Territorial Justice under Fire: The Trials of Peter Wintermute, 1873-1875

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The trials of Peter Wintermute provide fascinating insights into criminal justice in 1870s Dakota Territory. The territorial government's prosecution of the Yankton banker for the shooting of the territorial secretary would severely test the fledgling judicial system, its members, and juries. Wintermute would be tried twice and indicted thrice. His case would be heard on appeal by the Dakota Territory supreme court and subjected to close public scrutiny. Some of the territory's best lawyers, best judges, and most prominent citizens would participate in Wintermute's trials, which ultimately resulted in a finding of not guilty.

Violence broke out between nine and ten o'clock on the night of 11 September 1873 in Yankton, the territorial capital. A meeting chaired by former governor Newton Edmunds had been called to resolve conflicts involving the Dakota Southern Railroad, which had begun passenger service from the young capital seven months earlier. Although passions ran high on both sides, no one expected the night to erupt in gunfire. When it did, the news spread rapidly: Peter P. Wintermute, a banker, had shot and killed the secretary of the territory, Civil War hero Edwin Stanton McCook. One week after the event, a Vermillion newspaper published a description of the incident by Justice of the Peace Charles Rossteuscher, who agreed to relate his narrative on the condition of anonymity.¹

Rossteuscher described how, in the midst of a rousing speech by former territorial delegate Solomon Spink, a shot rang out in the meeting room. At the sound, the audience turned to see Mc-

The Dakota Republican (Vermillion) for 18 September 1873 printed Rossteuscher's rendition anonymously as "Statement No. 3." Because the statement disclosed the speaker's vocation and was essentially the same as Rossteuscher's later court testimony, it can be safely inferred that he was the source.

Cook burst in from the hallway entrance and lurch toward the diminutive Wintermute, who had risen from his chair next to the stove in the center of the room, a pistol in his hand. Rossteuscher recalled rushing into the room and taking hold of Wintermute's shoulders, saying, "You are my prisoner." When McCook tried to push the justice of the peace aside, Wintermute fired again. The bullet from the banker's thirty-two-caliber revolver passed just under one of Rossteuscher's raised arms and hit the territorial secretary's massive chest. Blood poured forth, and the two men crashed to the sawdust-covered floor next to the stove in a flurry of limbs.²

Someone grasped Wintermute's wrist, and a third wild shot was fired. In the melee, Wintermute became soaked with blood from the secretary's chest wound as he struggled beneath the larger man's weight advantage. The hundred or so men assembled quickly overcame their initial shock, and a few moved in to in-

 George W. Kingsbury, History of Dakota Territory, and George Martin Smith, South Dakota: Its History and Its People, 5 vols. (Chicago: S. J. Clarke Publishing Co., 1915), 1: 727.
See also Dakota Republican, 18 Sept. 1873.



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tervene. "For God's sake, General, quit," Rossteuscher pleaded. "No," exclaimed McCook, "Don't you see I am shot[?]" A few men managed to help Wintermute halfway to his feet before the secretary pounced upon him again. The stove and a drum toppled over. One or more additional shots rang out and lodged somewhere in the furnishings or architecture. As the two men continued to struggle, the chamber of Wintermute's pistol dropped from the gun.³

Seeing that Wintermute's pistol had been disabled, former territorial secretary Joseph R. Hanson stepped on Wintermute's arm and wrung the handgun away. The bloody McCook stood up and raised his right foot as if to kick Wintermute's face but then paused and let him get to his feet. Despite his own injury, McCook then broke loose from the men at his side and dragged the banker to a window. After deftly breaking the sash and shattering the pane with his fist, he heaved his assailant partway out. Quickly, more men overpowered the secretary and pulled Wintermute

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back inside. Rossteuscher made his arrest and led Wintermute away.

Hastily, McCook was carried to his private room in the Saint Charles Hotel next door, where doctors examined the single gunshot wound. It quickly became evident that the injury was a mortal one, the shot having entered just above the secretary's first rib on the left side and exited through the shoulder. Physician Walter A. Burleigh, who had been one of the first speakers at the meeting, determined that the bullet had pierced McCook's subclavian vein and artery. There was little to do except to ice the wound. Throughout the night, the territorial secretary slowly bled to death, soaking the mattress until blood dripped onto the hotel-room floor. He was pronounced dead at seven o'clock in the morning, having said goodbye to his wife Loraine and young son Charlie and assuring all assembled that his accounts would be found in order.⁴

The tragic death of the territorial secretary set off a storm of outrage throughout Dakota Territory, especially in the capital. The Yankton Press described the public mourning as chaotic, with "knots of excited men in every part conversing and gesticulating vehemently, running to and fro." At the Saint Charles Hotel, where McCook's body lay in state, "a sea of struggling forms [was] rushing hither and thither momentarily augmenting in numbers until the crowd was denser than comfortable."5 Given the notoriety of those involved and the political circumstances surrounding the killing, McCook's death was more often referred to as an assassination than a murder. Although the violence of 11 September 1873 would not have arisen without the existence of personal animosities between McCook and Wintermute, its causes also lay in the factionalism that had gripped Yankton for years. "Great crimes have their embryonic life," wrote the editor of the Dakota Republican. "They are not the offspring of the passion of a moment, but are, rather, the bursting out of the smothered volcanic fires of long nursed resentments."6

The reasons for McCook's tragic death resided ultimately in the steel rails connecting Yankton to the East and a related grassroots resentment of territorial governor John A. Burbank. As early

^{4.} Ibid.; Kingsbury, History of Dakota Territory, 1: 727, 729.

^{5.} Yankton Press, 17 Sept.

^{6.} Dakota Republican, 18 Sept. 1873.1873.

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as 1861, the year of the territory's creation, the citizens of Yankton recognized the importance of securing rail transportation in and out of the capital. The town's promoters eagerly sought a grant of federal lands as a means of enticing a railroad to venture into the relatively sparsely populated area. Dakotans watched impatiently as Congress bestowed land grants for rail lines in neighboring Iowa and Minnesota. Over the next few years, however, law-makers grew increasingly reluctant to issue such grants. In fact, the only stretch of rail financed with a congressional land grant in southern Dakota would be a short stretch from the Minnesota border to present-day Watertown, completed in 1873.⁷

Rail service was vital for Yankton for at least two reasons: attracting profitable commerce and facilitating immigration. Steamboat transportation to the Missouri River town was affordable but unavailable when water levels declined or the river froze. Invariably, these conditions occurred just when agricultural products were ready for market. Stagecoaches were limited to loads of about two tons and were less reliable, more expensive, and uncomfortable for passengers. When train tracks were laid into Sioux City, Iowa, in 1868, therefore, Yankton citizens sought an inducement that would lure the rails fiftyfour miles farther west. No railroad seemed willing to risk the venture capital necessary for construction without some form of assistance or assurance. Raising private funds was quickly dismissed as infeasible, and in 1871, the United States Senate refused to consider a bill for a land grant. In near-desperation, the town's business interests acted boldly, incorporating the Dakota Southern Railway Company on 17 March 1871.8

Having created its own rail company, Yankton leaders next planned to finance actual construction through the sale of county bonds. First, however, legislative authorization had to be secured. Governor Burbank called a special session of the legislature just for this purpose. To confirm the legality of the session—and any resultant laws—the governor telegraphed the United States attorney general

^{7.} Charles Lowell Green, "The Administration of the Public Domain in South Dakota" (Ph.D. diss., State University of Iowa, 1939), pp. 245-46; Robert F. Karolevitz, *Challenge: The South Dakota Story* (Sioux Falls: Brevet Press, 1975), p. 83.

^{8.} James F. Hamburg, "Railroads and the Settlement of South Dakota during the Great Dakota Boom, 1878-1887," South Dakota History 5 (Spring 1975): 166-67; Herbert S. Schell, History of South Dakota, 3d ed., rev. (Lincoln: University of Nebraska Press, 1975), p. 109; Herbert S. Schell, "The Dakota Southern, a Frontier Railway Venture of Dakota Territory," South Dakota Historical Review 2 (Apr. 1937): 110.

for authorization. Receiving a return telegram to that effect, the territorial legislature promptly assembled and approved a measure that allowed counties to issue bonds for railroad aid. Just as the session was about to adjourn, however, another version of the attorney general's communication arrived stating his opinion that the special session was *not* authorized. The wire operator in Omaha had garbled the first transmission. Undeterred, the legislature asked Congress to recognize the special session, which Congress did upon reconvening the next year.⁹

The next step was a county election on the bond issue, which was held 2 September 1871 and passed comfortably, 542 to 126. In their urgency to secure a railroad, the voters of Yankton County had approved the donation of a staggering two hundred thousand dollars in twenty-year bonds at 8 percent annual interest. At the same time, negotiations with construction companies were underway, and an agreement was concluded the next month with a Chicago firm. Construction began in earnest in June 1872, and the railroad reached Yankton in the first few weeks of 1873.10 The whirlwind of deals and promoters' tireless efforts had culminated in the realization of regular passenger and freight service to and from Sioux City. The railroad, however, had come at a substantial price for the young community. Some must have wondered nervously in the afterglow of the railroad's first run whether the obligations had been undertaken wisely. Such doubts intensified as the winter of 1873 turned to spring.

Governor Burbank took pride in having won himself a seat on the board of directors of the new company, but a faction in Yankton was becoming increasingly vocal in opposing his administration. Organized opposition to his reappointment as governor grew after it was learned that when Congress approved the actions of the special territorial session it added a clause moving the railroad's western terminus from Yankton to Springfield, where Burbank had acquired a townsite and a United States land office. A Springfield terminus would translate into financial rewards for Burbank. It also signaled that Yankton's profitable placement at the end of the line would be short-lived. Few doubted that the governor's father-in-law, Senator Oliver Morton of Indiana, had been instrumental in inserting the

^{9.} Schell, "Dakota Southern," pp. 111-12.

^{10.} Ibid., pp. 99, 112-17.

^{11.} When Congress validated the legislature's action granting Yankton County the authority to elect to issue railroad bonds, it also required that the railroad grant the county voting

new provision, and many began to wonder whether the governor had the interests of the territory or his own investments in mind.12

Even before construction was complete, the Dakota Southern board of directors passed a resolution to mortgage the road for \$1.2 million in order to raise additional capital. Stockholders, predictably, were outraged at the certain dilution of their stock. The outcry reached an even greater pitch when charges surfaced that the company was breaching its agreement to set up repair shops and make certain other improvements that would have employed Yankton inhabitants. Instead, the Dakota Southern appeared to be bestowing those favors upon Sioux City. 13

In early 1873, over one thousand individuals signed a petition opposing the reappointment of Governor Burbank and sent it to President Ulysses S. Grant. To counter this dissentience, the governor traveled to Washington, D.C., leaving Edwin McCook, his friend and recently appointed territorial secretary, to continue his campaign at home. McCook and Burbank succeeded in overcoming the opposition, which the secretary derisively described as comprising nothing more than "Copperheads and a few sore heads," and Burbank was recommissioned as governor in the spring of 1873.14

General McCook had arrived in the territory one year earlier, having accepted a four-year appointment as secretary from President Grant, his former commander in the Civil War. McCook's prepossessing physique and his membership in a family of Ohioan war veterans known as "the fighting McCooks" brought him near-celebrity status. Commissioned as a colonel of the Thirty-first Illinois Volunteers, he had distinguished himself during the siege of Vicksburg, Mississippi, and retired with the rank of brevet brigadier general. His political ambitions may have mirrored those of his cousin Edward McCook, formerly governor of Colorado Terri-

stock in an amount equal to the sum approved by voters. As a result, a Yankton County commissioner was given a seat on the Dakota Southern board of directors. Thus, both the county and the governor shared power on the Dakota Southern board. U.S., Statutes at Large, vol. 17, Act of 27 May 1872, pp. 162-63.

^{12.} W. Turrentine Jackson, "Dakota Politics during the Burbank Administration, 1869-1873," North Dakota History 12 (July 1945): 111, 119.

^{13.} Schell, "Dakota Southern," p. 119.

^{14.} McCook to Burbank, 3 Feb. 1873, Entry 15, Box 149, Field Appointment Papers, 1849-1907, Records of the Office of the Secretary of the Interior, Record Group (RG) 48, National Archives at College Park, College Park, Md. (hereafter cited NA-CP); Schell, History of South Dakota, pp. 191-92. "Copperhead" refers to a northerner who sympathized with the South during the Civil War.

tory, and his brother George McCook, a candidate for governor of Ohio in 1870. McCook's appointment as second-in-command of a vast territory was an important and prestigious political stepping stone, certainly an elevation from his former post as a collector for the Internal Revenue Service.¹⁵

The ground swell opposing the governor found its voice largely in Gideon C. Moody's "Broadway gang," while support for the administration resided in the "Capital Street gang" led by Judge Wilmot W. Brookings. When news of Burbank's reappointment reached the capital, the Broadway group organized a 29 March protest meeting. A savvy banker who had arrived in the territory two years earlier was selected to chair the meeting—Peter Wintermute. Secretary McCook and several associates, presumably at the governor's direction, arrived uninvited and objected boisterously as a resolution requesting that the president reconsider his decision was adopted. Wintermute and McCook exchanged words that were sufficiently unpleasant to efface whatever congeniality had previously existed between the two men. ¹⁶

Wintermute, who had been trained as a civil engineer, was a shrewd businessman. Born in New York State, he later moved to Minnesota and Wisconsin, where he speculated in real estate and played a prominent role in railroad legislation. His greatest success had come in securing a conditional grant from the Wisconsin legislature to charter the Saint Croix and Bayfield Railroad, which he later sold to Jay Cooke, the famous banking magnate. Wintermute's political aspirations reportedly included a desire to become territorial secretary or a delegate to Congress.¹⁷

Wintermute and others seethed under the territorial system of appointed officials whose political fortunes depended more upon their connections in Washington, D.C., than upon local sentiment. Frustration with the Burbank administration festered, and the fact that the governor was so closely associated with the Dakota Southern Railway particularly chafed the Broadway group. In June of 1873,

^{15.} Yankton Press, 17, 24 Sept. 1873; Kingsbury, Dakota Territory, 1: 721. Edward McCook was ridiculed and ultimately removed from office for nepotism and railroad speculation. Carl Ubbelohde, Maxine Benson, and Duane A. Smith, A Colorado History, 3d ed. (Boulder, Colo.: Pruett Publishing Co., 1972), pp. 140-41.

^{16.} Jackson, "Dakota Politics," pp. 121-22.

^{17.} Yankton Press, 26 Mar., 17 Sept. 1873. It was Cooke's death and the subsequent collapse of his banking empire that triggered the Panic of 1873. With the resulting nationwide economic downturn, Yankton citizens recognized the futility of pressing the Dakota Southern for the promised outbuildings and depot. Karolevitz, Challenge, pp. 96-97.

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Morrison Block, Yankton

the Dakota Southern revived its resolution to mortgage the road, to the alarm of the Yankton County commissioners, who sued for an injunction to prohibit the action. The commissioners' complaint also alleged that Governor Burbank held \$121,000 in stock for which he had paid no cash. When Judge Alanson H. Barnes ordered the Dakota Southern to provide a two-hundred-thousand-dollar cash guarantee to the county before mortgaging the road, an infuriated Governor Burbank threatened the judge with a transfer to Vermillion.¹⁸

Its initial success notwithstanding, the county wished to avoid further litigation, and a conciliatory meeting was scheduled for 11 September. Because of the shortage of public meeting places in the capital, a courtroom on the second floor of the Morrison Block adjoining the Saint Charles Hotel was converted into a meeting hall for the evening. The board of the Dakota Southern was allowed to present its views, with physician Walter Burleigh and Judge Brookings speaking for the majority of the directors. Wintermute was in

18. Barnes to Secretary of the Interior Columbus Delano, 2 Dec. 1873, Entry 15, Box 149, RG 48, NA-CP; Yankton Press, 22 Oct. 1873. Judge Barnes reported telling the governor, "You cannot afford to embark in an enterprise of this kind, it would not have been tolerated in France in the palmy days of the Empire. And I certainly shall permit no interference in my court. You have no right to interfere, and I hope you will not attempt it" (Barnes to Delano, 2 Dec. 1873).

attendance and threw the assemblage into confusion at the close of Brookings's remarks by making a motion that the residents of Yankton had no confidence in the railroad. The banker then announced that he needed a cigar and walked out, exchanging words with McCook as he left.¹⁹

Accompanied by a friend, Wintermute descended the stairs to the saloon in the basement of the Saint Charles. According to newspaper reports, the banker told bystanders he was "madder to-night than I have been since I came to Dakota." At that moment, the territorial secretary walked in. Raising his voice, Wintermute continued, "and here is the man I'm mad at. I asked him to loan me money enough to buy a cigar with and he wouldn't do it." When someone jokingly suggested that the small man whip the portly secretary, Wintermute replied that he believed he could. "I guess not," McCook answered with a laugh. An angry Wintermute fumed, "If I can't whip you, g-d d-n you, I'll shoot you." He then reputedly shook his fist at his adversary and concluded, "You are a G-d d-n dirty puppy."20 At the insult, McCook lost all composure and shoved Wintermute into the wall, breaking a picture.21 His powerful fists pounded Wintermute as he bent the tiny banker over the bar, took him by the collar, and threw him to his knees. "You'll shoot me, will you?" he growled, pummeling the downed man. Abruptly, the secretary turned his back on the dumbstruck crowd and the bleeding Wintermute and climbed up the stairs from the saloon.²²

After a moment, Wintermute recovered and left to clean up. As he returned to the meeting upstairs a few minutes later, he warned Francis Ziebach that he intended to shoot McCook on sight, and that Ziebach might tell him so. In his court testimony, Ziebach recalled telling Wintermute to "deliver his own message." Wintermute rejoined the meeting, watched as former governor Newton Edmunds was nominated to serve as chair, and then departed. Returning some time later, Wintermute interrupted the proceedings to call attention to his facial abrasions. In the middle of a speech by Walter Burleigh, he attempted to call the proceedings to order and asked loudly whether the meeting was a "d—d rowdy" one. Pointing to his face, he pro-

^{19.} Dakota Republican, 18 Sept. 1873.

^{20.} Yankton Press, 17 Sept. 1873.

^{21.} Kingsbury, Dakota Territory, 1: 734.

^{22.} Ibid., 1: 726.

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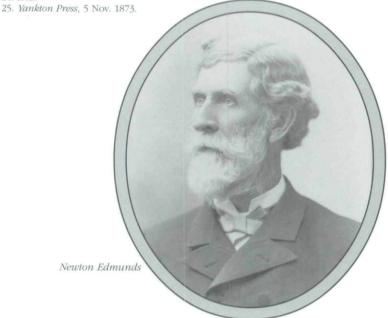
claimed that he had "just been licked out of his boots" by General McCook.23

Wintermute left the meeting yet again, then returned and took a chair near the aisle and next to the stove in the center of the room. Anxiously, he watched the doorway. The floor was turned over to Solomon Spink, who represented the stockholders opposed to the proposed mortgage. Three quarters of an hour into Spink's speech, McCook appeared in the doorway, and the shooting began.²⁴

The people of Dakota and the nation were shocked by the news of the secretary's death. What had begun as spirited political discourse had ended in the demise of a national hero. The underlying motives for the shots fired were less important than the context in which the incident took place and the public roles of McCook and Wintermute on opposite sides of the railroad question. After 11 September 1873, the mortgage controversy resolved itself in a settlement, and the economic recession set off by the Panic of 1873 rendered further construction infeasible.²⁵ The prosecution of Win-



24. Ibid.



termute, however, would occupy the attention of Dakotans over the next two years, consuming enormous resources and putting the relatively untried territorial judiciary system to its first severe test.

One month after the shooting, a grand jury convened in the same courtroom where the tragedy had occurred. To the surprise of many, the grand jury, presided over by Judge Alanson Barnes, refused to return an indictment for murder and instead indicted Wintermute for manslaughter. McCook's father-in-law Oscar Whitney, who had been appointed to fill the territorial secretary position, pressured the judiciary for a different result. For the second time that year, the Burbank administration threatened Judge Barnes with reassignment and, this time, carried through. During Governor Burbank's absence in November 1873, Whitney, as acting governor, banished Barnes to the third judicial district in Pembina, near the Canadian border, swapping him for judge Peter C. Shannon.²⁶

26. Barnes to Delano, 2 Dec. 1873; Yankton Press, 24 Sept. 1873; Jackson, "Dakota Politics," pp. 127-28. An outraged Barnes lodged a protest with President Grant through the secretary of the interior. Barnes to Delano, 2 Dec. 1873.



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In March of the following year, upon motion of the district attorney, Judge Shannon determined that the indictment had been found under a law that was no longer in effect and therefore had to be quashed. Such errors were not unheard of, given the jumble of territorial legislation that existed prior to the codification of laws in 1877. A second grand jury was summoned and on 29 April 1874 indicted Wintermute for murder, a nonbailable offense. He was committed to the local jail. ²⁷

In May of 1874, the trial got underway. The prosecution was composed of District Attorney Phil K. Faulk, lawyer George H. Hand, and Secretary of Wyoming Territory Jason B. Brown, who had been called to assist in the case. The defense was staffed with a territorial "dream team," including Gideon C. Moody, Solomon Spink, Leonard B. Swett (a close friend and confidant of Abraham Lincoln who had been imported from Chicago for the trial), William Tripp, and his brother Bartlett Tripp, future minister to Austria-Hungary. The government's theory was simple: Wintermute, shamed by the beating he had received in the barroom, secured a weapon, patiently waited for McCook to appear in the courtroom, and then executed him. Through the testimony of witnesses such as Walter Burleigh, Francis M. Ziebach, Joseph R. Hanson, Charles Rossteuscher, and McCook's widow, the prosecution laid out its version of the facts. Although the government contended that Wintermute's first shot had been wide of its mark, the bullet passing through the open doorway where McCook had stood, the second had been fired at almost point-blank range directly into the general's chest.²⁸

After the government rested and defense attorney Leonard Swett finished his nearly four-hour-long opening address, the defense team began calling its witnesses on 22 May. Almost immediately, cracks began to appear in the government's theory. Among the witnesses were the defendant's counsel, Solomon Spink and William Tripp. With so many eyewitnesses to the shooting, accounts would perforce vary according to perception, intelligence, angle of sight, bias, and memory. The defense, no doubt, used these variations

^{27.} Yankton Press and Dakotaian, 5 Mar., 30 Apr. 1874; Court Calendar, 1874, Second Judicial District, Yankton, D.T., p. 387, Records of the District Courts of the United States, RG 21, National Archives and Records Administration, Central Plains Region, Kansas City, Mo.

^{28.} Yankton Press and Dakotaian, 21, 28 May 1874; Doane Robinson, Encyclopedia of South Dakota (Pierre, S.Dak.: By the Author, 1925), pp. 734-35; Kingsbury, Dakota Territory, 1, 723

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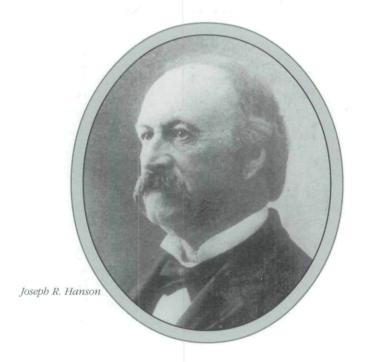
to sow the seeds of reasonable doubt. In addition, other testimony suggested that McCook was armed and that he, not Wintermute, fired the first shot.²⁹

Although the witnesses uniformly agreed that the second shot had been fired from Wintermute's gun, and that this shot had killed the secretary, at least three inferences supported the suggestion that McCook had fired first and that Wintermute had fired back in self-defense. To begin with, the first and second shots were closely spaced—too close, some said, to have been fired from the same gun. "Heard a sort of double shot, pat, pat, and saw flash," testified a Mr. Mathiensen. Such a firing sequence would contradict the government's theory, absent an automatic recocking device, which Wintermute's gun apparently lacked. Some witnesses had seen Wintermute holding a gun, but no one's eyes had actually been fixed on him at the critical moment. One witness, nicknamed "English Pete," testified that McCook had held a pistol, and although Pete's credibility was

^{29.} Yankton Press and Dakotaian, 28 May 1874.

^{30.} Kingsbury, Dakota Territory, 1: 733.

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thoroughly thrashed by a rigorous cross-examination, a second witness, Silas C. F. Norman, also reported seeing a pistol, or something that looked like it, in McCook's hand.³¹

Several witnesses testified that the sound produced by the first and second shots were remarkably dissimilar, suggesting that they had been fired from different guns in different locations. From the sound of the first shot, A. J. Sweetser testified, it had been fired from the hallway where McCook was standing at the time. Carl Meyer likewise contended that the first shot did not sound like the rest and that, from his experience in the army, a shot fired within the room would carry a sharper tone than one fired just outside the doorway. Such testimony lent additional support to a self-defense theory.³²

The third piece of evidence the defense relied upon was the location of the bullet holes. Here, the courtroom itself became an exhibit. If, as the prosecution wished to establish, Wintermute had

^{31.} Ibid., 1: 732-34.

^{32.} Ibid., 1: 731-32, 735.

fired the first shot as McCook stood in the doorway, a bullet hole ought to have been found at the apogee of a line extending from where Wintermute stood. During the cross-examination of defense witness Erick Iverson, a prosecutor led the man to the stair way to examine a bullet mark but received an answer that contradicted this logic. "I think a ball from where Wintermute stood when [the] first shot was fired, could not have struck here;" Iverson explained, "[it] would have hit the door post."33 The defense then introduced testimony to suggest that the first shot must have been fired by McCook and lodged somewhere in the courtroom, perhaps in one of the chairs containing bullet holes, which were also examined at some length. Although Wintermute's attornevs also introduced medical testimony that their client may have suffered a head concussion in the barroom beating that disturbed his mental faculties, they seem to have abandoned a diminished-capacity defense by the time they concluded their case. The jury received final instructions on the afternoon of 2 June and returned at noon the following day with a verdict: not guilty of murder, but guilty of manslaughter.34

The manslaughter verdict might be explained as a compromise between those jurors voting for a murder conviction and those favoring acquittal. Noted Dakota Territory historian George W. Kingsbury offered an alternative explanation. He ventured that Wintermute, in a show of bravado exaggerated by liquor, fired the first shot over McCook's head in the hope that the secretary would soil his reputation by running away. To support this reading of the record, Kingsbury noted that the two men were hardly twenty feet apart when the first shot was fired and that a miss at this range would have been unlikely. McCook's response was not flight, but fight, and Wintermute fired the fatal shot, Kingsbury concluded, in a reckless panic as the struggle ensued. Such a finding would be consistent with the jury's manslaughter verdict and, according to Kingsbury, matched Wintermute's explanation of the fateful night to his friends.³⁵

Whatever the thinking behind the jury's decision, the verdict satisfied no one. The government had been frustrated in its goal of ob-

^{33.} Ibid., 1: 735.

^{34.} Ibid., 1: 735-36

^{35.} Ibid., 1: 722-23. Wintermute's version of the events is unrecorded, and he elected not to take the witness stand at either trial.

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taining a murder conviction, and the defense had not attained its aim of acquittal. Several aspects of the case, including the political machinations at work behind the scenes, presented themselves as potential grounds for reversal. Seizing upon some of these irregularities, the defense filed for an appeal to the territorial supreme court, which met annually in Yankton. Comprising a panel of the judges from the three territorial districts, the court included Judge Shannon, who had presided over the trial, as well as Judge Barnes, who had presided over the initial manslaughter indictment, later quashed by Shannon.³⁶

Because Wintermute had been sentenced to ten years in an Iowa penitentiary, the first matter the defense brought up with the territorial supreme court was having him released on bail pending the outcome of his appeal. On 13 July 1874, during a special summer session, the court denied the defendant's motion. Oddly, the defense then moved for a continuance—while Wintermute sat in jail—until the court's regular session in January of the following year. The majority of the three-judge panel granted the motion over the dissent of Judge Shannon. Six months passed, and in January 1875 the parties began oral appellate arguments in the Yankton courtroom. Leonard Swett attacked the lower court proceedings on Wintermute's behalf, beginning his speech at 2:00 P.M. on Thursday, 22 January, and not concluding until noon on Saturday. The government presented its response the following Monday. On 30 January, the court reversed Wintermute's conviction and admitted him to bail.³⁷

The supreme court's decision rested on a subtle and technical, but nonetheless important, point of law. Judge Jefferson P. Kidder of Vermillion delivered the opinion of the three-member court over Judge Shannon's dissent. Judge Barnes submitted a separate concurring opinion responding to Shannon's dissent. The full opinion ran to more than forty pages and constituted the first published non-unanimous decision by the Dakota Territory supreme court since its creation in 1861. Key to the reversal of Wintermute's conviction was a provision passed by the 1863 territorial legislature allowing the accused to challenge a grand juror for bias at any time before the

^{36.} Statutes at Large, vol. 12, Act of 2 March 1861, p. 241.

^{37.} Dakota Territory, Supreme Court Docket Journal, 1874, pp. 106-7, and 1875, pp. 114-32, Roll 8, Elwyn B. Robinson Department of Special Collections, Chester Fritz Library, University of North Dakota, Grand Forks.

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grand jury retired to consider evidence.³⁸ Under this law, the accused could object to a juror's potential bias not only as the individual was being seated but even after the entire panel had been sworn in and heard evidence; something that had in fact happened during the Wintermute case. Because it was somewhat anomalous and potentially cumbersome, the law had been repealed by the 1869 legislature in the process of revising the criminal code.³⁹ Four years later, the legislature again attempted to straighten out the criminal laws of the territory. Deciding it was simpler to start afresh rather than try to repair the existing statutory scheme, lawmakers repealed the 1869 criminal code in its entirety, replacing it with

^{38.} Dakota Territory, Reports of Cases Argued and Determined in the Supreme Court of Dakota Territory, 1: 60-108; Dakota Territory, General Laws and Memorials and Resolutions of the Territory of Dakota Passed at the Second Session of the Legislative Assembly (1862-1863), Chap. 18, sec. 13, p. 107. For an excellent review of early attempts at publication and codification, see Delores A. Jorgensen, South Dakota Legal Research Guide (Buffalo, N.Y.: William S. Hein & Co., 1988), pp. 19-23.

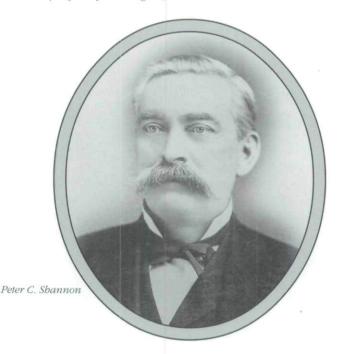
^{39.} Dakota Territory, *General Laws and Memorials and Resolutions* (1868-1869), Chap. 1, sec. 799, p. 165. As Judge Shannon pointed out, the old law allowed the accused to challenge a grand jury member after he or she had previously waived any objections. While providing the accused with additional procedural safeguards, this provision could inconvenience both

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various improved provisions in the 1873 session. In its prosecution of Wintermute, the Burbank administration had been dissatisfied with the first indictment for manslaughter, and a second grand jury had been called in April 1874. Among the sixteen new jurors was George W. Delamater, to whom the defense counsel voiced no objection. The grand jury was therefore sworn in, and Delamater was appointed foreman. The next morning, however, the defense attempted to interpose a generalized challenge to Delamater's ability to act impartially. Judge Shannon rejected the motion, reasoning that the only law that would allow a challenge to a seated grand juror had been repealed by the 1869 legislature.⁴⁰

The majority of the supreme court reversed Shannon on precisely this point. While it was true, Judge Kidder wrote, that the statute at issue had been repealed in 1869, the 1873 legislation had, in actuality, repealed this repeal. The majority of the panel believed

^{40.} Dakota Territory, General Laws and Memorials and Resolutions (1872-1873), chap. 5, sec. 1, p. 23; Dakota Territory, Reports of Cases Argued, 1: 72-76.



the prosecution and the court if the defense objected after the presentation of evidence. Dakota Territory, *Reports of Cases Argued*, 1: 75.

the court to be bound by a well-known rule of statutory construction holding that "the repeal of the repealing act" revives the statute originally repealed. In other words, the 1863 law was back in force during the second grand jury proceeding. Therefore, the court concluded, the grand jury indictment was flawed and the conviction on which it was based had to be reversed because Wintermute had been deprived of his statutory right.

The dismay of the government lawyers must have equaled or surpassed the rejoicing of the defense team. The supreme court's decision meant that if Wintermute were to be convicted, the prosecution had to begin all over again. Undeterred, the government assembled yet a third grand jury, and on 8 May 1875 secured an indictment for murder against Wintermute. At this point, the defense moved for a change of venue, arguing that a fair trial could not be obtained in Yankton. Shannon granted the motion, and the case was transferred to Vermillion.⁴³

In the meantime, Judge Kidder, the author of the court's opinion and sitting judge for the First Circuit in Vermillion, had resigned to prepare for his duties as a newly elected congressional delegate. His successor, Granville G. Bennett, convened court in Vermillion on 30 August and expended three full days selecting a jury. Testimony began on 2 September and differed little from that elicited in the first trial, with the defense again arguing that Wintermute's killing of McCook was legally justified on grounds of self-defense. When the jury retired to consider the case on 10 September, it took seven hours to reach a verdict. The twelve men selected to decide the case could not find that the government had met its burden of proving the charge beyond a reasonable doubt. A verdict of not guilty was returned exactly two years, nearly to the hour, after the shooting. The Wintermute affair was over.⁴⁴

The Wintermute trials are of historical interest if for no other reason than the host of famous personages involved. The roster of judges, lawyers, and witnesses are peppered with names that now appear

^{41.} Dakota Territory, Reports of Cases Argued, 1: 65.

^{42.} Ibid., 1: 67.

^{43.} Kingsbury, Dakota Territory, 1: 742.

^{44.} Ibid., 1: 740-41, 743. Wintermute died less than a year and a half later. Two days after his acquittal, he fled the territory with his family and returned to New York, the state of his birth. His finances exhausted and his health ruined, he died of tuberculosis at his father's home in Horse's Head, New York, on 27 January 1877. Kingsbury, *Dakota Territory*, 1: 743.

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on any South Dakota map. McCook County was named for the slain territorial secretary. Wintermute's attorneys, Solomon Spink, Gideon Moody, and Bartlett Tripp (for whom a town was also named), all had counties named after them. Hand County was named for an attorney for the government. Hanson County bears the name of the major who stepped on Wintermute's arm and wrested away the pistol. The city of Brookings received its name from Wilmot Brookings, who spoke for the railroad directors at the 11 September 1873 meeting. Ziebach County is named for Francis Ziebach, a witness who described Wintermute's professed intent to shoot McCook. Two western counties also bear the names of Judges Shannon and Bennett. Governor Burbank's surname had been adopted by a tiny settlement southwest of Vermillion when the Dakota Southern was built in 1872, but it would never identify a county.⁴⁵

In addition to the cause célèbre aspect of the case, the Wintermute trials put the judicial system of the territory to a stern test. With so much attention focused on the courts and the high-profile advocates making every plausible motion or objection that might advance their cause, the judges must have come under a great deal of pressure. In the 1870s, nearly every aspect of the case was roundly criticized, from the procedures employed to the results obtained. Public reaction to the supreme court's reversal was decidedly negative. exacerbated by a perception that the ruling had been based on a mere "technicality." 46 Newspaper editorialists failed to recognize the legislature's role as a culprit in the affair for its botching of the territory's criminal code. Nor was the supreme court's diligence in applying a law that was the product of an elected body praised. After all, the court could have bent to public opinion and passed over the grand jury law for policy reasons, as Judge Shannon had urged in his dis-sent, rather than restrict itself to applying the laws as it found them. The fact that the majority of the supreme court resisted the temptation to encroach into the legislative sphere seems to have been lost on contemporary commentators.

^{45.} South Dakota Writers Project, Work Projects Administration, South Dakota Place Names (Vermillion: University of South Dakota, 1941), pp. 25-51, 356; Clay County Place Names (Vermillion, S.Dak.: Clay County Historical Society, 1976), p. 32; Robert I. Vexler and William F. Swinder, eds., Handbook of the State of South Dakota (Dobbs Ferry, N.Y.: Oceana Publications, 1979), pp. 4-6.

^{46.} Yankton Daily Press and Dakotaian, 4 Feb. 1875.

The ultimate decision to acquit produced allegations of incompetence and graft against the Vermillion jury. The Closer examination, however, reveals the deliberate thoroughness with which the trials were carried out, as well as factual support in the record for the jury's determination that reasonable doubt existed as to whether Wintermute had intentionally and without justification killed General McCook. That the first and second jury trials did not produce identical results should not impugn their justness, for different juries, composed of different individuals, often will not reach the same decisions. By the time of the Vermillion trial, nearly two years had passed since McCook's death, and witnesses' memories would have faded to a degree, fertilizing reasonable doubts in the minds of jury members.

In the Wintermute proceedings, the neonate Dakota judiciary took a giant step toward legitimacy. The juries and judges had been tested by the pressures of public opinion and improper influence from the territory's executive branch and yet retained their sense of impartial justice and fundamental protections for the accused. The people of Dakota seem to have viewed the appellate reversal and the Vermillion jury's acquittal as an aberration rather than a failure of the system. Having survived its first real test of the pressures that could be brought to bear upon the administration of justice, the Dakota judiciary would eventually emerge a more efficient, stronger, and perhaps more confident forum for the adjudication of criminal trials.

^{47.} Ibid., 13 Sept. 1875. Throughout the trials, the grand jury system had come under harsh criticism, and some argued for its abrogation. The right to a grand jury was rescinded when South Dakota became a state. Yankton Press and Dakotaian, 30 Apr. 1874; South Dakota, Constitution, art. 6, sec. 10. Scholars have long found fault with the territorial justice system in general. See Lawrence M. Friedman, A History of American Law, 2d ed. (New York: Simon and Schuster, 1985), pp. 374-75; T. Alfred Larson, "Exiling a Wyoming Judge," Wyoming Law Journal 10 (Fall 1955): 171-79; Earl S. Pomeroy, The Territories and the United States, 1861-1890 (Seattle: University of Washington Press, 1947), pp. 51-61. For a reassessment of territorial judicial competence, see John D. W. Guice, "The Role of the Territorial Supreme Courts: The Historian's View," in The American Territorial System, ed. John Porter Bloom (Athens: Ohio University Press, 1973), pp. 105-13, and Friedman, History of American Law, pp. 375-76.

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