

Benjamin Cardozo Meets Gunslinger Bat Masterson

BY WILLIAM H. MANZ

Encounters between persons of widely different backgrounds are hardly unusual in the courtroom, but only occasionally, as in the William Jennings Bryan-Clarence Darrow confrontation at the *Scopes* “Monkey Trial,” do they involve two famous figures in American history. A lesser-known and particularly incongruous meeting of this type, took place in a Manhattan courtroom in May 1913, involving future Supreme Court Justice Benjamin N. Cardozo and Bat Masterson, a legendary figure of the Old West.

Perhaps because the case, *Masterson v. Commercial Advertiser Association*,¹ a libel suit by Masterson against a New York City newspaper, lacks any legal significance, the meeting of the two men has gone unmentioned in major works on Cardozo.² A more unlikely meeting is hard to imagine, however.

William Barclay “Bat” Masterson was a former buffalo hunter, lawman, gunfighter, and gambler whose friends had included Wyatt Earp, Wild Bill Hickok, Buffalo Bill Cody, and a young rancher from New York named Theodore Roosevelt. In 1874, at age 20, Masterson had fought Indians at the Battle of Adobe Walls and then took part in an army campaign against tribes in the Texas Panhandle and Indian Territory. Later, he served as sheriff of Ford County, Kansas (1878–1879) and as marshal of Trinidad, Colorado (1882–1883). In the late 1880s, he briefly owned a Denver gambling house and then managed a large gambling establishment in Creede, a Colorado mining boomtown.

By the 1880s, Masterson’s interests had also turned to boxing, and he attended the most notable matches of the 1880s and 1890s, including the epic 75-round bare-knuckle bout between Jake Kilrain and John L. Sullivan, and James J. “Gentleman Jim” Corbett’s victory over Sullivan. He had also been active in boxing circles as a founding member of the Denver, Colorado, Athletic Club, and, after being forced out of that organization by fight promoter Otto Floto, he had founded the rival Olympic Athletic Club. In 1903, after taking up residence in New York City, Masterson was hired by the *Morning Telegraph* as a sports editor and columnist.³

In contrast, the scholarly Cardozo had a sheltered life as a youth, and went straight into law practice after attending college and law school at Columbia University. Described by contemporaries as a “cultured gentleman,”⁴ he was not socially active, preferring to spend his evenings at home working on his memoranda and briefs. Within the courtroom milieu, however, Cardozo was every bit as formidable as Masterson had been in the wide-open frontier towns of the West. As Professor Andrew Kaufman has noted, he was “not the saintly man . . . associated with the elder Cardozo,”⁵ and he “[d]id not shrink from personal attack on the opposition or its counsel if needed.”⁶ Just short of his 44th birthday, he was an accomplished and experienced attorney, known for his ability to cross-examine witnesses.

Origins of the Case

The Cardozo-Masterson confrontation had its origins in a heavily promoted Madison Square Garden prize fight matching the latest “white hope,” “Oklahoma Giant” Carl Morris, against “Pueblo Fireman” Jim Flynn. The contest between the largely unknown Morris and Flynn, known as a competent boxer, had attracted significant interest in New York City sporting circles. However, when Masterson learned that both fighters were being financed by Morris’s manager, Frank B. Ufer, he questioned the integrity of the bout, charging that Flynn was being paid to “lie down” for Morris. In his



WILLIAM H. MANZ is senior research librarian at St. John’s University School of Law. A graduate of Holy Cross College, he received a master’s degree in history from Northwestern University and a J.D. from St. John’s University School of Law.

He wishes to thank Ralph Monaco, formerly director of the New York County Lawyers’ Association Library and now director of the New York Law Institute Library, for making available the association’s copy of the record and briefs of the *Masterson* case.

September 10, 1911 column, he remarked, "There have been a good many cooked-up affairs pulled off in the prizefighting, as everybody knows, but hardly one quite so daring or that smells so much like a polecat as the one between Flynn and Morris."⁷ Two days later he wrote, "[T]he Flynn-Morris contest is a frame-up and should not by any means be permitted to go on."⁸ Finally, on September 14, Masterson said, "As I've already stated in this column, 'the whole thing has a peculiar look.'"⁹

Ufer's answer to Masterson appeared on the day of the fight, September 15, 1911, included in an eight-paragraph front-page article in the *New York Globe and Commercial Advertiser*, entitled "Little Chance to Oust Garden Club." The article dealt almost entirely with the questionable validity of a lease on Madison Square Garden, but the final paragraph quoted Ufer's remark that Masterson had "made his reputation by shooting drunken Mexicans and Indians in the back."¹⁰ Masterson was apparently most displeased with the publication of Ufer's remark. He promptly engaged the services of Benjamin Patterson, an experienced general practitioner with offices at 302 Broadway. On September 22, 1911, a summons and complaint were served on the Commercial Advertiser Association, the publishers of the *Globe and Commercial Advertiser*, charging that the article had libeled Masterson, and demanding \$25,000 in damages.¹¹

The lawsuit may have surprised the publishers as Masterson would have seemed an unlikely libel plaintiff. Heavily fictionalized versions of Masterson's career had appeared for years, greatly inflating the number of men he had killed, and sometimes containing such lurid falsehoods as the decapitation of two Mexicans.¹² When his old friend President Theodore Roosevelt appointed Masterson a deputy marshal for New York City in 1905, wildly exaggerated tales of his exploits, characterized by one writer as "insufferable rot,"¹³ again appeared in the press. These accounts were generally positive, however, noting that Masterson had only killed men in self-defense or in the course of his official duties, and that his victims were lawbreakers. For years, Masterson had never really objected to such stories. In an 1890 letter written to Frank D. Baldwin, his former army commander, he once described coverage of his career as done with "recklessness" and an "utter disregard for the truth," but concluded that the writers could do him no harm.¹⁴

Simpson and Cardozo's practice usually consisted of contractual matters and commercial debt liquidation, but it did have some experience with libel cases.

Masterson had previously taken offense, however, when disparaged in the press by his enemies. In 1879, he wrote to the *Dodge City Times*, angrily denying a report by Bob Fry, editor of the *Speareville News*, that Masterson had threatened to lick "any s - of a b - that voted or worked against me at the last election," and stating that the "words s - of a b -" as applied to Ford County, Kansas, residents should be confined to the offending editor.¹⁵ Masterson again responded in print in 1883, after the *Dodge City Times* editor, Nick Klaine, accused him of wrongfully using force to seize a prisoner from an Iowa peace officer. In a letter to the *Ford County Globe*, Masterson denied the charges, and claimed that the article

"was evidently written with a view of doing me a malicious and willful injury."¹⁶

In the case of the *Globe and Advertiser* article, Masterson's reaction may have been influenced by the considerable abuse he had taken for his charges about the Morris-Flynn fight. In a post-fight column, he reported receiving "a number of anonymous letters, in which I've been called the vilest names imaginable. These letters, without a single exception, contained the foulest abuse that a degenerate mind could conceive."¹⁷ Unlike the offensive mail, the newspaper article had an identifiable source with the ability to pay for its transgression.

To handle its defense, the paper's publishers hired the firm of Simpson & Cardozo.¹⁸ The firm's practice usually consisted of contractual matters and commercial debt liquidation,¹⁹ but it did have some experience with libel cases. In 1892, it had won a libel action against the *Brooklyn Daily Eagle* for insurance agent Richard D. Alliger after an erroneous report of his arrest for forgery.²⁰ In 1911, it had successfully defended the Commercial Advertiser Association against a suit brought by one Oscar B. Bergstrom after the association's paper reported his default on bail and subsequent incarceration in the Tombs prison. The Masterson suit was also not the first time that Cardozo had handled a case involving a public figure. In 1907, he successfully argued the appeal of Lee Shubert after the theater owner had lost a \$25,000 verdict in a breach of contract case.²¹ Cardozo then won a second trial, and prevailed again at the appellate level.²² He also represented producer Florenz Ziegfeld in an unsuccessful action against an actress who had allegedly violated an injunction against appearing on stage except under Ziegfeld's management.²³

In the *Masterson* case, Cardozo's defense strategy rested on the grounds that Ufer's statement was essentially accurate, that it was not meant to be taken seriously, and that it could not have caused Masterson's reputation any harm. In his answer, Cardozo stated: "[T]he plaintiff is and has been for a great many years well known throughout the United States as a promiscuous carrier and user of fire arms and as having shot a number of men, including Indians, some of whom died as a result of the said shooting, and that he did on divers occasions become involved in conflicts in which he shot, wounded and killed a number of men, including Indians, and that his reputation at the time of the publication was due to such alleged exploits."²⁴ He also maintained that Masterson was "for a great many years known as a sporting man"²⁵ and claimed that Ufer's remark was "composed and published as the remark of one sporting man concerning another sporting man, and [was understood] to be humorous and jocular."²⁶

The trial began on Tuesday, May 20, 1913, in Trial Term, Part XI, of the New York County Supreme Court with Justice John Ford presiding. A former state senator, Ford had been elected a Supreme Court justice in 1906. Originally from Knowlesville, in upstate Orleans County, he was the son of Irish immigrants who won a scholarship to Cornell where he was captain of the football and crew teams. After graduating *magna cum laude* and Phi Beta Kappa in 1890, he began his legal career by working in a law office, and passed the bar in 1892.

Masterson's Testimony

The trial's star witness was, naturally, Bat Masterson. Described in a 1905 news article as "middle aged and middle sized,"²⁷ the graying 59-year-old man in the witness chair bore no resemblance to the popular image of a western hero or to the dapper figure portrayed by Gene Barry in the 1958–1961 *Bat Masterson* television program. His unremarkable appearance notwithstanding, the jurors listened closely as he testified under oath about his frontier adventures.²⁸ Justice Ford was also obviously quite interested, as he interrupted Masterson's testimony several times to ask for further details about his experiences.

When questioned by Benjamin Patterson, Masterson denied ever carrying a gun while employed by the *Morning Telegraph*, having been charged, indicted or convicted of any crime, shooting any Mexicans at all, having any personal encounter with an Indian, and shooting any drunken Indians or anyone else in the back.

In his cross-examination, Cardozo sought to establish that Masterson had indeed killed several men, including Indians. His initial question to Masterson was: "How many men have you shot and killed in your

life?"²⁹ Masterson denied killing 28 men as repeatedly reported by the press. Instead, he ventured that the number was probably three, a soldier in Texas who had shot him first, a Texas cowboy in Dodge City who had just fatally wounded his brother, Sheriff Ed Masterson, and another Texan, a wanted murderer, in 1879. He added that he had also shot a man in Dodge City in 1881, but didn't know if he'd killed him or not. As for Indians, he professed not to know whether he'd ever shot any, noting that in battle "I certainly did try to shoot them. . . . It wasn't my fault that I didn't hit them. . . . I haven't any idea of and can't give you any notion as to whether any of them fell under my fire."³⁰

Masterson also denied several widely circulated stories about his western career, including having been arrested in Dodge City and bringing armed men there to shoot inhabitants and intimidate residents. In response to Cardozo's question about altercations in Denver, he denied having a fistfight with Louis Spencer (a black-face comedian angered by Masterson's affair with his wife), or attacking fight promoter Reddy Gallagher with a gun. He did admit having a fistfight with rival boxing promoter Otto Floto, but denied striking him with a gun. He also confirmed that, while acting as a deputy sheriff, he had shot the gun from the hand of a policeman at a Denver polling place.

Cardozo then brought up an incident in 1902 when Masterson and several other westerners were arrested in Manhattan on suspicion of plotting to cheat a visiting Mormon elder, George A. Snow, in a rigged faro game.³¹ These charges had been dropped almost immediately, but Masterson was fined \$10 for carrying a pistol. Masterson insisted that he barely knew the others who had been arrested and that he had not been involved in any crooked scheme. He stressed that he was never "charged" with being involved in the crooked faro game, noting that "there was never any complaint filed against me."³² He also asserted that although he was fined for carrying the pistol, he was not arrested for that offense, and had not been "convicted" of anything. He also denied involvement in a fistfight at the Waldorf-Astoria, but admitted a "little mix-up," with words exchanged, but no blows struck.³³

Cardozo's questions next turned to the large number of articles about Masterson's career in the West. The witness denied knowledge of the specific content of such stories, saying, "There was so much of that stuff that I can't recall just what it was,"³⁴ and testified that he "was not at all interested in the accounts which the papers published."³⁵ Masterson indicated that he had never considered such stories as attacks on him, and that "[t]he mere fact that [he] was charged with killing a man standing by itself [he] never considered an attack upon

CONTINUED ON PAGE 14

[his] reputation."³⁶ He also stated, "[S]pace writers have to live, and if they could make a living off of me, well and good, let them go ahead."³⁷ Masterson differentiated the account in the *Globe* from other newspaper stories, characterizing it as "malicious," and later as "obviously malicious." Cardozo objected to both statements and successfully moved to have them stricken. Masterson stressed that what he most objected to was "the fact that [he] was charged with shooting drunken Indians and Mexicans in the back, when nothing of the kind ever happened,"³⁸ and that he resented the charge of shooting Indians "because [he] was charged with shooting drunken Indians in the back."³⁹

On redirect examination by Patterson, Masterson described in detail various events he had testified about earlier, including his arrest in New York City, the three men he'd killed, and his participation at the Battle of Adobe Walls. As for the offending *Globe and Advertiser* article, he stated, "I have many friends among the public men of the United States. It would hurt my feelings to have them think I had shot drunken Mexicans and Indians in the back."⁴⁰ In his recross, Cardozo attempted to establish that at least some of the men killed by Masterson had been drunk. However, all the witness would admit to having said earlier was that the men who had shot his brother had been drinking, but were not drunk, and that the soldier who had shot him "probably had been drinking."⁴¹ When asked about his prior use of the word "intoxicated," Masterson admitted that it was "his conclusion" that the men were intoxicated.

Other Witnesses

Masterson's two witnesses, *Morning Telegraph* publisher William E. Lewis and John Coulter, the paper's financial editor, did their best to bolster their colleague's case. When cross-examined by Cardozo, Lewis denied that Masterson was a habitual associate of gamblers or "sporting men." When asked by Cardozo about Masterson's purported 28 killings, Coulter testified that it was his understanding that Masterson was "compelled to kill people."⁴² Asked if Masterson's reputation hadn't been built up by killing large numbers of persons, he denied it, stating, "I would say that his reputation was built up because he was a most efficient officer of the law."⁴³

The witnesses called by the defendant must have done little to bolster Cardozo's case with the jury.

Leonard H. Edgren, the reporter who had researched the offending article, described Ufer as being very angry, contradicting Cardozo's assertion that the comment was merely jocular.

Nothing helpful came from the next defense witness, James E. MacBride, the article's author, who admitted

under cross-examination that he had made no effort to verify Ufer's statement about Masterson.

Detective Patrick F. Gargan, the arresting officer in the rigged faro game incident, admitted that the complaining witness, George A. Snow, had never mentioned Masterson, and that Masterson had only been arrested because Gargan had seen him "do something." However, he wasn't particularly specific about just what it was that had been done, other than claiming that Masterson had been observed in the company of the alleged co-conspirators.

The defendant's final witness, Manhattan District Attorney (and future governor) Charles S. Whitman, was equally unhelpful, stating that Masterson's reputation for peace and order in New York was good and that he had never heard that his conduct in the West "was impelled by private motives or desire for revenge."⁴⁴

Cardozo unsuccessfully moved for a directed verdict "upon the ground that it appears to be the uncontradicted evidence that the alleged libel has been justified; that this man had in fact killed a large number of persons, and that is all we charged him with doing."⁴⁵

Trial Result

The trial resumed the next morning with the summations. In closing, Benjamin Patterson made a remark that became a major point in Cardozo's appeal, saying, "If your Honor please, there is one thing I overlooked. In 'The Winning of the West,' Colonel Roosevelt spoke in the highest terms of Mr. Masterson."⁴⁶ Cardozo immediately asked that the jury be instructed to disregard the remark. Justice Ford agreed, but when Cardozo then requested a mistrial, he was refused.

Ford's proposed charge to the jury said that the verdict must be for the plaintiff in the amount of six cents up to any reasonable sum. Cardozo responded with a lengthy series of requests for charges, including several that would have allowed the jury to find that the article had been accurate in whole or in part. Ford did make some minor modifications in his charge, but none that significantly benefited the defendant's case.

After deliberating, the jury brought in a verdict of \$3,500 for the plaintiff, along with \$129.25 in costs.⁴⁷ Cardozo, objecting to the size of the verdict, unsuccessfully moved that the verdict be set aside and that a new trial be granted.

The next day, a celebratory article by William E. Lewis appeared in the *Morning Telegraph*. It claimed that Masterson had been "vindicated," maintained that attorney Patterson had permitted "the other side utmost latitude in their efforts to defend and justify the publication," and praised Justice Ford for "impartially and ably conduct[ing] the trial."⁴⁸

Benjamin Cardozo

Cross-Examines Bat Masterson

Record at 22:

Q. Now, do you think of any other fights that you ever had?

A. Well, I am not thinking; I suppose you are doing all the thinking. I do not know of any other fights that I ever had; I have never had very many fights.

Q. You don't think you have been a fighting man at all?

A. No, indeed; I never had any one accuse me of it.

Q. How many fights have you had?

A. Well, I am 59 years old, and I have been – I can't tell you. I told you all about the serious troubles. The fist fights, if that is what you are referring to, I couldn't tell you anything about that.

Record at 23:

Q. Your counsel asked you whether you ever carried a pistol. When did you stop carrying a pistol?

A. When I ceased to be an officer. That has been a good many years ago. I was a United States officer here, and never carried any; and I haven't carried any in New York for the last ten years. The last time that I carried a pistol was, I think, probably in Denver when I was acting as Deputy Sheriff.

Q. Did you ever carry a pistol in the City of New York?

A. Yes, sir.

Q. Then it wasn't the last time that you carried a pistol when you were acting as Sheriff in Denver was it?

A. No. I had almost overlooked the New York incident.

Record at 24:

Q. You were arrested on the charge of being mixed up in a crooked faro game, weren't you?

A. Well, I never knew what I was arrested for; there was never any complaint against me.

Q. You mean to say that you didn't make any inquiry as to what the charge against you was?

A. No; I never learned. I attempted to. I heard what they said, and that is all I know about it.

Record at 26–27:

Q. You have, in your judgment, quite a reputation in this town, haven't you Mr. Masterson?

A. Well, I don't know what you mean by "reputation"; good or bad? What do you mean?

Q. Well, you are well known, – generally known, I mean?

A. Well, yes; yes, sir; I am very well known. I was well known when I came here. I don't think my reputation had been made by the affrays which I had been engaged in, in the West.

Record at 32:

Q. You have killed a great many men including your affrays in the Indian War, haven't you?

A. I think I have stated all here.

Q. Well, you are proud of those exploits in which you killed men aren't you?

A. Oh, I don't think about being proud of it. I do not feel that I ought to be ashamed about it; I feel perfectly justified. The mere fact that I was charged with killing a man standing by itself I have never considered an attack upon my reputation.

Appeal of the Verdict

Cardozo was hardly finished with the case, however. He filed an appeal with the Appellate Division, First Department a week later. In his brief, he reiterated his main themes at the trial, but also argued strenuously that Patterson's mention of Roosevelt's book required a reversal. Noting that the former president was not a witness and that the book was not in evidence, he characterized the attorney's remarks as "flagrantly improper,"⁴⁹ and argued, "It is idle to say that such misconduct is to be overlooked because the trial judge instructed the jury to disregard the remark."⁵⁰ Later, in his reply memorandum, Cardozo derided Patterson's claim that the remark was inadvertent, stating, "It was a deliberate attempt to gain an unrighteous advantage; and it should receive its fitting penalty."⁵¹

On the subject of the plaintiff's reputation, Cardozo presented an unflattering summary of Masterson's

career, which he characterized as “chequered.”⁵² Demonstrating the same facility with words he later exhibited in many of his judicial opinions, he remarked that during Masterson’s career the “monotony of fist fights was varied by encounters with weapons.”⁵³ With regard to Masterson’s arrest in 1902, he wrote that when “the champion of the west came to the far east . . . [h]e had hardly set foot in this city before he was arrested on the charge of a disgraceful offense.”⁵⁴ Cardozo also used Masterson’s testimony about this arrest as an example of his alleged lack of candor on the witness stand.

Reviewing other aspects of the plaintiff’s testimony, he asserted that Masterson’s only real complaint was the charge that his victims were drunk, which “cut [the libel] down to a pretty fine point.”⁵⁵ He concluded by stating that the plaintiff “complains, not because he has been defamed, but because he has not been sufficiently extolled.”⁵⁶

Cardozo also argued that, considering Masterson’s reputation, the damages were excessive. Cardozo claimed that Masterson had gloried in the stories about him and “lived on notoriety,”⁵⁷ concluding that his “sudden sensitiveness ought not to be rewarded with a gift of \$3,500 out of the defendant’s treasury.”⁵⁸

The brief also defended the content of the article,⁵⁹ stressing that Masterson had indeed killed several men, and quoted John Coulter’s statement that Masterson was spoken of “as an efficient killer.”⁶⁰ It also noted Whitman’s testimony that the number of Masterson’s victims was reputed to be more than 28 men. Cardozo continued to insist that Ufer’s remark was not to be taken seriously, but was merely “the rough, and rather rude, humor of sporting men and pugilists,”⁶¹ adding that the idea that anyone would take them seriously ran “counter to common sense and experience”⁶² and did not justify a \$3,500 verdict.

The remainder of the brief dealt with Justice Ford’s charge to the jury. It claimed that Ford had erred by charging that Masterson had been libeled as a matter of law and for refusing to allow the jury to consider whether the libel had been justified, either in whole or in part. He also objected to other aspects of the charge, including the failure to state that the article did not charge Masterson with cowardice and that there was no innuendo in the term “gunfighter.”

The appeal was decided by a memorandum opinion issued on December 19, 1913, by the Appellate Division,

First Department.⁶³ By a 3-2 vote, it reversed the trial court and awarded a new trial unless the plaintiff stipulated to a reduction of the verdict to \$1,000. Voting to reverse were Presiding Justice George L. Ingraham, a veteran jurist who had been on the First Department bench since its establishment in 1896, Chester McLaughlin, who would later serve on the Court of Appeals with Cardozo from 1917–1926, and Francis M. Scott. For affirmance were Frank C. Laughlin and John Proctor

Clarke, both appointees of Bat Masterson’s friend, then-Governor Theodore Roosevelt.⁶⁴

Although Laughlin and Clarke’s dissent would have permitted an appeal to the Court of Appeals, at this point the case vanishes from the law reporters. There is also no mention of the appellate decision in either the *Morning Telegraph* or the *Globe and Commercial Advertiser*. Thus, it must be assumed the result was acceptable to both parties and that Masterson was paid his \$1,000 in damages.

This was probably the best result that Cardozo could have hoped to achieve. Arguing without the benefit of *New York Times v. Sullivan*,⁶⁵ both the facts and the law were against him. Ufer’s remarks taken as a whole were obviously false, and they were clearly motivated by his anger over the possibility that Masterson’s charges about the Morris-Flynn fight would hurt box office receipts. In addition, Masterson was a popular figure whose claim to a good reputation had the endorsement of both former President Roosevelt and the Manhattan district attorney. Thus, Cardozo’s best argument was his “common sense” claim that the passing remark of a man such as Ufer could have done no serious harm to Masterson’s reputation, and that significant damages were unwarranted.

Even if the Court of Appeals had heard the *Masterson* case, Cardozo would no longer have been involved. Less than a month after the Appellate Division decision, he began his judicial career as one of Justice Ford’s colleagues on the Supreme Court in the First Judicial District. Ford himself remained on the bench until his retirement in 1932. In the 1920s, he gained press attention as the founder of the Clean Books League, which sought to ban from the state such titles as D.H. Lawrence’s *Women in Love*.⁶⁶ The *Globe and Commercial Advertiser* was absorbed by the *New York Sun* in 1923. The *Morning Telegraph* survived until 1972, when it was taken over by the *Racing Form*. As for Bat Masterson, he died at his sportswriter’s desk in 1921, while working

Arguing without the benefit of New York Times v. Sullivan, both the facts and the law were against him.

on his column. He is buried in Woodlawn Cemetery in the Bronx.

1. 160 A.D. 890, 144 N.Y.S. 1129 (1st Dep't 1913).
2. There is also no mention of the case in Andrew L. Kaufman's *Cardozo* (1998), Richard A. Posner's *Cardozo: A Study in Reputation*, Richard Polenberg's *The World of Benjamin Cardozo*, or in any law review article. The trial is briefly discussed in the most comprehensive Masterson biography, but no mention is made of Cardozo. See Robert K. DeArment, *Bat Masterson: The Man and the Legend* 385 (1979).
3. The *Morning Telegraph* was a daily that featured several pages of standard news coverage, but the majority of each issue was given over to the coverage of sports and show business events and personalities.
4. *New Members of the Court of Appeals*, Bench & B., Feb. 1914, at 2.
5. Kaufman, *supra* note 2, at 112.
6. *Id.*
7. W.B. "Bat" Masterson, *Morris-Flynn Fight a Bunk Says Masterson*, Morning Tel. (N.Y.), Sept. 10, 1911, at 9.
8. W.B. "Bat" Masterson, *Governor Dix in Town; Will Look Over Boxing*, Morning Tel. (N.Y.), Sept. 12, 1911, at 7.
9. W.B. "Bat" Masterson, *Flynn-Morris Contest Still Being Exploited*, Morning Tel. (N.Y.), Sept. 14, 1911, at 6. When the fight was held, Flynn easily defeated the larger, slower Morris in a 10-round decision. See *Fireman Jim Flynn Whips Carl Morris; Oklahoma Giant and "White Hope" Shows No Class in Garden Fight*, N.Y. Times, Sept. 16, 1911, at 8.
10. Record at 93, *Masterson v. Commercial Advertiser Ass'n*, 160 A.D. 890, 144 N.Y.S. 1129 (1st Dep't 1913) (hereinafter "Record").
11. *Id.* at 6.
12. See *Too Much Blood*, Atchison Champion, Nov. 17, 1881, reprinted in DeArment, *supra* note 2, at 215.
13. "Bat" Masterson – Here's How!, Wash. Post, Feb. 8, 1905, at 6.
14. DeArment, *supra* note 2, at 216.
15. *Id.* at 180.
16. *Id.* at 244.
17. W.B. "Bat" Masterson, *Morris Surely Out of the Championship Race*, Morning Tel. (N.Y.), Sept. 17, 1911, at 4.
18. Cardozo's partner, Angel Simpson, retired during 1913 and the firm name then became Cardozo & Engelhard.
19. Kaufman, *supra* note 2, at 93.
20. See *Alliger v. Brooklyn Daily Eagle*, 6 N.Y.S. 110 (Sup. Ct. 1889), *aff'd*, 127 N.Y. 651 (1891).
21. See *Perley v. Shubert*, 121 A.D. 786, 106 N.Y.S. 593 (1st Dep't 1907), *aff'd sub nom. Hupfel v. Boston Ins. Co.*, 198 N.Y. 520 (1910).
22. See *Perley v. Shubert*, 199 N.Y. 544 (1910).
23. See *Ziegfeld v. Norworth*, 148 A.D. 185, 133 N.Y.S. 208 (1st Dep't), *appeal dismissed*, 202 N.Y. 580 (1911).
24. Answer to Am. Compl. at 9, *Masterson v. Commercial Advertiser Ass'n*, 160 A.D. 890, 144 N.Y.S. 1129 (1st Dep't 1913).
25. *Id.*
26. *Id.*
27. "Bat" Masterson in Office, Wash. Post, Mar. 28, 1905, at 1.
28. Before charging the jury, Justice Ford noted how intently they had followed the case. See Record at 77.
29. Record at 17.
30. *Id.* at 19.
31. Faro involves correctly guessing which of the next two drawn cards will be high or low. The game could be rigged by tampering with the box from which the cards were dealt.
32. Record at 24.
33. *Id.* at 26.
34. *Id.* at 28.
35. *Id.* at 30.
36. *Id.* at 32.
37. *Id.* at 49.
38. *Id.* at 33.
39. *Id.*
40. *Id.* at 44.
41. *Id.* at 45.
42. *Id.* at 74.
43. *Id.* at 76.
44. *Id.* at 69.
45. *Id.*
46. *Id.* at 77. In the book, Roosevelt referred to Masterson as one of the men of "noble spirit" who "clean[ed] the West of its murderers, of its bandits, and of its criminals and making it the garden spot of America," quoted in William E. Lewis, W.B. "Bat" Masterson Vindicated; the Globe Will Pay \$3,500, Morning Tel. (N.Y.), May 22, 1913, at 4.
47. Record at 12.
48. Lewis, *supra* note 46, at 4.
49. Appellant's Brief at 11, *Masterson v. Commercial Advertiser Ass'n*, 160 A.D. 890, 144 N.Y.S. 1129 (1st Dep't 1913) (hereinafter "Appellant's Brief").
50. *Id.* at 12.
51. Appellant's Mem. in Reply at 2, *Masterson*, 160 A.D. 890.
52. Appellant's Brief at 4.
53. *Id.* at 6.
54. *Id.* at 7.
55. *Id.* at 19.
56. *Id.* at 11.
57. *Id.* at 9.
58. *Id.* at 19.
59. *Id.* at 6.
60. *Id.* at 4.
61. *Id.* at 19.
62. *Id.*
63. See *Masterson v. Commercial Advertiser Ass'n*, 160 A.D. 890, 144 N.Y.S. 1129 (1st Dep't 1913).
64. Roosevelt had appointed Laughlin to the Appellate Division in 1901. That year, he had also chosen Clarke to fill the unexpired Supreme Court term of the late Justice H.R. Beekman.
65. 376 U.S. 254 (1964).
66. See *Justice Shocked by Book in Home; Ford Angered When He Learns Library Sent His Daughter "Women in Love,"* N.Y. Times, Feb. 11, 1923, at 18.