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The Legal Experiences of Mr. Alfred Packer

BY JOSEPH G. HODGES*

The Colorado territorial legislature of 1868 established the penalty for murder as death,¹ and in those days that meant hanging; there was no alternative.

The succeeding territorial legislature in 1870, however, provided that in cases of murder "the death penalty . . . shall not be ordered . . . unless the jury . . . shall in their verdict of guilty also indicate that the killing was deliberate or premeditated, or was done in the perpetration or attempt to perpetrate some felony."² This legislation is the basis of our present murder statute and was the only legislation on the subject of murder which was on the statute books until after Colorado became a state.

In the winter of 1872-3 in the western part of Colorado events occurred which caused an eminent historian of our state to say—"The recital of what follows is one of the most revolting and dreadful in the history of mankind. It is doubted if among any people, however uncivilized . . . and barbarous in any land under the sun, it has been exceeded in ferocity, cruelty, and incarnate fiendishness. But for the fact that the ghastly particulars are spread upon the records of our courts, upon the pages of our newspapers, that it was perpetrated but a few years ago and some of the witnesses are still living, it would appear incredible that any human beings could have possessed natures so savage, bloodthirsty, and venomous; that they could have executed their design unmoved by the least feeling of pity, or been impelled to wholesale massacre of their own brethren with whom they were in daily association, fraternizing in amity and concord, bound together by ties of race and kindred sympathies, for no other object than to rob them of their money. Our history is crimson with slaughters, but in the most devilish that have been told the slayers were less demoniacal than those who were guilty of the inexpressible deeds about to be narrated, and that fill the soul with unutterable dismay. Only the outlines will be given, for my pen is unequal to all the frightful task."

Late in the autumn of 1873 a party of men came to Colorado from Utah searching for gold. Near Montrose they met Chief Ouray and advised him of their plan to continue eastward into the mountains. Ouray counselled them against such an expedition because of the severe

*Of the Denver bar.

¹COLO. REV. STAT. (1868) c. 22, §20.

²Colo. Laws 1870, p. 70.

winters in that part of the country, but nevertheless, under the persuasion of Alfred Packer, one of their number, who professed a knowledge of the country east of Montrose, they set out. Some of the party went up the Gunnison and finally arrived at Saguache. A second group led by Packer, went as far as the present site of Iola on the Gunnison but there turned up towards Lake San Cristobal.

Six weeks later Packer arrived at an agency on Cochetopa Creek, some 75 miles east of the present site of Lake City. He told the agent there that his comrades had deserted him near Lake San Cristobal and had left for Silverton. He further declared that he had subsisted for several weeks on roots and berries and had only by chance reached the agency after suffering severe hardships. He was offered employment at the agency but refused and soon continued on to Saguache. There he met members of the party who had reached Saguache by way of Cochetopa Pass and their suspicion was aroused when Packer produced four different pocketbooks while searching for money with which to purchase a horse from Otto Mears. Mears communicated with the agent who had first seen Packer and his suspicions were confirmed. Packer also became intoxicated in Saguache and made damaging statements. He finally confessed that he had killed the five men who went with him, although he asserted it had been necessary for him to do it to save his life, that it had been a question of their life or his and that he had murdered them and resorted to cannibalism.

He was only half believed; but when the snows melted in the spring the bodies of the five men were found, all horribly mutilated. Packer was then arrested in Saguache and preparations were made to indict him for murder. A warrant for his arrest was issued but before it could be executed Packer escaped from the sheriff and disappeared.

During his absence great things were happening. Colorado became a member of the Union. In the spring of 1875 a cruel murder occurred at 634 Lawrence Street in Denver. As the historian says "premeditated murder is usually done under cover of darkness, but these butchers chose the glaring light of midday, yet, strange to relate, no trace of their work was discovered till six days afterwards, and in the interval the monsters had time to effect their escape." Certain Italians, Gallotti, Ballotti and Arratta had killed an old man and three boys. Robbery was the motive. The evidence showed that the crime had been planned for some time in the old country and that the assassins had followed their victims to Denver. They were indicted, in 1876 the trial was had and almost all the Denver bar was present. Attorneys were appointed to represent all the defendants but Charles S. Thomas appeared specially for Gallotti. He advised Gallotti to enter a plea of guilty and thereupon called the attention of the court to the statute

as amended by the territorial legislature in 1870, which provided in effect that no death penalty should be inflicted unless the jury should find in their verdict that the murder was premeditated or deliberate.³ Mr. Thomas argued that there was no provision for a jury when a plea of guilty was entered and under the statute no death penalty could be inflicted. As the same historian says "under the highly excited state of public feeling, this extraordinary and wholly unexpected state of affairs, which it was seen opened wide the doors of escape for the worst criminals that ever cursed the world, the judge's sustaining of Mr. Thomas's argument was fiercely condemned." But there was no other alternative, and as the historian continues, "There will always remain in the public mind a feeling of resentment against the legislative assembly for having so amended the criminal code to open the way for the tender of mercy and life to such self-confessed demons as these."

The other defendants quickly followed with pleas of guilty and all were sentenced to the penitentiary for life. Gallotti was pardoned in 1885 through the intercession of his "mother" who arrived in Denver and pleaded with Governor Eaton. It was later discovered that this woman who claimed to be Gallotti's mother was his mistress who was lonesome. At this time there was no provision for an appeal by the state in criminal cases so the Supreme Court was never called on to review the ruling of the lower court.

In order to remedy the situation which permitted Gallotti and the others to escape hanging, the state legislature in 1881 repealed the provisions of the statute adopted in 1870 requiring the finding by a jury that the killing was deliberate or premeditated or done in the perpetration or attempt to perpetrate a felony as a condition for the imposition of the death sentence, and adopted a new statute which contained in effect the same provisions as were contained in the act of 1870 but added thereto a provision that, in case a defendant pleaded guilty to murder, the question of whether the murder was deliberate or premeditated or in the attempt to commit a felony or in the perpetration of a felony might be submitted to a regular jury and if the jury found that those were the circumstances under which the murder was committed the death penalty might then be imposed.⁴

Early in 1880 one Hirschburg committed larceny and was convicted. In 1883 his appeal came before the Supreme Court of Colorado and it was there held that when the legislature in 1881 had repealed the larceny statute without a saving clause preserving the repealed statute as applicable to all crimes committed prior to its repeal, such repeal made the old law non-existent and that Hirschburg could not be con-

³*Supra* note 2.

⁴Colo. Laws 1881, p. 70.

victed for violating the law so repealed. The Supreme Court in commenting upon this said, "The failure of the legislature to place a saving clause can only be regarded as unpardonable carelessness in the discharge of its public duties."⁵

Later in 1880 one Garvey committed murder and was duly convicted. His case was appealed to the Supreme Court. The decision was handed down in 1883.⁶ Garvey's contention was that the statute passed in 1881 relating to punishment under a plea of guilty to murder could not be applied to one who committed his crime before the act was passed and that under the doctrine of the *Hirschburg* case the old statute which was repealed without a saving clause was also inapplicable. The state contended that only the punishment for murder had been changed and that the statutory crime had always existed. Beck had but recently mounted the bench and was chief justice. To him fell the lot of handing down the decision. He gave a learned discussion of the principles involved and came to the conclusion that since the new statute took away the dubious privilege of pleading guilty to a premeditated murder and escaping with life imprisonment, the punishment for murder had been made more severe under the 1881 amendment that it could not be constitutionally applied to punish Garvey even though he had pleaded not guilty, and that the *Hirschburg* case prevented him being punished under the old law, and so Garvey went off Scot free.

Meanwhile Alfred Packer remained at large. In March, 1883, one of the original party who had managed to reach Saguache was in a house in Fort Fetterman, Wyoming. He heard a voice in the adjoining room, through a thin partition, and recognized it as that of Alfred Packer. He communicated this to the authorities and Packer was arrested and brought to Denver and thence to Gunnison, then in Hinsdale County. On April 13, 1893, he was put on trial in Lake City upon an indictment hastily returned, charging the murder of Israel Swan, one of his victims. Four other indictments were also returned charging the murder of Wilson Bell, Frank Miller, George Noon and James Humphrey but Packer was not then tried on the other indictments. He was speedily convicted, and a month later the *Garvey* opinion was handed down.

Judge Gerry presided at the trial in Lake City and an interesting story is told concerning the sentence. The story goes that Judge Gerry looked at Packer, stood up and said, "You son of a ----- . There are only six democrats in this county and you have eaten five of them. For that you shall hang by the neck until you are dead, and may God have mercy on your soul." This is not confirmed by the record.

⁵*Hirschburg v. People*, 6 Colo. 145, 148 (1882).

⁶*Garvey v. People*, 6 Colo. 559 (1883).

Such a sentence might have dismayed a weaker soul, but not Packer. He decided to litigate. He went to the Supreme Court of Colorado not less than five times. On the appeal from his conviction the Supreme Court speaking through Beck held,⁷ that the conviction must be reversed under the *Garvey* decision. Packer also urged the point that since the indictment ended "against the peace and dignity of the people of the State of Colorado" and, because the crime was committed against the people of the Territory of Colorado, the indictment was defective. Beck spends several pages showing how this did not substantially prejudice the rights of the defendant. Packer also contended that when the legislature of 1881 repealed the law of 1870, that was a legislative pardon of his crime. He lost this point, too. The court remanded the case for trial on the issue of manslaughter, because a charge of manslaughter is included in a murder charge, and the Colorado manslaughter statute had never been altered, and Packer had not been placed in jeopardy as to that charge. This matter was not raised in the *Garvey* case, and thus Packer was retained in custody.

In 1886 Packer was tried for manslaughter, this time on all five indictments, was convicted, and sentenced to the maximum of eight years on each one, to run consecutively, which meant a total of forty years in the penitentiary. On this trial he moved to quash four of the indictments on the ground that he had not been tried within two terms of court since his arrest on the first one. This was overruled in the lower court. He petitioned the lower court for a writ of *habeas corpus* on the same ground which was denied. He then petitioned the Supreme Court for *habeas corpus* on this ground, but this was denied.⁸ He then appealed from the ruling of the lower court on this point and this appeal was dismissed for failure to prosecute.⁹

After he had served his first eight-year sentence, with time off for good behavior he again petitioned the Supreme Court for a writ of *habeas corpus* on the ground that the lower court had no power to sentence a being "*in futuro*" which he claimed it had done when it imposed the consecutive sentences each to commence as soon as the previous one finished. The Supreme Court speaking through Hayt, C. J., in 1893, denied the writ.¹⁰

In 1899 Packer came to the Supreme Court for the last time. He was represented this time by Ben Lindsey, Fred W. Parks and John R. Smith. This was an appeal from his conviction for manslaughter. He again claimed that two terms of court had elapsed between his imprisonment and trial of four indictments and that under the statute he could

⁷Packer v. People, 8 Colo. 361, 8 Pac. 564 (1885).

⁸Unreported.

⁹Unreported.

¹⁰*In re Packer*, 18 Colo. 525, 33 Pac. 578 (1893).

not be tried on those four. The court speaking through Campbell, C. J., took refuge in a defective bill of exceptions and said it would have to presume, in the absence of the evidence, that the lower court had some evidence of a waiver of this right by Packer at the time it was claimed in the lower court, and that the court would not overturn the lower court's conclusion on the matter. The same fate befell alleged errors in instructions given by the court and the alleged error in consolidating the cases. The main point urged for reversal was that because the crime occurred in 1873 and the indictments were returned in 1883 the prosecution was barred by the three-year statute of limitations applicable to murder indictments, and that the defendant's demurrer to the indictments which showed this situation on their face should have been sustained. The Supreme Court decided that the question could not be raised by a demurrer but must be raised by a special plea or by evidence under a plea of not guilty in order that the district attorney could present evidence which might bring the case under some exception in the statute, for example, by showing that Packer had been a fugitive from justice during the ten years.

Thus ended Packer's litigation and he went to the penitentiary. In 1901 Polly Pry, a Denver *Post* reporter, became interested in Packer and prevailed upon Bonfils and Tammien to campaign for his pardon. A campaign was organized and Charles S. Thomas, then Governor, was approached for a pardon. He at first refused but later granted the pardon.

It is interesting to note that if Governor Thomas, later United States Senator, had not successfully defended Gallotti in 1883 and had not discovered the possibility of escaping from a death penalty for murder by pleading guilty, the legislature might not have changed the statute as it existed in 1870. The original conviction of Packer might have been sustained and Governor Thomas would not then have been faced with the very embarrassing problem of pardoning Packer. Packer's first conviction would have stood and Judge Gerry's sentence would have been carried out.

Little more remains to be said. Packer frequented the office of the Denver *Post* for some years thereafter and as far as the records bear it out led a comparatively righteous and sober life. It is reported that he later retired to a small farm in the country to meditate upon his past sins. There is good authority that he died in a ripe old age and a confirmed vegetarian.

¹Packer v. People, 26 Colo. 306, 57 Pac. 1087 (1899).