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THE DEATH OF EDWARD McMURTY

DAVID WISHART

Edward McMurdy would have been lost to history if it hadn't been for the way he died and for what it meant in frontier Nebraska. McMurdy's bloated body was found on 20 June 1869 in a pond on an island in the Platte River, about five miles from the town of Columbus (Fig. 1). He had been missing for six weeks. His body had been tethered to a large log and weighted down in the water. But distant snowmelts in the Rocky Mountains and a torrential Nebraska downpour on June 19th swelled the Platte, which flowed onto the island, flooding the pond, moving the log, and returning McMurdy to the light of day.¹

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His body was found by a group of local Platte County settlers who were crossing the island when they spotted the "unfamiliar object in the pond".² McMurdy was laying face down in the water, still tethered to the log. One arm extended outward as if he were swimming. The settlers thought it wise to seek help.

Later that day a rescue team of about six men, including brother-in-law George Grant and friend and neighbor Isaac Clark, pulled the log and corpse to the bank and disentangled the two. Although they had all known McMurdy well, they could identify him only by his clothes, a strange outfit of a flannel shirt, two pairs of linen pants, and mismatched boots. The body itself was decomposed beyond recognition, though the multiple wounds that killed him were still evident: there were bullet holes and knife wounds on his back and side, his ears and nose had been cut (or bitten) off, and an arrow was lodged in his throat and protruded about six inches from his mouth.

They loaded what once had been Edward McMurdy into a skiff and floated the body just over two miles down the Platte in Butler County, where they had arranged to meet the

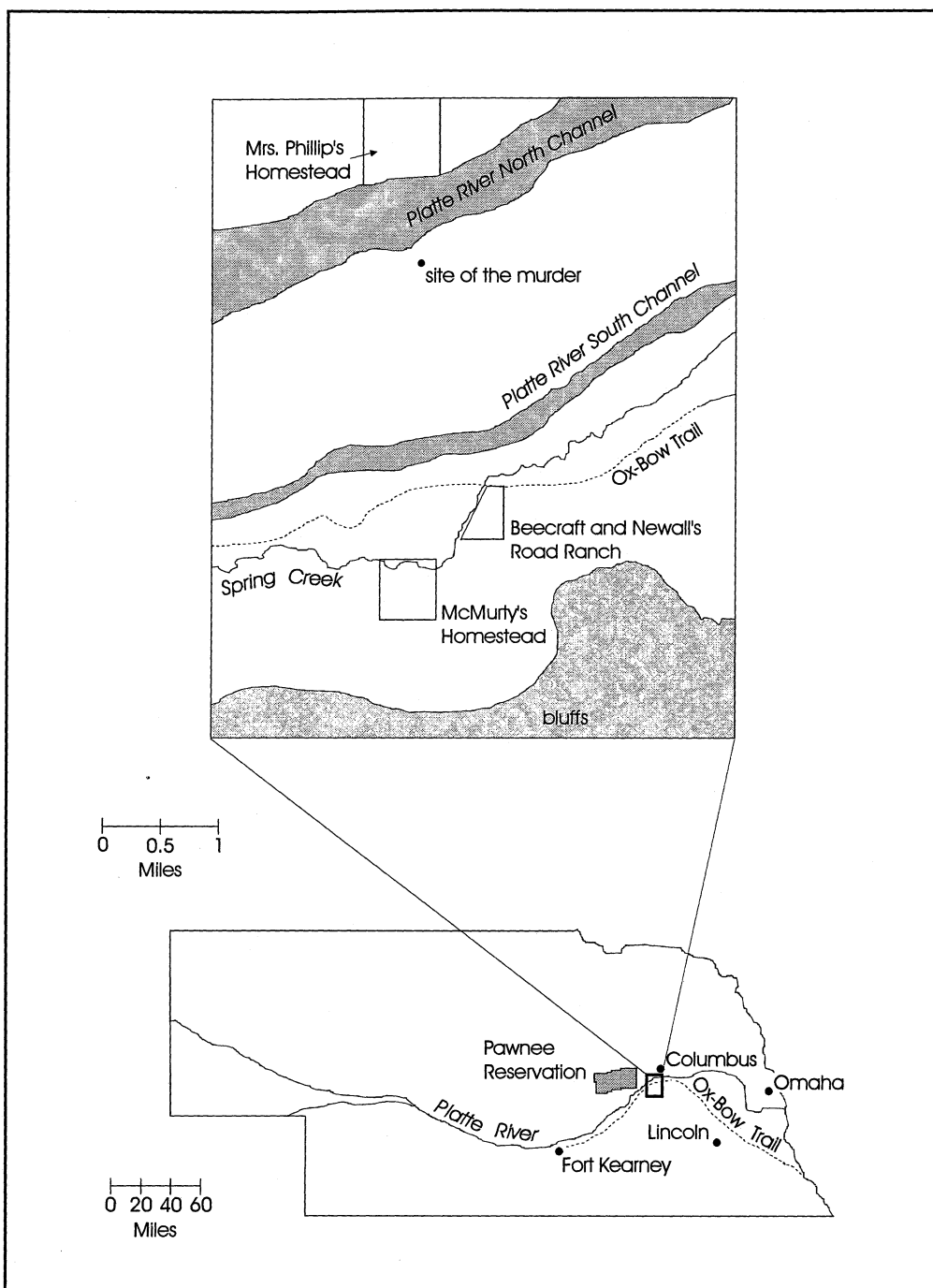


FIG. 1. *Location Map, Northeastern Polk County.* Redrawn by Sonja Rossum from the Original Surveyor General Plat Map (U.S. General Land Office Records, Nebraska State Historical Society. Film RG509. Reel 7. Township 1 west range 16 north) with details added. Courtesy, Sonja Rossum.

coroner. The body lay in the skiff overnight. Next morning, the coroner, aided by the rescue team, performed an autopsy. They “laid open” the rib cage and found neat round bullet holes in the liver and lungs. Grant pulled the arrow out of McMurdy’s mouth, spilling teeth with it. Grant said, and the others agreed, that it was a Pawnee arrow, smaller than the Sioux’s (Lakotas’), made of dogwood, and pliable.

McMurdy’s death set in motion a series of events that reveals much about the uneasy relationship between the settlers and Native Americans in late-nineteenth-century Nebraska. It brought out the settlers’ latent hostility toward the original Nebraskans, as well as the paternalism of federal officials who sought to protect their Native American “wards” while at the same time destroying their cultures. It exposed the inadequacies of the judicial system in dealing with crimes involving Americans and Native Americans and focused attention on sovereignty and capital punishment, which are still contested issues today. And it demonstrated the incompatibilities of the two different ways of life that intersected in central Nebraska in the late 1860s: one that had endured for centuries but then was in its final years; and the other, which had barely taken root, but was about to change the entire face of the land.

LIFE IN A DUGOUT

McMurdy was thirty when he was killed. He had come from New York in the early 1860s, like many of the first Euro-Americans into Polk County. The place was hardly organized: it was actually under the jurisdiction of neighboring Butler County until 1870. Everyone was poor. A census taken in 1860 counted nineteen people, mainly single men, with a combined wealth of \$1,250.³ After the Civil War began, immigration to Nebraska slowed to a trickle and the pace hadn’t picked up much by the time of McMurdy’s death, when there were only 137 residents in Polk County.

The one advantage of the area, and the probable reason why McMurdy and the other men were there, was the Ox-Bow Trail, the main freighting road on the south side of the Platte that linked Nebraska City with Fort Kearny and points west (Fig. 1). Here was an opportunity for settlers to make money by providing wood, hay, food, and accommodation for freighters at the inflated prices that monopoly over scarce supplies and services allows.

The problem with Polk County was not remoteness but inaccessibility. In McMurdy’s day, there was no bridge across the Platte, a wide expanse of braided river channels, vegetation-clogged islands, and marshy bottomlands. Crossing the sloughs and sands and the sometimes swollen river on foot or horseback was no easy matter. But once across, Columbus was within easy reach, a clapboard town of about 1,000 people sitting like a movie set alongside the freshly laid tracks of the Union Pacific (Fig. 2).

At the time of his death McMurdy was living with his wife, Minnerva, and their two sons in a dugout about a mile south of the Platte and the Ox-Bow Trail and on the section adjacent to Beecraft and Newell’s road ranch (a latter-day truck stop). They had just moved there, or at least made their residence legal, by filing for an eighty-acre homestead at the Columbus land office on 13 March 1869.⁴ This was not a good place for a dugout, as it was entirely on the floodplain, with the water table floating only a few feet below. Edward McMurdy probably saw the dugout as a temporary expedient. He might have planned to live there through the summer, plant a few acres of the virgin silty soils to corn, harvest the wild hay for sale, put the proceeds into cut timber boards that were sitting stacked in the Columbus lumberyard, and build a small frame house. The old dugout could then be relegated to use as a stable or shed. It was a common enough practice at the time but in this case it came to nothing on 8 May 1869.

Edward McMurdy left the dugout about eight o’clock in the morning, turned his oxen



FIG. 2. *Columbus, Nebraska, 1874.* Nebraska State Historical Society. P719:1-13.

out to graze and, according to Minnerva's later testimony, headed to Columbus to buy groceries and a file.⁵ He intended to be home by nightfall. Minnerva walked with him across the greening floodplain to the narrow south channel of the river. McMurty sat down on the bank and took off his boots. The last Minnerva saw of him he was wading across to the large island that split the river in two. She recalled that she had an uneasy feeling as she watched him go.

PAWNEE COUNTRY

It is not surprising that there were Pawnees on the island that day. The Pawnees were the real locals and had been for at least 300 years. The central Platte Valley and its tributaries, particularly the Loup, formed the very heart of their country. Their towns (and they were towns, not mere villages) had lined the river terraces and held as many as 15,000 people before the diseases and other traumas of the

nineteenth century fell upon them. In 1869 the ruins of these once-bustling towns could still be seen, their defensive sod walls still standing three or four feet above the ground and enclosing spaces of forty or fifty acres filled with circular hummocks, all that remained of their lodges. These have all since been reclaimed by the earth, but even today the bones of countless generations of Pawnees speckle the dark soil.

The days when the Pawnees "numbered as many heads as the stars in the sky" were long gone by 1869.⁶ Their population had plummeted to 2,400, and the land they once claimed as their own, reaching all the way to the Arkansas River, had been reduced by cessions in 1833, 1848, and 1857 to a small squared-off reservation on the Loup, about twenty-five miles northwest of McMurty's homestead (Fig. 1). There, as part of President Grant's new "Peace Policy," they were under the charge of Quaker agents. Unlike many former agents, the Quakers were honest men who sincerely

believed that they were saving the Pawnees from extinction by destroying their communal culture and transforming them into Christianized yeoman farmers with an American sense of private property.⁷

For elderly Pawnee who had lived through it all, the pace of change—and of decline—must have been incomprehensible. A seventy-year-old man would have seen, as a young boy, Zebulon Pike and other early American explorers passing through, harbingers of the coming flood. As a young man he would have witnessed the wolves devouring the bodies of those who died (fully half of the people) in the smallpox epidemic of 1831. And for the rest of his life he would have fought off Lakotas as they swept down almost every spring as soon as the grass was green enough to sustain their horses, and watched helplessly as the land filled up with Americans while simultaneously being emptied of all other living things. He would have been enraged, most recently, by the murder of nine Pawnee men in Ellsworth County, Kansas, in March of 1869. These were Pawnee Scouts, recently demobilized from military service and on their way home. Six of the Pawnees were decapitated and their heads dispatched to Washington, DC, for what authorities called scientific study. The crime went unpunished.⁸

Still, through all this, the Pawnees persisted. They resisted the American program to break their communities into nuclear families. Pawnee women continued to grow their crops in time-proven ways, the entire community (except for the old and sick) left for the bison ranges of western Nebraska and Kansas twice a year, and throughout the year they performed the ceremonies that made it all possible. They still cohered as four bands (Chaii, Kitkahakki, Pitahawirata, and Skiri) and one nation; but, from their reservation on the Loup in 1869, wherever they turned, a cold wind blew back at them.

The island in the Platte that McMurty walked onto that morning in 1869 had long been a favored piece of Pawnee territory. Every September, in preparation for the winter

bison hunt, they took their horses to the island to fatten on floodplain grasses that remained nutritious after the grasses around their towns had become desiccated in the torrid Nebraska summer. In spring, after they returned from the winter hunt, they took their horses there again, this time to feed them cottonwood bark while waiting for the new grasses to appear. It was also good hunting and trapping country, even in the 1860s when the escalating American presence had depleted game elsewhere, especially to the north of the Platte. In many respects, the island was a sanctuary for Pawnees, a place to escape to from the reservation with its agent, its draconian “manual labor school,” and its foreign rules.

This explains why there were at least three Pawnee camps on the island the day McMurty was killed. They were spaced about a half mile apart, each consisting of a group of families and individuals, along with about 150 horses. At the easternmost camp, near where McMurty waded ashore, Yellow Sun and Blue Hawk, along with one woman and a few children, were living in a single tipi and watching over forty horses. Yellow Sun, about sixty-five years of age and reputed to be a medicine man, was well known to settlers in the area. He spent a good deal of time away from the reservation, even though this was frowned upon by the authorities. Blue Hawk was also well known, and respected, by local Americans as a reliable soldier in the Company of Pawnee Scouts. Led by Major Frank North of Columbus, this Company was used to combat hostile Indians (wages were an additional but unnecessary incentive to fight Lakotas; the Pawnees had a backlog of grievances to be avenged). Sixty years later, Frank North’s aged brother Luther would remember Blue Hawk as a “fine man but unfortunate.”⁹ Unfortunate indeed, as the events following McMurty’s death would prove.

SEARCHING FOR MCMURTY

When McMurty failed to return from Columbus by nightfall, Minnerva walked the half

mile to her brother's homestead. She told Grant that she had been worried all day after hearing gunshots and dogs barking on the island just after Edward had left. Three miles away, on the north bank of the Platte, a homesteader named Mrs. Phillips also heard gunshots, followed by a cry of distress. Climbing onto the roof of her dugout, she peered across the north channel of the river and saw, about one-quarter of a mile away, eight or ten Indians on foot and horseback chasing a lone white man. There was another gunshot, then silence.

The next morning, 9 May 1869, Grant rode to Columbus, hoping to find an ordinary reason for his brother-in-law's absence. There was no trace of him. Later that day, George Barnum, another McMurty neighbor, and his cousin forded the north channel of the river in a two-horse wagon, just downstream from Mrs. Phillips' homestead. Coming up the sandy bank of the island, they met Yellow Sun, dressed in a bison robe, leather leggings, and a calico shirt. Yellow Sun rode with them for about three-quarters of a mile. Barnum noticed that his shirt collar was bloody and that there was a small fresh wound on his face. He also noticed that Yellow Sun was agitated and "behaving strangely." Barnum, who was, in his own words, "acquainted with Pawnee language," accused Yellow Sun of killing McMurty, a charge he denied. What Yellow Sun did convey, however, was that McMurty had stolen his horses, and he pointed in the direction of McMurty's homestead. Yellow Sun got out at his lodge and Barnum and his cousin drove on across the south channel.¹⁰

Monday morning, 10 May, saw Grant and six or seven others at the McMurty place ready to begin a thorough search. They followed McMurty's footprints onto the island but could not find them coming off the other side. They did, however, find many Indian tracks, and they followed these back to Yellow Sun's lodge. Yellow Sun and Blue Hawk were there along with two other Pawnees, Horse Driver and Little Wolf. Isaac Clark, who could also "understand the Indians and talk to them some,"

asked Yellow Sun about the wound on his face. Yellow Sun told him, unconvincingly, that it was the result of a toothache.¹¹

In the midst of this confrontation, the Pawnees started to dismantle their camp. They rounded up their horses and within an hour they were crossing the north channel on the way back to the reservation. At about ten o'clock in the morning, Asa Briggs, who lived next to Mrs. Phillips, saw eight or ten Pawnees leaving the island, driving a good number of horses.

Grant and the others gave up on the search. But as Clark was crossing the island, his horse reared as it went by the pond where (he would find out a month later) McMurty lay tied to the log. He thought at the time, he later told the court, that the horse was reacting to the smell of blood.¹²

ARREST AND ARRAIGNMENT

On 21 June, after cutting open McMurty's body, the coroner concluded that he "had come to death at the hands of parties unknown." But not altogether unknown, apparently, because he added that the murderers were "members of the Chowee [Chau] band of the Pawnee Tribe of Indians, then encamped on an island in the Platte River, in the northeast part of Polk County, State of Nebraska."¹³ Despite the lack of eyewitness accounts, beyond Mrs. Phillips's long-distance view, and despite the fact that when Pawnees were charged with the murder they were not members of the Chau band, the coroner's statement was sufficient encouragement for McMurty's friends to take matters into their own hands.

On 22 June they sent a letter to Jacob Troth, the new Quaker agent to the Pawnee, saying they were "much exasperated" and warning him that if he did not produce the guilty men they would "wage an indiscriminating warfare on *all Indians* found off the reservation." Troth passed this on to his superior in Omaha, Superintendent Samuel Janney, also a Quaker, saying that "it had only been by our pledge

that we have restrained them from commencing hostilities."¹⁴ Janney immediately took over responsibility for apprehending the suspects and protecting the Pawnees. It was a responsibility that would consume the next two years of his life.

A week later Janney traveled the eighty miles from Omaha to Columbus only to find that about thirty "southside citizens" had gone up to the Pawnee reservation, intending to dispense their own justice. Troth was too sick from "congestion of the brain" to deal with it, so the Pawnees faced down the settlers themselves. Greatly outnumbered, the settlers returned to Columbus that evening, angry and frustrated.¹⁵

Janney rode the track to the reservation on the following day. He lectured the assembled Pawnee chiefs in the schoolhouse, telling them that they would be held responsible for any crimes committed against the United States by their people. He warned them that their annuities would be withheld if McMurdy's murderers were not produced. Withholding annuities was within Janney's rights: clause 5 of the 1857 treaty mandated that the annuities would be withheld as compensation for Pawnee depredations against Americans or their property.¹⁶ But, of course, no such depredations have been proven.

Withholding annuities was a real threat because for years the Pawnee had been living at the brink of famine. Diminishing bison herds, recurring droughts, apocalyptic descents of locusts, and the loss to Americans, of much of their best agricultural land had brought them to that desperate place. The annuities—blankets, food, utensils, and so on, which were actually bought on the Pawnees' behalf using their own money from land cessions—were a poor support base, but sometimes it was all they had. Janney promised the chiefs that the accused men would be given a fair trial in federal district court. (Janney assumed that it would be federal court because states had little to do with Indians, who were defined as wards of the federal government.) He told them that they would be

treated the same as any white man who had murdered an Indian. Janney meant well, but this was a promise he could not keep.

The Pawnee chiefs immediately pointed out the contradictions here. Head Chief Pitaresaru asked Janney why the government had not apprehended the murderers of the Pawnee Scouts in Kansas. As for withholding annuities, Pitaresaru argued that they were the Pawnees' due and that without them the people would face certain starvation. Ter-re-kah-wah, a Pitahawirata chief, then angrily told Janney that his own relatives were among those killed in Kansas. "If it had been done by Indians," he argued, "we would have had our revenge, but as it was done by white men we did nothing. We could do nothing about it." Ter-re-kah-wah then offered a deal, proposing that "we are willing to say nothing about the men we have lost by the whites if you will do no more about the white man that has been killed."¹⁷ Janney would have nothing to do with deals, and he reiterated that the wagon loads of goods would be sent only after the murderers were produced.

The blackmail worked. On 1 July Pitaresaru called on Janney at Columbus and told him that "it was generally believed in the tribe" that four members of the Pitahawirata band had killed McMurdy.¹⁸ Janney then returned to Omaha and put the case in the hands of US District Attorney Silas A. Strickland.

Two days later Janney received the following telegraph from agent Troth: "The men are in the village at the Reservation and the chiefs want to deliver them up. Send Marshall."¹⁹ This was done, and on the evening of 5 July, the marshal brought not four, but eight Pawnees down to Omaha, where they were locked in the courthouse jail at 16th and Farnum (Fig. 3). Among them was Yellow Sun. The others—Little Wolf, Hard Driver, Great Traveler, Lucky Man, The Lame Man, and Man That Scares Horses—had also been on the island when McMurdy was killed. No doubt Mrs. Phillips's story, that she had seen a large group of Pawnees chasing a white man, was instrumental in this mass arrest.



FIG. 3. *Douglas County Courthouse and Jail, ca. 1869.* Nebraska State Historical Society. 054:2-14. The courthouse is the building surrounded by trees in the foreground.

Missing from those arrested was Blue Hawk, who was away in the service of North's Pawnee Scouts.

On 14 July the men were brought before the US commissioner, General George O'Brian, a leading Omaha lawyer regarded as a specialist in Indian affairs (he apparently knew some Indian languages). Janney was on hand "to ensure a fair and impartial trial."²⁰ The government's prosecution team consisted of Strickland and Charles A. Baldwin, as good a combination there was in Nebraska. Strickland was renowned as an impassioned orator. He came with a distinguished Civil

War career behind him and had just been appointed Nebraska's attorney general by President Grant in 1869. Baldwin was the best criminal lawyer in the state, though he was more used to defending than prosecuting.²¹

Janney hired Champion B. Chase to conduct the defense (Fig. 4). Chase also had excelled during the Civil War, rising to colonel in the Union army, before moving to Omaha in 1866. His main asset was his connections, particularly to Nebraska's governor, David Butler. Beyond this, as the proceedings would show, Chase was inept, except when it came to getting his money.

Speaking through their interpreter Baptiste Bayhille, a mixed-blood Pawnee, the accused men pleaded their innocence. O'Brian responded by remanding six of the eight in custody. Blue Hawk, arrested a few days later, was added to this number. Young Fox and The Lame Man, evidently able to prove that they had not been on the island on 8 May, were discharged. Subsequently they were held as witnesses on a security of \$500 each. They couldn't pay this, of course, so they were placed in what Janney euphemistically described as "apartments" in the jail.²²

The Pawnees waited in jail while a federal grand jury was being organized. According to Janney, only Yellow Sun was kept under tight lock and key. As the focus of guilt fell upon him, and isolated in his stifling cell, he tried to kill himself by cutting his wrists with glass. The cuts were severe but not mortal.

The other prisoners were allowed, in Janney's words, "considerable liberty." At the end of July, three of them took full advantage of this and walked back to the reservation. The chiefs handed them over to Troth, who promptly sent them back to jail. They told Troth that they had been frightened into flight by workers who were digging a sewer trench in the jail yard. The workers had taunted the prisoners into believing that the hole was for them after they had been cut down from the gallows.²³

The chiefs' willingness to surrender their own people to authorities they had good reason to distrust shows how far the United States—its agents, laws, and strictures—had penetrated into Pawnee lives. By 1869 they were not even permitted to leave their reservation without a pass. But it also shows that they were in desperate straits, caught in a subsistence crisis that threatened their very survival. True to his word, Janney had delivered the annuities a few days after the Pawnees were arrested. The delivery included seventy-five head of cattle which were immediately slaughtered to feed hungry people. This was not a long-term solution. They needed to go out on their summer bison hunt (even though the

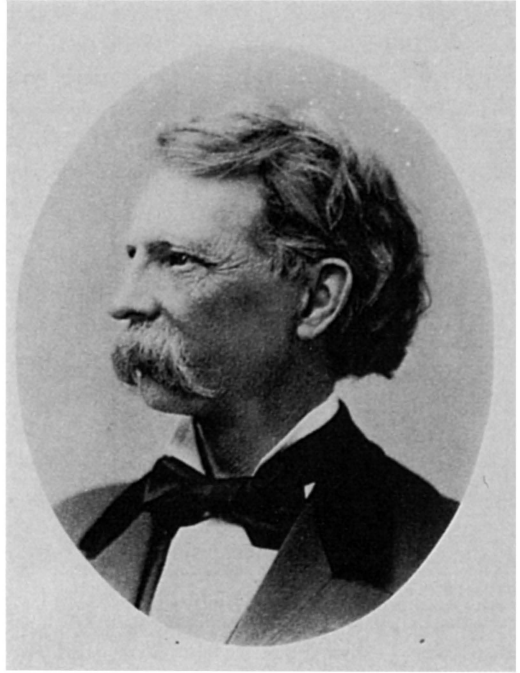


FIG. 4. *Champion S. Chase*. Historical Society of Douglas County Library/Archives Center.

Lakotas stalked the range) to secure their food supply until the crops were ready to harvest in September and early October. In fact, as the Pawnees saw it, they needed bison meat for the ceremonial feasts which would ensure that the crops would be worth harvesting at all. Pitaresaru and the other chiefs could not permit the actions of the accused Pawnees to jeopardize the welfare of the entire society.

When Janney gave the chiefs permission to leave on the bison hunt on 22 July, there was "much rejoicing among them."²⁴ The celebrations were short-lived. Just as they were ready to leave, Baldwin arrived with a US marshal and subpoenaed the chiefs. For the next month they would be used by Commissioner O'Brian as a means to elicit evidence, or confessions, from the accused men. Even when the Pawnees were allowed to leave for the bison range in early August, the chiefs were told to stay at home in case they were needed for the trial.

The chiefs met with the prisoners and their counsel in front of O'Brian at least three times during the first few days of August. Frank North served as interpreter. On 3 August they all gathered in the square in front of the jail for a council. About forty or fifty interested spectators crowded round. The chiefs exhorted the prisoners to tell what they knew about McMurty's death. They told the men that "their people were starving and were being kept from the hunt by this business."²⁵ Yellow Sun tried to speak but the chiefs would not let him: they said he told too many stories. And indeed he had. On 20 July, for example, he admitted to Frank North that he had found McMurty's bullet-ridden body in the pond, but he denied that he had anything to do with it. On another occasion he blamed the other prisoners for the murder.

The other prisoners in turn were keen to implicate Yellow Sun. Little Wolf told the council how, on the day of the murder, he was searching for a pony when he saw Yellow Sun in the reeds. Yellow Sun reacted strangely and told him to go away. Little Wolf remarked on the blood on Yellow Sun's face. Yellow Sun replied that it came from skinning an otter.

Then Horse Driver got up to speak. He told the assembly that on the day the trouble started Yellow Sun left the lodge at about eight in the morning, armed with a revolver, bow and arrows, and a hatchet. When he returned in the evening he looked "as if he had been in the water all day." Horse Diver claimed that as they were leaving the island on 10 May, Yellow Sun admitted that he had engaged in "a little fight" with a white man.²⁶

By the end of the council everyone, including Janney and the chiefs, was convinced of Yellow Sun's guilt. The chiefs were paid for their time and sent back to the reservation. Yellow Sun was sent back to his cell, where he was ostracized by the other Pawnees.

The federal grand jury met on 6 September and indicted Yellow Sun, Blue Hawk, Horse Driver, and Little Wolf for the murder of Edward McMurty.²⁷ The other Pawnees were released. The trial was scheduled to be held in

federal district court in Omaha on 4 November. The Pawnees spent the intervening month in a crowded subterranean cell along with four others, including Frederick Best, a forger, and a murderer called only Henly.

"A MOCKERY OF JUSTICE"

The trial opened at eleven o'clock in the morning 4 November, before a crowded courthouse.²⁸ It had taken most of the morning to select the jury. Each potential juror was asked the same two questions: "Have you conscientious scruples against capital punishment?" and "Have you any bias or prejudice in relations to Indians?" In answering the first question, one Joel Griffith explained, "At one time I had, but I have got so far west that I have got rid of them." It is not known whether or not he was impeached.

From his raised desk at the front of the courthouse, Judge Elmer S. Dundy presided (Fig. 5). Dundy had been commissioned judge of the district court in 1868. He held the position until his death in 1896. Dundy was respected as a fair and knowledgeable man. Ten years later he would also be a famous man, when he ruled in favor of the Ponca Chief Standing Bear in a trial that projected the injustices of the United States' treatment of the original Americans into full public view, particularly on the East Coast. Standing Bear was arrested in 1879 when he and thirty followers walked back to Nebraska from their reservation in Indian Territory, a reservation to which they had been forcibly removed in 1877. Not only did Dundy overturn the arrest and discharge Standing Bear, but he also refused to allow any appeals to a higher court. But this was ten years earlier, and Dundy still had much to learn about the justice system when it came to Indians.

The prisoners and the counsel sat in front of and below Judge Dundy. The jury sat to the side. There were two large cast iron stoves, presumably lit to moderate the November chill. A railing separated the bar from the crowd of witnesses and spectators who over-

flowed from the benches into the aisles. The local press was well represented: the trial was covered in detail in the *Omaha Weekly Herald*. A row of concerned Pawnees sat on the front bench, the focus of much attention.

Baldwin opened for the prosecution, citing precedents for the case, including one defining murder. He then systematically went through the sequence of events, from McMurdy's departure, his wife's uneasiness, Mrs. Phillips's account, and the later recovery of the body from the pond. With such an abundance of evidence, he told the jury, he would prove without a doubt that "these Indians were present when the deed was done."²⁹

Colonel Chase responded at length for the defense. Janney sat next to him taking notes—forty-six elegantly scripted pages. Janney told Eli Parker, the commissioner of Indian Affairs in Washington, D.C., that the newspapers "cast much censure" on him for this apparent allegiance, but he saw it as part of his responsibility to ensure a fair trial.

Chase made it clear from the onset that he would not contest the case on the facts; indeed, he told the jury, he would not call any witnesses at all for the defense. He reasoned that conventional expectations had to be jettisoned when dealing with Indians: "It should be borne in mind," he cautioned the jurors, "that every Indian would testify against another to shield himself." Moreover, he hoped the jury would understand that he would not be able to establish an alibi through Indian testimony, because Indians "have no account of time."

Instead, Chase emphasized procedural issues. He had "grave doubts" about "the question of jurisdiction." And he asked: was this a case for the federal or for the state courts? Directly addressing Judge Dundy, he argued that "if the crime had been committed on the Reservation there could be no doubts of the jurisdiction of your Honor in this case."³⁰ (In fact, Chase was wrong, because until the Major Crimes Act of 1885, this was murky legal territory; but his point was well taken: "Indian Country," including reservations, fell under

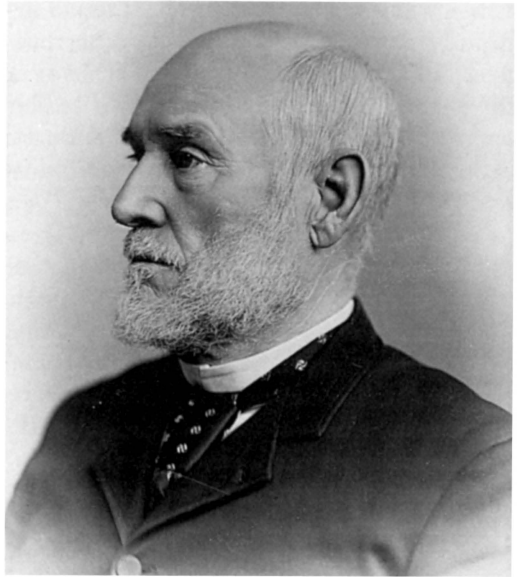


FIG. 5. Judge Elmer S. Dundy. Nebraska State Historical Society. P853.

the purview of the federal government, not the state). The case in hand, according to Chase, involved Indians who were charged with the murder of a white man *off* the reservation and therefore within state jurisdiction.

Despite these misgivings, Chase assured the jury that he would not stall the trial over jurisdictional issues because he believed that it was "in the public interest" for the case to come to trial. Translated, this meant that a public riot would ensue if the Indians were not put on trial, such was the animosity against them.

Chase's second concern was whether the accused men could get a fair trial. He told the jury that he had never defended "savages" before and could not "talk a word" with them. Because of this, he cautioned, "clouds and darkness will rest upon the evidence and great difficulty will be encountered." Certainly this was the situation for the Pawnees. The interpreter was used only on the two occasions when Pawnees—Spirit Chief and Chief That Strikes

Chiefs—were called to testify. For the remainder of the trial, the accused and other Pawnees in the courtroom, who knew little or no English, sat in a vacuum of incomprehension.

Winding up, Chase expressed his doubts about trying Indians before a jury of white men, hardly a jury of their peers. At the very least, he argued, this placed even greater responsibility on the jury to act impartially. And, in concluding, he proposed to them this standard of judgment: that they “should not bring in a verdict of guilty unless, under the same testimony, they would hang the United States District Attorney, or the judge upon the bench.”³¹

The following three days of testimony are mainly noteworthy for Chase’s abdication of responsibility for the accused Pawnees and for some dramatic events. Baldwin, true to his word, put the “southsiders” on the stand and brought out the details of the May search for McMurty and the subsequent discovery of his body in June. Clark and Grant were particularly featured (both were recalled to the stand), but Mrs. Phillips, Asa Briggs, and a grieving Minnerva McMurty also testified. Through their testimony, Baldwin was able to make a strong case that Yellow Sun, at least, was likely involved in McMurty’s murder.

In this he was aided and abetted by Chase who, also true to his word, called no witnesses on the Pawnees’ behalf. The two Pawnees who did take the stand were put there by Baldwin and over Chase’s objection to the testimony of “any Indian.” This, like his other objections, was overruled by Judge Dundy. And when a feasible motive for the killing emerged, a scenario involving stolen horses and McMurty’s possible incrimination, Chase did not follow it up.

Grant brought the horse issue up within the first two hours of the trial. Clark and Minnerva McMurty collaborated Grant’s story, though there was confusion over which Pawnees were involved. It seems that on 6 May, the Thursday before the killing, Little Wolf and Blue Hawk (at least Grant *thought* it was Blue Hawk) turned up at the Grant home-

stead looking for their horses. They told Grant that McMurty had them, and they showed him a promissary note for payment that carried McMurty’s signature. Blue Hawk warned that if they didn’t get the horses the following day, “eight Pawnee soldiers would come down from the reservation and kill a white man.”³²

McMurty had evidently agreed to buy two Indian horses, had taken them, then had not produced the payment. At a time when horse-stealing from Pawnees was a major component of the regional economy, it is possible that McMurty had no intention of paying his debt. Here was an opportunity for Chase to establish mitigating circumstances for the murder, an opportunity he did not take.

But this court was not a forum for reasoned and logical arguments. The trial took place in an atmosphere poisoned by public hostility. Naturally, this hostility was most bitter among the “southsiders,” McMurty’s friends and neighbors who sat at the back of the courtroom throughout the proceedings. On the night of 4 November, as the prisoners were being taken back to their cell, the settlers taunted them, mimicking (by putting their hands around their own throats) their execution.

Little Wolf reacted to the hostility badly. The following morning when the sheriff arrived to take the Pawnees to the courtroom, he found Little Wolf unconscious in a pool of blood. A doctor quickly ascertained that Little Wolf was feigning death. He had tried to cut his throat with a sliver of wood from the floor. It is hard to say whether he had really tried to kill himself, or if it was all a painful charade, a means to escape. Little Wolf continued to lie on the floor, with the other Pawnees waiting in the courtroom, until he was tricked into motion. An interpreter was sent to the cell to tell him that he was discharged and free to go home. On hearing this, Little Wolf jumped to his feet and was immediately taken to the courtroom.

Janney, sitting at Chase’s side, was convinced that Yellow Sun would be found guilty. But he was surprised and dismayed when, on

10 November, all four Pawnees were found guilty of the murder of Edward McMurdy.

When the verdict was explained to them, Blue Hawk and Horse Driver broke away from their jailors and escaped. Horse Driver inexplicably (even if it was cold) came back for his blanket and was recaptured. Blue Hawk evaded his pursuers for two weeks before being captured at a remote encampment near Lone Tree and returned to jail.

The *Omaha Weekly Herald* reported that “popular feeling fully endorsed the verdict” but went on to say that no one, not even the prosecution, had believed that all four Pawnees would be found guilty. In hindsight, however, Attorney General Strickland maintained that it was the only possible verdict. He was quoted in the *Herald* as saying, “if they are let loose they will never reach their reservation.” There were “strong men,” he continued, “who will never permit the men whose hands are stained with the blood of a loved one to go unpunished.” In Strickland’s view, it was better to kill them now, legally, than to let them be killed in retribution by the settlers, a strained logic at best.³³

Chase, following Janney’s orders, immediately filed a motion for arrest of judgment based on improper jurisdiction.³⁴ He followed up by filing a motion for a new trial. Chase and Janney didn’t expect that the Pawnees would be granted a new trial, but they hoped that the arrest of judgment would at least postpone sentencing for six or eight weeks and give them a chance to work against the expected death penalty. Dundy, overruling Strickland’s objections, agreed to decide on the motions when the court next met, on 8 February 1870.

Janney faced a dilemma: if the case were referred back to the state courts, the trial would take place in Butler County. Given public hostility there, the death penalty was assured. Janney also doubted that Governor David Butler, who personally opposed the death penalty, would jeopardize his political future by adhering to his scruples and commuting the sentence to life imprisonment. Worse still, Janney thought it likely that, once

in Butler County, the Pawnees would not “be suffered to live” long enough to stand trial. It was even possible that all eight of the Pawnees who had originally been charged might find themselves back in prison, with the hangman standing by.

The more Janney considered the likely consequences of the referral of the case back to the local courts, the more he questioned the strategy of appealing the verdict on jurisdictional grounds. By January he had changed his mind on the appeal, and he told Chase to withdraw the motions.³⁵

Janney’s strategy, approved by Commissioner Parker, was to appeal the anticipated death sentence to President Grant. He hoped that the president would completely pardon Little Wolf, Hard Driver, and Blue Hawk. The evidence had placed Little Wolf and Hard Driver on the island at the time of McMurdy’s death, but there were many other Pawnees on the island at the same time who had not been charged. The evidence against Blue Hawk was even more flimsy—the marshal who arrested him wasn’t even sure that he had the right man because there was at least one other Blue Hawk in the tribe. Janney believed, unrealistically perhaps, that the three Pawnees, if released, would be safe as long as they stayed on the reservation. Or perhaps, he suggested to Parker, they could be put in the temporary state penitentiary (the permanent prison was then under construction) for a year until the furor died down and they could then be safely set free.³⁶

Janney was convinced that Yellow Sun would be sentenced to hang, so he had his arguments prepared for President Grant. He would appeal for commutation on the grounds that capital punishment was “injurious [sic] to public morale” and that an alternative sentence of life imprisonment would have a better effect on the Pawnee tribe and on other Indians. Moreover, he would argue that a life sentence was actually “more dreaded than death” by Indians and not, therefore, a mitigated punishment.³⁷ Meanwhile, the convicted Pawnees sat in their cold, crowded cell.

On 8 February, the Pawnees were arraigned at a joint session of the US circuit and district courts, with Judges Dundy and John F. Dillon presiding. Both defense and prosecution wanted sentencing to go ahead, but Chase was ill and unable to make his arguments. Furthermore, Dillon and Dundy now had their own questions about jurisdiction. They even toyed with the idea of appealing the case to the US Supreme Court but rejected this when they realized that it might take up to two years to decide. On 10 February, they decided to postpone judgment until the next term, in May, and the prisoners were sent back to their cell.

On 4 May 1870, ten months after their arrest, the Pawnees were again brought before Dillon and Dundy.³⁸ The judges had decided to resolve the jurisdictional issues and, over the objections of both sides (who, for entirely different reasons, wanted a quick sentence), they set about mapping the boundary between federal and state authority in criminal matters involving Indians.

There was not much in the way of precedent, but as Dillon made his argument it quickly became evident where the jurisdiction lay. After a careful analysis of the act creating Nebraska Territory in 1854, the treaty establishing the Pawnee Reservation in 1857, and the act of statehood in 1867, he concluded that nowhere had the criminal jurisdiction of the state over "all persons living or found within" been specifically impaired. He then referred to two previous cases which, although not directly analogous to the case in hand, certainly shed light on its legal circumstances. In 1834, in *US vs. Baily*, it was decided that federal courts had no authority to indict two Indians who had killed a white man on a reservation in Tennessee. And in 1863, in *US vs. Ward*, state courts were again held to have jurisdiction in a case where a white man had murdered another white man on a reservation in Kansas. How could federal courts have jurisdiction in the McMurty case, Dillon reasoned, where the murder took place on state lands, when the precedents showed that those courts did not even have authority over crimes

committed on reservations? Consequently, Dillon overturned the November verdict and ordered the Pawnees to be discharged.

But not entirely discharged. Because they had been convicted and discharged only because of a jurisdictional ruling, Dillon ordered that the four men be placed under the authority of the Butler County sheriff (Polk County still lacked both jail and courthouse) and retried there. If Butler County authorities did not take charge of them within twenty days, they would be released. Judge Dundy concurred in this decision, though he must have had qualms about what would happen next.

The *Omaha Daily Herald* also endorsed Dillon's decision, editorializing that the "only wonder is that the Indians were not sentenced and hung before the mockery called a trial was gone through with."³⁹ In the editor's opinion, the Pawnees were "victims of the white man's hatred of their race." The *Herald* had been put off by the belligerent behavior of the settlers in the courtroom and alarmed by the scanty evidence that was nevertheless deemed sufficient to convict the Pawnees. In their opinion, Blue Hawk had "no more to do with the murder of McMurty than Mr. Janney." It is impossible to ascertain whether the public shared this view, though it can be safely assumed that sympathy for the Pawnees increased with distance from Polk and Butler counties.

By this time Janney had begun to question the worth of Chase. Not only had he proven to be incompetent as defense counsel but he was also expensive, charging \$2,000 for his services. This was "much higher than he had expected," Janney complained to Parker, but he paid it anyway. Chase promised that he would finish the job without further payment. Moreover, Chase's political connections were not as advantageous by 1870 because Governor Butler was being investigated for embezzling school funds, an investigation which would result in his impeachment within a year. In the end, Chase was retained for the defense, but Janney also hired Eleazer Wakeley, a specialist in criminal cases, to assist him. Commissioner Parker allocated \$1,000 to pay

for future legal fees, of which Chase, contrary to his promise, gladly accepted half.

On 19 May 1870, the sheriff of Butler County went to the Omaha jail to claim the prisoners.⁴⁰ At the last minute he balked, saying that the Pawnees would certainly be mobbed and killed if they were returned to his jurisdiction. Janney made arrangements to keep the prisoners in their Omaha cell while a grand jury was impaneled in Butler County. Fearing wider violence, Janney told the sheriff of Platte County, which lay immediately to the east of the reservation, to arrest any traveling Pawnees as vagrants so that they would not be killed.

In October, to no one's surprise, the Butler County grand jury indicted the four Pawnees for the murder of McMurdy. Chase and Wakeley immediately applied for a change of venue for the trial because of the blatant prejudice in Butler County. This was granted and the trial was scheduled for 23 November 1870 in district court in Lincoln. The presiding judge would be George B. Lake, soon to be a justice of the Nebraska Supreme Court. Lake was known as an able judge, but Janney was worried about his reputation for tough sentencing.⁴¹

What followed was a continuation for almost another year of what the *Herald* called a "mockery of justice" and a "cruel farce." The trial did not commence on 23 November because Attorney General John C. Cowin (who had replaced Strickland) could not get Mrs. Phillips and other witnesses to come down to Lincoln. It was postponed again on 21 April 1871 because the clerk of Butler County failed to submit the transcripts from the grand jury. The trial was then pushed ahead until the next term, in October. "The Indians are at least entitled to be hung" wrote the editor of the *Herald*, instead of dying slowly of homesickness and hopelessness in their dungeon.⁴²

Facing the prospect of endless delays, Chase asked Lake to discharge the Pawnees from the Omaha jail. On 12 June 1871, the four prisoners were brought before him in Lincoln on a writ of habeas corpus. The principal Pawnee

chiefs were on hand, "decked in full Indian paraphernalia, necklaces of bear claws, scalps, feathers, buttons, medals, and tomahawks."⁴³ Almost two years after their arrest, Yellow Sun, Blue Hawk, Hard Driver, and Little Wolf were released on bail. The chiefs contributed \$5,000, one-third of their annual annuity, to this cost, and Janney and Parker added another \$1,000. The chiefs, addressing Lake as "grandfather," promised to return the four men to district court in Lincoln that fall. There was great rejoicing outside the courtroom when the prisoners were reunited with their leaders. They turned their backs on their stone cell in that foreign town and rode the night train back to Columbus, and then on to the reservation.

On 23 October 1871 they returned to Lake's court in Lincoln where they were immediately released without bail and the case was stricken from the record. Lake added a proviso stipulating that they could be tried again if new evidence turned up, but after twenty-eight months their ordeal was over.⁴⁴

AFTERMATH

After Yellow Sun, Blue Hawk, Horse Driver, and Little Wolf returned to the Pawnee Reservation they disappeared from history, at least from written history. Their names did not appear on a census count of the tribe taken in 1886, though they may have changed their names to protect themselves.⁴⁵ In 1929 an aged Luther North recalled that all four had died within a few months of their release, worn down from the suffering they had endured. But North's recollections are filled with mistakes, including the date of the murder (he remembered 1868) and even McMurdy's name (rendered as McMurray), so he may also have been mistaken about the fate of the four men.⁴⁶

It would not have been unusual for the acquitted men to die soon after their release, such was the desperate condition of Pawnee life. From 1872 to 1875, 247 Pawnees died, 10 percent of the total population. They died of typhoid and tuberculosis and other diseases

caused by poor living conditions; they died from famine—particularly in the summer and fall of 1874 after grasshoppers ate everything that grew—and more than seventy of them died on 5 August 1873, when the Sioux trapped their hunting party in a ravine in southwestern Nebraska, a place known ever since as Massacre Canyon. As a result of these disasters, and of the constant pressure from new settlers for their lands, the Pawnees reluctantly turned their backs on their homeland in 1874 and 1875 and migrated to Indian Territory, where they continued to die in great numbers. Two years later, their Nebraska reservation was refashioned as Nance County and Euro-Americans moved in among the graves and ruins of the once-great Pawnee nation.⁴⁷

Minnerva McMurty, according to a letter written in 1922 by George Grant's daughter, proved up the eighty-acre homestead and later sold it to a neighbor.⁴⁸ The land office record books, however, tell a different story: written next to McMurty's name is the enigmatic clause "canceled Jan'y 22, 1872, by Gov's letter." No patent of ownership was ever issued, and Minnerva's name does not appear on any subsequent property transactions in the Polk County record books. Nor is there any evidence that she remarried and disappeared from the record in that way.⁴⁹ Edward was reputedly buried in Columbus after the autopsy, but none of the cemeteries there has his name in their records.

The passage of time did not clarify who killed McMurty; quite the opposite. Luther North recalled that several years after the trial a Pawnee named Loo-hoo (Shooting Star) confessed on his deathbed that he and another Indian were the murderers. Luther added that his brother Frank had also believed Loo-hoo was guilty.⁵⁰ This story was partly corroborated by Barclay White who succeeded Janney as superintendent. Years later White asked Baptiste Bayhille if he knew who had committed the crime. Bayhille recounted the story of the deathbed confession, with the details being that a Pawnee (here unnamed) caught McMurty stealing his horses, shot him,

and left the body on the ground.⁵¹ This would still not explain, however, how McMurty was also stabbed, an arrow shot into his throat, and the body tied to the log and submerged.

It is likely that McMurty had not been heading to Columbus to buy groceries on that day but had, as Bayhille (and the evidence) suggests, intended to steal more Indian horses. And perhaps Pawnees (it would have taken more than one to manage the body and the log) had caught him in the act and dealt out characteristic justice for horse thieves. But here the facts run dry, like Nebraska streams in the hot September sun.

NOTES

1. The McMurty case is introduced in Clyde A. Milner II, *With Good Intentions: Quaker Work among the Pawnees, Otos, and Omahas in the 1870s* (Lincoln: University of Nebraska Press, 1994), p. 37; David J. Wishart, *An Unspeakable Sadness: The Dispossession of the Nebraska Indians* (Lincoln: University of Nebraska Press, 1994), pp. 183-85; and Martha Royce Blaine, *Pawnee Passage: 1870-1875* (Norman: University of Oklahoma Press, 1990), pp. 17, 22-23.

2. A key source is "Proceedings of US District Court in the McMurty murder case," written by Pawnee agent Samuel Janney and sent with a letter to Commissioner of Indian Affairs Ely S. Parker on 10 November 1869, "Letters Received by the Office of Indian Affairs, Pawnee Agency, 1863-69," National Archives, RG75, film 234, roll 660 (hereafter referred to as LR). This source is corroborated, and expanded, in "The Murder Trial," *Omaha Weekly Herald*, 10 November 1869.

3. Mildred Newman Flodman, *Early Days in Polk County* (Lincoln: Union College Press, 1966), pp. 1-7.

4. United States *Land Tract Books*, Nebraska State Historical Society, RG509, vol. 121, pp. 112-13.

5. "Proceedings of US District Court in the McMurty murder case," (note 2 above), pp. 40-41.

6. Paul Wilhelm, Duke of Wurttemberg, *Travels in North America, 1822-1824* (Norman: University of Oklahoma Press, 1973), p. 389.

7. Background information on the Pawnees throughout is from Wishart, *An Unspeakable Sadness* (note 1 above).

8. Charles Whaley to Superior Denman, 22 March 1869, LR, Pawnee Agency, 1863-69.

9. Luther North to Robert Bruce, 9 February 1929, *Luther North Papers*, Nebraska State Historical Society, MS 449, box 1, folder 18.

10. "Proceedings of US District Court in the McMurty murder case," (note 2 above), pp. 26-28.
11. "Proceedings of US District Court in the McMurty murder case," (note 2 above), pp. 10-11.
12. Ibid.
13. Janney to Parker, 15 July 1869, LR, Pawnee Agency, 1863-69.
14. Ibid.
15. Ibid.
16. Charles J. Kappler, *Indian Affairs: Laws and Treaties* (Washington, DC: Government Printing Office, 1903-1938), 2: 765-66.
17. "Minutes of a Council," in Janney to Parker, 15 July 1869 (note 13 above).
18. Ibid.
19. Janney to Parker, 15 July 1869 (note 13 above).
20. Ibid.
21. This and other biographical information on lawyers and judges are from John T. Bell and James W. Savage, *History of the City of Omaha, Nebraska* (New York: Munsell and Co., 1894), pp. 221-50.
22. Janney to Parker, 15 July 1869 (note 13 above).
23. Janney to Parker, 23 July and 3 August 1869, LR, Pawnee Agency, 1863-69.
24. Ibid.
25. "Proceedings of US District Court in the McMurty murder case," (note 2 above), pp. 23-24.
26. Ibid.
27. Janney to Parker, 6 September 1869, LR, Pawnee Agency, 1863-69.
28. *Omaha Weekly Herald*, 10 November 1869 (note 2 above).
29. "Proceedings of US District Court in the McMurty murder case," (note 2 above), p. 3.
30. Ibid.
31. Ibid.
32. "Proceedings of US District Court in the McMurty murder case," (note 2 above), p. 8.
33. Janney to Parker, 10 November 1869 (note 2 above).
34. Janney to Parker, 13 November 1869, LR, Pawnee Agency, 1863-69.
35. Janney to Parker, 11 January 1870, LR, Pawnee Agency, 1870-72.
36. Ibid.
37. Ibid.; and Janney to Parker, 25 and 27 January 1870, LR, Pawnee Agency, 1870-72.
38. Janney to Parker, 4 May 1870, LR, Pawnee Agency, 1870-72. Also, *U.S. v. Yellow Sun et al.*, as reported in the *Omaha Daily Herald*, 5 May 1870.
39. Editorial, *Omaha Daily Herald*, 5 May 1870.
40. Janney to Parker, 19 May 1870, LR, Pawnee Agency, 1870-72.
41. Janney to Parker, 9 November 1870, LR, Pawnee Agency, 1870-72.
42. *Omaha Daily Herald*, 30 April 1871, and Janney to Parker, 7 May 1871, LR, Pawnee Agency, 1870-72.
43. Janney to Parker, 13 June 1871, LR, Pawnee Agency, 1870-72; *Columbus Journal*, 21 June 1871.
44. Barclay White to F. A. Walker, 5 January 1872, LR, Pawnee Agency, 1870-72.
45. *Indian Census Rolls, 1886-1940*, National Archives, RG75, roll 386.
46. North to Bruce, 9 February 1929 (note 9 above).
47. Wishart, *An Unspeakable Sadness* (note 1 above), pp. 189-202.
48. Flodman, *Early Days* (note 3 above), p. 10.
49. *Land Office Tract Books* (note 4 above); *Numerical Index; Deed Record*, vol. 1, p. 482; *Marriage Index*, Polk County Courthouse, Oseola, Nebraska.
50. North to Bruce, 9 February 1929 (note 9 above).
51. White, "Journals," vol. 1, pp. 302-3, quoted in Blaine, *Pawnee Passage* (note 1 above), pp. 22-23.