CHAPTER VII

NEW MEXICO: THE TERRITORIAL AND DISTRICT COURTS

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With the taking from Mexico of the vast southwest region in 1846, the United States took on problems unlike any encountered elsewhere on the frontier. Especially was this true in New Mexico. No other state has had a comparable background of language and racial problems. Here was no newly opened country, inhabited only by nomadic tribes. This was the land where Pueblo Indians had lived in their well-built communities for centuries, and where Spanish settlements antedated those of the Pilgrims. The change from Mexican to American control imposed upon the inhabitants an alien tongue, new laws, and unfamiliar political concepts and social customs.

The stark environment seemed to offer little more than bare existence, made perilous by the raids of hostile Indians and roving bandits. Strong and effective support from the federal government was needed but not received. Except for sending a governor and judges, most of them political job-seekers from back east, Washington for decades gave little attention and less help to the territory of New Mexico. True, the army was on hand, but it had its hands full trying to subdue the Apaches, Utes, and Navajos.

As early as 1853, the New Mexico legislature in a memorial to Congress listed the many things the territory needed, including roads and a penitentiary. No help in these regards was forthcoming for many years. That memorial, and another in 1854, also called attention to the lack of schools, saying that except for two private institutions in Santa Fe, the territory was wholly without schools, and that seven-eighths of the population (more than 25,000 by the 1850 census) could neither read nor write. That situation also went unremedied for decades.

A. *THE JUDGES OF THE PROVISIONAL GOVERNMENT, 1846-1851*

Life in New Mexico in 1846, when General Stephen Watts Kearny took possession, was simple. The people were generally law-abiding. Disputes were usually settled informally with the help of the priest or the alcalde. Serious controversies were disposed of by the governor, whose decision was usually final. Lawyers were almost nonexistent.[1]

1. *Joab Houghton*

General Kearny set up a provisional government and a system of laws, the "Kearny Code." The judicial branch consisted of a three-man superior court, to which Joab Houghton was named chief justice. Houghton had migrated from New York three years earlier. His associates were Antonio Jose Otero, the only person of Spanish descent ever to serve on the territorial court during the sixty-six years of its existence, and Charles Beaubien, of French extraction. Otero was a man of intellect and influence who, it was said, rarely expressed an opinion without deliberation. Beaubien was known in the territory, with a reputation for honesty and integrity. He had filled several offices, and in 1841 had been granted a large tract of land later famous as the Maxwell Land Grant, by the then Mexican governor, Manuel Armijo.

The judges served in a dual capacity. Each was a trial judge, presiding over a judicial district; sitting en banc, they constituted an

appellate court, reviewing their individual decisions. This combining of original and appellate functions, which existed through most of the territorial years, was a glaring weakness and object of loud and constant complaint on the part of lawyers, litigants, and the press. Even the judges must have had qualms about a system in which they were required to review their own decisions and the decisions of their brethren.

Within a year of the American occupation, an insurrection broke out in Taos. A number of persons were killed including the governor of the territory, Charles Bent, and Judge Beaubien's son Narcisco. The revolt was quickly put down, and one of the leaders, Antonio Maria Trujillo, was brought to trial for treason.

Taos was in Judge Beaubien's district, but because of Beaubien's personal interest, Chief Justice Houghton heard the case. Many prominent citizens attended, including Judge Beaubien and daughters and brothers of the murdered governor. Trujillo was found guilty. Chief Justice Houghton, in passing sentence, said:

> Not content with the peace and security in which you have lived under the present government, secure in all your personal rights as a citizen, in property, in person, and in your religion, you gave your name and influence to measures intended to effect universal murder and pillage, the overthrow of the government and one widespread scene of bloodshed in the land.

The judge sentenced Trujillo to death. But he then joined with the U.S. attorney, the defense attorney, most of the jurors, and a number of other citizens, in urging that execution be suspended until the President of the United States could be petitioned for a pardon because of Trujillo's old age and infirmity. The President declined, apparently on the ground that the insurgents were not citizens of the United States, but suggested that the governor might properly grant such a pardon. This suggestion was promptly acted upon, and the old man's life was spared.[2]

Such tempering of justice with mercy was not typical, however. At the new American court's first session in Taos in April 1847, it tried seventeen men for murder, five for high treason, and seventeen for larceny, convicting fifteen of murder, one of treason, and six of larceny. The court did this in fifteen working days, setting a record for speedy disposition that later sessions probably never equalled. And its dispositions were final; every man convicted of homicide was hanged before even a transcript for appeal could have been written.[3]

Houghton had read some law and handled some legal work, but he was not a lawyer. He had been a practical civil engineer, but after coming to New Mexico he went into merchandising and soon was operating a mercantile house, perhaps the biggest west of the Missouri River. As a leading citizen, he was not an unreasonable choice for chief justice. Lack of formal legal training was apparently not seen as a bar, as trained lawyers were scarce.

But lack of such training was all too obvious in his records. Docket entries were in crude form; judgments and orders were in peculiar wording; and the brand of justice he dispensed often raised complaints. His court had no rules of procedure to guide the lawyers who practiced before him and who sorely needed such guidance, for most of them knew even less law than he did.

The accelerating debate over slavery extended to New Mexico in the form of Texas' claim to territory extending to the Rio Grande—which would have included most of present New Mexico. Chief Justice Houghton was a staunch and outspoken opponent of slavery. As such, he made himself highly unpopular with Southern congressmen.

A statehood party was agitating for annexation of New Mexico as a state rather than as a territory. Houghton, on the other hand, was one of the leaders of the territorial movement. Neither party seemed favorable to the Texas claim, so the Texas authorities sent an emissary with a scheme to promote county elections in which Texas sympathizers would be elected to key positions. Houghton urged the people instead to hold mass meetings to protest all Texas claims.

A constitutional convention was called. Chief Justice Houghton controlled a majority of the delegates. During a ten-day session, a constitution was drafted. Written largely by Houghton, as the convention's legal light, it contained a declaration against slavery, which was buttressed by a separate resolution declaring that slavery would be impracticable in New Mexico and would prove a curse and a blight, as it had in every state where it existed. The convention also went on record as denying Texas title to any part of New Mexico.

Richard H. Weightman, a leader of the statehood party, had attacked Chief Justice Houghton in fiery speeches throughout the territory. He also filed charges with the military governor, Colonel John Monroe, asking for Houghton's removal from office. When the judge learned of this, he challenged Weightman to a duel. They held the duel in an arroyo where the Santa Fe stadium was later built. At the word of command, only Weightman fired. The judge, who was a bit deaf, shouted that he had not heard the command.

"All right," said Weightman, holding up his hands, "You have the right to shoot. Fire now." But the seconds rushed in to stop the performance. Weightman was induced to offer an apology, of sorts, which the judge accepted.[4]

B. *FIRST JUDGES OF THE ORGANIZED TERRITORY, 1851-1858*

1. *Grafton Baker*

In 1851 New Mexico became an organized territory and the Kearny provisional government was replaced. The superior court became a supreme court, manned by three appointees of President Millard Fillmore: Grafton Baker as chief justice, Horace Mower, and John S. Watts. Baker and Mower each served for only two years. Watts served for four. Years later, in 1868, he was appointed chief justice.

Unlike his predecessor Houghton, Baker had been trained in the law. But though he arrived from his native Mississippi wholly unfamiliar with the social and political climate of New Mexico, he promptly plunged into territorial affairs and political controversies. He took it upon himself to report to Washington that hostile feelings existed between the military and the native inhabitants—which brought criticism from former Judge Houghton and a newspaper editor, William Kephart.

Baker also got into a dispute with Bishop Lamy. Baker's first court session in Santa Fe was held in the Castrensa, the military chapel belonging to the church. Since the American occupation, it had been used by the civil authorities, but Bishop Lamy had demanded its return. Among those summoned for jury duty was the governor, Donaciano Vigil, who objected to being sworn on the ground that the court was being held "in a place consecrated to sacred objects," where the forefathers of himself and many others present were buried. With all respect, Vigil begged to be excused from serving in a place where he said he felt he was treading upon the ashes of his ancestors.

Chief Justice Baker, apparently more than somewhat elevated in (distilled) spirits, responded to this polite demurrer by announc-

ing he would have the bishop hanged. A wave of indignation spread through the city. More than a thousand citizens, both Catholics and protestants, quickly signed a petition asking for justice and return of the church property. A mob gathered in front of the judge's home. Baker called on the military authorities for protection, but they respectfully declined to act. The crisis was avoided only when Father Machebeuf, who was assistant to the bishop and whom Baker had threatened to hang along with his superior, interceded with the mob and induced Baker to beg for mercy and promise to do justice. That evening, Baker called on the bishop and apologized. The next day, the chapel was turned over to the bishop. The court was moved to a room in the Governor's Palace.

There were other complaints that the judges were injecting themselves into church affairs. Ever since the 1847 insurrection, both the military and the civil authorities believed that prominent church officials had been active sympathizers in the plotting which had resulted in the killing of Governor Bent and that they were hostile to American institutions. For example, during the provisional period Judge Otero had taken it upon himself to reinstate priests who had been suspended by the church and to alter the limits of parishes.[5]

The authority of General Kearny to set up a provisional government was challenged in a suit not decided until 1853, two years after that government had been superseded. The suit involved the validity of a law enacted under the provisional government. Chief Justice Baker for the court held that as military commander of the conquered territory, General Kearny, by authority of the President of the United States as commander in chief, had the power to provide a provisional government for the area, and laws enacted by the legislative assembly thus created were valid.[6]

Houghton and others persisted in their criticisms of Chief Justice Baker and tried to get him removed from office. These efforts presented enough of a threat to convince the judge that he had better take countermeasures. He betook himself to Washington, where he convinced President Fillmore of his good qualities. But when Franklin Pierce became President in 1853, Baker was not reappointed. He returned to Mississippi.

2. *James J. Deavenport*

To replace Baker, President Pierce appointed another lawyer from Mississippi, James J. Deavenport. One problem the court faced during his term was a controversy concerning the jurisdiction of justices of the peace. The territorial organic act denied them power to try cases involving disputed title or boundaries to land, or cases involving claims exceeding one hundred dollars. It did not, however, expressly deny the district courts power to try cases involving less than one hundred dollars. In an opinion by Chief Justice Deavenport, the court held that the district courts had concurrent jurisdiction with justices of the peace to try such cases.[7] In another supreme court opinion, he held that an appeal from a justice of the peace to the district court would be conducted as a trial de novo.[8] In effect, this kept the district court one of original jurisdiction, rather than giving it the status of an appellate tribunal.

In January 1857 a long-standing controversy between the pueblos of Acoma and Laguna reached the supreme court. It concerned the right to an oil painting of San Jose, patron saint of Acoma, which had been left with that pueblo by one of the early Spanish conquistadores. The Acomas came to regard it as an object of worship, with power to bring rain and thus help produce crops, and they placed it in their church.

The neighboring pueblo of Laguna had borrowed the painting for a holy week celebration but then laid claim and refused to return it. The Acomas appealed to the ecclesiastical authorities, who ordered lots drawn to determine the right to possession. The Acomas drew the winning slip, and the priests declared that God had decided the issue.

The painting was duly returned, but soon thereafter, a party of Lagunas climbed the high Acoma mesa to retrieve the painting. Intimidated, the Acomas surrendered it but then went to court to get it back.

The case was heard before Judge Kirby Benedict, who had been appointed to the court at the same time as Deavenport. He decreed that the painting should be returned to the Acomas. The Lagunas appealed to the supreme court, which affirmed the decision in an opinion written by Chief Justice Deavenport.[9]

The Acomas had another problem on their hands. The documents evidencing their right to their lands, executed in the name of king of Spain and deposited in the archives in Santa Fe, had disappeared. Sometime later they turned up in the hands of Victor de la O and others. The Acomas went to court, alleging that these persons refused to return the papers unless they were paid the sum of six hundred dollars. The court held that the holders or finders could not extort payment for returning the papers to the true owners. The supreme court affirmed in an opinion written by Judge Benedict that concluded by saying the court was gratified it could be the judicial agent through which the ancient manuscripts, the written evidence that established the Acomas' "ancient rights in their soil and their rock, are more safely restored and confirmed to their possession and keeping."[10]

For the first fifty years of American rule, court records were poorly kept. Key papers were often missing from the files, and in some cases the entire file had disappeared. The explanation was not only carelessness but more often theft. One way to stymie a criminal prosecution was to steal the file or to abstract from it some essential documents. All papers were hand-written with no copies, so if a material document disappeared, the case collapsed. One reason for the frequency of such disappearances was collusion on the part of the clerks or other court officials.[11] Title abstracters may have been responsible for some of this kind of abstracting. As a result of such thefts, plus probable carelessness, many of the old files are either missing or sadly incomplete.

Chief Justice Deavenport served from 1853 to 1858. During his incumbency, he made a compilation of the early laws, *The Deavenport Compilation*. He was a man of strong opinions and high moral character, and an able lawyer and judge.

C. *KIRBY BENEDICT'S COURT, 1858-1866*

Some of the judges of territorial days were colorful characters. Foremost among these was Kirby Benedict.

Here was a man who came to New Mexico as President Pierce's appointee to the territory's supreme court, who was elevated five years later by President James Buchanan to be chief justice, a master of prose style who wrote polished opinions but whose addiction to drink and rude behavior led not only to his removal from the court but later to his suspension from practice and death in the street.

Born in Connecticut in 1810, Benedict soon after his twenty-first birthday moved to Ohio and then to Natchez, Mississippi, where he studied law (and French and Spanish) under John Anthony Quitman, a lawyer of considerable talent. Benedict was admitted to the bar of Mississippi, but in 1835 moved to Illinois.

There he practiced law, served a term in the state legislature, and became a friend of both Abraham Lincoln and Stephen A. Douglas. Perhaps spurred by their example in successfully entering politics, Benedict had some friendly citizens recommend him for a judgeship in the territories. In 1853 President Franklin Pierce appointed him judge of the Third (northern) Judicial District of New Mexico.

Benedict was a man of strong convictions and the courage to express them. He was opposed to secession and said so, even when Confederate forces under General H.H. Sibley were occupying Santa Fe. In a letter to President Lincoln, he expressed doubts concerning the loyalty of many New Mexicans. President Buchanan, he said, had favored southerners in making appointments to New Mexico, and many of these had brought in extremists who were bent on implanting the southern way of life.

He also spoke out against the institution of peonage that he found being practiced. Not only Indian captives, but also orphans and children of impoverished families, he charged, were being sold into virtual slavery. He estimated there were between 1,500 and 3,000 peons in the territory.[12] The usual peonage arrangement was to advance money to the peon who would work out repayment at the usual wage rate of a dollar or more per month. A typical peonage case came before the supreme court in 1857. A master alleged that a servant girl had abandoned her service owing him $51.75 advanced to her. A justice of the peace ordered her to serve twenty-six weeks of work, or to pay the equivalent in money, $51.75, plus interest and costs. The district court, on a trial de novo, affirmed. On appeal, Judge Benedict found no proof that the agreement had been acknowledged before any magistrate and no proof that the amount sued for was correct. The girl had apparently been a minor at the time. She had been given no notice or summons. The lower court judgment was therefore reversed.[13]

It is believed that Indian captives often served in the families of wealthy citizens in a state of practical slavery. The practice apparently rested on custom rather than the law, though "no laws were invoked to prevent it."[14] Although entitled to their freedom, Indians rarely tried to obtain release from bondage by appealing to the white man's courts.[15] Enslavement of Indians was abolished by President Lincoln's Emancipation Proclamation and orders issued to enforce it. Peonage was arguably sanctioned by Mexican usage and by territorial law, and was not affected by the Emancipation Proclamation. But it was officially abolished by act of Congress in 1867.

Benedict had little respect for the justices of peace of his day. They were, he said, "for the most part, unskilled, if not uninstructed, in legal forms and technical proceedings."[16] The papers they drafted were often "defective and inartificial." He therefore held, speaking for the supreme court, that a district court entertaining an appeal from a JP's decision could in its discretion grant leave to amend the pleadings. Without such power "to correct and perfect what unskillfulness or ignorance has defectively done," suitors would be "turned from the court with heavy bills of costs, and confidence in legal justice [would] be destroyed."[17]

The Treaty of Guadalupe-Hidalgo provided that Mexicans living in the territory ceded to the United States could retain their Mexican citizenship by electing to do so within one year. The treaty was silent as to how the election was to be made or evidenced. A number of citizenship cases arose later, when persons of Mexican birth sought to vote, run for office, or serve as jurors and their citizenship was challenged.

In *Quintana v. Tompkins*,[18] for example, a plurality of the votes for justice of the peace were cast for Quintana. Tompkins contested the result, alleging that Quintana was not an American citizen. The evidence showed that Quintana had signed a list of persons choosing to retain their Mexican citizenship but later had declared his desire to have his name removed. It had not been removed, however. The court held that he apparently had decided not to remove his name, and therefore he was ineligible to hold office. In *Carter v. Territory*,[19] a criminal defendant challenged his conviction on the ground that one of the jurors was not a U.S. citizen. The juror had signed his name in a book kept by the secretary of the territory, listing those who elected to retain their Mexican citizenship, but he later orally declared his intention to become a U.S. citizen. The court found Carter had not shown that the juror's signature constituted the record of any probate court or that the signers had appeared before any court or officer. Therefore, the court concluded that the signature was insufficient to constitute a legal choice, and the juror was eligible to serve.

Judge Benedict was conscientious in the performance of his duties. When sitting as a district judge, each judge was obligated to hold court regularly in each county in his district. Benedict did so, notable because other judges too often did not. During the five years Benedict served the Third District, he never failed to hold court twice a year in every county in the district, even though his district ran from the Colorado River on the west to Texas on the east, and from the 35th parallel on the north to the borders of Mexico and Texas on the south—about two-thirds of the area of the present states of New Mexico and Arizona, and three times the size of Illinois from whence he had come.[20]

In addition, Benedict often performed the work of other judges who were absent or had resigned. Sometimes he was the only judge in the territory holding court. For his added labors he received no added compensation.

Benedict's right hand was crippled from a bowie knife wound, so he could write only with difficulty. He employed as a scrivener a young lawyer from Missouri, Thomas Benton Catron, who shortly came to dominate New Mexico political and business affairs for fifty years, as attorney, political leader, and one of New Mexico's first two U.S. senators.

Because almost all the legislators were native New Mexicans, until the latter part of the territorial period all legislative business was conducted in Spanish, with journals and laws translated into English. Legislative bills, executive messages, ballots, and state documents of all kinds were printed in English and Spanish. Translators were available at all legislative sessions. As early as 1852, Governor William C. Lane had urged the legislature to adopt one language or the other instead of passing laws in duplicate, but this suggestion was not acted upon. All too often, enactments were phrased in lamentably poor Spanish, with English translations equally poor, crudely worded and obscure in meaning. In the first case in *New Mexico Reports*, the court had to construe a statute having "a manifest defect in the English section," which, the court held, "is fully supplied and remedied by the Spanish exposition of the text."[21] And in a special concurring opinion in a later case, Judge Benedict laid down the proposition that "if there is any discrepancy between the plain and unquestioned meaning of the terms used in the Spanish original and the terms used to express the same meaning in the English translation, the original must prevail. . . . [T]he Mexican people are not to lose the benefit of their laws enacted in their own tongue, because the translation has done injustice, or because those who occupy judicial seats may not be versed in the Spanish idiom."[22] Benedict himself could speak Spanish,

having learned the language along with French, while reading law in Natchez. Even today, New Mexico is largely a bilingual state. Ballots are printed in both languages, and in political campaigns Hispanic voters are likely to be addressed in Spanish.

In 1857 Benedict was reappointed and the following year was elevated to chief justice. As such, he was assigned to the First District, headquartered in Santa Fe. William G. Blackwood, a native of South Carolina, was appointed to take Benedict's former position on the Third District.

Although smaller in area, the First District contained more people than the Third. But its mountainous terrain and freezing winters presented perils and hardships equal to those of the southerly Third.

During his twelve years' tenure, Benedict wrote many more supreme court decisions than any of his associates. Indeed, from 1862 until the January term of 1867, he wrote all the decisions.

The first opinion Benedict wrote after becoming chief justice held that although at common law a county could not be sued, in New Mexico it could. A territorial statute defined the word "person" to include bodies politic and corporate, and a county, the court held, is a quasi-corporation.[23]

Upon the outbreak of the Civil War, a number of military officers resigned their commissions to join the Confederate Army, and for a time that army controlled much of New Mexico. Of the few lawyers in the state, many were southern sympathizers. A citizens' convention in Mesilla, in southern New Mexico, declared itself in favor of the Confederacy. The Confederacy had, in May 1861, proclaimed the creation of a territory of Arizona with three judicial district courts. The only surviving records of these Confederate courts are a few fragments from Mesilla, which are now in the state archives.[24] For a time, the Confederates also held the capital, Santa Fe. But the governor, Abraham Rencher, stood firm, the Confederates were defeated, and by 1862 New Mexico was safe for the union.

From the earliest days, civil government had been largely subservient to the military authorities. The Kearny Code had given the courts limited jurisdiction, and even matters nominally within the courts' jurisdiction were continually arrogated by the military. This became even more true during the Civil War when New Mexico was placed under martial law. The writ of habeas corpus was suspended; criminal cases were tried by military tribunals. The civil courts were allowed to act in such cases only with the military's consent. Both the judiciary and the population at large chafed under the restraints. The commanding general, James H. Carleton, was the target of most of the criticism.

Benedict tried to cooperate with Carleton, but by the fall of 1864 the general's popularity had declined, and Benedict now attacked him, leveling charges of graft. Carleton in turn charged Benedict with incompetence and addiction to drink. But Benedict's good friend Abraham Lincoln stood by him. "He may imbibe to excess," he said, "but Benedict drunk knows more law than all the others on the bench in New Mexico sober."[25] He refused to remove him.

Conflict with the military was not limited to Chief Justice Benedict, but extended to his associates, especially Judge Knapp of the Third Judicial District.[26] Judge Knapp publicly asserted that "this Territory is under a military despotism." General Carleton denounced the judge and filed charges against him. Knapp replied in kind, citing numerous instances of interference by Carleton with the civil administration of justice, including instances in which Knapp had been summarily detained and prevented from holding court, and even locked up in the guard house. It should be

said that Knapp was as guilty as Carleton of interfering with the other's jurisdiction. Carleton had the task of subjugating the bands of marauding Indians and proposed to resettle Apaches and Navajos in the Bosque Redondo, on the Pecos River. Judge Knapp did his best to impede this program. Also, Knapp was promoting other causes besides civil liberties. He was a supporter of a movement to carve a separate territory out of southern New Mexico, to be called Montezuma.

In 1864 a grand jury in Dona Ana County filed a report inspired and perhaps written by Judge Knapp, charging Carleton with treating citizens as members of a conquered province. Instead of protecting their rights, the petition charged that through his subordinates, he has "imprisoned citizens, has fined and compelled them to submit to the performance of labor without conviction or trial; has taken away our property without just compensation and refused to restore it. . . ."[27] The report was, in effect, an indictment of General Carleton.

But Washington in 1864 was embroiled in more pressing concerns, and the report received little attention. It did, however, infuriate the general. He wrote General Thomas in Washington, expressing regret that Knapp's "itching to make himself a martyr, or to be notorious in some way," had given the War Department so much trouble, and saying that many New Mexicans seriously believed that "Knapp is a compound of a knave and a fool, or else he is crazy," and that "he has the unmitigated contempt of every respectable man in the country."[28]

In September 1866 Carleton was removed, largely because of his inability to work harmoniously with the civil authorities. Judge Knapp had left the court two years earlier, when President Lincoln "accepted his resignation."

The conflict with the military was only one aspect of the confusion of authority over the territories. In theory, the U.S. secretary of state had jurisdiction over territorial administration (after 1873, the secretary of the interior). But in fact, supervision was exercised by numerous offices, a situation frustrating and demoralizing to conscientious judges.

By 1862 Benedict's popularity had reached a high level. Some 150 persons recommended his reappointment as chief justice, including legislators, army officers, and friends in Congress. But a year later, he was the subject of complaint for public drunkenness, meddling in local and political strifes, and producing irregularities in an election.[29] Newspaper editorials denounced him in the strongest language.

At the same time, however, he was appointed to a three-man committee to revise the territorial laws. Work began in the spring of 1864. It was quickly completed and submitted to the legislature, which adopted it as the Revised Statutes of the territory and had it printed in both Spanish and English. For their work, the members of the committee were voted one hundred dollars each.[30]

By 1865 when the time for reappointment approached, the campaign against Benedict accelerated. Judge Sydney A. Hubbell[31] signed a letter to President Lincoln asking that Benedict be removed, saying "he has taken to his cups again, worse than ever before," that he was so drunk when he took the bench that he could hardly sit in his chair, and that Hubbell had been obliged to adjourn court to allow Benedict to sober up. But Benedict's friends in the legislature rallied to his support, with a resolution praising his "ability, energy and integrity," and denouncing his critics as "vile calumniators." Lawyers of the territory and elsewhere, including Justice David Davis of the U.S. Supreme Court, also wrote in his support.[32]

But friend Lincoln was dead, and President Andrew Johnson was unmoved. Benedict was

not reappointed. He returned to the practice of law, but his conduct was so rude and insulting that he was finally suspended. Judges John Reddick and Warren Bristol were inclined to be lenient because of Benedict's ability and honesty, but they yielded to Chief Justice Palen, who insisted on disbarment. Benedict apologized abjectly for his conduct, and "fairly groveled" before the court, but the chief justice was obdurate.[33] Benedict's efforts to be reinstated failed. In 1874 he fell on a Santa Fe street and died of a heart attack.

D. *THE POST-WAR DECADE, 1866-1875*

1. *John P. Slough*

To replace Benedict, President Andrew Johnson appointed John P. Slough as chief justice. Slough had led the Colorado Volunteers in halting the Confederate incursion into New Mexico in 1862, and later served as military governor at Alexandria, Virginia, commanding a reserve force protecting the nation's capital.

Chief Justice Slough proved a hard-working trial judge. During the July 1867 term, only a year after his appointment, he disposed of a surprisingly large number of cases and did so in a way that led the *Santa Fe New Mexican* to praise "the fairness and impartiality of his decisions."[34] Almost half of the cases charged violations of the revenue laws, but they also included a case in which he held the Pueblo Indians not to be included in the term "Indian tribes," as used in certain federal statutes. His opinion was later confirmed by the New Mexico Supreme Court in a lengthy opinion written by his successor, Chief Justice Watts.[35] Both Slough and Watts were lavish in their praise of the "civilized, peaceful and kind" Pueblos, distinguishing them from the "wild wandering savages" that Congress had in mind.[36] But the practical effect of the decision was to harm rather than help the Pueblos.

A person named Lucero had been charged with settling on land belonging to the Pueblo of Cochiti, in alleged violation of a federal statute forbidding settling on lands belonging to "any Indian tribe," including "Indian tribes" of New Mexico. Although both Slough and Watts devoted many pages of their opinions to showing that the Pueblos were American citizens, the only issue was whether they were "Indian tribes" within the meaning of the statute. Both held they were not. The United States Supreme Court agreed.[37] This exclusion of the Pueblos from the laws protecting Indians deprived them of protection against encroachment on their lands and resulted in non-Indians occupying and acquiring land within their reservations. Not until almost a half century later did the United States Supreme Court reverse itself and hold that the Pueblos were "Indians."[38]

Chief Justice Slough was more successful than his predecessors in working with the military. His prestige as a military leader, plus the fact that General Carleton was no longer on the scene, enabled him to get full cooperation in enforcing civil administration. In addition to his judicial labors, Slough served on a citizens' committee working for extension of the Union Pacific line from Kansas through New Mexico to California.

Although honest, Chief Justice Slough was often arbitrary and disagreeable in manner. He had an "exceptional command of abusive language." In December 1867 he displayed this talent in remarks he made about William Rynerson, a member of the territorial legislature. Rynerson had rashly introduced a legislative resolution censuring Slough for unprofessional conduct, although he scarcely knew Slough and had little personal information to support the resolution. In return, Slough referred to Rynerson as a thief, a coward, and an s.o.b. Rynerson promptly journeyed to

Santa Fe and sought out the judge in the billiard room of Santa Fe's old La Fonda Hotel. He demanded a retraction, and on Slough's refusal, threatened to shoot. "Then shoot, damn you," said the judge. Rynerson accepted the invitation by shooting him dead. Charged with murder, Rynerson was defended by former Chief Justice Kirby Benedict, and on evidence that Slough had been reaching for his derringer, was acquitted on the ground of self-defense. The verdict had wide popular—or at least newspaper—approval. Governor Robert B. Mitchell, who had also been an object of Slough's colorful comments, then appointed Rynerson adjutant-general for the territory.[39]

2. *John S. Watts*

Unlike so many of his predecessors, New Mexico's next chief justice was not a newcomer to the state. John S. Watts had served as an associate justice from 1851 to 1854. In 1861 he was elected to a two-year term as territorial delegate to Congress. He was a studious man, fond of historical research.

Watts was determined that lawbreakers be brought to justice. In *Garcia v. Territory*,[40] he held that whipping did not constitute cruel and unusual punishment, pointing out that the new western country lacked jails and offered many opportunities for thieves to steal and escape, and therefore had a pressing need for punishment by whipping.

Juries did not always agree with his concept of justice. When despite the judge's instructions a jury acquitted a defendant charged with violating the revenue laws, Watts wrathfully dismissed them and forbade them ever to serve in his court again.

His first term ended in 1854, when he was replaced by Perry E. Brocchus. Watts resented the replacement, and used his influence to induce the legislature in 1855 to adopt a resolution asking the President to remove Brocchus. Two years later a repentent legislature "annulled, cancelled and repealed" its resolution in order "to do justice . . . to a faithful and upright public officer."[41]

Brocchus was a man of strong character and personal courage. Before being appointed to New Mexico, he had served a term on the supreme court of Utah, where he quickly made himself persona non grata by publicly denouncing *The Book of Mormon*. A man of large and powerful physique, a fastidious dresser, and a gentleman of punctilious manners, he was also quick with his fists and quick to use them. Standing on a street corner in Santa Fe one day, speaking with Attorney General Merrill Ashurst, Brocchus saw approaching the editor of the *Santa Fe Gazette*, who had been criticizing the judge editorially. Brocchus bowed to Ashurst saying, "Excuse me one moment," stepped over and gave the editor two swift punches to the nose. He then removed his gloves, tossed them into the street, saying, "There you've done dirty work enough," and resumed his conversation with Ashurst as though nothing had happened. He had administered similar treatment to a prior attorney general, Theodore Wheaton, who had said unflattering things about the judge, and on a chance meeting had the temerity to offer Brocchus his hand. Another victim was former judge Kirby Benedict. In arguing a case before Brocchus, Benedict repeatedly warmed to his subject and raised his voice and gesticulated flamboyantly. After repeatedly asking Benedict to lower his voice, Judge Brocchus adjourned court for five minutes, shook the distinguished ex-judge by the coat lapels, and told him that if he continued to howl, "the court will thresh you all over the room." Benedict apologized profusely and was allowed to continue with no more howling. One eminent victim of a trouncing at Brocchus' hands grumbled, "They

called him the parlor judge; he was nothing but a Baltimore plug-ugly."[42]

When Watts was again appointed in 1868, this time as chief justice, the relationship between them worsened. A criminal case against the assessor for the territory, William Breeden, was brought to trial in Albuquerque, which was part of the First District and was presided over by Chief Justice Watts. But because Watts, before his appointment, had served as prosecutor in a prior charge against Breeden arising out of the same transaction (misconduct in drawing pension monies for a client), he was disqualified from hearing the new charge, which instead was heard by Judge Brocchus. Breeden was acquitted but then again indicted on a related charge. This trial was held before Judge Houghton,[43] during a temporary absence of Judge Brocchus. Breeden was convicted. A motion for a new trial was overruled by Judge Houghton. But when Brocchus resumed his place on the bench, he granted the new trial. This time Breeden was acquitted. Chief Justice Watts was indignant. He wrote to the secretary of the interior, objecting to Brocchus' granting of the new trial, "thus reversing the decision of a brother judge without having heard the trial," an act which he called "an unprecedented outrage upon public justice."[44]

Judge Brocchus in turn wrote to the attorney general, replying to the charges and denouncing Watts' conduct, saying that it was "no part of the duty of Mr. Chief Justice Watts to fulminate through the executive department his calumnious denunciations of my judicial acts." It was, he said, outside "the bounds of official propriety, or even common decency, for a judge to indulge in such disparaging innuendos towards a co-ordinate member of the bench, without the assignment of some specific act, or rational ground, on which to base his insinuations." He challenged the chief justice to point out any specific act or to stand condemned as one who dishonors himself by aiming false and malevolent imputations to disgrace a co-ordinate functionary.[45]

The territorial legislature entered the fray a month later by passing an act to reassign the judge, bringing Judge Brocchus to the First District headquartered in Santa Fe and moving Chief Justice Watts to the distant southern Third District. The governor vetoed the measure, saying that such reassignment could not be made without the consent of Congress and adding that this attempt to disgrace the chief justice in order to flatter the ambition of one of his associates would subject the legislature to the censure of every honest citizen and the prompt disapproval of the Congress.[46]

The legislature responded with a resolution declaring the veto message "discreditable to its author," denying that the purpose of the bill was to degrade one judge or to gratify the ambition of another, and asserting that the assumption that the bill violated the Organic Law was unwarranted. This measure was in turn vetoed, and an effort to override the veto failed.[47]

Soon thereafter, newly inaugurated President Grant removed all three judges, along with all other appointive officials of the territory. In April 1869 Chief Justice Watts was replaced by Joseph G. Palen, Houghton by Abram Bergen, and Brocchus by Hezekiah S. Johnson.

3. *Joseph G. Palen*

Chief Justice Palen was better qualified for judicial office than most of his predecessors. He had spent a year or two at Yale and at Amherst, although he graduated from neither. He had studied law in a lawyer's office in Hudson, New York, and then practiced for ten years as a partner of that lawyer.

At the end of that time his health broke down; he spent some years speculating in real estate while he tried to regain his health. He

applied more than once for a judgeship in the Northwest and was finally rewarded with one in the Southwest.

His impression of the New Mexico legal fraternity when he arrived in 1869 was not favorable. His appraisal was no doubt valid, though we may add that the advent of the railroads less than a decade later brought many newcomers, some of them highly able. He was a man who carried himself with dignity, and he expected lawyers and litigants appearing before him to respect the dignity of his office. All too often their conduct did not seem to him to do this adequately. Within a few months of his arrival, he found it necessary to reprove one lawyer and assess a fine against him for "playing some uncourtly pranks in open court."[48]

During that first summer of 1869, Chief Justice Palen not only disposed of the case load in his own first district but then traveled south to Mesilla to try the cases left by Judge Abram Bergen who, after one short term, gave up his position and returned east. Judge Johnson in the Second District was industriously keeping up with his docket.

This willingness to work and the efficiency with which Chief Justice Palen ran his court quickly brought praise. The *Santa Fe New Mexican* editorially commended "his strict views of justice, his urbanity and mildness, that inflexible dignity on the bench," and said that "no judge who has ever come to this Territory has, in so short a time succeeded in securing a deeper confidence among the people than Judge Palen has done."[49] That confidence, however, was not universally shared. One historian described him as "one of the most arbitrary men who ever occupied the supreme bench in New Mexico . . . headstrong, overbearing, partial and biased," and dictatorial both on and off the bench. "Possessed of but mediocre ability as a lawyer, his appointment is said to have been for purely political reasons . . . ."[50]

Chief Justice Palen's First District included seven counties and had by far the heaviest caseload, but he prided himself on carrying it through, although it meant traveling some 650 miles by stagecoach and horseback each year. The other two districts each comprised only three counties, though they too were extensive in area. The judge of the Third District, in order to hold two terms in each of his counties and to attend the supreme court term in Santa Fe, had to travel more than 1,500 miles. The ardor of these duties, coupled with the low level of compensation, made it difficult to find competent lawyers willing to accept the position. Until 1870, the salary was $2,500 a year. At that time, it was raised to $3,000, which was still not enough to make the job attractive, considering its rigors—especially since the judges did not always receive even that amount. For 1877 through 1880, Congress appropriated only $2,600 for each judge's salary. Some appointees declined the position: Thomas B. Stevenson (1858); Zachariah H. Nabers (1858); Nathaniel Usher (1864); David S. Gooding (1864); David P. Vinton (1865); Henry Sherman (1865); Charles A. Tweed (1869). Tweed accepted instead a position on the Arizona Supreme Court. Some who accepted came unprepared for the rugged life they were called upon to lead, and so resigned after only a short stay: William G. Blackwood (1859); William A. Davidson (1860). William F. Boone, appointed to the Second District in June 1858, came from Pennsylvania—the only one of President Buchanan's appointees from the free states. He became ill upon his arrival in New Mexico and did not go on the bench until the spring of 1859. During that year he wrote many of the court's opinions, but he left in December and died within a few days of rejoining his family.

Between 1869 and 1872 five different judges were appointed to the Third District. Abram Bergen, as already mentioned, stayed for only one term. One term was also enough for Benjamin J. Waters, appointed in April 1870. The constant traveling through unsettled country, inhabited by hostile Indians, was too arduous; he returned east. Joseph R. Lewis, a member of the Idaho Supreme Court, was nominated in May 1871, but declined to come to New Mexico. Instead, he accepted appointment to the court of Washington Territory and ultimately became its chief justice. Daniel B. Johnson, Jr. was appointed in July 1871, but resigned after only a few months. Of the five, only Warren Bristol stayed. Although born in New York, he was appointed from Minnesota, where he had been active in Republican politics. He stayed for twelve years, from May 1872 to July 1884.

During Judge Bristol's tenure, he presided at the trial of the desperado William Bonney, known as Billy the Kid, and other cases arising out of the so-called Lincoln County War.[51] That and other cattle wars, together with the train robberies that came with the advent of the railroads, created a heavy case load, but Judge Bristol handled it with both dispatch and care.

Not all the judges were as conscientious or able as Palen or Bristol in holding court twice a year in each county. Not doing so meant annoying and burdensome delays for litigants and a bad effect on criminal law enforcement. Defendants who had been released on bail often disappeared before they could be brought to trial. Persons not released on bail sometimes sat in jail for months before being tried and then perhaps found not guilty. But considering the hardships and frustrations that the judges faced as they journeyed out to the frontier to uphold law and order, it is commendable that so many did prove to have the courage, stamina, and intelligence that their task demanded.

Although widely praised for his forthright insistence on protecting law-abiding citizens and punishing the guilty, Judge Palen was not without enemies. One source of animosity was his alleged friendliness toward the "Santa Fe Ring," a group of lawyers, governors, judges, surveyors-general, and speculators—mostly Republicans but including some Democrats—who wielded pervasive political control and economic power during the period following the Civil War through the 1880s.[52]

By giving the legislature power to assign judges to the several districts, Congress opened the door to abuse. A judge out of favor with legislators was in danger of finding himself transferred to a less desirable district. One Saturday afternoon in December 1871, a bill was introduced in the New Mexico legislature to move Chief Justice Palen from the First District to the much less important Third, in Mesilla. The bill was passed "with unseemly haste," without being printed or referenced to committee, and without time for deliberation. When news of its passage became public, most of the lawyers in Santa Fe and most officials, as well as many important citizens, urged the governor to veto the measure. They denounced it as an outrage, instigated by a Democratic "money ring" acting from malice and fear of righteous judgments and enacted in indecent haste through false statements made to the legislature. Several prominent Santa Fe citizens were under indictment, and Governor Giddings thought these parties wanted a "more facile judge." Judge Daniel B. Johnson, who would take Palen's place under the bill, in the governor's opinion, was a "drinking debauchee . . . too low to be respected." But the governor also received a petition, signed by more than 400 persons, urging him not to veto. The two former chief

justices, Benedict and Watts, were among Palen's enemies. Watts was also trying to have the governor removed. The latter had a correspondingly low opinion of him. "Watts," he said, "was never a lawyer except in name."[53]

After a few days, Governor Giddings returned the bill with a long veto message. He referred to the earlier legislative attempt some years before to shift Chief Justice Watts to the Third District. And he agreed with his predecessor, Governor Mitchell, that the attempted reassignment was illegal. The veto was sustained.

This so angered the Democrats that they undertook the astonishing political maneuver of seizing control of the legislature. A coalition of Democrats plus several Republican bolters passed a bill declaring vacant the seats of three Republican members plus that of a member who had died and naming four Democrats to replace them. No justification for the ouster was alleged.

A few days later, Speaker Milnor Rudolph declared the house adjourned. Eleven Democratic members remained, on the assertion that no poll had been taken on the question of adjournment. They elected their own speaker and voted to order the arrest of the speaker of the house and several other Republican members, who were thereupon arrested and jailed.

Habeas corpus proceedings were brought before the supreme court. Judge Hezekiah S. Johnson wrote the court's opinion, which is not officially reported and seems to have been lost or stolen. According to newspaper reports, Johnson held (1) the action of the house declaring the four seats vacant and making appointments to fill them was unauthorized and void; and (2) the eleven members who remained after adjournment by the speaker had no legal right to transact business in a legislative capacity, and the order for the arrests of the speaker and other members was unauthorized and illegal. Chief Justice Palen joined in the opinion.

Judge Daniel B. Johnson dissented on several grounds. The court, he said, had no jurisdiction because the affidavit filed did not show the parties were arrested in violation of the United States law; nor did it show that the persons restrained could not have made their own affidavits asking for issuance of a writ of habeas corpus. Furthermore, the house could only be dissolved by vote of the house, and not by the speaker, and the members who remained had a right to adopt their own way of securing a quorum. Finally he said that under the separation-of-powers doctrine the judiciary has no power to determine who are entitled to seats in the legislature or to interfere with the executive department.[54]

The majority decision was promptly and bitterly criticized by pro-Democratic newspapers throughout the territory. Criticism was aimed as much at Chief Justice Palen as at Judge Johnson. The *Las Cruces Borderer* called Johnson Palen's "puppet." To counter these bitter attacks, Palen's friends held a mass meeting in Las Vegas, where a series of resolutions was adopted denouncing the newspaper articles and expressing full confidence in Chief Justice Palen's ability, integrity, and devotion to the public interest. Threatening notes were still being circulated, but Palen refused to be intimidated, and gradually the antipathy waned. He continued to administer justice in a way that met general approval. When he died in office, December 21, 1875, he was widely regarded as probably the ablest man who had so far held the position.

E. *WALDO TO AXTELL, 1876-1885*

1. *Henry L. Waldo*

In replacing Chief Justice Palen, President Grant disregarded established practice by

choosing someone from the opposition party. Henry L. Waldo was a prominent Democrat, but he had the happy facility of getting along with leaders of both parties. He was a man of dignity, integrity, and unimpeachable character.

A wave of violence was sweeping over the territory; killings and robberies had citizens fearing for their lives. Judge Waldo opened his July 1876 term of district court with a strong charge to the grand jury, demanding prompt and vigorous action to demonstrate "that crime henceforth is to be punished, and punished severely."[55]

The grand jury responded by returning numerous murder indictments, thereby earning the judge's praise for their prompt and rigorous action, which he said stood as an example to grand juries throughout the territory and which he hoped would inaugurate "a period characterized by a reign of law, peace and order."[56]

The example of the grand jury's rigorous action was not, however, often followed by trial juries. No matter what the judge may have said in his instructions, in the jury room the test of guilt was, "Did the defendant give the deceased a fair chance?" If the deceased had been given a fair chance in a fair fight, the defendant should be acquitted. If he shot the deceased in the back without warning, he should hang.[57] Few were hanged. Many were let off with sentences widely denounced as outrageously inadequate.

Three young men were charged with murder for robbing and beating to death an old and crippled Santa Fe doctor. One was discharged for lack of testimony implicating him in the act; the other two, found guilty, were sentenced to only one year in the county jail.

In another case, a young man, in a drunken spree, started firing at random in the plaza of Santa Fe. One of his shots happened to kill a young lady. The young man's father hurried from his home in the east to New Mexico and induced the mother and brother of the slain girl to write a letter to the governor asking that the young man not be prosecuted. The letter explained that their religion commanded them to forgive and that they could not resist the supplications of the young man's father or of his "tender mother who from the day she knew of the terrible mishap has been prostrated in profound grief." The governor obligingly granted the pardon; the attorney general issued a nolle pros; and the defendant and his father departed New Mexico.[58]

The pardon issued in this case raised the question whether the governor could issue a pardon before the person had even been convicted. The governor apparently had acted upon the advice of his attorney general, William Breeden, that he could.[59] Nevertheless, this pardon was roundly criticized by those demanding sterner law enforcement measures to curb the rampant violence. Similar denunciations followed the sentence of the young men tried for killing the elderly doctor. The *New Mexican* editorialized that the outcome of that case would encourage criminals, for which result the jury was directly responsible, "and ought to be made accessorys (sic) before the fact, for every crime resulting from their betrayal of the solemn duty entrusted to them."[60]

When Judge Hezekiah Johnson died in 1876, after seven years on the bench, President Grant appointed John J. Redick of Nebraska to replace him on the Second District Court. Redick resigned less than a year later and was replaced, for an equally brief period, by Samuel B. McLin. Appointed during a Senate recess in March 1877, McLin served only until the end of that year, when the Senate refused to confirm his nomination. President Hayes then

named Samuel Chapman Parks of Illinois to the position. Parks had served two years on the Idaho Supreme Court, 1863 to 1865. He served a four-year term on the New Mexico court, from January 1878 to January 1882, when he was transferred to the Supreme Court of Wyoming.

During the early years of the American occupation, opinions differed as to whether the Organic Act had ipso facto established the common law, or whether Spanish civil law was still in effect. The Anglos appointed from the eastern states knew nothing of Spanish or Mexican law,[61] and some of them knew but little American common law. The Organic Act of 1850 provided that the courts of the territory should have "chancery as well as common law jurisdiction," and an 1886 act said that "the common law as recognized in the United States of America" should be the rule of practice and decision. But whether this established the common law in its broadest sense, or simply a system of common law procedure, remained undecided for years. In 1886 the Supreme Court held this language was meant to adopt the common law and such British statutes of a general nature not local to that kingdom nor in conflict with the Constitution or laws of the United States, nor of the territory, which were applicable to our conditions and circumstances and which were in force at the time of the separation from Great Britain.[62]

Although this disposed of the question of which system of jurisprudence prevailed, it created new problems. It summarily abolished a system of law by which the population had lived for centuries and instituted a new and unfamiliar one. Few lawyers were adequately learned in the principles and procedures thus thrust upon them. Moreover, in most states and in England itself, by 1876 the old English common law had been extensively altered and pruned to eliminate antiquated provisions. Whether such changes were now part of the common law of New Mexico was not certain.

It was customary in New Mexico to address juries in Spanish. Chief Justice Waldo put an end to that practice and required using interpreters.

In 1878 after less than three years' service on the bench, Chief Justice Waldo resigned to resume private practice. Shortly thereafter, however, Governor Axtell appointed him attorney general for the territory.

2. *Charles McCandless*

Finding someone to fill the shoes of highly respected Chief Justice Waldo was not easy. The territorial legislature proposed the name of R.H. Tompkins, a long-time resident who had served as justice of peace. President Hayes, however, appointed Charles McCandless, a member of the Pennsylvania bar.

Chief Justice McCandless arrived in New Mexico in the summer of 1878. He made a most favorable impression. His charge to the grand jury on the opening of his first term of court called for a united effort by judges, jurors, and citizens to do their duty fearlessly and impartially so that law and order might reign, lawlessness and violence be suppressed, and each citizen be made secure in the enjoyment of life, liberty, and the pursuit of happiness.

In July, upon concluding the district court session, Chief Justice McCandless departed for Pennsylvania, ostensibly for a visit with his family. In October, New Mexicans learned that he had resigned. Apparently he had found, like others before him, that the physical conditions and social customs in New Mexico were too rugged and crude for his tastes.

3. *Lebaron Bradford Prince*

Hoping to find someone of a temperament and physique robust enough to cope with life

on the frontier, President Rutherford B. Hayes appointed L. Bradford Prince of New York. Prince left behind him a long political career in the New York legislature, where he had distinguished himself by rooting out and exposing dishonest judges and corrupt politicians and obtaining their impeachment. In 1876 he had served as delegate from New York to the Republican National Convention. There he broke with Roscoe Conkling, an act that probably was influential in leading him to accept appointment to the New Mexico bench. He had not sought the appointment and accepted it reluctantly, but once he arrived he became an enthusiastic resident.

Riding circuit over the First Judicial District—comparable in size to the whole of his native New York—entailed hardships new to the scholarly jurist from the exclusive society of Long Island, but he quickly adapted himself. He dug energetically into the accumulated court docket and soon became known as the hardest working judge New Mexico had known. The number of cases was increasing each year, but he cleared the docket and kept it cleared, sitting sometimes from 8:00 a.m. to 11:00 p.m., with only an hour off for lunch and dinner. During his three years on the bench, he disposed of 1,184 civil and 1,483 criminal cases; this was in addition to the appellate cases he heard as a member of the supreme court.

Prince's associates were Samuel Parks in the Second District and Warren Bristol in the Third. When Bristol's second term expired in 1880, President Hayes undertook to replace him. He submitted the name of William Ware Peck of the Wyoming Supreme Court. But the New Mexico leaders had heard of the controversies Peck had engendered in Wyoming,[63] and they persuaded the Senate Judiciary Committee to report adversely on the nomination. The President withdrew his name and nominated S. Newton Pettis (whom he had previously nominated to succeed Peck on the Wyoming court). The Senate rejected Pettis. Two weeks later it also rejected the President's third nominee, Charles Pelham of Alabama. With that strike-out, the President gave up and renominated Bristol for a third term.

It was a period of transition. For thirty years, New Mexico had been almost isolated from the outside world. The only means of communication was the stagecoach. Mail took thirty days to reach the eastern cities. The coming of the railroads in the 1880s brought not only faster transportation, but changes in business methods, increased prices, and an influx of lawyers. Some of the latter were highly able, and they indirectly improved the quality of the courts.

With the new era came also a crowd of rough and reckless characters who produced a huge increase in the crime rate. To keep up with the flow of cases, Chief Justice Prince continued to work with dispatch. During his first session in Mora County, on a Friday morning the grant jury indicted Jose Felipe Gallegos for murder. Gallegos was arrested and brought to trial that afternoon. The trial continued until nearly 11:30 p.m. and throughout Saturday. Saturday evening the jury brought in a verdict of guilty of murder in the fourth degree, and the judge imposed a sentence of seven years imprisonment—indictment, arrest, trial, conviction, and sentence, all within two days.[64] Whenever a party or a witness failed to appear at trial and the proceedings had to be delayed, Chief Justice Prince would call the next case and impanel another jury and try it while the jurors of the first case waited. On occasion the judge was known to open court at 8:00 a.m., adjourn from 12:00 to 1:00 and from 6:00 to 7:00, and continue until 11:00 p.m. He did not spend time discussing the points of law raised by

motions or objections but would immediately state his ruling. Speedy justice was no doubt sometimes imperfect justice, but frontier society suffered more from the delays in bringing defendants to trial than from Prince's celerity in trying them. And it should be said that his desire for expedition did not lead him to hurry counsel unduly. He was never impatient or harsh. Although tenacious in his views, he was even-tempered and self-controlled. He also had considerable skill in overcoming overt or undercover opposition. He was a man of fine appearance, tall, and displaying a full beard.[65]

Throughout all his days in New Mexico, Chief Justice Prince was a staunch defender of the good name of its Hispanic citizens. In a report to the secretary of interior in 1889, when he served as governor, Prince emphasized that "the native population was, as a rule, law abiding and respectful of authority, and was chargeable with but few crimes."

Some of the difficulties in administering justice in early New Mexico can be seen from the trial of five Laguna Indians charged with stealing sheep. The sheep had wandered upon Laguna lands. Unable to find the owner, the pueblo governor ordered five of his men to bring the animals into the village. Conducting the trial necessitated translating every question and answer from English to Spanish and then from Spanish to the Laguna language (Queres), and every answer from Queres to Spanish to English. The lieutenant governor of the pueblo was the first to be tried. His counsel, Colonel Sidney Barnes, presented a brilliant defense, but former Chief Justice Waldo, now attorney general, with an eloquent oration to the jury, obtained a conviction. Chief Justice Prince assessed the lightest possible penalty, a fine of ten dollars, and Attorney General Waldo thereupon nolle prossed the case against the other four.[66]

The peculiar conditions under which justice had to be administered in New Mexico is further illustrated by a murder case tried before a jury consisting wholly of Hispanics, none of whom spoke or understood English. The proceedings were conducted in English using an interpreter. The instructions to the jury were written in English but interpreted orally to the jurors. Upon conviction, the defendant appealed, contending that (1) a trial before a jury that did not understand English was not a trial by jury as contemplated by the common law or by the Bill of Rights, and (2) the instructions to the jury were given orally, in violation of the law requiring instructions to be in writing.

Chief Justice Prince's decision held: (1) not understanding English does not disqualify a juror; a defendant has no right to be tried by jurors of any particular nationality or language group; (2) the purpose of having instructions in writing was not so that the jurors could consult them while deliberating, as contended by defense counsel; the instructions were intended to be written so that they could be filed with the papers in case of exception or appeal. At the time of the trial there was no authority for allowing the jury to take the judge's instructions with them into the jury room.[67]

A psychological change was taking place in the attitude of the Anglos toward the Spanish-Mexican-Indian cultural heritage of New Mexico. One manifestation was Chief Justice Prince's stern denial of permission for his wife to remodel their Spanish adobe house in Santa Fe, formerly the home of the Sena y Baca family, into a Victorian mansion.

Although Waldo, when he was chief justice, had tried to end the practice, lawyers able to speak Spanish liked to address Spanish juries in their own language. W.H. Hendrie, a lawyer with a thorough command of Spanish, in

an 1879 federal criminal case started his closing address to the jury in rapid-fire Spanish. The U.S. attorney, Colonel R.P. Barnes, objected that permitting Mr. Hendrie to speak in Spanish gave him an advantage over members of the bar who did not understand the language. "Of course it gives me an advantage," retorted Hendrie, "and I ought to have it. Why didn't you come here twenty-five years ago as I did?" Chief Justice Prince allowed him to continue in Spanish but had his remarks interpreted for his opponent.

In spite of the heavy burden of his judicial duties, Prince still managed to publish a compilation of the laws of New Mexico.[68] It was said that he found the time for this task by working on the train when he journeyed back to New York between court sessions.

In 1882 perhaps prompted by his years in New York politics, Chief Justice Prince decided to seek the nomination for delegate to Congress from New Mexico. Because he felt it would be grossly improper to seek political office while on the bench, he resigned his judicial position. But at the convention making the nomination, he was defeated. His disappointed supporters charged unfair and dishonest tactics and urged him to run as an independent candidate. He graciously declined, saying he could not do that; he was a Republican and believed in party organization, and preserving that organization was more important than gratifying any man's individual ambition.

He turned his energies to private practice and historical research, plus fruit raising, mining, and financial interests. After seven years, in 1889, President Harrison, at the urging of financial and railroad interests, appointed Prince governor of the territory. During his administration and at his suggestion, the legislature enacted the first comprehensive public school law, and founded the University of New Mexico and other educational institutions. His term was politically stormy, and it ended when a Democratic administration took over in Washington in 1893.

In 1909 Prince was elected to the territorial council. Thus he served in all three branches of government. He died in 1922 in the town where he was born, Flushing, Long Island.

4. *Samuel Beach Axtell*

Following Chief Justice Prince's resignation, President Chester A. Arthur chose Samuel Beach Axtell for the position. Born and educated in Ohio, Axtell had moved to Michigan and then in 1851 joined the gold rush to California. There he served as district attorney for six years and as a member of Congress for two terms. Elected as a Democrat, he later switched and was a staunch Republican for the rest of his life. President Grant appointed him governor of Utah in 1874, but there he quickly encountered charges that he was too closely allied with the Mormon church, and a year later the President moved him to the governorship of New Mexico.

New Mexico's future looked bright when Axtell became governor in 1875. Indian troubles had subsided, and statehood, it appeared, was about to become a reality. Yet, within the next three years, conditions had become so desperate that a special agent for the Department of the Interior reported, "It is seldom that history states more corruption, fraud, mismanagement, plots and murders, than New Mexico has been the theater of during the administration of Governor Axtel [sic]." The governor himself, it was charged, "conspired to murder innocent and law-abiding citizens because they opposed his wishes and were exerting their influence against him."[69] The report recommended that Axtell be removed.

During his governorship, the legislature was induced by a Jesuit activist named Donato Gasparri to pass a bill incorporating the Jesuit Fathers of New Mexico and authorizing the order to establish educational institutions with the right to own an indefinite amount of property forever free from taxation. Governor Axtell vetoed the bill with a stinging message highly critical of both Gasparri and the society. The legislature, made up almost wholly of Hispanic natives, passed it over his veto, but Axtell was upheld by a unanimous vote of Congress annulling the act on February 4, 1879. His strong convictions in this controversy gained him both supporters and enemies. His enemies circulated a rumor that he was a Mormon bishop in disguise. A rising crime rate and charges of partisanship, corruption, and worse, arising chiefly out of Axtell's part in the Lincoln County War, led President Harrison to remove him in 1878 and appoint General Lew Wallace in his place.[70]

New Mexico was in turmoil. The Lincoln County War had almost depopulated that area. Judge Warren Bristol explained his reasons for not holding court in that county: the sheriff had either abandoned or been driven from his office; a large part of the better class of the population, from which jurors should be drawn, had fled; and witnesses were being intimidated, killed, or driven from the country. A proclamation by President Rutherford B. Hayes, admonishing all persons engaged in the obstruction of the laws to disperse and return peaceably to their respective abodes, and a general proclamation of amnesty by Governor Wallace, brought peace for a short time. Then on the night of February 18, 1879, Huston J. Chapman, attorney for the widow of murdered Lincoln County merchant Alexander A. McSween, was himself murdered. Charges were preferred against a number of men, including military officers. In all, nearly 200 indictments were returned out of the voting population of 150. General William T. Sherman suggested that the best thing to do with New Mexico would be to "prevail on Mexico to take it back."[71]

Samuel Axtell had influential friends as well as enemies. Four years after President Harrison removed him as governor, President Chester A. Arthur appointed him chief justice of the territory. In January of that same year, 1882, Joseph C. Bell of New York had been appointed for the Second District, to replace Samuel Parks, who had been transferred to the Wyoming court. Bell served until 1885.

After Axtell was appointed chief justice, charges against him quickly resumed, and they continued throughout his tenure. As judge, Axtell was more concerned that justice prevail than that legal niceties be observed. He tried when he could to acquaint himself with the details of a case before it came to trial. Then he would bend all his efforts to have the case come out "right" as he saw it, without much regard for accepted legal rules. In a case asking foreclosure on the farm of a poor man not represented by counsel, the judge, recognizing that without legal assistance the man would surely lose, descended from the bench and began cross-examining. At the end of the case he instructed the jury to find a verdict for the defendant. The jury nevertheless disagreed, whereupon the judge discharged them, announced the verdict for the defendant, and instructed the clerk never again to permit any of the discharged jurymen to serve in San Miguel County.[72]

To Chief Justice Axtell, "doing right" meant making sure that the guilty were punished no less than that the innocent were vindicated. Early during his career on the bench he had occasion to sentence a criminal defendant to a term of forty years. Before imposing the sentence, he had asked the defendant the usual question whether he had anything to

say. The defendant declined to answer, but after sentence, he stood up and said, "I now wish to say this sentence is unjust, and that I am not guilty of the charge." Judge Axtell replied, "You are adding falsehood to the charge, and now I change the sentence just imposed to sixty years instead of forty."[73] Fortunately for the defendant, he turned out to be a good prisoner and was pardoned long before the sixty years had run.

Chief Justice Axtell was a striking figure, who always wore a high silk hat. He was particularly kind and helpful to the younger members of the Bar whom he often helped guide through the intricacies of legal principles and procedures. His forthright speech and action, however, stirred bitter opposition. Pending a criminal trial in Las Vegas, he was warned that if he sat on the case, he would not leave the trial alive. Undaunted, he heard the case as scheduled but did take the precaution of having the sheriff search not only all the spectators but the court attendants and officers as well. When the search was completed, forty-two resolvers were piled on the table before him, some of them taken from the attorneys. Every person who had brought a weapon into the courtroom was fined ten dollars for contempt. The fines were collected without resistance.[74]

In a case involving ownership and right of possession of the Canon del Agua Mine in Santa Fe County, the judge enjoined certain influential claimants from entering on the mine premises while the case was pending. Acting on advice of counsel, they defied the order, whereupon Chief Justice Axtell had them, and their counsel, jailed. But the sheriff and his deputy, who were their political friends, gave them the run of the jailhouse and allowed them to use the jail office as a reception room, where they received and lavishly entertained their friends until the judge decided to end the farce by ordering their release.[75]

Chief Justice Axtell acquired a large number of critics who made repeated charges against him. Although the territorial legislature in 1884 passed a resolution denouncing the accusations as "malicious, scandalous and false," Axtell felt it prudent to resign in May 1885, after the election of Grover Cleveland, rather than await probable removal. He died in New Jersey in 1891.

When Judge Warren Bristol resigned in 1884 after twelve years of service, he was succeeded by Stephen F. Wilson, who had served for four years as a congressman from Pennsylvania and ten years as a Pennsylvania judge. Wilson was appointed in October 1884, but was suspended a year later, after the Democratic administration of Grover Cleveland took over.

F. *VINCENT TO O'BRIEN, 1885-1893*

1. *William A. Vincent*

The election of Grover Cleveland, the first Democrat to win the presidency since the election of 1856, opened the emoluments of office to hordes of Democrats hungry for office after years in the political wilderness. The late nineteenth century was a highly political era, and federal judgeships—even lowly ones such as those in the territories—were part of the spoils of office. Judges were likely to be replaced with each change of administration, and even more often. The lack of tenure and the political nature of the appointments invited attacks on political grounds. Many judges fell victim to local rivalries and ambitions. Because many departments had a hand in supervising territorial affairs, attacks could come from numerous directions. Replacement meant that pending cases had to be reargued.

One of the personages whom Chief Justice Axtell had jailed in the Canon del Agua Mine dispute was the claimants' attorney, William A. Vincent. Upon Axtell's resignation, President Cleveland appointed attorney-prisoner Vincent as his successor. The President also appointed William Brinker, from Missouri, to replace Joseph Bell in the Second District, and William F. Henderson, from Arkansas, to replace Stephen F. Wilson in the Third.[76]

The new chief justice made his first public appearance in the territory when he administered the oath of office to newly appointed Governor Edmond G. Ross at a secretly arranged sunrise ceremony held on Ross' arrival, June 15, 1885. He heard his first case on June 29, making a good impression on those present as he entered the courtroom, laid aside his silk hat, placed a copy of the *Compiled Laws of New Mexico* upon the table, and took his place on the bench.

But he quickly ran into trouble. The building of railroads and highways opened up vast areas of land which offered opportunities for fraudulent as well as legitimate acquisitions. A basic cause of the prevalence of fraud lay in the essential concept of the Homestead Act, which was to promote family-size farming units. In New Mexico, only a few river valleys and highlands were suited for such farming, with most of the land fit only for sheep or cattle raising. Running stock over the arid range called for large-scale operations; so cattle companies sought to acquire broad tracts of land by fair means or otherwise. The vast public domain lands were tempting targets for illegal entries, fraudulent claims, and other chicanery. Charges were brought, but convictions were few. One of those convicted was Max Frost, the register of the U.S. Land Office in Santa Fe, but he was granted a new trial and acquitted.[77]

Perhaps the most prominent of those suspected of perpetrating such frauds was a former senator from Arkansas named Stephen W. Dorsey. He had been charged with complicity in the so-called "Star Mail Route" frauds, but acquitted. Moving to New Mexico, he acquired a large cattle ranch—by what the government suspected was fraudulent manipulation. He was charged and scheduled for trial in Chief Justice Vincent's district.

At this point, Vincent appointed Dorsey to a five-man jury commission to select the names of grand and petit jurors for Colfax County. President Cleveland thereupon suspended him.

Vincent protested the summary action, which he said ruined his character, and asked for a hearing to show that "I have been an upright judge."[78] His enemies had charged that Vincent was intimate with Dorsey, although there was no evidence to support this beyond the fact that he had visited Dorsey's home on the occasion of one of Dorsey's annual "wining and dining" parties. Vincent insisted that his appointment of Dorsey had been made in good faith and upon the recommendation of the attorney general of the territory and of prominent members of the bar.[79]

Vincent soon left New Mexico to practice law in Chicago. His judicial service had lasted only five months. President Cleveland later came to believe that the charges against him were unfounded and offered him the position of chief justice for the territory of Montana, but Vincent declined.

2. *Elisha V. Long*

To replace Vincent, President Cleveland appointed Elisha V. Long, who was serving his thirteenth year as circuit judge in Indiana. He had been a delegate to the national Democratic conventions of 1860, 1876, and 1884, and

after coming to New Mexico was a delegate to the convention of 1892.

The load of cases coming before the courts had been growing rapidly. During 1886 Chief Justice Long had to spend eleven months trying district court cases. This left little time for his appellate work on the Supreme Court and caused long delays in deciding appealed cases.

The pressure was somewhat relieved in 1887, when Congress increased the number of New Mexico judicial districts from three to four. Reuben A. Reeves of Texas was named to the fourth judgeship. He was regarded as a sound lawyer, a fair and just judge, and a charming conversationalist. He joined William Henderson and William H. Brinker, both of whom had come on the court in 1885. R.E. Twitchell, in his historical treatise,[80] opined that this was probably the intellectually strongest court during the whole long territorial period.

Congress left to the judges responsibility for converting the three districts into four. Abandoning the long-established practice of having the chief justice serve the First District, centered at Santa Fe, they assigned that district to Reeves, with Chief Justice Long moving to the newly-created Fourth, headquartered in Las Vegas. The trial judge ceased to sit on the appeal.

Upon taking office, Governor Ross began replacing Republican office holders with Democrats. Attorney General William Breeden, however, refused to accept his dismissal. He appeared in a case before the supreme court to represent the territory, but he was interrupted by Mr. N.B. Laughlin who had been appointed to replace him. The court, in an opinion written by Chief Justice Long, said that since the matter had arisen only in a collateral way, in the course of a case not involving the controversy, it would decide the matter informally, so that the principal case might proceed. Congress had given the governor power to appoint a new attorney general upon the death or resignation of the incumbent. Colonel Breeden had neither died nor resigned, and although the governor had publicly announced he was removing him, the court chose to recognize his right to proceed with the prosecution of the case before the court as de facto attorney general—leaving undecided the question of who was the de jure holder of the office, and thus not directly challenging the governor's power of removal.[81]

But the court did not succeed in dodging the question for long. Exactly a year later, it was back in the court's lap, this time with regard to the office of district attorney for the Third District. Governor Ross had also undertaken to replace the holder of that office with an appointee of his own. The ousted official sued and was held by the district court to still be the rightful incumbent. On appeal, the supreme court agreed; the appointment had been for a fixed term, and the governor could not terminate such an appointment. This holding, said Chief Justice Long in his opinion, was not intended to impute lack of good faith to the governor. "No doubt, he acted upon the impression that he was entirely within the line of his duty, as well as of law, and that he believed the removal of the respondent was demanded by the best interests of the public service." But the court said it was constrained by duties it had to discharge to maintain principles of law firmly established and proper for the protection of human rights.[82] By finding that these principles denied the governor the power to allot the spoils of victory to fellow Democrats, Justice Long incurred the displeasure of many fellow party members.

Language problems, which the court had confronted before, arose again in *Territory v.*

Thomason.[83] After each side had presented its evidence and the jury had retired, it appeared—why so late is not explained—that half of the jurors could neither speak nor understand English, and the other half could neither speak nor understand Spanish. The jury asked for help, and the court sent an officer of the court, denominated an interpreter, into the jury room. The defense objected, contending that the law forbade any person to communicate with the jury after it had retired.

The issue was a novel one peculiar to New Mexico, on which the court found no precedent anywhere. In an opinion by Chief Justice Long, the court sensibly held that a defendant complaining of an irregularity has the burden of showing not only that it occurred, but that it prejudiced him. Here, the interpreter was in the jury room not to communicate with the jurors, but to act as a medium of communication. He did not intrude himself upon the jury, but went on direction of the court and at the request of the jury. There was no evidence that he said or did anything prejudicial to the prisoner.

Throughout the territorial period, controversies over land and water generated a continuing flow of litigation in New Mexico. The railroads opened vast new areas for settlement and for exploitation. Charges of illegally entering or fencing the public domain, fraudulently claiming homesteads, intimidating homesteaders, and preventing surveys comprised a high proportion of the cases coming before the courts. Out of more than 800 criminal cases on the docket of the First Judicial District from 1882 to 1896, for example, 344 were charges of violating the public domain.[84]

One illegal device was the gross inflating of claimed boundaries. Much of the land in New Mexico was held under land grants conferred by the King of Spain. These grants often set out metes and bounds unclearly, so exaggerated claims frequently succeeded. Another all too common practice was the illegal fencing of large areas of public domain. How widespread this was can be seen from the statistics. In the two years from 1886 to 1888, the court of the First Judicial District heard at least fifty illegal fencing cases, some involving only small acreages but others vast areas. The total number of appropriated acres ran into millions. These illegal fencings, added to inflating grants and other frauds, resulted in more land being claimed than actually existed. New Mexico generated more land fraud cases than any other territory or state in the Union. The accused included persons from all classes of society, evidencing a widespread disrespect for the homestead restrictions so unsuited to local conditions.[85]

Raising stock successfully required not only extensive acreage but access to water. Water also was essential to early mining techniques, which required diverting water from streams for use at locations distant from the point of diversion. This need led to the abandonment in the arid west, including New Mexico, of the riparian rights doctrine of the common law in favor of a rule permitting the appropriation of the waters of a stream for other than domestic uses.[86] The prior appropriation doctrine was later extended to the demands of irrigation for reclamation of arid lands and became even more important.[87]

Land and water together constituted the essential basis not only for economic development but even for bare existence. Land entries were typically filed to include as much water as possible. The man who held the water hole was the only one who could make use of the surrounding public range, and the man who controlled the range was in a good position to become a cattle king. But acquiring and holding a water hole called for intelligence and steady nerve. Warfare over water holes and

grazing land was almost constant and led to murder, arson, and other crimes.

Governor Lionel A. Sheldon in his 1883 report to the secretary of the interior said that although the homestead and prescription laws were designed to distribute lands among the people and to prevent monopoly, the contrary effect had been produced in the dry and mountainous west. "Locations are made which embrace springs, and the surrounding lands are valueless to any but the locators of the water. Hence the man who obtains 160 acres controls the usufruct of a vast tract without cost, and without paying any taxes to support the local government. A cattle company, or individual, may, by owning a few acres, have the occupancy of a tract as large as some of the states of the Union."[88] One of the land fraud cases afforded Chief Justice Long the distinction of writing the territorial period's longest opinion. The United States sued to set aside on grounds of fraud a survey of public lands claimed by the defendant through a grant from the government of Mexico, made before the American occupation. The governor of the department of New Mexico had granted the land in 1844 upon petition of Jose Serafin Ramirez. Later, Ramirez and a company organized to purchase the property fraudulently located the boundaries of the grant; the surveyor general, in cahoots, confirmed the new lines, which now included certain valuable copper mining properties. The federal government sought to set aside the survey and to vacate the patent made under it (which had been confirmed by act of Congress) so far as the fraudulent property lines were concerned. The court held that the original grantee, Ramirez, was fully familiar with the land and would certainly have complained if the original description had not been correct; the subsequent "correction" thus evidenced fraud.

The evidence—embodied in a record of more than 700 pages, plus numerous maps and plats—clearly showed that the new survey was fraudulent. Furthermore, mines could not be conveyed by such a grant; by Mexican law they were reserved to the government.[89]

Decisions such as this, denying the claims of wealthy land companies, and those denying removal power to the governor, took some courage. They created enemies who, years later, found an opportunity for retaliation. After the election of Republican Benjamin Harrison, Chief Justice Long resigned, December 31, 1889. In 1891 Congress created a Court of Private Claims to settle the many conflicting claims. Long was considered eminently qualified for appointment to that court, but his opponents had a provision inserted making residents of New Mexico or Arizona ineligible. This was exactly the contrary of what territorial leaders had been urging for years. The reversal of policy in this one instance appeared to be aimed specifically at Long.[90]

3. *James O'Brien*

The return of the Republicans to power brought the usual job turnovers. Chief Justice Long was succeeded by James O'Brien, a member of the Minnesota bar. Judges Reeves, Brinker, and Henderson were replaced by William H. Whiteman, William D. Lee, and John R. McFie.

O'Brien had been born in Ireland and was a fluent and forceful speaker, with a marvelous command of language. He was a man of firm convictions and an able and painstaking judge. He served for more than three years, during which time he worked hard to whittle down the crowded docket. In addition to handling the trial work of the Fourth District, he wrote the court opinions in twenty cases, plus several dissents.

William D. Lee was a lawyer of unusual legal knowledge. He had practiced in Indiana

for more than twenty years before coming to New Mexico in 1876, and in Las Vegas for thirteen years more. He was a gentle and patient judge, even in dealing with some of the unruly lawyers practicing before him. He admitted that he should not permit some of them to behave as they did, but he believed that if he could not make members of the Bar respect his court without lecturing, bullying, or fining them, he was not fit to be a judge. He served for five years as judge for the Second Judicial District, headquartered in Albuquerque, then returned to private practice.

Back in 1862, when the Confederates abandoned Albuquerque, they buried six cannon. Twenty-seven years later, the Confederate officer who had supervised the burying told about it, whereupon a digging party was organized. The owner of the land objected that the digging would destroy his chili plants and his field of alfalfa. Although offered one hundred dollars for his permission, he refused, and his lawyer asked Judge Lee for an injunction. The judge, a Union Army veteran, refused on the ground that damages would not be irreparable. "Besides," he told the complainant, "I'm curious myself about those cannon. I'd like to see if those rebels really buried them there." They had; the cannon were recovered.[91]

William Henry Whiteman was born in Ohio in 1844, served throughout the Civil War, then studied for a year at Ohio Wesleyan University. He moved to Missouri and practiced law there for ten years, before coming to New Mexico in 1881. His judgeship lasted only one year. He was replaced by Edward P. Seeds. Although an Iowa State University law graduate, Seeds had abandoned the practice of law to enter the United States mail service. Upon being appointed to the bench in 1890, he resumed the study of law and became recognized as an authority and a just and fair-minded judge. He served until his term expired in July 1894.

John R. McFie had come to New Mexico from his native Illinois in 1884, when President Arthur offered him the post of register of the United States Land Office in Las Cruces. In accordance with established custom, he was replaced when Cleveland succeeded Arthur. As President Harrison's appointee for the Third District, he served until 1893, when the Democrats returned to power. In 1897 he was again appointed, this time to the First District. Members of the bar quickly recognized his ability and fairness and overwhelmingly endorsed him for reappointment in 1901 and 1905. He served until statehood, a total of almost nineteen years, longer than any other judge of the territorial period. During all that time, not one of his opinions written for the territorial court was ever reversed by the United States Supreme Court.[92]

The stream of land fraud cases continued unabated. The next most frequently charged crime was, surprisingly, adultery. From 1882 to 1896, the docket of the First Judicial District listed 344 charges of violations against the public domain and 208 adultery cases. Consistently over a long span of years, adultery cases were the second most numerous in every one of the judicial districts. In the twenty-year period of 1891 to 1911, the Fifth Judicial District, for example, handled 402 cases. Of these, four were for larceny, nine for embezzlement, one for horse stealing—and 188 for adultery. Perhaps sociologists can explain this high incidence of adultery or at least prosecutions therefor.

But some cases raised less common issues. Early in Chief Justice O'Brien's tenure the court handed down an opinion that even today makes interesting reading, both for its wit and satire and for the historical background of the controversy. The writer was

Judge Alfred A. Freeman, who was from Washington, D.C. and had only recently been appointed to the Fifth District upon its creation in 1890.

The case concerned a colony of "faithists," followers of a spiritualist who, guided by divine inspiration, had written a new bible and founded a new movement seeking to establish a community in which all property would be held in common, conducted on principles of brotherly love and equal status. The founder, a Dr. John B. Newbrough, guided by "Jehovih" himself, found the sort of location he sought on the banks of the River Shalam (the Rio Grande), fifty miles north of El Paso. Here in the "Land of Shalam" he established his new Arcadia. But friction quickly developed among the disciples of brotherly love, and one disillusioned member, Jesse N. Ellis, was ordered to leave. He went to court, asking $10,000 damages. A jury awarded him $1,500. On appeal, the supreme court reversed the judgment. The court held Ellis was estopped by his own acts, and moreover, there was no evidence to sustain the award of $1,500; therefore, the trial judge should have set the verdict aside.[93]

The opinion was an able and important one on the doctrine of estoppel. But its light vein failed to amuse some readers, including President Harrison who regarded it as improper and undignified. Judge Freeman was fortunate to escape removal. He continued to serve until 1895.

After more than three years of judicial service, Chief Justice O'Brien asked to be relieved. He resigned effective in late 1893 and returned to Minnesota to resume the private practice of law.

G. *THE LAST TERRITORIAL YEARS, 1893-1912*

1. *Thomas J. Smith*

O'Brien's successor was Thomas J. Smith, a native of Virginia. Smith had served in the Confederate Army, been seriously wounded, and mustered out as a brigadier general. He had fought a duel with an editor who had cast aspersions upon his father, then governor of Virginia, and had shot him in the mouth—the organ, Smith was gratified to observe, that "he used in maligning my father."[94]

Smith had come to New Mexico in 1885, when President Cleveland appointed him U.S. attorney for the territory. During his four years in that office, he worked diligently to root out and prosecute the omnipresent land frauds. He was a ready and pleasing speaker and was regarded as one of the strong men of the territory.

When Cleveland was returned to office for a second term, he named Smith chief justice in 1893. His associates now numbered four: two Harrison holdovers, Alfred A. Freeman and William D. Lee, and two newcomers, Albert B. Fall[95] and Needham C. Collier.[96] The holdovers were later replaced with Democrats. Napoleon B. Laughlin[97] succeeded Lee in the First District in 1894, and Humphrey B. Hamilton succeeded Freeman in the Fifth early in 1895.[98]

The new chief justice habitually wore a cape overcoat with white silk lining. He disapproved of the rough informality with which court was conducted in New Mexico and insisted on greater decorum and dignity. Attorneys addressing the court, for example, were required to come forward to the bar of the court—apparently something of an innovation.[99]

The brutal murder of a popular Santa Fe sheriff led to the most sensational and highly publicized legal proceedings since the Taos insurrection. The victim was Francisco Chavez, a Democratic political leader. He was ambushed and killed on the night of May 29, 1892.

Suspicion focused on Francisco Gonzales y Borrego and his brother Antonio. In 1890

Borrego had been coroner of Santa Fe County, and ex officio chief of police of Santa Fe. But in 1891 Santa Fe was incorporated as a city, with its own police chief. The shrunken role of coroner no longer interested Borrego, and he tendered his resignation, hoping his Democratic friends would provide him a more worthy job. But the county commission refused to accept the resignation. The next day Borrego announced that he was changing his affiliation to the Republican party. The commissioners thereupon voted to accept the resignation and to replace Borrego with a loyal Democrat.[100]

That evening, as Borrego was sitting in a hall watching a dance (the coroner's duties included licensing and chaperoning dances), his would-be successor entered with some other men and demanded that Borrego turn over his coroner's star. Borrego replied that his resignation had not been accepted and that he had withdrawn it. A fight ensued in which one man was killed and another wounded. Borrego was taken to jail and shackled, as was customary, to a log buried in the ground. There he was beaten by the jailor and later by the sheriff, Francisco Chavez. Borrego told the sheriff, "You will pay me for this."[101]

Within a year, Chavez had paid with his life. Borrego and his companions were arrested and eventually, in January 1894, brought for preliminary hearing before Judge Edward P. Seeds. They were represented by two eminent Republican lawyers, Thomas B. Catron and Charles Spiess.[102]

The trial was held a year later. Presiding was Judge Humphrey B. Hamilton, who had been appointed for the Fifth District three months earlier. He had been called in to substitute for Judge Napoleon B. Laughlin, who had disqualified himself because he had been counsel for the territory at the preliminary hearing. On May 29, 1895, three years after the killing and thirty-seven days after the bitter trial had begun, all four defendants were found guilty and sentenced to death.[103] A motion for a new trial was denied, although the defense presented evidence that the sheriff and both bailiffs had talked with the jurymen and that one bailiff told them the defendants were sons of bitches whose evidence was untrustworthy.[104]

Pending appeal to the territorial supreme court, two of the defendants confessed, detailing their part in the crime and that of Gonzales y Borrego and his brother. The brothers made several attempts to escape. Thomas Smith had become chief justice several months before the appeal was argued, and he wrote the court's opinion, affirming the convictions.[105]

The *Santa Fe New Mexican*, which had been a Republican paper, came under Democrat control three weeks before the trial. It covered the case in detail, with constant emphasis on its political implications. Trial by newspaper was a common phenomenon of the time, but the *New Mexican* was blatant in its efforts to influence public opinion against the defendants and, more importantly, against their lawyer, the leading Republican in the territory, Thomas B. Catron. It called the court's opinion "learned, luminous, able," and the dogged exertions of defense counsel "Efforts to Cheat Justice."[106]

The efforts continued, however. Catron and Spiess moved to set the judgment aside on the ground that the record did not show defendants had ever been arraigned or given an opportunity to plead to the indictment. But the prosecution produced affidavits stating there had in fact been an arraignment; the failure of the record to so show was due to omission or oversight. The court declined to set aside the judgment.[107]

The prosecution moved to correct the record. This motion was heard by Judge Laughlin. But Catron and Spiess objected that Laughlin had no power to act, that he certainly could not do so then—in vacation and in chambers—and that if it could be done at all, it would only be by Judge Hamilton, the trial judge. Judge Laughlin overruled these objections and ordered the record corrected to show the arraignment.[108]

Defense counsel's persistent objection to recognizing the tendered correction succeeded in getting a special term of the district court called to consider the issue. But the district court affirmed, and so did the territorial supreme court.[109] Counsel still persisted. They carried the case to the United States Supreme Court, which also affirmed.[110] The defendants were executed on April 2, 1896, almost five years after the crime.

But repercussions from the case were not ended. Disbarment proceedings were brought against Catron and Spiess. The supreme court appointed a committee of five leading lawyers to investigate the charges. Catron was charged with influencing defense witnesses to give false testimony, obtaining interviews with some of the prosecution's witnesses, and trying to persuade them to testify falsely or to stay away from the trial entirely. Similar charges were made against Spiess.[111]

Catron was sufficiently concerned to take some precautions. He sought help from his old antagonist, Democratic leader A.B. Fall. Catron had strongly opposed Fall's appointment to the bench in 1893, calling him "the most offensive man in the whole Territory and the most venal." And he had helped speed Fall's resignation in 1895, by getting word to Fall that unless he resigned he would be removed. But now, only months later, Catron swallowed his pride and asked for Fall's support. Fall promptly complied.[112]

Catron also got his close associate, Stephen B. Elkins, to write a letter to Judge Gideon Bantz, Fall's replacement on the court, praising Catron and assuring the judge that a man of Catron's standing would not be guilty of any acts that would justify disbarment.[113]

Whether or not aided by such encouragement, the court found for the defendant. Judge Collier pronounced the verdict. Chief Justice Smith, reportedly ill, was not present. Catron was pleased, for he regarded Smith as an enemy who "would have emasculated me if possible." He thanked heaven that Smith had been "thrown into a congestive chill from which doubtless under the interposition of divine providence he was not allowed to recover in time to take part in the nefarious transaction."[114]

Judge Hamilton later wrote the majority opinion, holding that the low moral character and poor reputation for veracity of the prosecution's witnesses in the disbarment action rendered their testimony beyond belief. Judge Laughlin dissented; to reject testimony, he said, merely because the witnesses were of low moral character and of poor reputation for truth, was to "destroy the most fruitful source of testimony for the detection and suppression of crime."[115] He felt strongly enough on the subject to have copies of his dissenting opinion sent to all members of Congress and heads of departments in Washington.

A sensational development in the case arose a few days before the trial began, when an Albuquerque newspaper, the *Daily Citizen*, ran a long editorial denouncing the court and Chief Justice Smith in particular. Smith, it alleged, had come to Albuquerque to consult with one of the members of the investigating committee on how to use the investigation to injure Catron (who had been elected a delegate to Congress). Judges having any regard

for their office, it said, have never allowed themselves to be consulted or to advise what line of investigation a committee should pursue. The editorial also criticized the court for appointing a special committee to investigate the charges against the two lawyers, instead of using the standing grievance committee. The actual author of the editorial was Catron.[116]

On a charge that the article was calculated to impede the court in administering justice and to degrade and scandalize it, the editor and the publisher of the newspaper were arrested and charged with contempt. The editor, Hughes, published a retraction and apology, saying he had not written the editorial and had not carefully read it before publication. Lacking confidence, however, in the acceptability of this explanation, he took a trip to Arizona, as Catron had advised. But he was caught in Winslow, Arizona, and returned for trial.

A majority of the court held Hughes guilty of contempt. "It would be difficult to find," wrote Judge Laughlin, "a more flagrant and outrageous abuse of the liberty of the press." Hughes was sentenced to sixty days' imprisonment and a fine of one dollar and costs. McCreight, the publisher, testified he had no personal knowledge of the article's publication; his responsibility was solely for the business aspects. He was subjected only to a $25 fine, plus costs.[117] Contempt proceedings were also brought against persons who had testified for the defense, seeking to impeach their testimony, and against persons charged with attempting to influence the testimony of prospective witnesses.

Further killings and shootings arose out of the Borrego case. Chavez' loyal followers resented Catron's able and persistent defense of the Borregos. One night in 1899, when some legislators were having a meeting in Santa Fe, five men on horseback rode up and sent a volley of shots through the window. Their object was Catron, whom they assumed to be present. He was not. They succeeded only in peppering one representative with buckshot and were never apprehended.[118]

Thomas Smith served as chief justice for four years. After the election of 1896, Governor Otero and Republican leader Thomas Catron agreed that the Democratic judges should be replaced as soon as possible with Republicans, with Thomas J. Smith, Gideon D. Bantz, and Napoleon B. Laughlin to be replaced at once. The governor traveled to Washington to confer with President McKinley concerning appointments for the judicial and other positions. They agreed that Otero would name three judges and President McKinley two. Otero named William J. Mills as chief justice, Frank W. Parker, and John R. McFie. McKinley added J.W. Crumpacker and Charles A. Leland.[119]

2. *William J. Mills*

Shortly before the end of Chief Justice Smith's tenure in office, an important case arose involving the constant problem of water rights. It concerned not only rights within the territory to water of the Rio Grande but also rights in Mexico to water sent down from the north. The Rio Grande Dam and Irrigation Company sought to build a dam at Elephant Butte, in New Mexico, to store water for purposes of irrigation. Federal authorities sought to enjoin the proposed project, relying on an act of Congress that prohibited obstruction of a navigable stream without approval of the secretary of war. This raised the question whether the Rio Grande was navigable.

The suit was brought before Judge Gideon D. Bantz of the Third Judicial District, who held it was not. The territorial supreme court

affirmed. It was "perfectly clear," said the court, that the river above El Paso, Texas, had never been used as a navigable stream and that it was not then capable of being so used.[120]

But the United States Supreme Court reversed and instructed the district court to order an inquiry whether the proposed dam project would substantially diminish the navigability of the part of the river that was navigable, many miles south of the border. If so, the district court was instructed to restrain any acts that would cause such diminution.[121]

Judge Bantz had meanwhile resigned after the election of William McKinley and been succeeded by Frank W. Parker. Judge Parker complied with the mandate of the U.S. Supreme Court by having an investigation made, which convinced him that the dam would have no deleterious effect on navigation. He made elaborate findings to that effect and authorized the company to proceed with the project. On appeal, this decision was upheld by the New Mexico Supreme Court in a long opinion by Chief Justice Mills, reviewing and adopting the findings.[122] But once again the United States Supreme Court reversed, this time on the ground that the federal government had not been allowed enough time to prepare and present its case.[123]

Back again at the district court, Judge Parker held this time for the government on the ground that the company had failed to answer a supplemental complaint within the prescribed twenty days. The company argued that the government had no right to file the supplemental complaint. But the territorial supreme court, on appeal, held that Judge Parker had acted properly in permitting the filing and that the company's failure to answer was fatal.[124] The United States Supreme Court agreed,[125] ending the company's hopes after twelve years of litigation in which the United States Supreme Court had the final word without ever addressing the substantive merits of the case.

Chief Justice William J. Mills, who wrote one of the *Rio Grande Dam* opinions for the territorial supreme court, had been appointed by President McKinley in January 1898. Although born in Mississippi, he had been reared in Connecticut, educated at Yale, and elected to both houses of the Connecticut legislature. At the time of his appointment, he was a "gold" Democrat, opposed to the "free silver" platform of William Jennings Bryan. Shortly thereafter, he became a Republican. Chief Justice Mills was an efficient though not a great jurist. He had no exceptional administrative skill, but he was a man of strong character, clear in his concepts of right and wrong. He was a courtly gentleman, with a natural kindliness of disposition toward rich and poor alike.

Judge Parker, who conducted the trial court hearings in *Rio Grande Dam*, had come to New Mexico from Michigan in 1881 and practiced for seventeen years in Dona Ana County. Those years had educated him in the local jurisprudence, with its background in Spanish and Mexican civil law. In 1897 the year before he joined the court, New Mexico had discarded common law pleading and adopted a code of civil procedure, compelling both bench and bar to adjust themselves to the change. Judge Parker was reappointed in 1901, 1905, and 1910. He was a life-long Republican and active in party politics, and on the bench his record for impartiality and judicial soundness was excellent. He was active in the drive for statehood and was a delegate to and an active participant in the convention elected to frame a constitution. When statehood was achieved, he was elected to the new state supreme court and served until his death in 1932.[126]

Court sessions offered entertainment for the little communities where they were held. The

dockets usually included a murder case or two and the lawyers could be relied upon to put on a good show. The court also brought business to the town; the saloons often had to put on three shifts of bartenders to serve the crowds.

Of especially widespread public interest was a trial held in the mining town of Hillsboro in 1899. Three years earlier, Col. Albert J. Fountain and his nine-year-old son, Henry, had mysteriously disappeared. Fountain was a leading citizen—former Texas Ranger, Indian fighter, Indian agent, lawyer, playwright, publisher, and senator. He had just obtained indictments against several men, mostly for cattle stealing. Among them was Oliver Lee, a leading cattleman and authority on horses. Gossip soon had it that Lee had a hand in the disappearance. But it was not until April 1898, more than two years later, that a bench warrant was issued for Lee's arrest and the arrest of two others, charging them with murder.

The warrant had been issued by Judge Frank Parker on the petition of the sheriff of Dona Ana County, Pat Garrett. This was the Pat Garrett who, seventeen years before, as sheriff of Lincoln County, had fired the shot in a darkened room that killed William "The Kid" Bonney. Now Garrett would have the opportunity to arrest a man known as a crack shot who would probably not submit peaceably.

Lee had expected to be charged. Only a few days before, he had been in a poker game in Tobe Tipton's saloon in Tularosa, with Tipton, George Curry, Garrett and others, when Curry remarked that he had heard that the grand jury might indict someone for killing the Fountains. Bowing toward the sheriff, Lee said, "Mr. Garrett, if you wish to serve any papers on me at any time, I will be around here or out on the ranch." With equal courtesy, Garrett replied, "All right, Mr. Lee, if any papers are to be served on you, I will mail them to you, or send them to George Curry here to serve on you."

But this was mere surface politeness. Lee had been told that Garrett meant to kill him while making the arrest, and Lee had expressed his fears to former judge Albert B. Fall.[127]

Garrett did arrest one of the men charged with the killing, William McNew, but it was not until July, three months after the warrant was issued, that Garrett undertook to arrest Lee. With a posse, he trailed Lee and a companion, James Gilliland, to Lee's ranch. Lee was sleeping on the roof of a building when he was awakened about daybreak by Garrett and his men shooting at him. Lee returned the fire, hitting deputy sheriff Kent Kearney and forcing the posse to withdraw. Kearney died of his wound, and Lee and Gilliland were indicted on a new charge, murder of Kearney.[128]

Lee, denounced as an outlaw, could not safely surrender to Garrett. There were rumors that if he tried to give himself up, he would be lynched. He and Gilliland hid out on a ranch where his friend, Eugene Manlove Rhodes, the writer, was working as a horse wrangler. The Garrett-Lee feud had reached a stand-off. Some persons were saying that Garrett did not want to find Lee and face a show-down.[129]

But now two prominent political figures took a hand in the situation. Albert B. Fall and W.A. Hawkins devised a plan to have the legislature carve a new county out of parts of Dona Ana, Socorro, and Lincoln Counties. Prospects for success, however, were not good. Thomas B. Catron, in political control of the territorial council, the legislature's upper house, was unfriendly to Lee and to Fall. But Fall and Hawkins enlisted the support of Governor Miguel A. Otero by providing in

their bill that the new county would be named Otero in his honor. Catron was induced to go along when Fall and Hawkins agreed to reciprocate by supporting a pet bill of Catron's to create another new county in the western part of the territory.[130]

Only after the bill was passed and the legislature had adjourned did Catron become aware that the new Otero County would include the area where Col. Fountain and his son were last seen alive and that Otero County, not Dona Ana, would henceforth have jurisdiction of the case against Lee, Gilliland, and McNew. Catron was further irked when Governor Otero appointed Lee's long-time friend George Curry as sheriff of the new county.[131]

Terms were now negotiated for the surrender of Lee and Gilliland. They would not be turned over to Pat Garrett, sheriff of Dona Ana County, and would not be placed in the Dona Ana jail. They could not be confined in Otero County, which as yet existed only on paper, and had no jail. Judge Parker decided to have them jailed in Socorro, there to remain until a jail was built in Alamogordo, Otero County. When that jail was ready, the sheriff of Socorro County was instructed to deliver them. This required traveling on the Santa Fe Railroad south to El Paso, Texas, and then on the El Paso and Northeastern back north to Alamogordo. In El Paso, the sheriff left his two prisoners, on their honor, at the Union Station, while he went off to see the town. In the course of "seeing the town," he was arrested by a constable who refused to believe he was a New Mexico sheriff. He had to bring the constable back with him to the Union Station for his patiently waiting prisoners to identify him.[132]

The trial was held in May 1899, in Hillsboro, Sierra County, on a change of venue from Otero County. Prosecution and defense had agreed that the territory could not get a fair trial in Otero County, where Lee had many friends, and that Lee could not have a fair trial in Dona Ana County, where the Fountains had lived. Hillsboro had recently built a new brick courthouse, and it won the honor and benefit of holding the trial.

The case was looked upon generally as a collision between the forces of Thomas B. Catron and Albert B. Fall. Catron was determined that Lee should hang; Fall was equally determined that he should be acquitted. The trial brought together not only the judge and court officials and an array of lawyers, but also some seventy-five witnesses, plus innumerable spectators. The prosecution housed its witnesses at one end of town, with its own cooks, waiters, and guards. The defense had a similar encampment at the other end of town.[133]

The trial lasted eighteen days. The most important lawyers of the territory participated, either as prosecutors or special prosecutors, or as defense counsel. But the most popular figure was Oliver Lee. Friends from all parts of the territory had come to show their friendship and to offer their help. The evidence against the defendants was essentially circumstantial. No one purported to have seen the victims killed, and there was not even proof of corpus delicti.[134]

In a short final argument to the jury, Mr. Fall said: "Gentlemen of the Jury: The prosecution of Oliver Lee is the result of a conspiracy to send an innocent man to the gallows. The District Attorney is involved in that conspiracy; the Honorable Thomas B. Catron is involved in that conspiracy. His honor on the bench is involved in that conspiracy."

Judge Parker rose in anger, pounded his gavel, and said: "Mr. Fall, unless you withdraw your remarks about this court from the

jury immediately, I shall send you to jail for contempt."

Fall replied: "Your honor will not send me to jail for contempt until I am through addressing this jury. When I finish my argument you may do whatever you wish."

The judge knew that any attempt to stop Fall from addressing the jury would convince Lee's cowboy friends that the judge was bent on denying him a fair trial. Shooting might start. Fall finished his argument. The jury retired but returned in only a few minutes with a verdict of not guilty.[135]

Many years later, when Fall was involved in the Teapot Dome charges, the one man who stood by him throughout his tribulations was Oliver Lee. What happened to Col. Fountain and his son was never determined, notwithstanding an offered reward of $20,000, up to that time the largest reward ever offered in the United States.

With the arrival of the railroads came train robbers. Among the most notorious of these were Thomas (Black Jack) Ketchum, alias George Stevens, and Ezra Law, alias William H. McGinnis.

Ketchum's career ended with an attempted hold-up on the night of August 16, 1899, of a Colorado and Southern train on its way to Clayton. As the train neared Robber's Gap—so called because several daring train robberies had occurred there—the engineer felt the muzzle of a six-shooter in his ribs and then saw the man behind the gun, who ordered him to go on "to the point of the last hold-up." There he was told to stop the train and uncouple the engine and the baggage car (which was carrying the valuable Wells Fargo express). The mail clerk poked his head out of the mail car and was promptly hit with a shot that shattered his jaw. The conductor, when the train was suddenly stopped, got his shotgun and ran forward. Four men were coming toward him. One of them yelled, "I am going to shoot to kill right now." The conductor fired at him but was himself shot almost immediately. The hold-up men, however, disappeared, and the crew got the train under way without further interference.[136]

The next morning a brakeman on a freight train passing the scene saw someone waving a hat to attract attention. It was Black Jack Ketchum. His right arm had been shattered; and the front of his body was caked with blood. He was laid on a cot and taken to Folsom, where he was turned over to the law and in due course tried for train robbery, a capital offense in New Mexico.

The trial was conducted before recently appointed Chief Justice Mills, sitting as judge of the Fourth Judicial District. The proof was evident, and the jury took only a few minutes to return a verdict of guilty. Judge Mills pronounced the sentence of death mandated by the statute.[137]

Defendant's attorneys, William B. Bunkert and John R. Guyer, appealed. They presented only the single question, whether the death penalty, as applied to this offense, constituted cruel and unusual punishment within the meaning of the Eighth Amendment.

The court, writing through Judge Frank W. Parker, held it did not. The word "cruel," he said, implies "something inhuman, and barbarous." He recited the life-endangering and desperate nature of the ordinary train robbery, and concluded that the death penalty "is a most salutary provision and eminently suited to the offense which it is designed to meet."[138]

Many efforts were made to obtain executive clemency for Ketchum. A bogus telegram was even sent, purporting to grant such clemency—all to no avail. Ketchum was duly hanged.

His execution proved a grisly performance. As reported, when the trap was sprung before the throng who had come to witness his demise, the rope cut through Ketchum's neck. The body fell to the floor, but the severed head was not in sight. It took a while to find it, under the body.[139] It seemed like an effort to demonstrate Ketchum's last argument, that the death penalty is cruel, at least in the form of hanging.

McGinnis' career ended in the same year, 1899, when he was convicted of killing a sheriff and another member of a posse that was trying to break up a fight in Turkey Canyon, in Colfax County. The evidence against him was largely circumstantial, and its admissibility was strongly challenged. But Chief Justice Mills, before whom the case was tried, allowed it. McGinnis was convicted of second degree murder, and the judge sentenced him to life imprisonment. The sentence was affirmed.[140] Governor Otero eventually commuted it to a term of ten years.

The Ketchum case was one of the first in which Judge Daniel H. McMillan, appointed in December 1900, participated. He had come to the southwest for his health after thirty years of practice and political and civil service in his native state of New York. There he had served a term in the state senate, was manager of the Buffalo state asylum for fifteen years, trustee of the state normal school for twelve years, and law examiner for admission to the bar for twenty-one years. He was active in Republican politics, attending the national conventions of 1888, 1892, and 1896. He was a delegate to the state constitutional convention of 1894 and a member of the commission to revise the state educational laws in 1899. As judge for the Fifth Judicial District of New Mexico, he showed solid integrity and a sound grasp of the problems presented by the cases. He also had a strong sense of social responsibility, which led him to champion many projects for civil improvement. He served until 1903, when President Theodore Roosevelt replaced him with William H. Pope.

In 1903 Congress created a Sixth Judicial District, to which President Roosevelt appointed Edward A. Mann. Mann had had a broad and successful career as a lawyer, and he was respected as an eminently able, honest, and fearless judge. He served a full four-year term and then returned to the private practice in Albuquerque.

Present day citizens may be gratified to know that justice was at least sometimes administered with dispatch. One Elmer Price, charged with murder, was dispatched more quickly than he liked. He had been molesting a woman passenger on a train. When the conductor interceded, Price fired several shots into his body. A new term of court happened to open two days after the killing. Price was promptly indicted, put on trial two days later, and convicted six days after that. He appealed, alleging that he had been denied adequate time to prepare for trial. Judge Ira Abbott overruled these objections, pointing out that there was no denial of the fact of the killing; that Price's contention was self-defense, on which the law is simple; and that therefore the only reason that could be urged for more time would be to find witnesses. But since the authorities had brought in all the passengers who had seen or heard the shooting, there was no need for that. Trial Judge Pope, therefore, was to be commended, said Judge Abbott, for his expeditious handling of the case.[141]

Ira A. Abbott had been appointed to the Second District in January 1905, succeeding eminently able Judge Benjamin S. Baker, who had served from 1902. Abbott had been born in Vermont in 1845. He served in a Volunteer Infantry regiment during the Civil War, then

entered Dartmouth College. After graduating in 1870, he read law, while he also taught mathematics at Phillips Academy in Andover, Massachusetts. He served as a judge for several years, until his appointment to the New Mexico court. Abbott was a dignified, even austere, man, who habitually wore an old-fashioned stiff-bosomed shirt, starched collar, and a double-breasted Prince Albert coat. He also carried a gold-headed cane. He quickly distinguished himself for fairness and political impartiality. He served until statehood and was regarded by many as one of the ablest men to sit on the territorial bench.

In a trial before Judge Abbott, a man was convicted of murdering a school teacher in Ramah. Abbott, a tender-hearted, religious man opposed to capital punishment, would normally accept a plea of second-degree murder. But this was a brutal killing. When the defendant appeared for sentencing, the judge in a long discourse counseled him to seek comfort in the Bible and the support of a clergyman, and emphasized that as a judge, he wanted to be known as being merciful. All this led the defendant to assume he was going to get off lightly, so he was surprised to hear the judge then sentence him to ninety-nine years at hard labor. "Why you old son of a bitch!" he growled.

The offender was hustled out of the courtroom by Deputy Pat Dugan, a colorful lawman of the era, who then shoved him down the flight of stairs, saying "Brother, you can insult the judge, but you can't insult me."[142]

One of the all too frequent murder cases of the period took a turn that raised an intriguing non-criminal question. A Torrance County cowhand named Jap Clark, who previously had been charged with larceny and other crimes, walked into a Torrance saloon in April 1905 with his friend, W.A. McKean. A man against whom Clark apparently had some grievance or grudge was standing at the bar. Clark promptly hit him over the head with his six-shooter and then beat and kicked him. Another man succeeded in pulling the two apart. After leaving the saloon, Clark and McKean encountered Deputy Sheriff James M. Chase, another man against whom Clark held a grudge. Shots were fired, and Chase was killed. Clark and McKean were indicted for murder, but they disputed whether Clark or McKean fired the fatal shot. The jury convicted Clark and acquitted McKean.

On appeal, defense counsel argued that the trial court had no jurisdiction. When Torrance County was organized, Progreso was named as the county seat. Actually, there was no settlement at the place so named, and two years later the legislature changed the county seat to Estancia. That is where the trial was held. But counsel argued that the change violated an act of Congress prohibiting territorial legislatures from changing county seats, and that because Clark had not been tried at Progreso, he had not been legally tried. Judge Abbott found it unnecessary to address that contention directly, holding that the legality of the change could only be attacked in a direct proceeding and not collaterally as was attempted here. Moreover, he held that Estancia was at least the de facto county seat. The trial court's sentence of seven years imprisonment was affirmed.[143]

In the early days officials charged with collecting public monies were compensated by being allowed to retain a certain percentage of the amounts they collected. These fee provisions gave rise to a substantial number of controversies during Chief Justice Mills' incumbency. Around the turn of the century, the treasurer, the sheriff, and the county assessor of Bernalillo County were each withholding a four percent commission on gaming and liquor license fees collected. Early law had entitled the treasurer to this cut, but in 1901 the legislature had made the sheriffs collectors of

these license fees with the right to a four percent commission for their services. When the district attorney filed suit against the treasurer and the assessor, the court held the 1901 law had made the treasurer a mere custodian of the funds collected by the sheriff, with no right to compensation. The court reached a similar conclusion with respect to the assessor; the 1901 law left the assessor with merely a clerical duty as regards the license fees and with no right to a four percent commission. The supreme court in opinions by Judge Mann upheld these conclusions.[144]

In another case the county treasurer had again withheld commissions from liquor and gaming license fees that had been collected by the sheriff and turned over to the treasurer, this time acting on a ruling of the solicitor general of the territory that both the sheriff and treasurer were entitled to such commissions. Moreover, the county commission had, in auditing the treasurer's accounts, allowed the commission. In these circumstances, the district court held that the commission had been paid under a mistake of law and that the treasurer was entitled to keep the money. The supreme court, in an opinion by Chief Justice Mills, agreed.[145]

Not only the fees, but the right to the office itself was the subject of other cases coming before the court in the first years of the century. In December 1906 Governor Otero undertook to remove both the treasurer, Frank A. Hubbell, and the sheriff, Thomas S. Hubbell, of Bernalillo County, on charges of malfeasance in office and to replace them with new appointees. The Hubbells filed for a writ of quo warranto, questioning the right of the governor to remove them from offices to which they had been elected by the people. In a long and exhaustive opinion, the court held the governor did not have such power.[146]

In another case, it was the county commissioners who had tried to remove an elected official, namely, the county assessor. Again the court held that the commissioners had no such power and that the old assessor was entitled to the office and to recover fees that had been collected by the would-be successor.[147]

Chief Justice Mills frowned on the prolixity of lawyers, as have other judges before and since. On an appeal assigning fifty-seven grounds of error, Mills repeated a comment of the United States Supreme Court, that when counsel assign such an abundance of alleged errors, most of which are obviously frivolous, there is always a possibility that a substantial one may be lost sight of.[148] On the other hand, in a case in which appellee failed to file any brief whatever, thus putting on the court the labor of looking up the law, he commented that "if our opinion is not as exhaustive as it might be, it is owing to the lack of time which has been at our disposal."[149]

Mills served as chief justice for twelve years, at the end of which time he was appointed governor. He was the last territorial governor, serving from 1910 until New Mexico became a state in 1912.

3. *William H. Pope*

The last chief justice of the territorial court was William Hayes Pope. He had originally been appointed judge for the Fifth Judicial District in 1903. His elevation to chief justice in 1910 was one of the few times during the entire territorial period when that office was filled from within the court.

Pope was born in 1870 in South Carolina and brought up in Georgia. After graduating from the University of Georgia, he joined the law firm of his uncle, Hoke Smith, secretary of the interior under Grover Cleveland and later

U.S. senator. He also held the chair of ancient languages at his alma mater.

The son of an ex-Confederate officer, Pope was a born Democrat. In 1894 he came to New Mexico, like so many others of that day, as a health seeker. Here he worked as a reporter for the *Santa Fe New Mexican*. Under the tutelage of its editor, Max Frost, and because he could not accept the "sixteen to one" silver platform of William Jennings Bryan, he became a gold Democrat and then a Republican. His conversion was quickly rewarded. He was assistant U.S. attorney from 1896 to 1902, and special U.S. attorney for the Pueblo Indians from 1901 to 1902. He did a stint as judge in the Philippines, under governor general of the islands, William Howard Taft. When Taft became President, he nominated the then associate judge Pope to be chief justice of New Mexico.

Pope was an indefatigable worker, more painstaking and thorough than brilliant. As chief justice, he initiated a vigorous effort to clear the court's docket. Cases were disposed of and opinions handed down with unprecedented speed. Lawyers were required to appear for oral argument at the time set; continuances on mere request were no longer allowed. Some lawyers grumbled that the chief justice was working the bar and the court to death, but the popular consensus was probably expressed by the *Santa Fe New Mexican*'s commendation for the rate at which the court was turning out opinions, thus "establishing a new record for hard work and speedy disposal of business before it."[150] By the end of Pope's first term as chief justice, March 3 to August 31, 1910, the court had disposed of every one of the fifty-six cases on the docket when the term began, a record unequalled in any previous session.

Pope's determination to expedite the flow of decisions did not, however, cause him to act without due deliberation. His opinions rested on painstaking and scholarly research. He often labored long into the night, verifying each citation and weighing every word.

The chief justice did, however, grant a general continuance for one important political occasion. When the court convened for its January 1911 term, an election was upcoming for ratification of a proposed state constitution. Many lawyers were active in the campaign for adoption, and they asked the court to postpone hearings. The court acceded and recessed for two weeks. But to help maintain the output of decisions, the court urged lawyers, when possible, to submit their cases on briefs alone, foregoing oral argument.

Orphaned at a young age and brought up by aunts of strict Presbyterian ideals, Pope early developed a keen sense of righteous conduct and public duty. His devotion to duty often made him appear austere and even harsh in demeanor. He had no sympathy for men who tried to evade jury duty and would publicly rebuke those offering petty excuses. He was as unrelenting with men of political power or with personal friends as with any humble citizen. Such unusual and unexpected behavior lost him some friends and made him some enemies.

His sense of duty extended not only to his judicial functions but also to his role as a member of the community. Throughout his life he participated vigorously in civic affairs, serving numerous worthy causes as founder, or official, or financial contributor. During the time he was associate justice, headquartered in Roswell, the citizens of that city were torn by the fight over prohibition. Judge Pope allied himself with the church and temperance forces. As an elder of the First Presbyterian Church of Santa Fe, he was a financial mainstay, a wise counselor, and an untiring worker. His Sunday School class of teenage boys

was one of his closest interests. He often planned picnics for them and for years maintained a mountain cabin or clubhouse for their use, where he enjoyed happy days with them, discussing their ambitions and helping develop their sometimes latent talents.

The judge was straight-laced, even puritanical. He conducted his court with strict formality, tolerating no profanity. He allowed no man—juror, witness, officer, or lawyer—who was not wearing a coat inside the railing of his court. He finally bought an alpaca coat to be loaned to anyone who appeared without one and was too far from home to get one.

At one point Pope learned, as others had long known, that houses of prostitution were operating in Roswell. He ordered a grand jury investigation, which resulted in a number of indictments. When the first of these came to trial, the judge asked the usual question, "Mr. District Attorney, what says the Territory of New Mexico?" The district attorney rose and replied, "The Territory of New Mexico is ready, Your Honor." Turning to the defense attorney, Mr. W.W. Gatewood, the judge asked, "What says the defendant Mabel . . . , Mr. Gatewood?" Mr. Gatewood rose, bowed, and said, "Mabel . . . is always ready, Your Honor," then turned and winked at the audience. The judge was not amused.[151]

While still an associate justice, Pope had written the opinion in an important case concerning the status of the Pueblo Indians, *United States v. Mares.*[152] The court had previously held that these Pueblos of New Mexico and Arizona were citizens of the United States, with all the rights as such. In *Mares,* the defendants were charged with selling intoxicants to Taos Indians outside the pueblo jurisdiction. Sale of liquor to Indians had been prohibited by acts of Congress. But the Pueblos, wrote Judge Pope on behalf of the court, "have been judicially determined to be a people very different from the nomadic Apaches, Comanches, and other tribes. . . . They are not tribes within the meaning of the federal intercourse acts prohibiting settlement upon the land of 'any Indian tribe.' They are not wards of the government in the sense that this term has been used in connection with the American Indian."[153] The defendants were ordered discharged.

In reaching this conclusion, Judge Pope obeyed the dictate of the law as it then stood, even though his sympathies were wholly in favor of protecting the Pueblos from introduction of liquor on their lands. The United States Supreme Court, in *United States v. Joseph,*[154] had declared that the Pueblos were not "Indian tribes" within the meaning of laws protecting tribes.

Shortly after Judge Pope's decision, Congress declared that the prohibition against sale or introduction of liquor into Indian country should be construed to apply to the Pueblos and their lands.[155] And in 1913 the United States Supreme Court reversed itself and held that the Pueblos were Indians within the meaning of the laws.[156]

But meanwhile, the failure of the government to protect their rights, as Spain and Mexico had done and as the United States was by treaty obligated to do, caused great loss to the Pueblos. Trespassers and squatters constantly violated their lands. Thirty percent or more of their best acreage had passed into non-Indian possession. Some 3,000 Hispanics and Anglos claimed land and water rights that formerly had belonged to the Pueblos.[157] Reversal of the *Joseph* decision put many of these claims in doubt, but their holders were not disposed to surrender them without a fight. Suits to quiet title moved slowly through the courts, and conflicts festered for years.

Congress was finally persuaded in 1924 to create a Pueblo Lands Board, to investigate and resolve conflicting claims of the Indians and the newcomers.[158] But sifting through the thousands of claims was slow work. In 1982 the Department of the Interior still had on the dockets hundreds of cases.

In 1900 the territory brought suit to collect delinquent taxes, including taxes assessed against land grants belonging to the several Pueblos. Trial Judge Crumpacker ordered the complaint dismissed as to the Indian defendants, but the supreme court, in an opinion by Judge Parker, reversed. He reviewed the history showing that the Pueblos were full citizens of Mexico, and hence of the United States, and concluded that, as such, they were subject to taxation. He held immaterial the territory's lack of efforts for more than fifty years to assess such taxes. The court's opinion was unanimous, except that Judge Pope, having acted as attorney for the defendants, did not participate.[159] This decision was promptly followed by an act of Congress annulling the taxes levied and forbidding further levies.[160]

One of the hardest working members of the hard working court of the last territorial years was John R. McFie. He served for almost nineteen years, longer than any other of the territorial judges.[161]

The other associate members of the last supreme court of the territory, in addition to John R. McFie, Ira A. Abbott, and Frank W. Parker, were Merritt C. Mechem, Clarence J. Roberts, and Edward R. Wright.

Merritt C. Mechem was born in Kansas in 1870. He was educated at the state university and then read law in his father's office in Fort Smith, Arkansas. He was admitted to the bar of Arkansas in 1895 and practiced there until he moved to Tucumcari, New Mexico, in 1903. In 1909 President Taft appointed him judge for the newly created Seventh District. Judge Mechem was meticulous in his diction and wrote a vigorous, concise prose. He was a man dauntless in spirit, charming and gallant. He served until statehood, then returned to private practice. He was elected a state district judge and in 1920 was elected governor.

Clarence J. Roberts was a native of Indiana who had "read law" and then practiced in Indiana and Colorado before moving to Raton, New Mexico. He served in the legislature and as a member of the constitutional convention. In July 1910 he was appointed to the court, and presided over the Fourth District. Upon statehood, he was elected to the state supreme court.

Edward R. Wright, reared in New York, came to New Mexico in 1901 and was appointed to the court in 1910. Upon statehood, he was nominated for the new state supreme court by the Republican party but was defeated by the Progressive Republican candidate, R.H. Hanna.

Wright had succeeded Alford W. Cooley, who had come to New Mexico as assistant attorney general of the United States to investigate the administration of Governor Herbert J. Hagerman, especially certain land transactions. His report led to Hagerman's forced resignation. Less than a year later, Cooley found he had tuberculosis, and he returned to New Mexico as a health seeker. President Taft appointed him to the court for the Sixth Judicial District in July 1901, but his health broke again, and he felt compelled to resign a year later. He died in 1913.

The territorial court's last case concerned a conflict between two land grants, which overlapped to the extent of some 5,000 acres. Both had been confirmed by the same act of Congress of June 21, 1860. But one, the Beck grant, had its origin in an act of a Mexican *jefe politico* (political chief) before the annex-

ation. The district court held that the United States had in effect recognized the validity of that grant and, therefore, under the guarantees of the Treaty of Guadalupe-Hidalgo, that grant had priority over the later Perea grant. But the territorial supreme court reversed, holding that what had happened before the act of Congress could not be considered; since both held by that same act, insofar as the two overlapped, each held an "equal undivided moiety of the lands within the conflict."[162]

This Solomon-like solution satisfied neither party. Nor did it commend itself to the United States Supreme Court, which agreed with the district court that the confirmation by Congress "cannot be disassociated from what had preceded it," and that the confirmation "constitutes a declaration of the validity of the claim under the Mexican laws and that the claim is entitled to recognition and protection by the stipulations of the treaty."[163]

A denial of a rehearing in this case, on January 4, 1912, constituted the last item on the docket and the last official act of the supreme court of the territory of New Mexico. Under Chief Justice Pope's driving leadership, it had maintained its record for speedy justice to the last. During its last year, it disposed of more cases than it had in any two consecutive prior years.

The court met once more, on January 10, for the ceremony of swearing in the three members of the new state supreme court, Clarence J. Roberts, Frank W. Parker, and Richard H. Hanna. Chief Justice Pope, never in robust health, was unable to attend this final session. Although statehood would deprive him of his high office, he had worked hard and long for New Mexico's admission into the Union. President Taft, however, quickly nominated him to be the new state's first federal district judge. He served, in spite of relentlessly worsening illness (pernicious anemia), until his death in 1916, at the age of forty-six.

H. *STATEHOOD AND THE LONG TENURE OF COLIN NEBLETT*

Statehood, the quest for which had started almost immediately upon the American occupation, took almost sixty-four years to attain, a waiting period unequalled for any other state. More than fifty bills had been introduced to that end without success before the Enabling Act was finally passed in 1910, and New Mexico proclaimed a state January 6, 1912.

The creation of a separate federal court, with exclusive jurisdiction in cases wherein the federal government had an interest, was a boon to both the federal government and the local courts. Such cases had always been given priority in the territorial courts; the interests of the United States in scheduling took precedence over those of the territory or of private parties. The local courts were now relieved of that class of litigation.

The United States District Court for the District of New Mexico was made a part of the Eighth Circuit. That circuit included thirteen states and covered an area approximately 1,000 miles square. In most years it handled more cases than any other circuit, even the Second, based in New York City.

1. *Colin Neblett*

Judge Pope, the first federal district judge for New Mexico, held the office for four years. His successor served for thirty-one years. Colin Neblett was the last of the colorful type often found in territorial times. He had been born in Virginia in 1875, but had come to New Mexico after receiving his law degree from Washington and Lee University in 1897. He practiced in Silver City and served briefly in the territorial legislature and then as state district judge for four years before President Wilson appointed him to the federal bench.

While under consideration for the appointment, Neblett was interviewed by an investigator sent out for the purpose. The investigator mentioned that he had heard that Neblett was not adverse to liquor (this was during the Prohibition era). Neblett acknowledged that he saw nothing wrong in having a drink with friends on occasion. The interviewer said he had also heard that Neblett liked to play poker. Yes, replied Neblett, he enjoyed a game of cards with his friends. The interviewer also said it had been reported that Neblett had considerable interest in the fair sex. "Sir," said Neblett, "if you are looking for a gelding, I'm not your man."[164]

Drink he did, but not usually while on the bench. One day, however, during the noon recess he apparently ran into some friends at La Fonda and had a few drinks, and a few more. He had ordered the marshal to have all the defendants ready for sentencing when he returned. The marshal did so: because space was limited, he put them all in the jury box. When the judge resumed his seat on the bench, he looked at the filled jury box and said, "Gentlemen, have you reached a verdict?" The court clerk hastily whispered to him that the men in the jury box were the defendants. With no loss of aplomb, the judge proceeded to read the sentences, which he had written beforehand.[165]

Colin Neblett was an individualistic, freewheeling person with an exuberance and quickness of action reminiscent of the court's territorial days. He was regarded as an excellent trial judge, who presided with dignity and formality, and tolerated no nonsense.

An acquaintance described him as a powerful individual with a great sense of justice and a passing acquaintance with the law books. His judgments seldom relied on legal research, but they were seldom reversed. He rarely if ever wrote opinions, preferring to hand down his rulings or judgments as soon as the parties had presented their case.

Swift & Co. brought an action to have the New Mexico sales tax declared unconstitutional. Eminent local counsel appeared for each side, and Swift also sent one of its attorneys from Chicago. On the day the decision was to be handed down, Swift's local counsel explained that their Chicago counterpart could not be present; they asked that a recording be made of the judge's decision, because they intended to appeal if the judgment was adverse. The issue was one they thought should be decided by the United States Supreme Court.

Judge Neblett said, "Well, gentlemen, you just tell your Chicago lawyer that he done lost the case. Case dismissed."[166]

An important "portal to portal" labor dispute concerned the question whether time potash miners spent traveling from the portal, where they reported for work, to and from the diggings should be compensated as time worked. The litigation took several days and was strongly contested. After both sides had rested, Judge Neblett announced his decision without further ado. "Riding," he declared, "ain't working."[167]

An Indian was brought before Judge Neblett, charged with polygamy. Through an interpreter, the judge instructed the defendant to decide which woman he wanted for his wife, and then to tell the other one to go, to leave. The interpreter talked to the Indian, and the Indian talked to the interpreter, until the judge broke in to ask, "What is he talking about?" The interpreter replied, "Judge, he says you tell 'em."[168]

A young real estate man, George Savage, on behalf of a client leased a building from a well-known local bootlegger. Savage, although new in town, had learned of the bootlegger's

reputation and got his assurance that he was not using the building for bootleg operations. But within days the feds raided the building, found illicit liquor, and padlocked the building. The lessee petitioned the court to lift the padlock order, contending that he had no knowledge of the illegal use of the building. Savage appeared as a witness for his client. Judge Neblett asked him, "Mr. Savage, how long have you lived in Albuquerque?" "Four months," was the answer. "If you've been here that long," said the judge, "you must have known [name of bootlegger] was a bootlegger." The petition to lift the padlocking was denied.

Judge Neblett could be curt when on the bench. He did not hesitate to scold lawyers who appeared unprepared. But he could also be indulgent. He always had a liking for Elfego Baca, a colorful and fearless, even occasionally violent, character, who could be seen on the streets of Albuquerque wearing a cape and accompanied by a bodyguard. He had been sheriff of old Socorro County, with a number of notches in his gun. He was regarded as the hero of a gun battle he had fought near Socorro with a band of Texas cowboys. Movies were made about him.[169]

Baca was also a lawyer. But on one occasion when William Pope was the federal judge, Baca had appeared before him as a criminal defendant, charged with effecting the escape of a federal prisoner. General Salazar, a Mexican soldier of fortune, had been a supporter of President Huerta. When Huerta was deposed, Salazar fled across the border. Here he was soon arrested on a charge of perjury. With a certain amount of help, he escaped. The escape, it appeared, was engineered by Elfego Baca.

The jury, however, found him not guilty. Judge Pope indignantly ordered the names of all the jury members stricken from the jury list. He told Baca that he was satisfied he was guilty but that since the jury had acquitted him, all he could do was to bar him from practicing law in federal court. Baca smiled genially and said, "That's all right judge. I don't have much practice in your court anyway."[170]

Judge Neblett enjoyed hearing Baca plead a case. A man charged with selling liquor to Indians retained Baca to defend him. The government offered in evidence a bottle labeled Crab Orchard Whiskey. The bottle was sealed, unopened. In his plea to the jury Baca held up the bottle and said, "Gentlemen, you see this bottle. Everyone has said it is whiskey, just because it is labeled 'Crab Orchard Whiskey.' But gentlemen, how can you be sure it is whiskey? If I came into this court with a sign on my back, 'Jesus Christ,' would that make me the Savior?"

The judge appreciated the argument, but the defendant was nevertheless convicted.

As most lawyers knew, Judge Neblett had had a hemorrhoid operation. One day, when a bootlegging case was called, defense counsel rose to say his client could not appear because he was in the hospital. More than once before Judge Neblett had fined the defendant, and the last time he had threatened to send him to prison if he appeared in his court again. But when counsel explained that the defendant had undergone an operation for hemorrhoids, the judge dismissed the charge, saying, "That man's done suffered enough."

2. *Orie L. Phillips*

Congress in 1923 created a second, temporary judgeship for the District of New Mexico to relieve the court's heavy workload. Although a lifetime appointment, the position was temporary in that it was to be abolished after the incumbent's departure.

Appointed to this new position was Orie Leon Phillips. Born in Illinois in 1885 and educated at Knox College and the University of Michigan Law School, Phillips had been admitted to the New Mexico bar in 1910. He had spent his intervening years mainly in private practice, with a stint as assistant district attorney and a term as a state senator.

Shortly after his ascending the bench in 1924, Congress authorized terms of court to be held not just in Santa Fe, as before, but also in Albuquerque, Roswell, Las Cruces, Silver City, Raton, and Las Vegas.[171] But even with the increase in travel that this entailed, helping Judge Neblett handle the district court work did not take all of Phillips' time, so he accepted frequent appointments to sit on the Eighth Circuit Court of Appeals. During his six years of service as temporary district judge, he participated in more than 330 circuit court cases and wrote 104 opinions. So when a new Tenth Circuit was carved out of the old Eighth, in 1929, he was a natural choice for a position on the new court.

I. *MID-CENTURY: HATCH, ROGERS, AND PAYNE*

1. *Carl A. Hatch*

Until early in the twentieth century, federal judges frequently remained active until age eighty or even ninety. "Senior status" was not created until 1948, when an act of Congress permitted retirement at age seventy with full pay. Judge Neblett, who was seventy-three years old, thereupon retired, having served for thirty-one years. He died two years later of a heart attack while lunching at the old Hilton Hotel in Albuquerque.

To replace him, President Truman appointed Carl Atwood Hatch, then U.S. senator from New Mexico. Born in Kansas, Hatch had grown up in Eldorado, Oklahoma. His formal schooling ended at age sixteen, when he became first a clerk in his father's hardware store and then a printer's devil on the town's weekly newspaper, *The Eldorado Courier*. He went on to become a reporter and half owner. Covering the courthouse as part of his beat exposed him to the drama of legal trials, and the eloquence of the lawyers so impressed him that he abandoned journalism for law. He studied law at Cumberland University and embarked on a legal career.

One of his cases required him to travel to Clovis, New Mexico, to defend a nineteen-year-old youth on some criminal charges. Hatch enlisted the local law firm of Patton and Bratton to assist him. Some years later, in 1916, when his wife's illness called for moving to a drier climate, Hatch chose Clovis.

Knowing Patton and Bratton was apparently sufficient to help the newcomer get started. Harry Patton became attorney general that year and made Hatch his assistant soon thereafter. Hatch served as collector of internal revenue (1919 to 1922) and as a state district judge (1923 to 1929) before entering private practice in New Mexico. During Bratton's 1933 campaign for the U.S. Senate, Carl Hatch acted as his campaign manager. When Bratton resigned his Senate seat to become a judge of the U.S. Court of Appeals, Hatch was appointed to fill his unexpired term. He was thrice elected for consecutive terms, serving for sixteen years, until his appointment as judge of the U.S. District Court in 1949.

During his service in the U.S. Senate, Carl Hatch played an important role in national affairs. He is best remembered as author of the Hatch Act, restricting political activities of federal employees. But he was also a leading member of the Truman Committee, which oversaw war production policies during World

War II, and he served on committees dealing with public lands, agriculture, Indian affairs, water rights, and the judiciary.

Senator Hatch did not run for reelection in 1948. He knew that Judge Neblett planned to retire, and if he was not eager to have the position, his wife was eager for him. The pressure of life in Washington was telling on the senator and led to too much drinking. Also, his eyesight was failing. He could no longer drive a car; his wife, the former Ruth Caviness, acted as chauffeur. She also exerted all the influence and pressure she could muster to gain him the judicial appointment. President Truman fulfilled her ambition on January 21, 1949, and the Senate confirmed the appointment the same day.

As judge, Hatch showed a fine capacity for memory and logical thinking. During a trial, he displayed surprising ability to recollect the wording of documents and the testimony of witnesses. He enjoyed holding court and particularly enjoyed following the arguments of counsel. His opinions showed ability to weigh the evidence and the arguments, come to a sound decision, and administer justice sympathetically but firmly. It was said of him that, like Socrates, he "listened courteously," "answered wisely," "considered soberly," and "decided impartially."[172]

Judge Hatch would occasionally assign a case to Senior Judge Neblett to allow him to remain useful. One such case involved an airline passenger, who had suffered a heart attack while aloft. The plane for some reason had been unable to land at its intended destination and had to fly on to Albuquerque. Plaintiff alleged that the heart attack had been brought on by his becoming distraught with worry over whether the plane would run out of fuel before it could land. Attorney Richard Krannewitter, representing the plaintiff, put an Air Force officer on the stand as an expert on aircraft logistics and asked him whether there was reason to fear that the plane might not reach its destination. Without waiting for an objection, Judge Neblett said, "Mr. Krannewitter, the plane done landed. You can't ask that question."

To cope with the handicap of his failing eyesight, Judge Hatch had his law clerk summarize the pleadings using a typewriter with very large type; the letters were more than a half inch high. He had the ability to grasp what a case was about from a very brief summary. He also had the clerk type up memoranda of applicable law. Stock instructions he memorized and recited to the jury from memory. More complex or specialized instructions he dictated and had the court clerk read them to the jury. His law clerks had to work hard. During trials, the judge would write notes, calling on the clerk to look up points of law or of evidence as they arose; this research had to be done during the noon recess, so that the judge would be able to rule on them in the afternoon. Clerks had little time for lunch. Points arising at the afternoon sitting had to be researched in time for court the next morning. This practice reflected the judge's deep concern about being right in his rulings and decisions. Lawyers practicing before him could be confident that the judge would be thoroughly prepared on the law.

He was also concerned about wasting the government's money in running the court and about wasting jurors' time. He made sure that the court personnel, including himself, did a full day's work each day. He would often start a jury trial at 9:00 a.m., run to noon, continue from 1:30 to 5:30, and from 7:30 to perhaps 9:30. Because New Year's Day fell on a Sunday in 1950, Monday, January 2, was declared a holiday. But it was no holiday in Judge Hatch's court. He had jury trials coming up later in the month, and he wanted to get

pre-trial conferences out of the way. He scheduled the conferences to start on Monday, January 2. The lawyers groused but to no avail.

With these work habits, he quickly became one of the nation's busiest judges. A Senate Judiciary Committee report showed that in 1952 he conducted eighty-eight trials, more than twice the national average.

Civil cases in particular were increasing at a tremendous rate. In 1948, 58 civil cases were filed; in 1952, 159, almost three times as many. Private civil suits normally take two or three times as much of a judge's time as those in which the government is a party.

Criminal cases handled by Judge Hatch also exceeded the national average per judge, even without counting immigration cases. The immigration cases, mostly involving illegal entry from Mexico, pushed the number of criminal cases to astronomical heights. Twice a month, the court held a day for immigration cases in Las Cruces, disposing of twenty-five to fifty cases, sometimes even one hundred. The median period of time taken by Judge Hatch to dispose of cases was considerably below the national average. "This splendid record," said the Senate committee report, "is due to the diligence and ability of Judge Hatch."

The report was made in connection with a proposal to provide a second federal judge for New Mexico, to handle the press of cases. In 1954 Congress authorized a second judgeship, again on a temporary basis.[173]

2. *Waldo H. Rogers*

President Eisenhower appointed Waldo Henry Rogers, then serving as a state district judge. Judge Rogers was a native New Mexican, the first to attain a position on the federal bench. He was born in Las Vegas, New Mexico, in 1908. Both his father and his maternal grandfather were leading lawyers dating back to territorial days. The latter, Henry L. Waldo, had been a judge of the territorial court, 1876 to 1878.

Waldo Rogers had graduated from the University of Colorado in 1931 and had practiced in New Mexico for more than twenty years. He was active in Republican politics and had been an assistant district attorney in 1932, Republican candidate for Congress in 1940, and attorney for the City of Albuquerque from 1947 to 1950.

Upon America's entry into World War II, Rogers volunteered as an infantryman, served in the African and Italian campaigns, and was mustered out a captain. He resumed his law practice and in 1951 was appointed to fill a vacancy on the state district court. The voters continued him in office at the election of 1954, even though he was a Republican running in a heavily Democratic district. He quickly earned a reputation as being one of the state's ablest judges, a reputation that led to his appointment to the federal district court in 1954. This temporary judgeship was made permanent in 1961.[174]

Judge Rogers was direct and often curt in colloquies with lawyers appearing before him. He was not always patient in listening to arguments and would make rulings that the lawyers sometimes did not think well considered. And once he made his ruling, the matter was settled. He tolerated no further argument. One eminent member of the bar, A.T. Hannett, once presumed to remonstrate against a ruling. The judge raised up and said, "Mr. Hannett, did you hear me rule? Sit down!"

He would participate actively in the examination of witnesses. A lawyer putting a series of carefully prepared questions to an adverse witness, designed to lead up to a deadly coup,

might find the judge beating him to the punch by asking the crucial question himself.

In a Dyer Act case, the defendant had apparently signed a confession, which the prosecutor was trying to introduce. Counsel appointed to represent the indigent defendant[175] asked to examine the FBI agent who had taken the confession, out of the presence of the jury. Judge Rogers told the agent, "I want your file." This was delivered up, and while counsel was examining the witness, the judge was paging through the file. Suddenly he interrupted the proceedings to say, "I've heard enough. Recall the jury." When the jury had returned, the judge pointed to one juror and said, "Mr. ____, you're the Foreman. [No foreman had been selected.] The bailiff is going to hand you a not guilty verdict, and you are going to sign it." Then to the prosecutor he said, "Mr. U.S. Attorney, you are not going to file any cases of this sort in my court. You've got the right guy but the wrong crime."

The judge's point was that the accused should have been charged with violating the Mann Act, not the Dyer Act. He had been caught driving the car of some California madam, apparently for the purpose of transporting some women, but with the car owner's knowledge and consent.

The judge enjoyed doing the unexpected. Sometimes he joined the jurors in the jury box. He would comment freely on the proceedings and on the witnesses. As one party in a case was putting an expert witness on the stand, Judge Rogers quoted a definition of an expert as "an S.O.B. from out of town." In another case, an inexperienced young FBI agent was proving himself a poor witness. Obviously unfamiliar with the hearsay rule, he repeatedly tried to relate what someone had told him. When he had finished, Judge Rogers told the U.S. attorney, "Your witness sure laid an egg."

In a case arising out of the death of two men when their plane crashed during a violent storm, an old farmer from Hico, Texas, was testifying about the torrential storm. When he finished, he reached up his hand and said, 'Glad to have met you, judge. If you're ever in Hico, come and see me." The judge politely shook hands and thanked him for the invitation.

Bryan Johnson, a leading member of the Albuquerque bar, had been a judge for a term. In a case he handled after returning to private practice, when the parties met in Judge Rogers' chambers before starting the trial, opposing counsel asked that Johnson be referred to as Mr. Johnson, not Judge Johnson. The title of judge, they felt, would give Johnson added status in the eyes of the jury. Judge Rogers agreed. And in strict accordance with the agreement, when he introduced counsel to the jury, he said, "And this is Mr. Johnson. He used to be a district judge, and one of the finest we ever had."

His years in private practice, pitted against the best lawyers in the state, qualified Judge Rogers to use the rules of procedure and of evidence to cut through abstruse arguments and to administer justice soundly and efficiently. He worked closely with his older colleague, Judge Hatch. Together, they conducted a smoothly functioning court.

Judge Rogers spoke with a stammer. But he never allowed it to embarrass or impede him. He generally managed to make his hesitation sound natural. It certainly did not hurt his career.

Never in robust health, Judge Rogers fell victim to the cigarette habit. He developed bronchiectesis. His wife induced him for a short while to switch from cigarettes to a pipe, but not for long. During his last years of his life he suffered from continual pain and discomfort. Probably as a consequence, he became increasingly irritable. Especially with

young lawyers, he was often impatient. But he carried on his duties with courage and dedication, even if with less of the zest and enthusiasm that had characterized him earlier. He could inject a humorous comment without impairing the dignity with which he ran his court. Such comments were as likely to be at his own expense as that of others; they were not harsh or humiliating.

Circuit Judge Sam Bratton took senior status in 1959 and thereafter spent much of his time serving as a third district judge. But all three judges were in poor health. Hatch had emphysema, and his eyesight was very poor. Rogers' bronchiectesis was worsening. In 1963 Rogers was hospitalized five times. But during such periods he held court in the hospital. Sometimes he also handled court business in his home.

In February 1962 Judge Hatch announced his retirement, to be effective upon appointment of his successor. But no successor was appointed until more than a year later. Judge Rogers became presiding judge of the U.S. District Court for New Mexico when he administered the oath to Judge H. Vearle Payne on April 5, 1963.

On September 15, 1963, Judge Hatch died. On September 22, Judge Bratton died, and four months later, on January 12, 1964, Judge Rogers. He had heard his last case two months before and handed down his decision while in the hospital. Within less than six months, New Mexico had lost all three of its federal judges.

In 1980 Judge Hatch's widow endowed the Carl Hatch Professorship of Law and Public Administration at the University of New Mexico.

3. *H. Vearle Payne*

To replace Judge Hatch, President Kennedy, upon the nomination by Senator Clinton Anderson, appointed H. Vearle Payne. Payne's early career was in the Horatio Alger mold. He was born September 6, 1908, in Chihuahua, Mexico, in a colony, Colonia Dublan, established by the Church of the Latter Day Saints of Jesus Christ. He was from a family of fifteen children. During the years 1910-1914, bands of marauding revolutionaries roamed over northern Mexico. The Payne family fled across the border and settled in Virden, New Mexico. Although prosperous enough in Mexico, they were now almost penniless. Time and again, young Vearle had to interrupt his schooling to help at home; he was twenty-three years old when he finally finished high school.

He managed to find time to spend one year at the National University Law School in Washington, D.C., working at a government job during the day and attending classes at night. He also devoted two years to missionary work, as required of Mormon church members. He returned to New Mexico and studied law in law offices in Lordsburg and Deming, and when time allowed, attended classes at Eastern Arizona Junior College in Thatcher, Arizona.

In August 1934 Vearle Payne attained his long-sought goal: he passed the New Mexico bar examination and embarked on the practice of law. He opened an office in Lordsburg and quickly proved to be an able and popular lawyer. He was elected and reelected to the legislature, serving from 1939 to 1949. In 1945 and again in 1947 he was elected speaker of the house. In 1953 he was elected to the state senate and served for six years. Concurrently from 1936 to 1955, he was also city attorney for Lordsburg.

Upon the death of the incumbent state district judge for the Sixth Judicial District in 1957, Governor Edwin L. Mechem appointed Payne to the post, even though Mechem was a Republican and Payne a Democrat. Why this

departure from the usual political practice? Perhaps because the district was preponderantly Democratic; perhaps, as one member of the bar suggested, because no Republican would take the job. Or, possibly, because Payne was the most qualified candidate. At the next election, in 1958, he was continued in office by the voters and again in 1962. His industry and integrity, his judicial temperament, and his courtesy and dignity on the bench and off won the respect of lawyers and litigants alike. He was, therefore, seen as well qualified to fill Judge Hatch's place on the federal bench.

The work of the court had fallen behind during the last days of the ailing judges, so newly-appointed Judge Payne faced an imposing backlog of cases. Also on the horizon loomed important changes in practice that would radically alter the older relatively simple and straightforward procedures. Pretrial conferences and complex discovery procedures were coming into use, bringing more and longer delays in disposing of cases.

Judge Payne was always very concerned whether he was doing what was right. If a party or a prisoner wrote to complain, he would carefully look into the matter even if the complaint looked specious on its face. He was a worrier. He worried that his own predilections or prejudices might impair his objectivity, and so he leaned over backward to avoid being unfair to Blacks or Hispanics or to plaintiffs in civil suits (he had represented insurance companies while in private practice). He was always willing to reexamine his own motives, and would pray for divine guidance, which usually gave a comforting assurance that his motives and his conclusions were sound.

Judge Payne was a patriarch, with rigid religious views of right and wrong. He frowned on drinking. He frowned even more severely on cohabiting without benefit of clergy; he would place offenders on probation, conditioned on their getting married or ceasing to cohabit. He strongly disapproved of women wearing pants. He had a sign outside his courtroom warning that women were required to wear skirts. Women attorneys were on notice; women witnesses were sent home to put on a skirt. This was also the practice in other courtrooms at one time, but Judge Payne was one of the last holdouts. Married women attorneys sometimes prefer to keep their maiden names in their professional capacity. Judge Payne did not approve of that.

Whether the use of water by the Pueblo Indians is controlled by New Mexico water law was the important issue in a suit brought by the state in 1966. The suit concerned the water of the Nambe-Pojoaque River system, a tributary of the Rio Grande. Substantially all the drainage area of the system lay within the boundaries of the pueblos of San Ildefonso, Pojoaque, Nambe, and Tesuque. The state asserted that state law governs rights to the water and named as defendants the four pueblos, the United States, and some 1,000 others.

Judge Payne held that state law did control. But the Court of Appeals reversed. Federal water rights, it held, are not dependent on state law or state procedures. The Spanish and Mexican governments recognized the Pueblo land titles, and by treaty the United States agreed to protect them. In 1858 Congress specifically confirmed the titles of the Pueblos to these lands. The rights of the Pueblos are prior to those of all non-Indians whose land ownership was recognized pursuant to the 1924 law creating the Pueblo Lands Board and the 1933 law providing compensation for lands lost by the 1924 act.[176]

Judge Payne was an inherently modest man. It struck him as surprising that from humble beginnings he had risen as far as he had. Perhaps because of his humble beginnings, he was sensitive to criticism, somewhat uncom-

fortable in the company of other judges, and appeared to distrust urbane, articulate young lawyers from prestigious law schools. The judge put his faith in the counsel and judgment of older, simpler men. He did not much care for complicated argument or citation of secondary authorities such as law review articles.

The judge was innately kind. In court he was always considerate of lawyers' feelings. Seeing a man lying drunk in the street, he would bend down to help him. He was an inveterate story teller. He always had an anecdote or interesting incident to relate. He was a dog lover and a photography bug. His photographs took prizes at the state fair.

An operation in 1977 sapped his strength and in 1978, having reached the age of seventy, he took senior status. He for a time handled a large load of cases, many of them indigent habeas corpus petitions. Judge Payne and Mrs. Payne moved from Albuquerque to Virden, New Mexico, a community where he had many relatives, and there enjoyed retirement. He died in 1984.

NOTES

*Ph.B., 1926; J.D., 1928; J.S.D., 1930, University of Chicago; Professor of Law Emeritus, University of New Mexico.

[1]1 G.B. Anderson, *History of New Mexico, Its Resources and People* 298 (1907).

[2]A.W. Poldervaart, *Black-Robed Justice* 23 (1948); R.E. Twitchell, *The Leading Facts of New Mexican History* 233-53 (1912).

[3]Cheetham, *The First Term of the American Court in Taos, New Mexico*, 1 N.M. Hist. Rev. 23 (1926); Twitchell, *supra* note 2 at 255-61.

[4]Twitchell, *supra* note 2 at 165-75, 392.

[5]*Id.* at 175-80.

[6]*Leitensdorfer v. Webb*, 1 N.M. 34 (1853). *Accord Ward v. Broadwell*, 1 N.M. 75 (1854).

[7]*Romero v. Silva*, 1 N.M. 157 (1857).

[8]*Archibeque v. Miera*, 1 N.M. 160 (1857).

[9]*Acoma v. Laguna*, 1 N.M. 220 (1857).

[10]*Victor de la O v. Pueblo of Acoma*, 1 N.M. 226, 237-38 (1857).

[11]A notorious example is the case of Max Frost, registrar of the Santa Fe Land Office, against whom numerous indictments were filed for his involvement in land frauds and abuse of his office to aid and abet such crimes. V. Westphall, *The Public Domain in New Mexico, 1854-1891*, 105-110 (1965).

[12]H.H. Bancroft, *History of Arizona and New Mexico*, 1530-1888 (facsimile of the 1889 ed.) 681, n.2 (1962).

[13]*Jaramillo v. Romero*, 1 N.M. 190 (1857). *See also Bustamento v. Analla*, 1 N.M. 255 (1857); A. Hunt, *Kirby Benedict: Frontier Federal Judge* 107 *et seq.* (1961). Peonage was abolished by act of Congress, March 2, 1867. Rodriguez, *New Mexico in Transition*, 24 N.M. Hist. Rev. 184 (1949).

[14]Bancroft, *supra* note 12 at 681.

[15]*Id.* at 682; Ganaway, *New Mexico and the Sectional Controversy, 1846-1861*, 18 N.M. Hist. Rev. 113 (1943).

[16]*Sanchez v. Luna*, 1 N.M. 238, 242 (1857).

[17]*Id.*

[18]1 N.M. 29 (1853).

[19]1 N.M. 317 (1857).

[20]The hardships and dangers of riding this circuit are vividly described in a journal kept by W.W.H. Davis, secretary of the territory, who accompanied Judge Benedict on the circuit ride of 1854. W.W.H. Davis, *El Gringo* 345 (1962). The Arizona area was severed in 1863, when Arizona became a separate territory.

[21]*Bray v. Territory*, 1 N.M. 1, 3 (1852).

[22]*Leonardo v. Territory*, 1 N.M. 291, 299 (1859).

[23]*Donalson v. County of San Miguel*, 1 N.M. 263 (1859). Absent direct statutory provision, counties cannot be sued for acts committed in the exercise of their governmental functions. *Elliott v. Lea County*, 58 N.M. 147, 267 P.2d 131 (1954); *Murray v. County Commissioners*, 28 N.M. 309, 210 P.2d 1067 (1922).

[24]Twitchell, *supra* note 2 at 302; Walker, *Confederate Government in Dona Ana County*, 6 N.M. Hist. Rev. 253-302 (1931).

[25]Poldervaart, *supra* note 2 at 59.

[26]Joseph G. Knapp, born 1805 in Cayuga County, New York, had been ordained a Methodist minister, but within a year thereafter joined the Episcopal Church. He was sent to Wisconsin as a missionary but later became a newspaper editor and publisher, meanwhile studying law. He was more than forty years old when admitted to the bar. He was appointed to the New Mexico court in 1861 and served until 1865.

[27]W.A. Keleher, *Turmoil in New Mexico 1846-1868*, 404 (1952).

[28]*Id.* at 406.

[29]Letter to President Lincoln dated December 19, 1863, from W.F.M. Arny, secretary of the territory. Benedict wrote a denial and in turn charged Arny with being "a moronic maniac, an egotist, and a general mischief-maker."

[30]Hunt, *supra* note 13 at 1651-66.

[31]Hubbell, from Connecticut, had been appointed judge for the Arizona district in 1861. Following the Gadsden Purchase in 1853, the area known as Arizona had been designated a county of New Mexico. It became a separate territory in 1863. When Hubbell first came on the court, Chief Justice Benedict referred to him as a man of slight judicial experience but good intentions, a man of much energy and fluent in Spanish. *Id.* at 139, 152. He served from 1861 to 1863 and again from 1864 to 1867.

[32]*Id.* at 183 ff.

[33]1 Anderson, *supra* note 1 at 302-303.

[34]*Santa Fe New Mexican*, Aug. 19, 1867.

[35]*United States v. Lucero*, 1 N.M. 422 (1869). *Accord United States v. Santistevan*, 1 N.M. 583 (1874); *United States v. Varela*, 1 N.M. 593 (1874).

[36]Watts' opinion said among other things that "you may pick out one thousand of the best Americans in New Mexico, and one thousand of the best Mexicans, and one thousand of the worst pueblo Indians, and there will be found less, vastly less, murder, robbery, theft, and

other crimes among the one thousand worst pueblo Indians than among the thousand of the best Mexicans or Americans in New Mexico." *United States v. Lucero*, 1 N.M. 441 at 442.

[37]*United States v. Joseph*, 94 U.S. 614 (1876).

[38]*United States v. Sandoval*, 231 U.S. 28 (1913).

[39]C. Horn, *New Mexico's Troubled Years: The Story of the Early Territorial Governors* 127-28 (1963). Accounts of the incident vary. *Compare* Hunt, *supra* note 13 at 193-94; 1 Anderson, *supra* note 1 at 318; G.L. Roberts, *Death Comes For the Chief Justice* 62-70 (1990).

[40]1 N.M. 415 (1869).

[41]Laws of N.M. Terr., 1857-58, at 88.

[42]R.E. Twitchell, *Address*, 1895 N.M. Bar Assoc. Minutes 20; 1 Anderson, *supra* note 1 at 302; Poldervaart, *supra* note 2 at 77-78. Brocchus enjoyed four separate appointments to the Second District bench: 1854-1858, 1861, 1863-1864, 1867-1869. This fifteen-year span was interrupted by the incumbencies of William F. Boone, 1858-1859, and Sydney A. Hubbell, 1861-1863 and 1864-1867. Brocchus failed to qualify for the 1861 appointment because he could not cross the prairie to New Mexico.

[43]Joab Houghton, who had been chief justice under the Kearny provisional government, 1846-1851, was again appointed to the court in 1865, this time as judge for the Third (southern) District. During the Civil War, he had been district attorney for New Mexico. As such, he brought indictments against several prominent citizens who had shown southern sympathies. None, however, was ever convicted. As judge, his high-handed treatment of persons brought before him, especially ex-Confederates whose property was being confiscated, caused widespread condemnation. A memorial asking the President to remove him charged, among other things, that he had neglected his duties, had proved himself incompetent in illegal and erroneous decisions, and had shown excessive partisanship for Andrew Johnson. Such partisanship was a serious charge in the eyes of the Radical Republicans opposed to Johnson. He was removed in 1869. During the whole of his two terms on the bench, he had written only one opinion, *Archibeque v. Miera*, 1 N.M. 419 (1869).

[44]Poldervaart, *supra* note 2 at 79-80.

[45]*Id.* at 80-81.

[46]*Id.* at 81.

[47]*Id.* at 82-83.

[48]*Santa Fe New Mexican*, Sept. 1, 1869.

[49]*Santa Fe New Mexican*, Dec. 2, 1869.

[50]1 Anderson, *supra* note 1 at 301.

[51]On the Lincoln County War, see Horn, *supra* note 39 at 182 ff.; W.A. Keleher, *Violence in Lincoln County* (1957).

[52]Horn, *supra* note 39 at 177-79; V. Westphall, *Thomas Benton Catron and His Era* 199-203 (1973).

[53]Horn, *supra* note 39 at 165-66; Poldervaart, *supra* note 2 at 89-92.

[54]Horn, *supra* note 39 at 155-66; Poldervaart, *supra* note 2 at 92-95.

[55]Poldervaart, *supra* note 2 at 99.

[56]*Id.* (citing *Santa Fe New Mexican*, July 24, 1876).

[57]K. Crichton, *Law and Order, Ltd.* 15 (1928).

[58]Poldervaart, *supra* note 2 at 101; *Santa Fe New Mexican*, Feb. 15, 1877.

[59]This view is supported by the cases except in states where the pardoning power is specifically limited by a provision that pardons may be granted "after conviction." *See Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867), and cases cited in 3 *Attorney General's Survey of Release Procedures* 143 (1939).

[60]*Santa Fe New Mexican*, Mar. 12, 1877.

[61]Two exceptions were Brocchus and Benedict. In *Chavez v. McKnight*, 1 N.M. 147 (1857), Brocchus cited "Escriche" (referring to the work of Joaquin Escriche y Martin, 1784-1847), on the rights of married women, and spoke of the "humane regard" and "wise policy" of the civil law in allowing a married woman to proceed against her husband without his consent for his civil or criminal actions. In *Jaramillo v. Romero*, 1 N.M. 190 (1857), Benedict cited Escriche on the subject of peonage.

[62]*Browning v. Estate of Browning*, 3 N.M. 659, 9 P. 677 (1886); *accord Ex parte DeVore*, 18 N.M. 246, 136 P. 47 (1913).

[63]For details of Peck's troubles as judge of the Wyoming court, *see* Thomson, "A History of Wyoming Territorial Supreme Court Justice," 53 *Annals of Wyoming* 22, 33-36 (1981), (*See also* Chapter 4, p. 79, *supra*).

[64]Poldervaart, *supra* note 2 at 112.

[65]Walter, *Ten Years Later*, 7 N.M. Hist. Rev. 377 (1932).

[66]Poldervaart, *supra* note 2 at 114.

[67]*Territory v. Romine*, 2 N.M. 114 (1881).

[68]L.B. Prince, *The General Laws of New Mexico* (1880).

[69]Horn, *supra* note 39 at 173-74; Rasch, *Exit Axtell—Enter Wallace*, 32 N.M. Hist. Rev. 231 (1957).

[70]Horn, *supra* note 39 at 178-79.

[71]4 Cong. Rec. 3825-3828 (June 15, 1876). Mrs. Lew Wallace agreed. "We should have another war with Old Mexico," she wrote her son, "to make her take back New Mexico." Horn, *supra* note 39 at 200 ff. Daniel Webster, secretary of state, and C.M. Conrad, secretary of war, also suggested withdrawing and allowing New Mexico to revert to its native inhabitants. *Id.* at 18, 208.

[72]Poldervaart, *supra* note 2 at 125-26.

[73]*Id.* at 128.

[74]1 Anderson, *supra* note 1 at 306.

[75]*Id.* at 304; Poldervaart, *supra* note 2 at 127.

[76]Henderson was chosen only after William B. Fleming had been appointed in June 1885 but had quickly resigned. Henderson was appointed in October during a Senate recess. When his name was later submitted for confirmation, the Senate Judiciary Committee reported adversely, but he was nevertheless confirmed in June 1886 by a vote of 29 to 23. He had served in the Confederate army and held numerous offices in Arkansas, including attorney general. He resigned in 1889 and returned to Arkansas, where he died some years later.

[77]Poldervaart, *supra* note 2 at 133.

[78]*Santa Fe New Mexican*, Oct. 27, 1885.

[79]Poldervaart, *supra* note 2 at 134-35. Ten years later, Dorsey was suspected by Thomas B. Catron of influencing a decision of another chief justice, Thomas J. Smith, by taking Smith and his wife on an all-expense-paid trip to Mexico. But Catron never found time to investigate the matter adequately. Westphall, *supra* note 52 at 251.

[80]Twitchell, *supra* note 2 at 497-98.

[81]*Territory v. Stokes*, 2 N.M. 63 (1881).

[82]*Territory v. Ashenfelter*, 4 N.M. 93, 12 P. 879 (1887).

[83]*Territory v. Thomason*, 4 N.M. 154, 13 P. 223 (1887).

[84]*See* M.E. Jenkins and A.H. Schroeder, *A Brief History of New Mexico* 61 (1974).

[85]1 Anderson, *supra* note 1 at 188-89; Westphall, *supra* note 52 at 218.

[86]*Albuquerque Land & Irrigation Co. v. Gutierrez*, 10 N.M. 177, 61 P. 357 (1900).

[87]Adjudicating water rights among numerous claimants sometimes called for unraveling complex data. *See, e.g., Millheiser v. Long*, 10 N.M. 99, 61 P. 111 (1900).

[88]Quoted in W.A. Keleher, *The Fabulous Frontier* 92 (1962).

[89]*United States v. San Pedro & Canon del Agua Co.*, 4 N.M. 405, 17 P. 337 (1888).

[90]Poldervaart, *supra* note 2 at 144.

[91]Keleher, *supra* note 27 at 208, n.54.

[92]*See, e.g.*, the leading case of *Rio Arriba Land & Cattle Co. v. United States*, 167 U.S. 298 (1897). *See also* Ebright, *The San Joaquin Grant: Who Owns the Common Lands? A Historical Legal Puzzle*, 57 N.M. Hist. Rev. 5 (1982).

[93]*Ellis v. Newbrough*, 6 N.M. 181, 27 P. 490 (1891). For accounts of the Shalam community, see Anderson, *supra* note 1 at 511-18; Priestley, "Shalam . . . 'Land of Children,'" in *This is New Mexico* 44 (G. Fitzpatrick rev. & enl. ed. 1962).

[94]Poldervaart, *supra* note 2 at 157.

[95]Albert B. Fall, assigned to the Third Judicial District, served for only two years. By nature too much of a trial lawyer to enjoy the judicial function, he resigned in January 1895 to return to the practice and the hurly-burly of politics. His judicial service was a minor interlude in a career that soared to the heights and ended in the lowest depths. He came to New Mexico from Kentucky in 1881 and quickly became a political leader, first as a Democrat, then after the election of 1900, as a Republican. He was one of the state's two first United States senators. In 1921 he became secretary of the interior in the Harding administration. There he became involved in an oil lease scandal that shook the nation. After years of legal battling, he was convicted of bribery. Seventy years old and broken in health, he served a year in prison—the first American cabinet officer so punished for a crime committed while in office. He died in 1944 in near poverty. Stratton, "New Mexico Machiavellian: The Story of Albert Bacon Fall," 7 *Montana: The Magazine of Western History* 12 (1957).

[96]Needham C. Collier was born in Georgia and had served in the Confederate army. He practiced law in Georgia for fourteen years before coming to New Mexico in 1885. He served as judge of the Second Judicial District from 1893 to 1898.

[97]Napoleon B. Laughlin, although born in Illinois, had also served in the Confederate army. At age twenty-three, he was unable to read or write; but he put himself through the University of Missouri, came to New Mexico in 1879, and practiced for fifteen years before being appointed to the bench. He served from 1894 to 1898.

[98]Humphrey B. Hamilton, judge from 1895 to 1898, was regarded as having a broad knowledge of legal principles; only one of his decisions was ever reversed. He had been born and brought up in Illinois and had practiced for thirteen years in Missouri and ten more in Socorro, New Mexico, before being appointed to the bench. He served ably and impartially. Upon expiration of his term, he returned to private practice. He died in El Paso, Texas, on June 29, 1903.

[99]*Santa Fe New Mexican*, July 30, 1894.

[100]Accounts differ as to whether the appointee's name was Jose Ortiz y Baca or Silvestre Gallegos. Compare Westphall, *supra* note 52 at 217, with Poldervaart, *supra* note 2 at 155.

[101]Poldervaart, *supra* note 2 at 156.

[102]Westphall, *supra* note 52 at 218.

[103]*Id.* at 227.

[104]*Id.* at 228-29.

[105]*Id.* at 229.

[106]Poldervaart, *supra* note 2 at 159; Westphall, *supra* note 52 at 220-26.

[107]Westphall, *supra* note 52 at 263-64.

[108]*Id.*

[109]*Borrego v. Territory,* 8 N.M. 446, 46 P. 349 (1896).

[110]*Gonzales v. Cunningham,* 164 U.S. 612 (1896).

[111]Westphall, *supra* note 52 at 240 ff.

[112]*Id.* at 245.

[113]*Id.* at 243-45.

[114]*Id.* at 259.

[115]*In re Catron,* 8 N.M. 253, 43 P. 724 (1895).

[116]Westphall, *supra* note 52 at 246-47.

[117]*In re Hughes,* 8 N.M. 225, 43 P. 692 (1895).

[118]Poldervaart, *supra* note 2 at 172.

[119]Westphall, *supra* note 52 at 278-79.

[120]*United States v. Rio Grande Dam & Irrigation Co.,* 9 N.M. 292, 301, 51 P. 674 (1898) (hereinafter *Rio Grande Dam*).

[121]*Rio Grande Dam,* 174 U.S. 690 (1899).

[122]*Rio Grande Dam,* 10 N.M. 617, 65 P. 276 (1900).

[123]*Rio Grande Dam,* 184 U.S. 415 (1902).

[124]*Rio Grande Dam,* 13 N.M. 386 (1906).

[125]*Rio Grande Dam,* 215 U.S. 266 (1909).

[126]Watson, *Frank Wilson Parker,* 7 N.M. Hist. Rev. 377 (1932).

[127]Keleher, *supra* note 88 at 252.

[128]*Id.* at 253-55.

[129]*Id.* at 256-57.

[130]*Id.* at 257.

[131]*Id.* at 258.

[132]*Id.* at 258-62.

[133]*Id.* at 262-66.

[134]*Id.* at 267-68.

[135]*Id.* at 275-76. For fuller accounts of the trial, *see id.* at 211-39; E. Fergusson, *Murder and Mystery in New Mexico* 73 *et seq.* (1948).

[136]Poldervaart, *supra* note 2 at 181-82.

[137]*Id.*

[138]*Territory v. Ketchum,* 10 N.M. 718, 724, 65 P. 169, 171 (1901).

[139]Poldervaart, *supra* note 2 at 183.

[140]*Territory v. McGinnis,* 10 N.M. 269, 61 P. 208 (1900).

[141]*Territory v. Price,* 14 N.M. 262, 91 P. 733 (1907). *See* Poldervaart, *supra* note 2 at 183-84.

[142]A.T. Hannett, *Sagebrush Lawyer* 9-10 (1964).

[143]*Territory v. Clark,* 13 N.M. 59, 79 P. 708 (1905); 15 N.M. 35, 99 P. 697 (1909); Poldervaart, *supra* note 2 at 185-86.

[144]*Sandoval v. County Commissioners,* 13 N.M. 537, 86 P. 427 (1906); *Hubbell v. County Commissioners,* 13 N.M. 546, 86 P. 430 (1906).

[145]*Territory v. Newhall,* 15 N.M. 141, 103 P. 982 (1909).

[146]*Territory ex rel. Hubbell v. Armijo,* 14 N.M. 205, 89 P. 269 (1907). Governor Otero, in the story of his governorship, implies that his power to remove was upheld. Otero, *My Nine Years as Governor of the Territory of New Mexico, 1897-1906,* 240-45 (1940).

[147]*Territory ex rel. Sandoval v. Albright,* 12 N.M. 293, 78 P. 204 (1904); *Albright v. Territory ex rel. Sandoval,* 13 N.M. 64, 79 P. 719 (1905); *Albright v. Sandoval,* 200 U.S. 9 (1908); *Sandoval v. Albright,* 14 N.M. 434, 94 P. 947 (1908).

[148]*Robinson v. Palatine Ins. Co.,* 11 N.M. 162, 173, 66 P. 535, 536 (1901).

[149]*Douthitt v. Bailey,* 14 N.M. 530, 532, 99 P. 342, 343 (1908).

[150]*Santa Fe New Mexican,* Aug. 16, 1910.

[151]C.C. Modrall, *Courtroom Humor and a Selection of New Mexico Profiles* 19 (1974).

[152]14 N.M. 1, 88 P. 1128 (1907).

[153]*Id.* at 1128.

[154]*United States v. Joseph,* 94 U.S. 614 (1876).

[155]Act of June 20, 1910, § 2, 36 Stat. 557, 560.

[156]*United States v. Sandoval,* 231 U.S. 28 (1913), *overruling United States v. Joseph,* 94 U.S. 614 (1876); *United States v. Candelaria,* 271 U.S. 432 (1926); *United States v. Chavez,* 290 U.S. 357 (1933).

[157]M. Simmons, *New Mexico: A Bicentennial History* 168-175 (1977).

[158]Pueblo Lands Act of June 7, 1924, 43 Stat. 636.

[159]*Territory v. Delinquent Tax List,* 123 N.M. 139, 76 P. 307 (1904).

[160]Act of March 3, 1905, 33 Stat. 1048, 1069.

[161]After leaving the court, McFie opened a law office in Gallup. In the trial of one case he abused opposing counsel, A.T. Hannett, charging him with using "ambulance chasers" to drum up business. Hannett, a former governor, relates in his memoirs that he replied by shaking his finger under McFie's nose and saying, "You bald-headed old buzzard, you served the corporations far more ably on the bench than you ever will at the bar." Objection was overruled, the judge saying, "Well, he asked for it." Hannett, *supra* note 142 at 52-53.

[162]*Stoneroad v. Beck,* 16 N.M. 754, 774, 120 P. 898, 906 (1912).

[163]*Jones v. St. Louis Land & Cattle Co.,* 232 U.S. 355, 361 (1914).

[164]Modrall, *supra* note 151 at 23.

[165]*Id.* at 26.

[166]*Id.* at 24.

[167]*Id.* at 27.

[168]*Id.*

[169]Crichton, *supra* note 57.

[170]Hannett, *supra* note 142 at 36.

[171]Act of June 7, 1924, 43 Stat. 642.

[172]A.K. Montgomery, *Proceedings of the Annual Judicial Conference: Tenth Circuit* 5, 13 (1964).

[173]Act of Feb. 10, 1954, § 20(b) (1), 68 Stat. 10.

[174]Act of May 19, 1961, 75 Stat. 81.

[175]Until the latter half of the twentieth century, indigent defendants were represented by court-appointed counsel. Accepting such appointments, without compensation, was deemed part of a lawyer's professional obligation. In the New Mexico District Court, newly admitted lawyers were summoned to be in court every Friday morning, to be appointed to represent indigents. Indigent defendants were thus represented by lawyers who were least experienced, and least able to afford donating such service.

[176]New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976).