of the facts, the chief justice sided with the plaintiff and the discretion of the jury. He expressly rejected attempts to use different New York precedent to weaken this discretion.[42]

Doster also made calculated moves to reduce the possibility of a successful defense of contributory negligence in the context of crossing accidents. Especially demonstrative was a case in which this early champion of women's suffrage used prevailing prejudices against women to allow recovery. When a defendant argued that the contributory negligence of a carriage-driving husband should be imputed to the wife because she directed the trip which led to her injury, Doster disagreed, noting that it was a "universal sense of mankind, [that] a privilege of management, a superiority of control, a right of mastery on such occasions is accorded to the husband, which forbids the idea of coordinate authority, much less a supremacy of command, in the wife."[43]

The Chief Justice, moreover, placed specific duties of care on corporate

41. Brodhead, *Persevering Populist,* 56–112. Doster also said: "I know only one code of law and that is the same one studied by other lawyers and I shall try to follow it as best I can." Such assurances hardly placated anxious Republicans, who made his more radical statements the focus of the Republican-Fusion contest of 1896. See *Id.* at 101–02.

42. *Atchison, Topeka & Santa Fe R.R. Co.* v. *Swarts,* 58 Kansas 235, 239 (1897).

43. *Reading Township, Lyon County* v. *Telfer,* 57 Kansas 798, 802 (1897).

defendants. One such case involved injury to a minor trespasser. In *Price* v. *Atchison Water Company* an eleven-year-old boy fell into the company's reservoir and drowned. The trial court had dismissed the claim in favor of the company, presumably because the defendant had built a barbed wire fence around the water. Reversing, Doster stated that the common law punished those who did not take "reasonable precautions" to insure even trespassers' safety. Especially noteworthy was the manner in which the Chief Justice curtly dismissed the company's argument that it was absolved from any liability because it had erected a fence. He noted the obvious fact that the fence did not work, and added that the company knew persons had crawled over it in the past. Doster also thought that "boys can seldom be said to be negligent when they merely follow the irresistible impulses of their own natures." Much of this was legally significant. The doctrine of "attractive nuisance," which creates liability for property owners who maintain "alluring" conditions which lead to injury, especially to children, was then a subject of great contention. Doster's decision established that Kansas, unlike many other states, would give an expansive reading to the rule.[44]

Doster's perspective on liability also surfaced in disagreements with his fellow justices on the specific question of evidence of lack of due care. In *Atchison, Topeka, and Santa Fe Railroad Company* v. *Tindall,* Johnston and Allen reversed a verdict in favor of an injured railroad employee. They found that there was no evidence that the company was negligent, and held that the employee, at any rate, had been at fault. Although Doster agreed that contributory negligence may have occurred, he thought knowledge of dangerous conditions could be imputed to the company: "A railroad company is presumed to have knowledge of a defect in its machinery, or a dangerous condition of its track, existing under such circumstances as to give it reasonable opportunity to learn of the same." Later, in dissenting from two sections of the *Swarts* opinion, Doster again argued that there should be an assumption that a railroad knows of a continuing defect. In short, Doster attempted to weaken the prevailing rule that an employer was not liable for injuries when the defect was latent by imposing a presumption of employer knowledge.[45]

Even if he was a stickler for safety in railroad switching yards, *Atchison,*

44. *Price* v. *Atchison Water Company,* 58 Kansas 551, 554, 557 (1897). On the development of the attractive nuisance doctrine, see Fowler V. Harper, Fleming James Jr., and Oscar S. Gray, *The Law of Torts* (Boston: Little, Brown, & Co., 2d ed., 1986), Vol. 5, 159–88.

45. *Atchison, Topeka & Santa Fe R.R. Co.* v. *Tindall,* 57 Kansas 719, 726 (1897); *Swarts,* 58 Kansas at 241–42. Beyond demonstrating deference to juries and weakening the likelihood of contributory negligence, Doster also displayed a tendency to nullify plaintiffs' pleading errors. See *Chicago Rock Island & Pacific Ry. Co.* v. *Mills,* 57 Kansas 687 (1897) (woman wrongly sued as administratrix of killed husband, not widow; she was allowed to maintain case).

Topeka, and Santa Fe Railroad Company v. *Willey* established that Doster did not favor abandonment of the fault standard. In this dispute George W. Willey was hit by a locomotive while driving his wagon across tracks on the open plains of central Kansas. Willey won a substantial jury verdict, but Doster reversed. To be sure, he thought the railroad's poor maintenance of a view-blocking high hedge adjacent to the accident scene was negligence. On the other hand, he believed it could have been contributory negligence that Willey did not stop to see if a train was approaching: "Regard for one's own personal safety, and that of others to whom he may stand in dangerous relations, requires that exercise of diligence and caution; and the policy of the law should be to impose penalties upon the negligent injurer, and likewise to hold relief from the negligent sufferer."[46] Most important, the decision indicated that Doster was willing to follow the prevailing legal notion that plaintiffs had a specific duty to protect themselves even when a railroad was negligent.

Doster's two non-negligence civil wrong cases also tend to suggest that his decision-making did not repudiate established rules, even if they might impose liability on railroads. The first was a private nuisance action brought by an abutting land owner for damages caused by the erosion of a railroad drainage ditch. Doster thought precedent precluded liability for the otherwise lawful diversion or obstruction of surface water. Yet he found for the plaintiff because the source of the flow, a railroad right of way, was unnatural. Doster relied in part on the well-known English case of *Rylands* v. *Fletcher,* which he described as supporting the principle that one who brings something "likely to do mischief" onto his property is responsible for all damage regardless of fault if the "dangerous" material escapes.[47] Still, railroads were not responsible for all injury. In a malicious prosecution action Doster reversed a jury verdict against a railroad because the corporation could only be liable for the actions of its agents when the wrongful acts were "performed in the line of employment of such agent and in the execution of the authority conferred." The jury had been willing to assess damages even though it believed the agent was not acting on behalf of the company in directing a complaint against a purported burglar. Doster apparently did not wish to expand the vicarious liability of corporations.[48]

Neither negligence nor other civil wrongs, however, made up a majority of Doster's business docket. Instead, most of his opinions addressed

46. *Atchison, Topeka & Santa Fe R.R. Co.* v. *Willey,* 57 Kansas 764, 770 (1897). For a discussion of variations in the application of this, the Stop-Look-Listen Rule, see Harper et al., *The Law of Torts,* Vol. 3, 570–72.

47. *Reinhart* v. *Sutton,* 58 Kansas 726, 731–32 (1897).

48. *Atchison, Topeka & Santa Fe R.R. Co.* v. *Brown,* 57 Kansas 786 (1897).

contract rights. He evaluated agreements for mortgages, cash loans, sales, and insurance. Doster generally managed to excuse himself from the kind of tedious contest among creditors suits that plagued Allen. As a result, the issues in his contract cases more frequently involved direct confrontations between individuals and corporations, particularly banks, insurance companies, and railroads.

Doster's decisions in the land-debt area often benefitted Populist constituents, if not radically. He achieved favorable results most often by giving beneficial readings to the state's Statute of Frauds, which required contracts for the sale of land to be in writing, and to the constitutional Homestead exemption, which allowed landowner-debtors to exempt up to 160 acres from a money judgment. In one Statute of Frauds case Doster held that a letter to a third person, not the buyer, stating that a piece of land had been sold, was sufficient to meet the writing requirement.[49] Similarly, he reversed the judgment of a trial court and held that Kansas law bound a mortgage company to the terms of its written offer of sale.[50] Doster's interpretation of the Homestead exemption is also suggestive. In *Peak* v. *Lenora State Bank,* because the debtor Peak lived on a less valuable piece of his farm, and because the Homestead provision only protected property that contained the actual home place, Peak faced the prospect of losing his choice land. The case asked whether Peak could protect the better land by moving onto it after judgment. Doster validated Peak's actions by ruling generally against the creditor-bank. He reasoned that "Homestead interests are subjects of special favor by the courts, and claims of homestead exemptions are to be liberally viewed."[51]

Decisions involving cash and service exchanges produced equally suggestive conclusions. The most important was a tendency to evaluate and enforce corporate agreements based on the extent of the company's "public" role. Of course, the law had long given special treatment to business

49. *Miller* v. *Kansas City, Fort Scott & Memphis R.R. Co.,* 58 Kansas 189 (1897). The statute was located in *General Statutes of Kansas, 1897,* c. 112, s. 6.

50. *Bogle* v. *Jarvis,* 58 Kansas 76 (1897). See also *Miller* v. *Kansas City, Fort Scott & Memphis R.R. Co.,* 58 Kansas 189 (1897) (contract was sufficient under Statute of Frauds even though price paid was not written). Still, there were limits to Doster's lenient reading of real estate contracts. In *Carbondale Investment Co.* v. *Burdick,* 58 Kansas 517 (1897), he reversed a jury verdict against a real estate developer. Doster relied on established rules allowing that damages awarded the injured purchasers had been based on unduly speculative evidence and that the jury had been wrongly allowed to interpret the contracting parties' intent when the written language of agreement was unambiguous.

51. *Peak* v. *Lenora State Bank,* 58 Kansas 485 (1897). The Homestead provision was located in Article 15, s. 9 of the Kansas Constitution. It had long been generally recognized in American law that such exemptions were to be given a broad reading. For this reason Doster's attitude toward the Statute of Frauds may be more legally significant, as many courts viewed the writing rule restrictively. See C. Dallas Sands, *Statutes and Statutory Construction* (Chicago: Callahan & Co., 3d ed. rev., 1974), vol. 3, ss. 69.06, 70.02.

affected with a public interest, particularly carriers. Doster appeared especially interested in the distinction. In *Solomon Salt Co.* v. *Barber,* for example, he ruled that a company could not avoid its shareholders' agreement to purchase the stock of another shareholder in the company's name. Such commitments were not outside its corporate authority. But Doster then expressly questioned whether such internal agreements would be enforceable for companies involved in "public service," such as "railway and water companies."[52]

The "public service" idea may have had some effect in several cases. *Alexandria, Arcadia, and Fort Smith Railroad Company* v. *Johnson* involved a railroad's attempt to excuse itself from the obligations of a contract. The railroad argued that certain promises were beyond its corporate powers. However, citing decisions from Kansas and other states, Doster reversed the trial court and bound the company to the agreement because it would have been unjust to allow one party not to perform when the other party had already met the terms of the bargain.[53] A similar result obtained when a railroad failed to live up to its agreement to provide an individual with annual passes. One of the railroad's defenses was that the federal Interstate Commerce Act prohibited railroads from giving passes. Although Populists often argued that passes were used to corrupt politics, Doster held that the company could not "shelter itself" behind the law, because it had already exchanged the passes for land.[54]

Another analysis of a public service company's obligations was *Mulvane* v. *O'Brien.* The case involved a rather sordid scheme by one Joab Mulvane, the president of a water company, to sell the utility to new investors. He reached an agreement with O'Brien, a shareholder, to transfer O'Brien's shares to the buyers at par. In return, O'Brien agreed to let Mulvane keep any selling amount above par. Actually, Mulvane already knew that he could sell the shares for far above the par amount. Doster refused to enforce the agreement between Mulvane and O'Brien on the corporate law ground that Mulvane had only limited duties to shareholders. Instead, according to Doster, liability for the wrong grew out of the fact that Mulvane was actually the direct agent of O'Brien. The emphasis was on requiring ethical conduct by corporate managers.[55]

Despite the radical potential of the "public service" idea, Doster drew a traditional boundary as to what kinds of corporations might be considered

52. *Soloman Salt Co.* v. *Barber,* 58 Kansas 419, 423–24 (1897). For a nearly contemporary view of the unique status of "public" corporations, see Bruce Wyman, *The Special Law of Public Service Corporations* (New York: Baker, Voorhis, & Co., 1911), especially Vol. I, pp. 1–36.

53. *Alexandria, Arcadia & Fort Smith R.R. Co.* v. *Johnson,* 58 Kansas 175 (1897).

54. *Curry* v. *Kansas & Colorado Pacific Ry. Co.,* 58 Kansas 6, 18 (1897).

55. *Mulvane* v. *O'Brien,* 58 Kansas 463 (1897).

"public." He was thus uninterested in a redefinition of the obligations of insurance companies. Insurers were not classed historically with carriers and other public service corporations, although their contracts were subject to special rules. One revealing insurance dispute involved the liability of a fraternal organization.[56] Doster's attitude toward such groups is important. After all, Populism had sprung from a fraternal organization, the Farmers' Alliance.[57] Despite this, Doster failed to view the legal responsibilities among members of "fraternal cooperative societies" apart from prevailing legal concepts. It is, he thought, a "contract relation," and "in the effort to ascertain the rights of a member against the [co-operative] upon the occasion of a loss by him, their positions and interests are antagonistic." The case asked whether a member petitioning for disability benefits could bring suit in court. Doster thought a mere "custom" that a party could not pursue ordinary legal remedies was not valid, and held against the cooperative. As a result, he suggested that the apparent inequity of denying the performance of a contract outweighed any damage to the cooperative structure. The decision was in harmony with prevailing principles of insurance law.[58]

Any attempt to determine whether appellate decisions can illuminate Populism faces considerable barriers. Given flexible legal rules and inevitable factual differences, there is a seemingly infinite number of nonquantifiable variables. There are also institutional complications, such as the fact that the decisions, although authored by one individual, were intended to reflect the view of the entire court. The dilemma this poses is evidenced by the failure of the Republican justice, Johnston, to disagree more often. Even if Johnston was not a conservative, his lack of dissent makes it impossible to designate areas of dramatic disagreement between him and his Populist brethren.[59]

Nonetheless, in 1897 two committed Populists signed their names to

56. *Order of Select Friends* v. *Dey,* 58 Kansas 283 (1897). Insurance law is analyzed in Charles Fisk Beach, Jr., *Commentaries on the Law of Insurance,* 2 Vols. (Boston: Houghton, Mifflin & Co., 1895).

57. Even more important, according to Lawrence Goodwyn, the "cooperative crusade [of the Alliance] provided the mass dynamics for the creation of the People's party." Lawrence Goodwyn, *Democratic Promise: The Populist Moment in America* (New York: Oxford University Press, 1976), 142.

58. *Dey,* 58 Kansas at 287, 292. Doster did not rule every insurance claim valid. For example, he wrote an opinion in favor of one insurer because the policyholders had failed to file their claim within the time limits of the Statute of Limitations, the very sort of "technical" defense one might expect to have reduced validity for an anti-corporate Populist. *Cottrell* v. *Manlove,* 58 Kansas 405 (1897). He also reversed a jury finding of fraud against an insurance company because the trial judge had given the jury a too lax definition of what degree of proof was required to show fraud. *Kansas Mill Owners' and Manufacturers' Mutual Fire Insurance Co.* v. *Rammelsberg,* 58 Kansas 531 (1897). On the prevailing view that contract governed relations between policyholders and benevolent associations, see Beach, *Law of Insurance,* Vol. 1, 111–50.

59. On Johnston's lack of conservative bias, see Brodhead, "Stephen H. Allen," 78.

roughly 60 business-related opinions. Most important for the analyst, there is enough discernable coherence, consistency, and direction in their individual and collective efforts to warrant several conclusions. The clarity and uniformity is most obvious in the negligence and intentional wrong realm. There, the persistent circumstance of large, often interstate railroads pitted against maimed individuals confronted Allen and Doster with patently demonstrable social choices. Both men responded by using this area of law to force railroads, and, to a limited extent, other businesses, to increase public and employee safety. They did this by deferring to juries and by increasing the legal duties of defendant corporations. Interestingly, there was disagreement among the two Populists. Doster was more anxious than Allen to create rules ensuring liability, especially on the ground that certain acts by railroads were negligence as a matter of law.

Equally revealing, however, neither judge was willing to challenge the fault standard by imposing absolute liability for any harm, and neither judge, even when imposing liability, took obviously radical stands outside the general bounds of tort law. Their decisions reaffirmed the centrality of fault and recognized that only plaintiffs free of fault could recover. This, of course, left the burden and uncertainty of legal action on injured plaintiffs. The expense, difficulty of proof, and slowness of process meant that, as a practical matter, some wrongs would go without remedies. Even when results favored plaintiffs, Doster and Allen at most simply modified existing law; they did not indicate that Populism offered a genuinely radical alternative. The Populist version of negligence did not challenge the prevailing dogma that only demonstrable corporate "fault" merited recovery.

Whether the contract decisions reflected a genuinely innovative Populist position is even more doubtful. The difficulty of analysis is compounded by the fact that, unlike in negligence, the contract matters might fail to array a poor individual against a mighty corporation. Worse, even when an obvious Populist contest was presented, the corporation could usually come to court with a promise from the individual to do something that had not been done. At any rate, about the most that can be said of Doster and Allen's contract decisions is that in their Court agreements were enforced regardless of technical defenses. This sanctioned corporations that attempted to use superior legal staying power by denying contract liability pending litigation. The two more consistent legal means of obtaining this end were rejecting claims that corporations lacked power to enter into agreements and openly condemning and punishing corporate fraud. Yet the narrowness of this theme, as well as its grounding in traditional rules of equity and contract, is such that it indicates that there was no aggressive Populist redefinition of contract rights, even for mortgagors of real property.

In fact, the general impression left by Populist contract decisions is decided ordinariness. Allen and Doster always returned to the fundamental principle that individuals are obligated to perform their considered agreements. This view obtained even if the failure to pay a debt or to have any protected right resulted in financial difficulty, including the loss of real property to a corporation. It also prevailed regardless of which party suffered the greater hardship. Perhaps the best indicator of the nature of the contract decisions is that contract operated as an organizing and binding force even in the context of dispute between a fraternal cooperative and one of its members. By stating that the relationship among participants in a cooperative was contractual, Doster and Allen appeared to be indicating that contract was a just way of arranging relations among individuals and corporations.

Doster and Allen's legal reasoning suggests several characteristics of the context of Populist reform. Although Populists were serious about finding means to hold "natural monopolies," such as railroads, to a high standard of behavior, particularly in the negligence area, their doctrine did not challenge the idea that established common law principles, such as the fault standard and freedom of contract, should function as fundamental sources of private rights and obligations. Moreover, neither Allen nor Doster ever gave the slightest hint that the corporate form was wrong or unjust or that cooperatives were a wholly distinct and more desirable entity. Nor did they try to weaken corporations through radical definitions of property or contract rights. In contract, Doster repeatedly rejected corporations' arguments that they lacked the power to make a promise, and both men were determined supporters of corporate creditors. In short, the law was not repudiated, even when its effect in some cases could be to compound differences in wealth and power.

Also revealing is the Court's strong adherence to precedent and the Rule of Law. If Populism sought to recast fundamentals, obeisance to rules generated by capitalists and their allies seems strange behavior indeed. Moreover, Doster and Allen did not choose to make a mockery of law by reaching results favorable to Populist litigants while claiming to defend existing rules. If a corporation had both the law and the facts on its side, it appears to have prevailed. Together, the results and reasoning of the decisions suggest that Populists did not understand the success of their political proposals to require a radical reconception of private law.

Contrary to the arguments of some historians, Populism, through Populist law, appears as a moderate shifting of burdens fundamentally accepting of individualism and industrial society, and not a radical attempt to defeat emerging capitalist relationships. There simply is no evidence that these Kansas justices, who were genuine Omaha Platform Populists, be-

lieved their party wanted to undermine the basic legal foundations of a capitalist economy. The decisions of the Kansas supreme court indicate that Doster and Allen assumed that, after their party destroyed naturally monopolistic forms of private ownership, namely private property, freedom of contract, and the fault standard would persist. Accordingly, private corporations, even large corporations, would survive, and unfettered competition for economic rewards, albeit in an altered, fairer form, would continue. Specifically, the law would not affect guarantees of favorable contract bargains or insure negligent individuals against their own folly. It would reward persons who made the "right" economic choices. It most certainly would not impose the kind of "public regulation of exchange" that Hahn has suggested, or view the "cooperative" as a radically alternate means of organizing the economy, as both Hahn and Goodwyn have argued. Despite their assumption that Populist reforms would defeat the monopolists and Wall Street and thereby save the smaller producer, the existing evidence is that Populists believed fundamental economic relationships were best governed by the individual rights and individual obligations of existing law.