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T. Alfred Larson

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EXILING A WYOMING JUDGE

T. ALFRED LARSON*

Carpetbaggers commonly served as judges in Wyoming during the territorial period. Appointed by the President of the United States with the approval of the Senate, they came often knowing little about frontier conditions. There were three judges in the Territory, a chief justice and two associate justices. Each had a district, and the three sat together as the supreme court of the Territory.

The records of the Justice Department, National Archives, Washington, D.C. offer much of interest concerning the judges of Wyoming Territory.¹ Among them the judge with the fattest file and the most controversial career was William Ware Peck, associate justice in Wyoming Territory 1877-1882.

Peck was practicing law in New York City when at the age of 57 he wangled the Wyoming appointment from President Hayes. Peck apparently had no special interest in Wyoming, but wanted whatever judgeship might be available. He came West highly recommended by members of bench and bar in New York and in his native Vermont. Prominent men commended Peck in terms such as the following: "He was marked for his devotion to, and industry in, his profession, and for his habit of thorough investigation of legal subjects, a gentleman of integrity and culture," "learning and character," "gentleman of good habits and unblemished professional character, courteous and well bred," "Vermont has produced few men more scholarly," and "high notions of professional honor and integrity." No doubt he was a devout Christian, a cultured and courteous gentleman and a scholarly student of the law. Moreover he had worked for his party (Republican). A former Governor of Vermont wrote to President Hayes: "He was a vigorous worker through our last contest. . . ."

Wyoming Territory at the time had only five counties, Laramie, Albany, Carbon, Sweetwater and Uinta, each extending all the way from Colorado to Montana. Chief Justice Joseph W. Fisher had Laramie County as his district; Jacob B. Blair had Albany and Carbon Counties; and Peck was given Sweetwater and Uinta Counties.

Peck opened the July 1877 term in Evanston. Since he had been appointed while the Senate was not in session he soon reminded Hayes of a promise to renew the commission during the next session. Moreover, Peck wrote to the President that Chief Justice Fisher "is over 70 . . . paraly-

*Professor of History and Head of the Department of History, University of Wyoming. A.B. University of Colorado 1932; M.A. 1933; Ph.D. University of Illinois 1937.

1. This study is based on research in the National Archives in Washington, D. C. Most of the information comes from the Appointment Papers for Wyoming Territory in the Justice Department records. However, supplementary material has been drawn from Department of the Interior and Legislative records.

tic . . . [and] cannot probably live long. . . . Now I want to be Chief Justice. . . . Do not understand me however as intending to intimate that Judge Fisher is not entirely competent for his position: I have no thought of doing so. I am simply anticipating a vacancy. . . . I suspect his health is really yielding to overwork. . . .”

Before long, people in Evanston and Green River began to take sides for or against Judge Peck. He was too deliberate to suit some of the people who had come to believe in quick punishment—or, more often, in quick acquittal. Cases that used to be settled in a day now took fourteen, to the complete despair of interested parties who had no patience for the technicalities and delays. One day the county commissioners of Uinta County asked Judge Peck to speed things up but he did not change his ways. Others took up where the commissioners left off, arguing that Peck would bankrupt the county. Comparisons published at the time show that in the July term of the previous year 25 civil and 10 criminal cases had been disposed of at a cost to the county of only \$2027.20, while in Peck's July term only 6 civil and 14 criminal cases cost the county \$8836.60.

A faction was organized to prevent Judge Peck's confirmation by the U.S. Senate. Friends thereupon rallied to the Judge's defense. Petitions were circulated and dispatched to Washington. From Green River Judge Peck wrote to President Hayes in October 1877: “This disorderly element of the County became restive under my administration of the law and are disposed to make a hubbub about it. . . . I have truly a stiff-necked people to deal with, but will manage to bend its neck to the law in time. . . .”

Even Peck's friends conceded that he was slow in the trial of cases, but they defended him by saying that Wyoming judges in the past had not been sufficiently conscientious and thorough.

While the Judge had quite a number of friends he seems to have had none among the men who represented Uinta and Sweetwater Counties in the legislature that met in November and December 1877. The representatives from eastern Wyoming were not acquainted with Peck, but went along with the wishes of the men from the western counties. Peck's enemies thus got the legislature to petition the U.S. Senate not to confirm his appointment. When, nevertheless, Peck was confirmed, the legislature chose another weapon from its arsenal. With only one dissenting vote it passed a re-districting bill, and transferred the unpopular judge to a new district made up of two as yet unorganized counties, Pease and Crook, in northeastern Wyoming. Governor John M. Thayer signed the bill reluctantly, yielding finally with the rationalization that if he tried to block it, there were plenty of votes to pass it over his veto.

There were very few white people in northeastern Wyoming in 1877, and the legislature's action was at once recognized as a method of exiling Judge Peck—sagebrushing him, it was called. There were precedents. The

territorial legislatures of Colorado, Utah, Montana, Washington and New Mexico had previously treated judges in similar fashion.

Peck's old district was made a part of Judge Blair's district. Blair would get \$1000 from the territory in addition to the \$3000 federal salary, in consideration of his double duty. The legislators felt that they were within their rights since the territory's organic act merely stipulated that there should be three districts, and left the actual laying out of the district boundaries to the legislature.

Not satisfied with giving Peck a sagebrush district, the legislature before going home submitted a Joint Memorial to the President and Senate of the United States asking for the judge's removal. Their memorial stated that Peck did not possess a "judicial mind," that he was "capricious and not always impartial," and "That owing to his unfitness he impedes and delays the due course of law . . . to such an extent as greatly to prolong the term of court to the great expense of the people." The Joint Memorial declared that in Uinta County alone the cost of a term had gone up from \$4000 the year before to \$13000 under Peck. In transmitting the Joint Memorial Governor Thayer wrote to Wyoming's Delegate in Congress that at this rate Uinta County would become bankrupt in two or three years.

The newspapers discussed Peck so much that his name became a household word. The *Evanston Age* related a story that once back East while arguing a case Peck had spoken for three days when the court became uneasy and asked him how much more time he would want. When Peck replied that "he had only just commenced" the presiding judge became irate and cut him off.

A communication published in the *Salt Lake City Tribune*, signed "A Juryman" described Peck's procedure at Evanston as follows:

Whenever the time arrived for court to open he was invariably late. . . . There were some exceptions to this rule, though rarely, and when they did occur, woe befall the attorney, witness or juror who arrived five minutes after his Honor. . . . his method of trial is excessively tedious. He assumes the duties of court, counsel and jury, forever interrupting lawyers to ask questions himself, and if an attorney who happens to be a special favorite of his (and there are some such) misses a good point, his Honor will call his attention thereto. He invariably aids the prosecution causes, and no man charged with any crime feels safe in being tried before him. . . .

As "A Juryman" said, Peck had some friends among the lawyers. Two of them in Evanston, C. M. White and A. H. Davis, worked hard for him. In Laramie, John W. Kingman, a former associate justice of the Territory, pleaded with Governor Thayer and President Hayes to undo the wrong done to Peck. Kingman called the Legislature's action "a scandalous attack . . . upon the independence of our Judiciary and the Sovereignty of the Federal Government."

In Laramie, also, Editor J. H. Hayford called Peck a victim of "senseless persecution." Hayford felt that Peck first was sniffed at by some people when he adopted the practice of opening his court by prayer and closing with a benediction. Hayford conceded, however, that though Peck was "an honorable, upright, Christian . . . it is, perhaps unfortunate that he is a little too old fogyish and puritanic for this latitude, and he let these traits manifest themselves in a way that excited prejudice and hostility in the minds of the free and easy western people. . . ."

One of Peck's firmest backers was Thurman Arnold's grandfather, the Rev. F. L. Arnold, pastor of the Presbyterian Church in Evanston. The pastor wrote to President Hayes:

" . . . It does seem that the Saloon, Gambling and Impure houses of this District are determined to get rid of Judge Peck. The Legislature now say as soon as he is confirmed by the Senate, they will appoint him to Pease County in the Black Hills and one of them advised some of our good citizens that we have his head shaved or the Indians would get his scalp. I have been in this territory almost seven years. . . . In the July term of court I was foreman of "Grand Jury," and I think everyone of the criminal cases originated either in gambling, saloon or impure houses. Judge Peck has so instructed jurors, and explained the laws, that this class of people who have been largely in the ascendancy are determined to get rid of him. Since Judge Peck came among us one or two saloons have closed, and if he continues among us others will soon follow. Should our dear Judge Peck be removed to Pease County by the Legislature may I be permitted to ask your Excellency to send us, if not a Christian gentleman, at least a temperance man; but O, I would thank God so much if Judge Peck can be continued here. Eternity alone will reveal how much you have encouraged and cheered God's people in appointing Judge Peck to this place. He has already been the means of starting a Sabbath School in "Green River," a most fearfully wicked place. . . . P.S., Judge Peck is an Episcopalian."

The hardest worker for Peck was Alf G. Lee, Uinta County clerk, who assembled in printed form a 24-page, legal-size, "Statement supported by Proofs and Affidavits" in behalf of the judge. One of Lee's exhibits showed that those who complained the loudest about the expense of Peck's court were not taxpayers. Property taxes collected in Uinta County in 1877 amounted to about \$50,000. The Union Pacific paid \$27,000 of this. The division superintendent of the Union Pacific signed a pro-Peck petition, as did 29 other taxpayers who together accounted for \$4000 in taxes. Those who paid most of the taxes, then, said Lee, favored Peck, while William Hinton, leader of the opposition faction, paid no tax at all.

Judge Peck went to Washington in February 1878 to obtain Congressional repeal of Wyoming's re-districting act. Congress had taken away the power of the legislatures to assign judges in a few other western territories after sagebrushing incidents; so Peck had reason to think that he could get some remedy from Congress. The U.S. Senate quickly voted

to disallow the Wyoming re-districting act, but the repeal measure never got out of the judiciary committee in the House of Representatives; so the Wyoming action stood. Wyoming's Delegate to Congress, W. W. Corlett, chose to support the Wyoming legislature, and was instrumental in getting the bill held up in committee.

The tactics employed by Corlett so successfully are not known for sure, but there are a few clues. In the Legislative Records of the National Archives is preserved a 40-page longhand document entitled "Report on S732 Wyoming Territory Counties of Pease and Crook." On it is a notation "Found in Hall of House March '89." It is clearly a preliminary draft which was never put in final form, since it was not needed. Why it was not destroyed, but instead turned up in the House 11 years after its preparation, is surprising, to say the least. The document points out that Wyoming Territory was "subject only to the limitation that such districts must be three in number. . . ." The document argues that while no doubt Congress has the power to annul such legislation it "ought not to exercise that power." The document goes on to say that Peck's one term cost Uinta County "about \$9000," and that when the county commissioners courteously and respectfully suggested "that such a great expense might be avoided" they were "dismissed . . . with a rebuke." The facts before the committee, says the document, left no question but that "a very large portion of the people" of Sweetwater and Uinta Counties "are bitterly opposed to Judge Peck." Previous judges had had no trouble. The Senate "must have been grossly imposed upon by representations coming from interested parties. . . ." There was evidence, claims the document, that petitions for Peck were forged. Then, adds the document, it was not the intent of the legislature to deprive Peck of his rights. The new district was not completely uninhabited. The Indian title had been extinguished in 1876, and the district was fertile and promising, and might "soon have a larger population than the other two districts." Western territorial legislatures have to anticipate settlements and provide for them in advance. The legislature merely wanted to give Peck a chance "to redeem his reputation" in a new district where he would soon be needed.

Some of the correspondence in the Justice Department files indicates that Corlett obtained support from state's rights champions whose sympathies for the rights of individual states extended to the territories as well.

When Peck's hopes for Congressional intervention were not realized, he thought of getting another job. He applied for a vacant judgeship in New York State, and for the Governorship of Wyoming Territory. President Hayes did remove Wyoming's Governor, John M. Thayer, apparently for his part in the re-districting business, but he gave the position to John W. Hoyt rather than to Peck. Failing to get another job Peck decided to make the most of the one he had. He did not try to hold court in northeastern Wyoming where the proposed new counties would not be organized for several years, and where there was nothing to do, but he did

carry most of the burden in the territory's supreme court during the next four years. As has been mentioned above, the three district judges sat together as the supreme court. Since Peck had no district chores, the other two judges permitted him to do most of the supreme court work.

In 1878 and 1879 Judge Peck wrote the court's opinions in 21 of the 25 cases before the supreme court. Whether he wrote the court's opinion or dissented, Peck's opinions run to 126 pages in the *Wyoming Reports* for 1878 and 1879, while Chief Justice Fisher wrote only three pages, and Associate Justice Blair, four pages. After James B. Sener replaced Fisher as Chief Justice, the new judge assumed part of the load but still left most of it to Peck. In the four years 1878, 1879, 1880 and 1881, Peck's opinions fill 269 pages, Fisher's, 3, Blair's 20, and Sener's, 62.

Not infrequently Judge Peck annoyed his colleagues on the bench. Understandably, Peck held consistently that the re-districting act which had deprived him of his Uinta-Sweetwater district was unconstitutional. Whenever appeals came from that district after Blair had taken it over, Peck would hold that Blair had no jurisdiction. Blair and Fisher would over-rule him, however. Another chronic cause of difficulty in the Supreme Court was Peck's willingness to accept informal appeals. He refused to accept the majority view that before an appeal should be heard there must be a bill of exceptions made up and signed by the presiding judge of the court below. Judge Blair normally wrote very little, but he could not resist the urge to express himself on this subject, in the case of *Johns v. Adams Bros.*,² March Term, 1880:

"... He who searches either sacred or profane history to find more than one Job, will search in vain. From the time of the creation of man to this hour, no one, it is said, ever possessed the patience of him. In that respect he stands without peer. . . . Of two things I feel morally certain. The first is, that had he lived in this age of the world's history, and been honored with a seat on this bench, his fame as a man of inexhaustible patience would have been less. Second, men and women would not be so often admonished to profit by his example.

"I am led to these reflections from the fact that, notwithstanding a rule of this court which has received the judicial sanction of a long list of illustrious predecessors, . . . which rule in the most positive language declares that the court will not review alleged errors in the record, unless the motion for a new trial made by the court below is incorporated in a bill of exceptions duly and properly signed or allowed by the court rendering the judgment; yet strange as it may seem, we are urged if not importuned at every turn, and sometimes by those who breathed into it the breath of life, to wholly disregard it. This, so far as I am concerned, I cannot, will not do. But while I shall always be found defending it from all assaults, come from whatever quarter they may, I hope I shall be pardoned for saying, that I think that our moments of time are too precious, and life far too short, to be required at

2. 2 Wyo. 194 (1880).

every term of this court to assign the same reasons for refusing to review cases improperly brought here."³

Judge Peck was a Republican in politics (as were the other judges with whom he served), but opposition to him was bipartisan. In October 1878, almost a year after he had been sagebrushed, the Territorial Republican Convention meeting in Cheyenne adopted a resolution, apparently unanimously, asking the President to remove Peck "upon the ground that he is unfitted to discharge the duties of so responsible a position in consequence of certain infirmities of mind." In transmitting the resolution to the President, W. W. Corlett referred to Peck's "idiosyncracies of character."

Peck's friends came from both parties, too. A Democratic leader, William R. Steele, a Cheyenne attorney, in 1879 referred to Peck as "an honorable, conscientious gentleman, a good lawyer and I believe an able Judge." Laramie attorney J. W. Kingman (formerly associate justice of the territory), a Republican, wrote to President Hayes in 1879 that Peck was a "keen, well-read lawyer, an industrious, painstaking student, and a clear-headed incorruptible, fearless Judge."

Wyoming Governor John W. Hoyt, a Republican, at first defended Peck but later, in November 1879, wrote to President Hayes that he had come to believe that opposition was so strong that "the best interests of all parties concerned would be promoted by the assignment of the Judge (Peck) to some other field of labor. . . . His voluntary retirement, or his appointment to another post would put a final end to bitter feuds and partisan strifes in all parts of the Territory. . . ."

Presumably this letter had something to do with the nomination of Peck to the associate justiceship of New Mexico Territory in March 1880. However, Peck remained in Wyoming when leaders in New Mexico got wind of Peck's troubles in Wyoming and were able to block his confirmation.

Territorial lawyers had been divided on the Peck issue, but in 1881 all members of the territorial bar except one signed a statement praising Peck on the occasion of his application for a position on the U.S. Court of Claims. Their statement lauded the "ability, integrity and learning brought by you to the judicial office . . . dignity and courtesy of bearing, diligence, accuracy, fidelity and courage. . . ." Joseph W. Fisher, who had earlier served on the supreme court bench with Peck for two years, was one of the signers of this statement, but he soon wrote to the U.S. Attorney General:

". . . When I attached my name to the letter in question I was laboring under a mistake as to its purport. I do not believe that a single member of the bar in this territory desires the return of Judge Peck to his present position and it is only with the hope of

3. *Johns v. Adams Bros.*, 2 Wyo. 194, 199 (1880).

getting rid of him that the letter which was signed was gotten up.

“Judge Peck is a moderately good lawyer but he lacks every other element required to constitute a judge, and while nearly all the members of the legal profession would regard it as a calamity to have him returned to this territory, I for one do not wish to have him inflicted upon any other judicial district. I therefore wish to withdraw any influence which my signature might give in favor of his appointment. I have nothing to say against Judge Peck as a man but as a Judge I beg leave as an humble citizen to enter my protest. . . .”

As in 1877, the petitions were circulated in 1881, when the end of Peck's term approached. One petition bearing 641 signatures objected to his “eccentricities of manner and idiosyncracies of character.” The *Cheyenne Sun* reported that Peck was in Washington in December 1881 seeking another four-year term. The *Sun* claimed that on the supreme court Peck “assumed to dictate all the decisions and browbeat the other judges. Not that he knew more, but he had less scruples.” The *Sun* reported also that some time earlier, when Chief Justice Fisher resigned, a few cases had remained in his Laramie County district. Peck took them over. Said the *Sun*: “These Judge Peck took under his judicial wing and held court by the month on them. He nursed them along in truly rural fashion. . . . It really cost our county more to try those few civil cases than the expenses of any entire term of court since held in the County. . . .”

Judge Peck was not re-appointed, but he chose to remain in Wyoming for ten years or so, engaging in private practice. He found time to even a few scores. Once he wrote to the U.S. Attorney General about Judge Blair, who had shared the supreme court bench with him: “The Judge of the second district—lazy, ignorant, frivolous and profane—has been the buffoon of the Courts for the last twelve years. . . .” Blair was not re-appointed, but since Blair was a Republican and President Cleveland a Democrat, his replacement was probably in the cards whatever Peck may have written about him.

Peck needled his assorted enemies in Wyoming by publishing articles in the *New York Times* belittling some of the Republican federal office holders in Wyoming. Whether Peck switched his party affiliation from Republican to Democrat is not clear, but the Democratic U.S. Attorney in Wyoming under Cleveland procured Peck's services as special U.S. attorney. As soon as the Republican Benjamin Harrison replaced Cleveland in 1889, Wyoming's Delegate to Congress Joseph M. Carey got Peck's appointment revoked. In a letter to Harrison's Attorney General, Carey complained that Peck had praised the Cleveland administration and had been “engaged principally in doing dirty work for the Democratic party.”

Probably Peck enjoyed his sweetest bit of revenge in 1889 when he helped block W. W. Corlett out of an appointment as Chief Justice of the territorial supreme court. It was Corlett who had done most to keep the U. S. Congress from disallowing the re-districting bill which sage-

burshed Peck. Joseph M. Carey did his best to get President Harrison to appoint Corlett, but Peck submitted damaging evidence against Corlett that Carey could not explain away, although he tried. Peck supplied the President with indisputable evidence that Corlett had supported Cleveland against Blaine in 1884. Harrison could have forgiven Corlett if he had merely "taken a walk," but instead he had written a letter to a Democratic leader supporting Cleveland and calling the Republican standard-bearer Blaine a "Plumed Poppy-cock" and an "historical humbug." Harrison felt compelled to pass over Corlett, and he named instead Willis Van Devanter, who was Carey's second choice.

Soon after this Peck returned to New York City and resumed the practice that he had dropped in 1877. One can imagine him regaling his New York associates in the legal fraternity with elaborate stories about life in the Far West.⁴

4. To close this study of Wyoming's controversial William Ware Peck, I have asked a senior law student at the University of Wyoming, Richard V. Thomas, to read the judge's supreme court opinions, as published in *Wyoming Reports*, vols. I and II, and to comment on them. Mr. Thomas's comments are as follows: A perusal of Judge Peck's opinions discloses that while he may have been unpopular, Peck was as competent in the role of appellate judge as any of his contemporaries on the Supreme Court for the Territory of Wyoming. He cited authority for his rulings just as frequently as any of the other judges if not more frequently, and his decisions show reasoning of at least equal quality. He did, of course, assume a dogmatic position with regard to Blair's authority to act in Uinta and Sweetwater Counties, and he had practically a stock opinion which he included in every case appealed from those counties, to the effect that the second judicial district court with Blair sitting as judge was without jurisdiction there because the re-districting bill was unconstitutional. It should be pointed out that Peck's ability as an appellate judge is not necessarily indicative of his competency as a trial judge, and his opponents could very well have had a legitimate argument against him on that score.