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Black-Robed Justice in New Mexico

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BLACK-ROBED JUSTICE IN NEW MEXICO, 1846-1912

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CHAPTER XVIII

WHEN WOLVES' HEADS HUNG

As the railroads nosed deeper and deeper into the Territory, train robberies became an increasing menace throughout New Mexico. Among the most treacherous of the frontier outlaws was a gang under the leadership of Thomas (Black Jack) Ketchum, alias George Stevens, and Ezra Lay, commonly known under the alias of William H. McGinnis. Sometimes they waylaid the train en masse, sometimes they undertook these robberies singlehanded. But, like most terrorists, they eventually met their doom.

On the dark night of August 16, 1899, the No. 1 passenger train on the Colorado and Southern Railway, after a seven or eight-minute stop at Folsom in Union County, New Mexico, was chugging its way toward Clayton on the Trinidad to Texline run. The train neared what was known as Robbers' Cut, so called because several daring train robberies had been staged at that point. A short way past Folsom the train's engineer, Joseph H. Kirchgrabber, felt an icy muzzle of a six-shooter gradually being poked under his arm from the rear. As he turned around the engineer saw a swarthy-faced unmasked figure outlined in the dark night sky standing in the gangway between the engine cab and the tank. "Keep on going," warned the menacing voice of a hold-up man, "to the point of the last hold-up. I'll tell you when to stop the train."

Eight long minutes the cold six-shooter rubbed against the engineer's ribs as the train rolled on, then the order came to halt the train and to do it quick. The train stopped, the hold-up figure marched the engineer to the baggage car and ordered him to uncouple the engine with the baggage car, which carried the valuable Wells Fargo express, from the rest of the train so the express car could be run farther up the line.

Ira Bartlett, U. S. government mail clerk, had finished sorting the Folsom mail that night in quick order and had laid himself down to rest in the mail car immediately behind the express and baggage car. Suddenly he felt the train stop dead and awakened with a start. Thinking the train had arrived at Clayton he grabbed a mail bag which was to be dropped off, headed for the open car door, and stuck out his head. He saw two figures standing beside the train in the dark. "Take your damned head in or I will shoot it off," one of the figures thundered and almost simultaneously a shot shattered Bartlett's jaw.

F. E. Harrington, the conductor, ran for his shotgun in the combination car farther back, then hurried forward to the mail car. As he did he saw four men coming from the direction of the locomotive. One of them yelled, gun in hand, "I am going to shoot to kill now."

Harrington heard the engineer's reply, "Well now, partner, don't be in a hurry, we can't do these things all at once" as Kirchgrabber struggled with the lever that parts the drawheads. The train had stopped on a slight curve and the couplings would not come undone. Harrington fired on the would-be killer who almost instantaneously answered fire hitting Harrington in the left arm. The hold-up man eased away from the side of the car and was seen no more.

Harrington reached the engine and whistled for the fireman to start up the train. But the water had left the boiler and it was necessary to build up steam; in trying to uncouple the air escaped and the brakes were stuck, so air had to be pumped up. A further expected attack did not materialize and the train finally proceeded unmolested.

Early the next morning as a freight was going from Texline to Trinidad and passed the scene, Brakeman John W. Mercer on top the engine cab, while looking out for possible signs of outlaws, saw someone wave a hat as though to attract attention. The engineer stopped the train. Mercer and the engineer hurried to the man whom they found sitting on his knees with a Winchester and a six-shooter underneath him. The man was Black Jack Ketchum. His right

arm had been shot to pieces, the front of his body caked with dirty blood. Too weak to walk, Black Jack was carried on a cot into the train and taken to Folsom where he was turned over to the law.

Dynamite enough to "blow a safe to atoms" was later found underneath a cattle guard where Black Jack had hidden it for blasting open the two safes in the express car. Nearby was his horse, saddled and pack arranged, in readiness for a quick get-away with the loot.

Chief Justice William J. Mills, who had been named by President William McKinley as successor to Colonel Smith, presided at the criminal trial of Black Jack as judge of the Fourth judicial district soon after his appointment. Trial was had at the regular September, 1900, term of the court in Union county. Prosecution proceeded under provisions of Compiled Laws of 1897, Sec. 1151, which read as follows:

> If any person or persons shall willfully and maliciously make any assault upon any railroad train, railroad cars, or railroad locomotive within this Territory, for the purpose and with the intent to commit murder, robbery, or any other felony upon or against any passenger on said train or cars, or upon or against any engineer, conductor, fireman, brakeman, or any officer or employee connected with said locomotive, train or cars, or upon or against any express messenger, or mail agent on said train, or in any of the cars thereof, on conviction thereof shall be deemed guilty of felony and shall suffer the punishment of death.

The evidence presented at the trial proved extremely damaging and incriminating. The jury deliberated only a few minutes before they returned a verdict of guilty. Black Jack exhibited no emotion when the verdict was read. When Judge Mills put the usual inquiry whether he cared to say anything, Black Jack calmly and promptly replied, "I'd like to shave the district attorney."

Judge Mills' sentence provided that

> on the fifth day of October, A. D., 1900, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon of said day, in an enclosure to be erected by the sheriff on the courthouse grounds in the town of Clayton, county seat of Union county, Territory of New Mexico, you be there hanged by the neck until you are dead.

Defendant's attorneys William B. Bunker and John R. Guyer appealed to the Supreme Court. The record being remarkably clean they relied upon the single question whether the death penalty, as applied to this offense and prescribed by the statute, constituted a cruel and unusual punishment within the prohibition of the eighth amendment to the Constitution of the United States.

Justice Frank W. Parker, writing the opinion for the court, concluded that the interpretation of the world "cruel" sought by the defense was untenable. "Punishments," he wrote,

> are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word, as used in the Constitution. It implies there something inhuman, and barbarous, something more than the extinguishment of life.

In fact, the judge pointed out, this sort of punishment was very fitting and proper for the crime committed. Said he:

> It is hardly necessary to recall the incidents attending the ordinary train robbery, which are a matter of common history, to assure everyone that the punishment prescribed by this statute is a most salutary provision and eminently suited to the offense which it is designed to meet. Trains are robbed by armed bands of desperate men, determined upon the accomplishment of their purpose, and nothing will prevent the consummation of their design, not even the necessity to take human life. They commence their operations by over-powering the engineer and fireman. They run the train to some suitable locality. They prevent the interference of any person on the train by intimidation or by the use of deadly weapons and go so far as to take human life in so preventing that interference. They prevent any person from leaving the train for the purpose of placing danger signals upon the track to prevent collisions with other trains, thus wilfully and deliberately endangering the life of every passenger on board. If the express messenger or train crew resist their attack upon the cars, they promptly kill them. In this and many other ways they display their utter disregard of human life and property, and show that they are outlaws of the most desperate and dangerous character.[1]

Many attempts to obtain executive clemency were made after the Supreme Court upheld the conviction. Efforts to save his life went even so far as to include the sending of

1. *Territory v. Ketchum*, 10 N. M. 718, at p. 724.

a spurious telegram to stay the execution. Nevertheless, justice was done, and Black Jack eventually hanged.

The execution of Black Jack was a well attended ceremony. Trinidad C. de Baca, who witnessed the hanging, reports that as the trap was sprung the sharpness of the noose completely severed Black Jack's head from the rest of the body. The body crumpled to the floor beneath and the head strangely vanished from view. The executioners excitedly looked around for the missing pate. Somehow it had rolled underneath the body where it was found upon removal of the corpse.

McGinnis was tried before Judge Mills at the 1899 term of the court in Colfax county at Raton. He was indicted for killing Sheriff Edward Farr and H. N. Love, who were members of a posse seeking to break up a fight in Turkey Canyon. The evidence in this case was largely circumstantial, and the question of whether much of it was properly admitted at the trial was bitterly contested. However, Judge Mills, apparently convinced of the defendant's guilt, permitted it to go in. McGinnis was convicted of second degree murder after the jury had deliberated three hours. Sentence of the court was the penitentiary for life. However, because of McGinnis' exemplary conduct there, Governor Otero ultimately commuted the sentence to ten years upon recommendation of penitentiary authorities.

Then there was the murder case of Elmer L. Price[2] who, while traveling on a train, proceeded to molest a woman passenger. When Frank B. Curtis, the conductor on the train, interceded in behalf of the lady, Price put an end to him by shoving him against the side of the car and firing three revolver loads at point blank range into his body. Price was convicted of second degree murder and the case was appealed when motion for a new trial was denied.

It so happened that a regular term of court opened two days after the killing and Price was indicted April 4, put on trial April 7, and convicted on April 13. The first three assignments of errors were based on a claim that Price had

2. *Territory v. Price*, 14 N. M. 262, 91 Pac. 733.

been forced to trial without adequate time for preparation of his defense by counsel and for procuring witnesses. Judge Abbott in overruling these grounds of complaint pointed out that there was no denial that Price killed Curtis, that the defense was justifiable homicide on ground of self defense and that, since the law on this score is simple, more time could have been needed only to locate witnesses, but it appeared clearly that the authorities had brought in all the passengers on the train who saw or heard the shooting. Under these circumstances, Judge Abbott decided, the best possible time for trial had been chosen and the trial judge was to be commended rather than censured for his prompt disposal of the case.

In addition to the railroad cases other sensational cases of a criminal nature occupied the courts during this period. On April 3, 1905, Antonia Carrillo de Mirabal was brutally murdered. Rosario Emilio was indicted in connection with the crime eight days later. Trial was had and a verdict of guilty of first degree murder returned on May 3, 1905, one month to the day after the murder. Judge Edward A. Mann, before whom the trial was held, pronounced the death penalty on May 5. Defense attorneys stayed the date for an early execution by appeal. As error they set out the fact that they had sought change of venue on account of local prejudice, but that the court had overruled them because it found that four witnesses whose affidavits had been produced by the defense to establish prejudice were not disinterested parties. Other technical errors were also claimed.

Throughout the trial Emilio consistently professed innocence of the crime and swore that the victim had taken her own life. He admitted he was present as an interested spectator, and testified with surprising clarity to the procedure which the lady had followed in carrying out her supposed act of self-destruction. Witnesses, however, put on the stand by the prosecution completely knocked out the fantastic suicide version advanced by the defendant.

On appeal the Supreme Court, speaking through Judge Parker, held that the irregularities claimed by the defendant were immaterial and that denial of the motion for change

of venue would not be disturbed because opportunity had been afforded to examine the compurgators as to interest and knowledge.

Then came the case of Jap Clark,[3] employed as a cowboy on the Block ranch in Torrance county and who had been having difficulty with the law on charges of larceny and other infractions. Clark detested Deputy Sheriff James M. Chase of Torrance county.

On the evening of April 4, 1905, Clark was in an ugly mood as he with W. A. McKean entered Jim Davidson's saloon at Torrance. J. C. (Charley) Gilbert was standing at the bar as they came in, and Clark, thinking he had a bone to pick with Charley, proceeded forthwith by cracking a six-shooter over Gilbert's head, pounding the victim with his fists after a by-stander took the gun away from him, and kicking Gilbert with his feet. McFarland then succeeded in pulling the two apart. Gilbert went home and Clark and McKean headed toward the railroad depot.

Chase was on the way to his room when he heard the sound of rapidly approaching feet. As he turned around he saw Clark and McKean drawing towards him. Clark and McKean promptly made some remarks, shooting followed and Chase was killed. Clark and McKean were jointly indicted for murdering the official. After trial the jury found Clark guilty but set McKean free. There had been a question whether Clark or McKean had fired the shot which killed the deputy who had two bullet holes through his body.

In his assignment of error to the Supreme Court defense attorney A. B. Renehan questioned the legality of the court which tried Clark and McKean at Estancia. This novel question arose from the fact that when Torrance county was organized pursuant to Laws of 1903, Chap. 70, the county seat was given to Progreso by the act. Actually, Progreso was little more than just a name for there was no settlement at that point. The 1905 legislature changed the county seat to Estancia, but this Renehan contended was in violation of the so-called Springer act passed by Congress and approved

3. *Territory v. Clark*, 13 N. M. 59, 79 Pac. 708, 15 N. M. 35, 99 Pac. 697.

July 30, 1886, which provided that Territorial legislatures could not pass local or special laws locating or changing county seats. By an act of Congress approved July 19, 1888, the Springer act had been modified to the extent that it should not be construed as prohibiting the establishment by the Territorial legislatures of new counties and the creation of county seats thereof.

It was Mr. Renehan's contention that since Clark had not been tried at Progreso, he had not been legally tried. This was a serious question, but Judge Abbott, unwilling to set a criminal free, found a way out on the basis that the validity of the 1905 act should be attacked in a direct proceeding, rather than in an ordinary case in which it was brought collaterally before the court. He further found authority in an Illinois and in a Colorado decision to the effect that a valid session of a court could be held at a *de facto* county seat.

Other grounds of error advanced were reviewed and rejected; the trial court's sentence to seven years in the penitentiary was affirmed. Later Clark was let out on parole, but he soon became involved in another affray in which he beat up a man, thereby securing his re-incarceration.

Not all the interesting railroad cases of this period were of a criminal nature. To encourage building of railroad lines Congress during the last century had made the transportation companies various concessions. Occasionally, however, these grants led to abuse or caused controversy in other ways. Under one Congressional act the Denver and Rio Grande Railway Company was given the right to take stone, timber, earth, water and other material required for construction and repair, from the public domain adjacent to its roads, under certain specified conditions. Several controversies grew out of this particular act, one of which reached the New Mexico Supreme Court in August, 1898.

The Denver and Rio Grande Railroad was being sued for $96,000 for conversion of logs, lumber and timber manufactured from trees cut from public lands in Rio Arriba county. The lumber had been cut for and on behalf of the railroad by the New Mexico Lumber Company and accord-

ing to the evidence it appeared that a great deal more had been taken than was actually needed. The district court jury had found the railroad company liable for converting the excess lumber and assessed damages at $6,282.

Judge Mills in speaking for the Supreme Court said that the burden of proving that there had been a wrongful conversion rested with the United States, inasmuch as the railroad had the right to enter the public lands to cut the timber. On this ground, because an instruction had been given which placed the burden on the railroad to prove that it needed the lumber, the lower court was reversed and a new trial granted. Attorneys for the United States, however, preferred to appeal the decision to the United States Supreme Court which, on reviewing the facts, in turn reversed the New Mexico Supreme Court. The United States tribunal found that a burden rested on the railroad to show that cutting of the timber was for a proper purpose, and that this burden could not be shifted upon the United States by employing an agent to do the work.

In a somewhat earlier Supreme Court decision,[4] it had been decided that the railroad was restricted by the meaning of the word "adjacent" to cutting its timber from the public domain located within the townships which immediately adjoined the right of way. This ruling of the New Mexico court, however, was appealed and in a decision by the Eighth Circuit Court of Appeals, reversed on December 13, 1897.[5] The latter court held that use of the word "adjacent" did not restrict the company to the townships through which the road ran or even to those adjoining them. Cutting as far as twenty-five miles from the right-of-way, it said, was not in itself illegal, suggesting that it was for the jury to determine, under proper instructions, of course, whether a particular cutting was or was not adjacent. A proper test, the court thought, would be to ask whether the timber was within reasonable hauling distance by wagons.

Questions involving the right to the incumbency of various Territorial and county offices, and to the fees and

4. *United States v. Bacheldor*, 9 N. M. 15, 48 Pac. 310.
5. *Ibid.*, 83 Fed. 986.

emoluments connected with them occupied a considerable share of the Supreme Court's attention during the twelve years Judge Mills was on the bench.

Several of these cases were controversies in which Frank A. Hubbell, treasurer and ex-officio collector, Alejandro Sandoval, assessor, and Thomas S. Hubbell, sheriff, of Bernalillo county were involved. Two cases reached the Supreme Court early in 1906. Frank Hubbell and Sandoval had been withholding a four per cent commission on revenues derived from gaming and liquor licenses collected under Territorial law. Action was instituted against them in each case by and on behalf of the Territory and the county of Bernalillo by District Attorney Frank W. Clancy, who contended that the officials were not entitled to withhold the commissions after passage of a law in 1901 prescribing the duties of sheriffs in regard to liquor and gaming licenses.[5a]

The county treasurer under earlier legislation had been entitled to withhold a four per cent commission, but the 1901 law made sheriffs the actual collectors of the license fees and gave them a four per cent commission as compensation for their services. The district court had concluded that under this state of the law the county treasurer now was a mere custodian of the funds collected by the sheriff and was not entitled to any compensation.

In the other case the only question was whether or not the county assessor was entitled to a four per cent commission on these same gaming and liquor licenses. Under the old statutes it had been the legislative policy to make the pay of assessors contingent upon their diligence in placing taxable property on the assessment rolls, the law fixing their compensation by allowing them four per cent on the amount of taxes collected on their assessments. In the case of gaming and liquor licenses the county assessors were charged with the duty of certifying a list of all persons subject to the payment of gaming and liquor license fees, and their listing depended solely upon the diligence of the assessors in preparing these lists. The latter were then placed in the hands

5a. Laws of New Mexico, 1901, Chap. 19 (Albuquerque, 1901), p. 46.

of the collectors and were the basis of the tax and the collector's authority for collecting the fees.

The radical change made by the legislature in 1901 left to the assessors only a clerical duty to perform for which they were, perhaps, allowed an honorarium of fifty cents for each license under the terms of Chapter 108, Laws of 1901. Such, in substance, was the conclusion of the Supreme Court in its opinion written by Mr. Justice Mann. The Court upheld the district court in denying the commissions to both the treasurer and the assessor.

In another suit, growing from confusion and misinterpretation of the commission statutes, the Territory and the county of Bernalillo sought to recover $2,265.20 in commissions which had been retained by Charles K. Newhall during 1901 and 1902, while serving as treasurer of the county, on $56,630 worth of saloon and gaming licenses that had been turned over to him by the sheriff and ex-officio collector. Retention of the commission had been based upon a ruling of the Solicitor General of the Territory dated May 2, 1901, which expressed the view that both the sheriff and the treasurer were entitled to keep out a four per cent commission. Allowance of the commission, furthermore, had been approved by the Board of County Commissioners in a subsequent audit of Newhall's books. The lower court concluded that under these circumstances the erstwhile treasurer was entitled to keep the commission money. Chief Justice Mills upheld Judge Ira Abbott's decision in the trial court, saying:

> In the case at bar we can come to no other conclusion but that the four per cent commission on the gaming and liquor licenses, were paid to Newhall under a mistake of law. In truth it is not contended that the payments were made on account of any fraud, duress or mistake of fact, and under the law . . . such payments having been made under a mistake of law, we are of the opinion that the court below very properly instructed the jury to return a verdict in favor of the defendants.[6]

Late in December, 1906, the Hubbells appeared before the Supreme Court protesting their removal from office by

6. *Territory v. Newhall*, 15 N. M. 141. at p. 149.

Governor Otero. Thomas S. Hubbell had been replaced as county sheriff by Perfecto Armijo and Frank A. Hubbell as county treasurer and ex officio collector by Justo R. Armijo on August 21, 1905, for alleged malfeasance in office and upon other charges.

After their ouster the Hubbells, through their attorney, had filed a petition for a writ of *quo warranto* in the second judicial district before Judge Abbott. The respondents demurred to the petition and the court, in order to speed the case to the Supreme Court, sustained the demurrer *pro forma* (as a matter of form) by agreement of counsel, in order that final decision might be reached before the terms of the incumbents in the two offices had expired. The question presented by both cases was whether or not Governor Otero had legal power to remove the appellants from their respective offices to which they had been elected by the people. After a lengthy consideration of the question, the court said:

> We conclude . . . that the power to remove from office a lawfully elected sheriff in this Territory is not by the Organic Act vested in the governor, and . . . until otherwise provided by Congress, the legislative assembly has the right by appropriate legislation to determine the method of removal.[7]

Sandoval, who had been replaced by George F. Albright as Bernalillo county assessor under action of the County Commissioners, went to court and obtained a judgment of ouster against Albright. Then he was compelled to sue to recover $6,184.16 which he claimed as due him as fees and emoluments of the office that were collected by Albright between March 27, 1903, and November 19, 1904. A verdict of $5,360.53 was returned for Sandoval. The Supreme Court upheld the decision but expressed some impatience with the constant wrangling which had brought about repeated appeals. Said the court:

> This is one of the fragments of a litigation which has been before this court in one form or another at almost every term since 1904. The case at bar presents no features that have not been already fully considered and decided by this court. The power of the county commis-

7. *Territory ex rel. Hubbell v. P. Armijo*, 14 N. M. 205, at p. 226.

sioners to appoint Albright to the office of assessor was decided adversely to him in *Territory v. Albright*, 12 N. M. 293, 78 Pac. 204. The eligibility of Sandoval to hold the office was decided favorably to Sandoval in the same case. The right of Sandoval, under these conditions, to recover the fees of the office, was settled in his favor, by *Sandoval v. Albright*, 13 N. M. 64.[8]

During the closing months of Chief Justice Smith's tenure of office, an interesting and extremely important litigation had been started which remained in the courts of the Territory and of the nation for many years. The case involved the use of waters of the Rio Grande and was impressed with international complications. The problem first appeared before the Supreme Court of New Mexico in 1897. During this initial appearance the court was asked to answer what seemed at first blush to be a comparatively simple question of fact; namely, "Is the Rio Grande River navigable in New Mexico?"

The Rio Grande Dam and Irrigation Company was about to construct a dam at a point called "Elephant Butte," the object of which was to take water from the river and to store it in reservoirs for irrigation purposes. Federal authorities, hearing of these proposed plans of the Company, sought to enjoin construction of the dam by invoking the provisions of an act of Congress requiring approval from the Secretary of War in cases where rivers are navigable, contending in this case that the proposed dam would obstruct navigation of the river.

The New Mexico Supreme Court took judicial notice of what the Rio Grande is like along its course through the Territory, read some geological reports on its own, and after reviewing the evidence presented concluded that "it is perfectly clear that the Rio Grande above El Paso has never been used as a navigable stream for commercial intercourse in any manner whatever, and that it is not now capable of being so used.[9]

The case was appealed to the United States Supreme Court which looked at the controversy in a new light, and

8. *Sandoval v. Albright*, 14 N. M. 434, at pp. 435-436.
9. *United States v. Dam & Irrigation Co.*, 9 N. M., 292, at p. 301.

after it had rendered its opinion, the situation must have appeared about as clear to the Territorial Supreme Court as the waters of the river during a heavy spring run-off. The nation's highest court ordered the cause remanded to the district court with instructions to set aside the decree of dismissal there, and to order an inquiry into the question of whether the intended acts of the Rio Grande Dam and Irrigation Company in constructing the dam and appropriating the waters for irrigation would substantially diminish navigability of the stream within the limits of its then present navigability many miles below the New Mexico boundary, and if it was found that it would diminish such navigability, to enter a decree restraining those acts to the exact extent to which they would so diminish navigability.[10]

Judge Parker, sitting as the trial judge when the case came back to the district court, had an investigation made in accordance with the mandate and, based thereon, decreed in favor of the irrigation company and authorized it to go ahead with its damming. Again, however, the case was appealed to the New Mexico Supreme Court which sustained Judge Parker in an opinion written by Chief Justice Mills.[11]

Opposition of Federal authorities to construction of the dam appears to have originated in protests from Mexican authorities, and also from the fact that the United States was about to conclude a treaty with Mexico giving the latter liberal privileges in the use of the waters of the Rio Grande. In reviewing the history of the case and commenting upon the decision written by Judge Mills, the Santa Fe *New Mexican* on August 24, 1900, declared:

> This decision stands as another defeat for the national government in its efforts to infringe upon the rights which the people of New Mexico and Colorado have to the use of the waters of the Rio Grande and its tributaries, and to pander the interests of a few political schemers and town lot boomers owning lands on the international boundary line at El Paso and Juarez, Mexico. The Supreme Court in passing upon the case sent it back to the third judicial district of New Mexico for further investigation on the point of whether the impound-

10. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 43 Law Ed. 1136, 19 Sup. Ct. 770.

11. *Ibid.*, 10 N. M. 617, 65 Pac. 276.

ing of waters at the Elephant Butte site would serve naturally to decrease the flow in the Rio Grande at that point where the stream was admitted to be 'navigable'—800 miles below El Paso.

A second appeal was perfected to the United States Supreme Court and for the second time the New Mexico Supreme Court was reversed, this time upon the ground that the United States had not been allowed sufficient time to prepare and present its case properly.[12] The cause was once more remanded, therefore, to the district court.

When the case was heard in the district court for the third time, Judge Parker held against the Company because it had failed to answer a supplemental complaint (filed by the United States over Company objections) within 20 days from the date of filing as required by law. Appeal was taken to the Territorial Supreme Court on assignment of many errors. The appeal challenged the right of the government to file the supplemental complaint. The appellate tribunal found that Judge Parker had acted with proper discretion when he permitted filing of this additional pleading.[13] Since it pointed out that the Company had not completed its dam within five years as required by an act of Congress for such construction, thereby forfeiting its rights, the supplemental complaint set out nothing which was inconsistent with the original cause of action, the court said. On appeal to the United States Supreme Court the New Mexico appellate court was upheld, twelve years after the case originally was filed in the Territorial district court.[14] It is interesting to observe that during all this time the nation's supreme tribunal never reviewed the case on its actual merits.

Perhaps the most disagreeable task that faces the Supreme Court from time to time is that of disciplining members of the bar whose conduct reflects upon the integrity of the profession. Thus it was that in January, 1907, the New Mexico Bar Association's committee on grievances presented papers charging a youthful attorney, W. J. Hittson, with

12. *United States v. Rio Grande Dam & Irrigation Co.*, 184 U. S. 416, 46 L. Ed. 619, 22 Sup. Ct. 428.

13. *Ibid.*, 13 N. M. 386, 85 P. 393.

14. *Ibid.*, 215 U. S. 266, 54 L. Ed. 190, 30 Sup. Ct. 97.

unprofessional conduct, allegedly consisting of soliciting business in an unethical manner and in making claims of having peculiar influences which enabled him to secure acquittal in criminal cases.

According to the evidence presented to the court, Hittson requested in a letter that a client, Cabe Adams, who was in jail charged with murder, sign notes to cover his legal services. Hittson told his client that he had a "pretty hard case," but that if Adams would follow Hittson's directions, raise the money or sign the notes, he (Hittson) would bring him through. Adams did not raise the money and did not sign the notes, but employed other counsel, and Hittson, learning of this, wrote Adams again, saying: "If you go on trial without me in your case, I will bet you, you hang. Will bet you the best suit of clothes made. You had better get busy."

The court's decision in the matter was long postponed but finally, in January, 1909, gave its opinion. Acknowledging that the last letter especially was improper and unprofessional, and recognizing too the difficult struggle which a young attorney just starting out in the practice of law frequently faces, it declined to disbar him, but suspended him from practice for a two-year period. Writing the court's opinion Judge Abbott said:

> In view of the respondent's youth and in the hope that he will profit by this experience to adopt and conform to a higher standard of professional conduct in the future, we refrain from disbarring him, but suspend him from practice in this court and in the several district courts of the Territory for the period of two years.[15]

Chief Justice Mills was a thorough believer in adequate but at the same time short briefs by attorneys on appeal. Improper briefing appears to have given him considerable grief. When appellee's counsel in *Douthitt v. Bailey* failed to file a brief altogether he wrote:

> We regret that the attorneys for the appellee did not file a brief in this case, as it would have saved this court a considerable amount of labor in looking up the law which is applicable to it. We have, however, endeavored to ascertain the law of the case, and, if our opinion

15. *In re Hittson*, 15 N. M. 6, at p. 9.

is not as exhaustive as it might be, it is owing to the lack of time which has been at our disposal.[16]

Excessive length and unnecessary padding of the briefs was frowned upon in *Robinson v. Palatine Insurance Co.*, wherein Judge Mills diplomatically observed:

> Fifty-seven grounds of error are assigned in this cause, and as is usually the case, when the assignments are so numerous, it will not be necessary to discuss them all. It will perhaps be proper for us, in view of the very many assignments, to call the attention of the members of the bar to what the Supreme Court of the United States say in regard to making so many assignments of error: 'Other errors are assigned which it is unnecessary to notice in detail. Most of them are covered by those already discussed, and some of them are so obviously frivolous as to require no discussion. It is to be regretted that defendants found it necessary to multiply their assignments to such an extent, as there is always a possibility that, in the very abundance of alleged errors, a substantial one may be lost sight of. This is a comment which courts have frequent occasion to make, and one which is too frequently disregarded by the profession.'[17]

After serving the Territory for twelve years on the bench, Judge Mills received appointment from President William Howard Taft to succeed George Curry as Governor of New Mexico. At noon on March 1, 1910, Judge Mills took the oath of office as chief executive on the steps of the capitol in the presence of thousands of people from all parts of the Territory. The oath was administered by Judge Mills' successor on the court, Chief Justice William H. Pope.

As governor, Mills served New Mexico until statehood, January 15, 1912. His term as governor was almost completely devoted to making the shift from Territory to State, a matter which overshadowed all else from 1910 until 1912. Mills retained his legal residence in East Las Vegas, where he died on December 25, 1915, a victim of pneumonia.

(To Be Continued)

16. *Douthitt v. Bailey*, 14 N. M. 530, at p. 532.
17. *Robinson v. Palatine Insurance Co.*, 11 N. M. 162, at p. 173.