1992

Justice in the Black Hawk War: The Trial of Thomas Jose

Albert Winkler
Brigham Young University - Provo, albert_winkler@byu.edu

Follow this and additional works at: https://scholarsarchive.byu.edu/facpub

Part of the United States History Commons

Original Publication Citation

BYU ScholarsArchive Citation
Winkler, Albert, "Justice in the Black Hawk War: The Trial of Thomas Jose" (1992). All Faculty Publications. 1844. https://scholarsarchive.byu.edu/facpub/1844

This Peer-Reviewed Article is brought to you for free and open access by BYU ScholarsArchive. It has been accepted for inclusion in All Faculty Publications by an authorized administrator of BYU ScholarsArchive. For more information, please contact scholarsarchive@byu.edu, ellen_amatangelo@byu.edu.
Justice in the Black Hawk War: The Trial of Thomas Jose

BY ALBERT WINKLER

IN AUGUST 1867 THOMAS JOSE, A WHITE MAN, was tried and convicted of the murder of Simeon, an Indian. The case was unusual because the settlers of Utah seldom faced legal action for misconduct victimizing Native Americans during the Black Hawk War.

The legal system in Utah was administered by the whites to deal with conduct among themselves and to protect their interests. Indians were largely excluded from that system and were given inadequate protection especially in times of conflict such as the Black Hawk War of 1865–68 when even peaceful Native Americans were viewed with suspi-

Dr. Winkler is an archivist in the Harold B. Lee Library at Brigham Young University.
The stress of war led some whites to excesses because they did not need to worry about legal restraints. Incidents of the mistreatment of women, children, and other hapless Indians during the hostilities were often inadequately investigated, lightly punished, or simply ignored.

During the Black Hawk War a number of instances of the killing of Indians by whites occurred under questionable circumstances. On July 18, 1865, a “dozen or more” Native Americans, including women and children, were killed near Burrville by a militia unit that fired blindly into a large cedar grove. That same month several Indian women and children captives were killed when a woman struck one of the guards with a stick. The militiamen shot the woman and the rest of the prisoners. Neither of these incidents was officially investigated.

Individuals with legal authority could also be accused of excesses. On March 14, 1866, the Ute chief Sanpitch and seven or eight other men were arrested near Nephi after they had been implicated by rumor. Sanpitch was ordered to dispatch men to bring in Black Hawk and his band or be shot. The chief had insufficient power to bring in the warring Utes, so he and his fellow prisoners broke jail rather than await execution. Each was hunted down and killed. The largest massacre of Indians occurred at Circleville in April 1866 when at least sixteen unarmed Paiute Indians, including women and children, were killed—most had their throats slit. Despite pleas for an investigation, federal and territorial officials took no legal action.

Another incident demonstrates that even the most blatant murder could go unpunished. On June 10, 1866, Ute warriors attacked Round Valley (Scipio), taking stock and killing James R. Ivie and Henry Jennings. Militia units pursued the raiders but failed to prevent their escape. Unable to avenge the death of his father on the raiding party, James A. Ivie killed an “old Indian,” Pannikay (Panacara or Parmi-kang). The victim belonged to the Round Valley “tribe or family” of Pahvant Indians who were considered peaceful, but the fact they were Native Americans was enough to raise suspicions.

Shortly after the Ute attack, Pannikay had come to Benjamin Johnson of Round Valley where Thomas Callister was visiting. Johnson told

---

1 Peter Gottfredson, Indian Depredations in Utah (Salt Lake City, 1919), pp. 159–61.
Pannikay the whites were very angry and doubted his safety there, and Callister advised him to go to the camp of Kanosh, a Pahvant chief. Pannikay, probably in fear of his life, ran away. Johnson intercepted him on horseback and took his gun. He was leading the unarmed Indian back when James A. Ivie rode up and shot him. Callister and others saw the Indian fall, and they approached to see the victim covered with blood.

Ivie admitted killing the man, saying he was avenging his father’s death. Callister told Ivie that the “poor Indian” had nothing to do with his father’s demise and that “he had better go into the field where the hostile Indians were” if he wanted to kill the perpetrators of the act. Hoping to avert trouble, Callister told the leaders of the Pahvants what had happened. Kanosh simply recommended that Ivie give Pannikay’s son a horse and some money in compensation. So, although Ivie murdered an unarmed man in front of witnesses and admitted the deed, apparently his only punishment for the crime was a verbal reproof from Callister and a suggestion of a payment by Kanosh.

From the outset of hostilities in 1865 LDS church leaders had spoken against harming innocent Indians. On July 19 of that year John Taylor made the following statement at Mount Pleasant: “Some want to kill the Indians promiscuously, because some of them have killed some of our people. This is not right. Let the guilty be punished and innocent go free.”

Brigham Young was more detailed in his opinion as expressed at Springville on July 28, 1866. He stated that Indian hostilities were brought about by “our brethren” who had not treated the Native Americans as they should. He had “a harsh word” for anyone “who professes to be a Latter-day Saint who has been guilty of killing an innocent Indian.” Such a person “is just as much a murderer through killing that Indian, as he would have been had he shot down a white man.” Young stated what should be done with anyone who murdered a Native American: “Take that man and try him by law and let him receive the penalty. The law will slay him.” Despite such sentiment the legal system did little to punish crimes against Indians until Thomas Jose was accused of killing Simeon a year later.

---

1 Thomas Callister to George A. Smith, June 17, 1866, Journal History of the LDS Church, LDS Church Library-Archives, Salt Lake City. See also William Probert to Peter Gottfredson, July 1, 1915, cited in Gottfredson, Indian Depredations, pp. 228–29.

2 Whether Ivie actually gave the horse and money to the boy is not known.

3 Desert News, July 19, 1865.

On Saturday, July 6, 1867, Simeon, a Paiute Indian of a group residing near Beaver, was seen “on the range” where the cattle were kept near Paragonah (Red Creek). He was detained by the militiamen who guarded the stock, but he had a pass from Isaac Riddle of Beaver and was allowed to continue. The local Paiutes were believed to be peaceful and to have little sympathy for the warring Utes because of animosities between the two groups. But Joseph Fish of the militia protested to Silas S. Smith, who was over the guards, “against allowing Indians to pass near our stock, as they might be acting as spies.”

A few days later Simeon was again in the area and got a ride in the wagon of George Condie. The man had some fish with him and said he had been to Fish Lake. He said he was on his way back to Beaver.

Probably on July 8 Simeon camped about two miles north of Paragonah near “Little Creek.” On July 17 his body, with a bullet wound in the back of the head, was found by a sheepherder. This “created much excitement both among the friendly Indians and some of our brethren.”

The discovery of Simeon’s body was soon followed by an Indian raid. During the night of July 21 raiders struck near Paragonah. Several times they attempted to seize cattle and escape up Cottonwood Canyon. Each time they were thwarted by the whites, and sporadic fighting lasted until the afternoon of July 22. The affair was a complete success for the militia which repulsed the Indians, regained the stolen cattle, and captured about fifty of the raiders’ saddle horses without losing a man.

---

8 Joseph Fish, Diaries, July 6, 1867, typescript, Special Collections, Lee Library, Brigham Young University, Provo, Utah. This journal is in part at least retrospective because Fish entered under certain dates information that he could only have acquired later.

9 George Condie as cited in Utah v. Thomas Jose, Iron County Legal Records, Utah State Archives, Salt Lake City.

10 Fish Diaries, July 9, 1867.

11 Ibid., July 21, 22, 1867.
Soon after Simeon's body was found, William H. Dame, president of the Parowan Stake of the LDS church and colonel of the militia, had received strong advice from Brigham Young and George A. Smith on what to do with murderers of Indians. The telegram, dated July 20 at 3:30 p.m., clearly stated that anyone guilty of "the murder of a friendly Indian . . . should be taken by the civil authorities; and punished, as any other murderer: as an act of this kind exposes the lives of many innocent and defenceless persons."12

The fear of Young and Smith that the unpunished crime of murder might lead to further atrocities was justified. Joseph Fish reported on August 4 that "the Indian excitement has not abated very much" and that "some of our boys took some of our friendly Indians and were going to hang them, claiming that they were connected with the hostilities during the last raid."13 These men were dissuaded from the attempt, but the fear of such rash reprisals remained. The murder of Simeon was examined perhaps as much to serve as a deterrent as for the cause of justice.

Samuel H. Rogers and Silas S. Smith conducted the investigation. Rogers interviewed a number of people in Paragonah. Some settlers were reluctant to cooperate, and Rogers finally "threatened" Monroe Lowder to get information from him. When a few people questioned whether Simeon had actually been murdered, since the body was buried without an inquest, Rogers exhumed the body on July 23. He cut the head off the corpse, found the entry wound of the bullet, and re-buried it. On August 5 he returned to the grave with a physician, Calvin C. Pendleton. This time they "brought away" the head, "opened" the skull, and removed the bullet. As a result of that investigation Rogers brought charges against Thomas Jose.14

A grand jury was impaneled on August 22 to decide if the evidence was sufficient to bring Jose to trial. Joseph Fish, a member of the grand jury, recorded that "it was with difficulty that the indictment was found, as some thought it of little consequence in these times of Indian troubles to kill one [i.e., an Indian], whether friendly or not."15

Erastus Snow addressed such issues in a speech that day and in two

12 Brigham Young and George A. Smith to William H. Dame, July 20, 1867, Special Collections, Lee Library, BYU.
13 Fish Diaries, August 4, 1867.
14 Samuel Rogers outlined the investigation at the trial of Thomas Jose; see Utah v. Thomas Jose.
15 Fish Diaries, August 22, 1867.
sermons on the day following. Traveling north from St. George, Snow apparently stopped at a number of towns to speak to the people. Fish summed up Snow’s remarks: “His preaching was principally about relations with the Indians. He showed how we as a general thing condemn all the Indians for the hostile acts of a few. This was not right or just. The Jose case called for some measure to be taken, or the Indians, whether friendly or not, would be shot down like wolves on the prairie.”

Jesse N. Smith, judge of the Iron County probate court, presided at Jose’s trial. Smith was a prominent citizen but had little if any formal training in law. The jury for the case of “The People of the Territory of Utah versus Thomas Jose indicted for the murder of one Simeon a friendly Indian” consisted of men called from Cedar City, with John M. Higbee serving as foreman. Testimony in the trial was heard for two days starting on Monday, August 26.

The trial began with Samuel H. Rogers, the prosecuting attorney, calling witnesses. William Lefevre testified that on July 8 he had met the defendant who was looking for mules. Jose had been searching for two or three days and thought Indians had taken them. He said “he would be damned if he did not kill the first Indian he came across.” That same day Joseph Fish also heard the defendant say that if he learned Indians had taken the mules he would kill the first one he met if he “swung for
it the next minute.” F. Whitney reported that Jose had made a similar threat on or about July 12 when he had come to Whitney’s store. When asked what he intended to do with the pistol he carried, Jose had said, “I am going to kill the first Indian I come across by h - l.”

Alan Miller testified that he and Thomas Butler had talked with “an old Indian” near “Little Creek field” at sunset on July 8. Miller said they saw someone who looked like the defendant about one-half mile from the road. The man had no weapons that Miller could see. Later that evening Miller went to see Thomas Jose to go with him to play games with William Robb. Later, when Isaac Riddle came looking for Simeon, Miller asked the defendant if he had killed the Indian. Jose said he had not.

Emily Lowder testified that she saw Jose leave his house with a gun right after her children reported seeing an old Indian pass by. Her nephew, Monroe Lowder, came home about midnight that evening from playing at Robb’s. He said the defendant had told him he had followed the Indian to Little Creek and had observed him take a drink there and go into the brush to make camp. Monroe commented that he did not think the Indian would bother anyone again because he thought Jose had killed him. But when Emily pressed Monroe to say directly that the defendant had murdered the Indian, he replied no. Emily later approached Jose’s mother, Ann, who said Thomas had left with a gun that evening. It was loaded when he left, but it had been fired when he returned. Emily also reported, “Mrs. Jose said to me if it was told what she told me her life would not be worth that” and snapped her fingers.

Monroe Lowder testified that Allan Miller and Thomas Jose had arrived between 8 and 9 p.m. to play games. Rogers asked Lowder if he had questioned Jose about killing Simeon, but Lowder did not remember. When asked again if he had queried Jose about the death of the man, Lowder said yes. But Lowder deflected this line of questioning by referring to the defendant’s earlier statement that he would kill an Indian to pay for the theft of his mules.

John D. Pickering had found the dead Indian. He had made no detailed examination of the corpse but said the victim was in a sleeping position, lying on his right side with his left arm across his body and his right arm above his head. The body was buried shortly after Pickering’s discovery.

Most of the physical evidence in the case was presented by the physician, Calvin C. Pendleton, who had participated in the coroner’s
inquest and had examined Simeon’s body. Pendleton declared he was “satisfied” the victim’s skull had been “perforated” by a ball that had entered the skull just behind the left ear “and passing along in a glancing direction stopped just forward of the same ear.” The bullet weighed a little less than a slug from a “navy revolver.” In the doctor’s opinion “it could not have been possible for the ball to have passed into the head the way it did without wasting some.” Pendleton had taken Jose’s gun, “unbreached” it, and found it loaded with a “small charge of powder.” He believed that “a good fair charge of powder must have driven the ball quite through the head.”

Samuel H. Rogers stated that during his investigation he had experimented to see if he could account for the deformity of the bullet, because the projectile had “passed along inside the head in a glancing direction.” He had loaded Jose’s gun with a navy ball and a light charge of powder and then shot the round “square against” the shoulder blade of a horse. This did “not waste the ball much if at all.” He then shot the bullet at a glancing angle into the bone, and it was “wasted very much.”

Silas S. Smith testified that he was familiar with the gun, having carried it to Jose when it was sold to him. Smith saw “the boys” practicing with it and had heard the defendant say he always used a navy slug in it. Smith also claimed to know that Thomas Jose had borrowed Thomas Robb’s navy-revolver moulds to make bullets.

In an apparent attempt to demonstrate the hostility of some individuals to the idea of legally defending Indians, Rogers recalled John D. Pickering as a witness and asked him: “Do you think the killing of that Indian was murder?”

“No. I never have nor do not now believe that Indian was shot.”

Rogers also recalled Monroe Lowder to the stand to ask him: “Do you think a white man ought [to] suffer for killing an innocent Indian?”

“Don’t know.”

“That was your answer before the grand Jury to the same question. ‘Don’t know.’ Should a man in your opinion suffer death for killing an innocent white man?”

“Yes.”

Revolvers at that time commonly did not use metal cartridges. Each chamber had to be loaded separately by placing a charge of powder in it and then ramming a bullet into the chamber. The navy slug was probably a .38-caliber, 145-grain ball for the navy .36-caliber Colt or Remington revolver. The lead balls were molded slightly larger than the chamber to assure a snug fit. A load of 17 grains of powder was commonly used during the Civil War. See Jack Coggins, Arms and Equipment of the Civil War (Garden City, N. Y.: Doubleday, 1962), pp. 41–42.
The counsel for the defense was James H. Dalton. His first witness was Thomas Robb who testified that the defendant had visited his home for “a long time” on the evening of July 8 and never told him he had shot the Indian. Rogers immediately tried to discredit the witness by asking him the same question as he had others: “Should a white man be punished for killing an Indian under such circumstances?” Robb gave the common answer: “Don’t know.” Apparently taking the bait to show his hostility, Robb added that Indians “are a good deal the friendliest when they are dead.”

Dalton called a number of witnesses who had seen Simeon and Thomas Jose on July 7 and 8. Their testimony did little if anything to shield the defendant. It is not known if Dalton’s strategy was to use this testimony to lead up to an important point for the defense because his next two witnesses were not allowed to testify.

When Dalton attempted to call the defendant’s father, William Jose, to testify Rogers objected on the grounds that the man would not tell the truth under oath. Dalton demanded proof of that statement, so Rogers called Stephen Barton, justice of the peace at Paragonah. Barton thought he knew of instances when William Jose had “testified falsely” while under oath and added that William’s wife, Ann Jose, had “no regard for truth whatever.” Barton said he could not accept their testimony relating to their personal interests. As a result, neither Ann nor William Jose was allowed to testify in their son’s behalf.

The last witness for the defense was Charles Young. When Rogers challenged his character, saying he was a deserter from the army, the defense asked that he be allowed to give evidence anyway. Since Young claimed to know nothing of the case besides hearsay, he was not allowed to testify.

The defense rested without throwing substantial doubt on the prosecution’s assertions. Rather than trust his fate to the weak case presented by his attorney, Thomas Jose volunteered a statement. He said that after his mules had turned up missing on July 6, he had searched for them armed on the 8th and looked for them unarmed on the 9th. On the evening of July 9 he had met with Monroe Lowder, Thomas Robb, and Henry McFate. Apparently, the main point of Jose’s defense was that his meeting with friends on the 9th cast some doubt on his alleged actions of the day before.

The court records refer to this man as Mr. Dalton. James H. Dalton, farmer, was the only Dalton listed as a head of household in the area by the federal census. See J. R. Kearl, Clayne L. Pope, and Larry T. Wimmer, comps., *Index to the 1850, 1860, and 1870 Censuses of Utah: Heads of Households* (Baltimore: Genealogical Publishing Co., 1981), p. 90.
In his concluding statement defense attorney Dalton said the whites were at war with the “surrounding tribes of Indians,” while the local Paiutes “nearer at hand to whom the murdered Indian belonged” had never been involved in “an open rupture.” He repudiated the opinion expressed by some that killing a friendly Indian was justifiable but added, “it was difficult to tell who among them were friendly” or how they might be connected with hostile bands. He had talked with the defendant and his father separately, and they both had declared Thomas’s innocence. There had been conflicting testimony, Dalton asserted, and if there were any “palliating circumstances” he asked Thomas Jose be given the benefit of them. In his conclusion prosecutor Rogers simply referred to Jose’s threats to kill Indians.

In his charge to the jury Jesse N. Smith addressed perhaps the most important question in a trial in which the actual guilt or innocence of the defendant seemed of almost secondary concern. The main issue was whether the law protected Indians:

It has not been customary in the United States, neither in the Territory of Utah to attempt to protect the Indian in his rights, it has not been supposed that his rights were worth looking after. The law which throws its mantle of protection over the Indians as well as over all others, has been in their particular a dead letter. As unprejudiced men we should consider that they have the same right to live that other men have....Shall the letter of the Statute book remain dead in their regard? It rests with the gentlemen of this jury. We know full well that if something is not done to fill this infamous breech of the Peace that the avenger of blood will be on the back of the white man....Unless some attempt at atonement or palliation be made it will be the worse for this people.22

If the evidence was insufficient for a conviction, Smith said, then the matter was “in the Providence of Almighty God.” But if there was sufficient cause to convict Jose then “our duty is plain, a duty that on our conscience we must not shrink from.”

Smith then proceeded to destroy the meager case for the defense. In referring to the testimony given at the trial, Judge Smith stated his opinion that “a collusion has been entered into by some young men for the purpose of screening the prisoner.” He cited some discrepancies in testimony as evidence of this deception: Emily Lowder had testified that Monroe Lowder told her before Simeon’s body was found that he be-

---

22 Jesse N. Smith, “Charge to the Travers Jury,” Iron County Legal Records. A typescript of the “Charge” is also found in the Journal History, August 27, 1867.
lieved Jose had killed the man. Rogers had alleged that Lowder had also told him the same thing during the investigation, but in court Lowder denied those statements “in the most positive terms.” Smith believed the hearsay evidence from Emily Lowder and Rogers and denounced Monroe’s testimony as “leaving his Aunt and the Prosecutor in the lie.” Smith rejected Lowder’s statements in court and dismissed him as “an abandoned sinner.”

The other testimony that Smith viewed as “throwing dust in the eyes of justice” were discrepancies in the dates when witnesses saw Jose near Simeon. Once again Judge Smith believed the statements of Rogers and Silas S. Smith about what they claimed the testifiers said during the investigation rather than what these individuals related at the trial.

The defense said Simeon could have been killed by “transient travelers.” Smith observed that there was no evidence of such individuals passing the area on the evenings of July 8 or 9. After stating there was no reason to give credence to this suggestion, Smith made an ironic concession: “but I am willing to give the prisoner the benefit of a doubt.” It is unclear what Smith was trying to demonstrate by these statements which seemingly both attacked and defended the assertions of the defense.

Smith told the men of the jury not to let the question of the actual date of the murder dissuade them from finding the appropriate verdict. That issue should not be used as a reason to “turn a murderer loose on the community” if there was sufficient evidence to convict Jose. He also reminded them that “the prisoner was the last mortal known to have been within sight of the Indian before his death.” If Jose was culpable, Smith said, “it would seem that he is guilty of murder of the first degree.” It was up to the jury to decide on the degree of murder and affix the penalty if the defendant was found guilty.

A conviction of first degree murder probably meant Jose would be executed or given a life sentence. The jury was unwilling to go that far
and returned a verdict of guilty of murder in the second degree. Jose was sentenced to ten years in the territorial penitentiary. The jury cited the “extreme youth[,] inexperience[,] and surrounding circumstances of the prisoner” as extenuating reasons for the light sentence. When the verdict was read the court “expressed the hope that he would return to society a wiser and a better man.” The case had cost Iron County $455.85 in court costs to prosecute. A heavy expense for those times, it demonstrates the length the county was willing to go in this case.

Thomas Jose served one year of his sentence before he was pardoned by the territorial governor. Nothing is known of his activities following his release. His name and that of his father do not appear on the Utah census rolls for 1870, probably meaning the family had left the territory.

Jesse N. Smith confided in his diary that Jose got “a fair and patient hearing, although the evidence was entirely circumstantial.” If Smith had any lingering doubts about the trial and verdict the report of John Lowder no doubt reassured him. Lowder told Smith that after his release from prison Jose informed him that he had indeed killed the Indian.

By late twentieth-century standards the case left much to be desired. Judge Smith accepted hearsay evidence, called witnesses dishonest when they disagreed with such testimony, did not allow key witnesses for the defense to testify, and gave such a biased charge to the jury that a verdict of guilty was the only logical outcome. The sermons of Erastus Snow alone were sufficient to have prejudiced the case, and the suspicion must remain that Jose was found guilty before he was tried. That such a case came to trial at that time was indeed remarkable. It required uncommon efforts to overcome the animosity then felt against Indians to allow the law to punish those who mistreated them. No matter how flawed, the justice system was made to work in the case of Simeon’s murder.

It was perhaps Thomas Jose’s misfortune to be accused of murdering an Indian at such an inopportune time. It seems likely that the crime would have been ignored earlier in the war. But by the end of the summer of 1867, with the surrender of Black Hawk shortly before the
trial, the conflict was drawing to a successful conclusion for the whites. Jose’s trial near the end of the hostilities provided a statement that the settlers were repudiating the brutal measures often used during the conflict. If that is so, the verdict of guilty was almost as much an indictment against the conduct of the war as it was of Thomas Jose; however, the timing of the trial near the end of the fighting would also leave the final impression that the whites had been law-abiding all along.

As a result of the Black Hawk War the Indians had to give up their lands and, increasingly, were forced to live on reservations; but they suffered little from arbitrary acts of revenge. A major factor in this was the effort by Black Hawk and many white leaders to reach a reconciliation after the war. Additionally, whites also realized they could no longer molest Indians with scant fear of punishment because the legal system had at last shown it was willing to prosecute such cases.

An account of an interview with Black Hawk appeared in the Deseret News on August 28, 1867. The chief obviously had surrendered some days if not weeks before.

Black Hawk visited many communities seeking reconciliation following the war. For an account of his speech at Fillmore see Josiah F. Gibbs, “Black Hawk’s Last Raid—1866,” Utah Historical Quarterly 4 (1931): 108. Gibbs was probably at the meeting.