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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 XV

COMBING POLITICAL HAIR

Elisha V. Long, who was serving as judge of the circuit court of Whitney county at Warsaw, Indiana, though not an applicant for the office, was selected by President Grover Cleveland to fill the vacancy occasioned by removal of Chief Justice Vincent.

As a member of the bar of Indiana before coming to New Mexico, Judge Long occupied a number of positions of honor and trust. In 1863 he was appointed district attorney for Kosciusko and Wabash counties, holding the office for three years. Governor Thomas A. Hendricks, afterward a vice president of the United States, in 1872 named Judge Long to the circuit bench of Indiana presiding over the judicial area comprising Kosciusko, Marshall and Fulton counties, with a later addition of Whitley county. After completing this term by appointment he was twice re-elected, presiding for thirteen years in all. Though Long was a Democrat in politics, his personal popularity and judicial distinction were so pronounced that he twice carried Kosciusko county and the city of Warsaw by large majorities when the district was overwhelmingly Republican.

In R. E. Twitchell's opinion Judge Long's court was in all probability the strongest, intellectually, which ever sat on the Territorial bench in New Mexico.[1] Serving with Judge Long were Associate Justice Reuben A. Reeves of Texas, Associate Justice William H. Brinker from Missouri and William F. Henderson from the State of Arkansas.

Early in 1887 Congress authorized division of the Territory of New Mexico into four judicial districts, placing upon the Territorial chief justice and the associate justices

1. *Leading facts of New Mexican history*, II, 497-498.

the responsibility for carving the three districts of the Territory into four. Under the new plan, the newly appointed additional judge, Reuben A. Reeves, was assigned to the first judicial district with headquarters at Santa Fe, thus breaking the long established precedent of having the chief justice head the first judicial district and reside in the capital. Chief Justice Long took over the newly created fourth judicial district with his headquarters at Las Vegas, where he continued to reside until his death.

Legal questions coming before the Supreme Court had increased manifold for several years and the variety of cases was quite phenomenal. The *Santa Fe New Mexican* editorialized on this subject, saying:

> In view of the limited population of New Mexico and the undeveloped state of our natural resources it is a surprising fact that our Supreme Court has to consider every term questions whose legal importance and whose magnitude, in reference to the pecuniary and proprietary interests involved, are at least equal to those which are involved in the litigation of the wealthiest and most populous states of the Union.[2]

The district court dockets had been similarly crowded. In 1886, for instance, while he was still presiding over the first judicial district, Judge Long held court eleven months, resulting of necessity in serious delay in the decision of cases appealed to the Supreme Court. This alarming situation was partially alleviated through creation of the fourth district.

Almost immediately after his arrival in New Mexico, Judge Long was faced with important political questions at solution of which he became exceptionally adept. Democratic Governor Ross upon taking office proceeded to remove all the Republican officials, but Attorney General Breeden and some other Republican officials refused to submit without a legal battle.

In January, 1886, the already familiar question of who was attorney general of New Mexico arose again, this time between Colonel Breeden and N. B. Laughlin, the latter a member of the Supreme Court some years later. Colonel

2. Dec. 16, 1887.

Breeden started to represent the Territory in the case of *Territory of New Mexico v. Kinney*,[3] when he was interrupted by Mr. Laughlin, who proceeded to address the court and claimed that he was the attorney general and not Colonel Breeden. In support of his claim he produced a commission, regular upon its face, signed by Governor Ross and dated November 15, 1885. Colonel Breeden thereupon presented his commission, also regular and formal, signed by Gov. Lionel A. Sheldon in April, 1884.

Judge Long himself wrote a separate opinion which settled the dispute in a collateral way, pointing out that the question really was not before the court as an issue legally joined since it came up in the course of another controversy properly before it.[4] Hence, said Judge Long, the court would determine the matter informally so it might proceed with the principal case, using such facts only as were then apparent and without determining finally who was the real attorney general of New Mexico.

The governor had sought to remove Colonel Breeden and had publicized his decision to do so. Since an act of congress, however, declared that the governor could appoint a new attorney general either upon death of the incumbent or upon his resignation and since Colonel Breeden appeared in person very much alive and showing no disposition whatsoever of having resigned his position, the court concluded that the political appointment of his alleged successor could not have been predicated upon either of those contingencies. On the other hand, the governor had openly announced through the press and otherwise, that he was removing Colonel Breeden and substituting Mr. Laughlin. The court concluded that it could take judicial notice of these facts as being current history of the Territory. It thereupon decided that in accordance with the earlier decision in *Territory v. Stokes*, 2 N. M. 63, Colonel Breeden's term not having expired by limitation, it would recognize his right to proceed with prosecution of the Kinney case as the *de facto*[5] attorney

3. 3 N. M. (Gild.) 656, 9 Pac. 599.

4. *See In re Claim for Recognition as Attorney General*, 3 N. M. (Gild.) 524, 9 Pac. 249.

5. In fact, but without lawful title.

general. The court thus side-stepped a forthright clash with the governor on the question of the chief executive's power of removal of the Territorial officer.

Exactly one year later, however, the same legal question came up in another political appointment wrangle. And in this case the issue was placed squarely before the court. Judge Long again wrote the opinion.

In this case Edward C. Wade had been duly appointed and confirmed as district attorney of the third judicial district on March 11, 1884. According to Mr. Wade's contention, on November 9, 1885, Singleton M. Ashenfelter came along with an illegal claim to the office, based upon a gubernatorial commission. Wade contended the commission was void because, although it had been made by the governor, the appointment had not been approved by the legislative council. Since that ill-fated day in November, Wade declared, Ashenfelter had actually excluded him (Wade) from the office. The district court listened to Wade's story and agreeing with him, adjudged him to be the lawful incumbent.

Mr. Ashenfelter predicated his right to the office upon a commission issued him on October 28, 1885, by Governor Ross. The council had not been in session since that date and hence had not had the opportunity either to confirm or to reject the appointment. The questions presented to the Supreme Court by this controversy were:

> (1) Was there a vacancy when the governor made this appointment?
>
> (2) If no vacancy existed, did the governor have the power to create one by the mere act of appointment and delivery of a commission to Ashenfelter, and thus by the same act both create and fill the vacancy?

The real question, according to the Court's interpretation, resolved itself into whether the governor had the power to remove from office one who had been appointed for a fixed and definite term. In a lengthy summary and survey of opinions by courts of other jurisdictions on the question, Judge Long wrote that such power in the governor did not exist. The opinion was based upon pure and convincing

principles of fundamental law, but it did not negate the fact that the decision was the second in two years in direct opposition to the wishes of the executive. In what appears to have been an attempt to smooth over the governor's ruffled feelings as best he could, Judge Long declared, in an eloquent exposition of human rights:

> In what has been said upon the law of this case, there has been no wish or purpose to cast the least imputation on the motives of the executive. The same presumption of good faith and honest desire to act within legal and constitutional limits are accorded to him as to either of the coordinate branches of the government, and his motives are not the subject of criticism. 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.
>
> It is a very delicate task for one department of the government to pass upon the acts of either of the others. It is, however, unavoidable, as the law has imposed upon the judiciary duties it can not and should not seek to escape, but rather to discharge them with the highest respect for the other departments, and with the single purpose to maintain only those principles of law firmly established by the weight of authority, well founded in justice, proper for the protection of human rights, and the maintenance of that system which prevails, that every one, however humble, shall be heard before he is condemned or his rights denied.[6]

Because of his stand in upholding the law against his own party, Judge Long was severely scored by party friends.

In the case of *Territory v. Thomason*,[7] an interesting language problem confronted the court, originating in a criminal trial. After the trial had been concluded and while the jury was in deliberation, it developed that about one half of the jury couldn't speak a word of English, while the other half couldn't speak or understand Spanish. All possibility of deliberation or agreement was thus cut off. In desperation the jury twice earnestly asked to be supplied with some medium of communication. Finally an officer of the court, specially provided by statute as an interpreter, was first sworn and then sent into the jury room. The de-

6. *Territory v. Ashenfelter*, 4 N. M. 93 (Columbia, Mo., 1896), pp. 147-148.
7. 4 N. M. 154, 13 Pac. 223.

fendant's attorneys now contended that sending the interpreter in with the jury, when it was considering the verdict, over the defendant's objection, was error. The law is extremely jealous, said the defendant, "of the slightest communication of any person, including even the judge, with the jury after they have retired."

The question, as Chief Justice Long pointed out in writing the opinion in the case, was a novel one peculiar to New Mexico, and one which had "not been before decided by any court," in so far as the court had been able to find in its search. Hence, the judge held, this case stood on its own peculiar facts.

Deciding the point upon general principles, the court concluded that when the defendant relies upon an alleged irregularity of the court or jury, the burden is upon him, not only to show it, but also to prove he was prejudiced thereby. The presumption is, said the court, that the interpreter was in the jury room

> not to communicate to the jury, but only to act as the medium of communication. He could not have been an embarrassment to the jury, for that body twice earnestly asked for his presence. The interpreter did not intrude himself upon the jury as a mere listener, but went by direction of the court, on the request of the whole panel. This case is not like one where, unbidden, a stranger goes into the jury room as a spy upon the deliberations, or as an unwelcome intruder. Such a person might be a restraint upon that free interchange of opinion so important to correct results. It is not in this case shown, or attempted to be proven, that the interpreter said a word, or performed an act, inimical or prejudicial to the prisoner, or that any juror was restrained in the exercise of his duty, or in the slightest influenced by the presence of the interpreter. Acting under oath and the order of the court, the presumption should be in favor of proper action by him, rather than against it. . . . If this officer of the court did or said anything prejudicial, that is a fact for the defendant to show in the court below in the first instance. [8]

Chief Justice Long held several distinctions in his able career upon the bench in New Mexico. Among these may be included that of having prepared the longest and most exhaustive opinion written in any case during Territorial days.

8. *Territory v. Thomason*, 4 N. M. 154, at pp. 167-168.

The controversy in question was that of the *United States v. the San Pedro and Cañon del Agua Company,* reported in volume 4 of the New Mexico Supreme Court reports. The case begins on page 405 of the volume in the Gildersleeve edition and extends through page 602, but two pages short of two hundred printed pages. The actual opinion of Chief Justice Long extends from page 414 to page 577, and there is an additional opinion on rehearing by Judge Long beginning on page 598 and continuing to page 602. In this case the United States sought to set aside on grounds of alleged fraud and imposition, a survey of public land which the defendant claimed he had derived through a grant from the Mexican government that had been made prior to the cession of New Mexico to the United States. The grant had been approved by the surveyor general, and it had been confirmed by act of congress.

In February, 1844, Jose Sefarin Ramírez had petitioned the then governor of the department of New Mexico for a certain tract of land described in his petition as over a league distant from the town of Real de San Francisco. In the case before the court it was averred that the north line of the grant as confirmed by the surveyor general, through the fraud and connivance of the original petitioner with the surveyor general and others, had been extended so as to include certain valuable copper mining properties. The bill then seeks to set aside the survey and to vacate the patent made under it, so far as the alleged extensions are concerned, on grounds of fraud and mistake. The court made a lengthy study of the facts and concluded that Ramirez was thoroughly familiar with the original delineation and that if it had not been correct he would certainly have complained and sought a correction of the descriptions. Accordingly, the subsequent delineation which extended the boundaries evidenced fraud because it in effect reversed the boundaries of the grant.

After what the court said was a careful weighing and consideration of the record in the case (which consisted of over seven hundred closely printed pages, with numerous

maps and plats in addition!), it held that the fraud and mistake alleged were clearly and satisfactorily proven. It also pointed out that in any event, by the laws of Spain and Mexico, mines would not be conveyed in such a grant since they were reserved to the crown or the government.

Both in the Cañon del Agua case in the Supreme Court and in the Las Vegas Grant case in the district court, Judge Long showed courage and legal knowledge. As in the Attorney General case these decisions made him some influential and bitter enemies. Several years later when the Court of Private Land Claims was about to be created, Judge Long was considered as one of the most likely persons to be considered for appointment to that body. His adversaries, however, slipped a proviso into the act stating that no resident of New Mexico or Arizona should be eligible as a judge for such a court. Leaders in Territorial affairs for some years had been active in promoting appointment of New Mexico and Arizona residents for official positions within these Territories, and this sudden reversal of policy has been generally interpreted as directed primarily at preventing Judge Long's appointment.

In 1890 the chief justice submitted his resignation and entered private practice of law at Las Vegas, where he died on September 9, 1928.

CHAPTER XVI

AN IRISHMAN ADORNS THE BENCH

Dr. John B. Newbrough, Ohio born spiritualist, had a vision while living in New York State which in 1881 impelled him to write a new Bible "by automatic control." He called it the *Oahspe* and had it published early in 1883. Andrew M. Howland, a well-to-do wool dealer in Boston saw a copy of the new book in a bookshop and became interested in the movement which it outlined, the founding and maintenance of a home for orphans and castaway babies.

Howland, in October, 1883, went to a meeting which Newbrough called in the interests of his new movement, and

thenceforth helped it along financially. Newbrough's plan "differed" from other orphan homes in that the children would be reared under a strictly religious program from the cradle amidst teachings of cooperation, brotherly love and helpfulness.

Down in Atlanta, Georgia, Jesse N. Ellis, the father of two young boys, also learned of the new movement through some of its literature. He was particularly impressed with communal features of the program, a "Utopian scheme for the amelioration of all the ills, both temporal and spiritual, to which human flesh and soul are heir." [1] According to Ellis' understanding of the plan, as outlined in the official literature, the property of the community which the "Faithists" would establish in some remote and isolated spot was to be held in common; no one individual was to have any separate title or property; the community would be conducted on principles of brotherly love, without master or mortal leader there to exercise control over the others; all members were to enjoy equally a permanent place in the society. This, Ellis decided, was the ideal life. He had gone bankrupt only a few years before and knew what it was to be left without any security in a cruel and merciless world. He, therefore, wrote Newbrough that he was ready to join the community and to consecrate his life, his labor and his worldly effects and prospects, together with those of his two sons, to the good of the program. He joined the group in July, 1884, at Pearl River, New York, some twenty-five miles from New York City, where the Faithists were "mustering in" to start their new adventure.

In *Oahspe* Newbrough had envisioned the type of location needed for the new Faithist colony and went West to find a permanent site for the movement. Through Arizona he looked, then in California, finally in New Mexico. Convinced that he had been guided in his choice by "Jehovih" from on high, Dr. Newbrough located his new Arcadia on the river Shalam (Rio Grande), 50 miles above El Paso, in the county of Doña Ana, in the valley of the Mesilla. He

1. *Ellis v. Newbrough*, 6 N. M. 181, at p. 184.

christened this new Vale of Tempe as the "Land of Shalam." Friction developed among the members and Ellis was ordered to leave the colony. He decided to seek $10,000 compensation for alleged losses. In a district court jury trial, he was awarded the sum of $1,500. The case was appealed to the Supreme Court. The opinion, handed down on August 19, 1891, stands today as a leading case on the legal doctrine of estoppel. Ellis was estopped by his own acts, the court said. It further held that there was no evidence to sustain the verdict of the jury awarding the plaintiff $1,500; that the refusal of the trial judge to set aside the verdict was all wrong; and that the judgment of the district court would have to be reversed.[2]

The opinion in the case was written by Judge Alfred A. Freeman and is probably the best mixture of facetious humor and satire ever penned by a member of New Mexico's highest tribunal.

It very nearly lost him his place upon the court. President Harrison was deeply disturbed by what he regarded as conduct improper and inconsistent with the dignity of the bench.

Serving as chief justice of the Supreme Court during this time, from 1890 to 1893, was an Irish-born jurist by the name of James O'Brien, named to the post, while practicing law in Minnesota, by President Benjamin Harrison. Judge O'Brien found a crowded docket upon his arrival in New Mexico and in the three years on the bench he personally wrote twenty majority opinions and also prepared dissenting views in five cases, in addition to presiding as judge of the fourth judicial district with headquarters at Las Vegas.

Throughout Territorial days controversies involving water rights turned up in the courts from time to time with curious twists. An interesting question of this nature was decided by the Supreme Court in July, 1891, a few weeks before the decision in *Ellis v. Newbrough,* in an opinion written by Chief Justice O'Brien.[3]

2. *Ellis v. Newbrough,* 6 N. M. 181, 27 Pac. 490.
3. *Trambley v. Luterman,* 6 N. M. 15, 27 Pac. 312.

In May, 1846, Rafael Garcia, before justice of the peace Manuel Duran, solicited permission to erect a mill on an artificial race or ditch along the Gallinas river, near Las Vegas, explaining that erection of the mill would in no way impede use of the water from the acequia for irrigation purposes. Consent was granted and in 1849 Garcia erected a grist mill, the machinery of which was propelled with the water from the ditch, which in turn was supplied from the river. A mill, such as the one Garcia built, is described by Lt. John G. Bourke as follows:

> Cottonwood log edifices, about 12 ft. square and 7 ft. high, built over the ditch to allow the water to turn a small turbine wheel. I should conjecture that in an emergency, under the stimulus of a Gov't contract, with a full complement of hands (that is to say a man smoking a cigarrito, a small boy scratching his nose, and a big dog scratching his ribs) and running full time, one of these mills could grind a bushel of wheat in a week; the ordinary output can't be over half that quantity.[4]

In 1859 Miguel Desmarais, Garcia's successor in interest, erected a new mill which he owned and worked until October, 1864, when he conveyed to Juan Francisco Pinard, who used it until May 10, 1867. Pinard sold out to Peter and Ernestine Trambley and the latter operated the mill until the summer of 1886 when George Luterman erected a wool and pelt cleaning establishment along the ditch which withdrew so much water that the Trambleys couldn't operate their mill. They brought suit against Luterman to restrain him from diverting the water from the acequia.

The controversy was first brought before a Master who concluded that the Trambleys were entitled to a restraining order from the court against Luterman enjoining him from using the water during the season of limited flow unless the water so used was returned to the ditch above the Trambleys' mill, without serious diminution in quantity. Luterman appealed. In upholding the judgment of the fourth judicial district court which had been based upon the Master's report, the Supreme Court, through Chief Justice O'Brien stated:

4. NEW MEXICO HISTORICAL REVIEW, X, 299.

The ditch or acequia in controversy was made in the year 1846, before the acquisition of the territory by the United States. The rights of the parties to the use of the waters therein then attached according to the laws, customs, and usages in force in the republic of Mexico. It is apparent that when defendant bought his mill site in 1886 the Trambleys personally, and by their predecessors through whom they claimed title and took possession, had occupied and used the premises continuously during forty years for substantially the same purposes for which they were used when this suit was commenced; hence, when defendant purchased he knew or might have known of the existence of this servitude upon the land which he bought.[5]

Anyone familiar with the final, congested hours of the last days of a legislative session will readily understand why some acts eventually reach the courts for disentanglement and interpretation. The courts, however, can do no more than interpret the law as it is actually passed, giving as much weight as possible to the true legislative intent. When Chief Justice O'Brien was on the bench and former Chief Justice Prince was governor of New Mexico a very important law which had suffered a last minute legislative abortion came before the Supreme Court for final disposition.

The trouble arose from a provision in Chapter 94, Laws of 1891, otherwise known as the Finance bill, or appropriation act for the forty-second and forty-third fiscal years of the Territorial government. Section 1 provided funds and made all needed appropriations for the forty-second fiscal year; section 2, by its terms, was intended to make provisions for the forty-third fiscal year. Charles W. Dudrow, holder of an outstanding Territorial warrant, sought to convert the same into a Territorial six per centum interest-bearing bond in conformity with a proviso in section 2 of the act.

Sections 1 and 2 occupy thirty-eight printed pages in the 1891 session laws and each of these two sections is unusually complex, "surcharged with a strange variety of detailed items and multifarious provisions." The bill was originally introduced in the Council and passed there, but it was indefinitely postponed by the House which, on the

5. *Trambley v. Luterman*, 6 N. M. 15, at p. 23.

eve of final adjournment, passed a House substitute. The Council rejected the House version and instead adopted a "Council Substitute for House Substitute for Council Bill No. 81." On the last day of the session the Council appointed a three-man committee to confer with a like group from the House to consider the matter. The joint conference, after persistent disagreements, finally recommended for passage a version of the Council substitute, whereupon rules were suspended and the bill passed. The conferees, however, had barely time to rewrite section 1 of the bill, and, finding it impossible before the hour of final adjournment to amend in terms and rewrite section 2, they appended after section 1, and directly ahead of section 2 which remained formally unamended for want of time, the following note:

> The amendments in Sec. 2 (for 43rd fiscal year) coincide with those of preceding section throughout, and amounts and notes to be changed to the same.[6]

The provisions under which Dudrow tried to convert appear in section 2 of the amended act but not in section 1; hence, the court concluded that since these provisions are not found in section 1, in effect they did not appear in section 2, regardless of the fact that they did appear as part of the printed section in the session laws. Said the court in justifying its position:

> This court can not afford to be technical with the law-making power of the territory. Our province is to interpret and obey the will, not to criticise the *modus operandi*, or dictate the policy, of the legislature, created by the power of the general government. In justice to the representatives of the people it must not be forgotten that the legislature was on the eve of a final adjournment when the bill passed. The house had refused to pass the finance bill adopted by the council. A final adjournment without such an enactment would be more than a calamity—it would be a public disaster. To prevent such a misfortune, haste and disregard of the usual formalities seemed imperative. Notwithstanding all this, it scarcely admits of doubt that the legislature clearly expressed the intent, when it adopted the report of the joint conference committee, that section 2 of chapter 94 should

6. *Laws of New Mexico*, 1891, Chap. 94, Sec. 2, p. 207.

contain the substantial provisions embraced in section 1, and that all provisions found in the former, not embraced in the latter, should be expunged.[7]

When the Constitution was drafted for the new State of New Mexico nearly twenty years later, the possibility of this type of confused legislation was averted by the inclusion of a provision prohibiting the amendment of legislation by reference. No doubt the recollection of the difficulties caused by this act may have added to the determination of some of the convention members to avoid the problem in statehood days.

A controversy connected with selection of the county seat of San Juan county was one of the important issues which came up for settlement during the time O'Brien was chief justice.[8] According to provisions of Chapter 7, Laws of 1889, the legal voters of San Juan county were authorized at the general election of 1890 to vote on Junction City, Aztec and Farmington for their permanent county seat. The election was spirited and the board of county canvassers duly declared Junction City as the county seat with a majority of nine votes over Aztec, the next nearest competitor. In the election contest which followed, evidence tended to show that three non-citizens had voted for Junction City, some one else who voted for Junction City had lived in the Territory only forty days; and enough others had voted for Junction City illegally and fraudulently to change the result. Illegality of these latter votes was based on a charge of bribery. Testimony indicated that up to two or three months before the date of election there was no such place in existence as Junction City, nor was one contemplated. About that time a company was organized which purchased land at the place, platted it as a city, and gave a large square for county purposes. This company made a proposition to the San Juan county voters that, if they would locate the county seat at this place, where as yet no one resided and the lots were not sold, it would bind itself to build the necessary county buildings for the use of the county. To induce the

7. *Territory ex rel. Dudrow v. Prince*, 6 N. M. 635, at pp. 641-642.
8. *Edward G. Berry, et al. v. Henry Hull, et al.*, 6 N. M. 643, 30 Pac. 936.

voters to have a personal interest in locating the county seat at this place they began offering certificates to residents of the county to lots in the proposed town which upon their face recited a price of only $1.00 per lot. This one dollar was clearly nominal, intended probably to pay the cost of the documents and, as the court phrased it, "so nominal as to cast suspicion upon the whole transaction." There was no outright evidence that the company actually campaigned, asking people to vote for Junction City, but conversation about voting for Junction City as county seat was constantly in the air, concluded the court, while these certificates were being issued. Furthermore, it was notable that the certificates were not good after the first of January following the election in November. Nothing was paid at the time the script was given, and the dollar was paid only upon delivery of the deed, if the certificate was presented before January 1.

Aztec, of course, heard what was taking place so it too offered some one dollar lots.

The Supreme Court made a careful survey of the facts when the case came up before it and concluded that from the two-hundred and fifty-five votes cast for Junction City, twenty-three should be deducted as illegal, leaving as legal votes cast in favor of Junction City, 232; from the 246 votes cast for Aztec, nine were found to be illegal ballots, leaving as legal votes cast for Aztec, 237. As a result, Aztec was given the county seat over Junction City by a majority of five votes.

Antonio Cortesy had been fined for selling liquor on the Sabbath. He appealed to the Supreme Court to determine whether New Mexico had any valid law against selling goods, wares, and merchandise, including liquor, on Sunday. The question was one which involved interpretation of legislative intent in amending one Sunday statute by another which, to make it more definite and certain, left out some of the phraseology of the earlier act, and reduced penalties to make the law more readily enforceable. In holding that sale of liquor on Sunday was a violation of the law, Justice Seeds, writing the opinion, concluded:

As a Christian nation, it has always been the policy of the legislature to protect the sanctity of the Sabbath; to pass appropriate laws for the proper observance of the Sabbath; and, unless the law is so specific as to demand a construction against such view, it would be a rash court that would give its adhesion to such a construction. It must also be considered in this connection that the whole trend of modern thought, feeling and legislation is toward the curtailing of the admitted evils of the liquor traffic. . . .[9]

Justice Lee and Justice McFie concurred in this majority view, but Chief Justice O'Brien found himself unable to agree and stated in his dissent:

Notwithstanding the foregoing vigorous argument of the court, redolent with the fervent eloquence of my Brother Seeds, I reluctantly dissent from the conclusion reached. What induced the twenty-seventh session of the legislative assembly of New Mexico to remove the safeguards thrown around the Christian Sabbath by a preexisting law of the territory, is not the question submitted. Has it done so, is the only point the court is called upon to determine in this case.[10]

The word "labor," Judge O'Brien declared further, meant "nothing more or less than manual, servile labor," and that it would be "sheer nonsense to call a saloonkeeper or merchant a laborer or laboring man."

Judge O'Brien's court needed to discipline a leading member of the bar for disrespect to the court when he prepared his brief on appeal in the case of *Tomlinson v. Territory*. Explained the court:

The brief for appellant in this cause contains such an unwarranted attack upon the trial judge, his conduct, rulings, and instructions, as to amount to a scandalous and impertinent attack upon the judiciary of the territory and of this court, of which the nisi prius judge is a member, which would warrant us of our own motion in striking the brief and argument from the files, and affirming the decision without further investigation. It is proper for defendant to show errors, and apply the law to the same; but to allow an attorney to come into this court, and criticise and question, comment upon, and condemn the motives which actuated the judge in his rulings below, would be to place the defendant above the law, and to subject the courts of this territory to wild tirades of abuse from any person of

9. *Cortesy v. Territory*, 6 N. M. 682, at p. 695.
10. *Ibid.*, at page 697.

malignant or depraved mind—would be lowering the dignity of the bench, and subversive of good government.[11]

Chief Justice O'Brien and Mr. Justice Lee concurred with a separate statement, saying, "We concur . . . on account of the unwarranted attack upon the official conduct of the trial judge in appellant's printed brief." The attorney who had thus invoked the displeasure of the court was Frank W. Clancy. He sought a rehearing in the case on the ground that misconduct of counsel, no matter how gross, should not be visited upon the client, unless that client actively participated. In apologizing for his transgression, Mr. Clancy said:

> If, in my earnest effort to do my whole duty to a client who has intrusted his case to me, I have exceeded the bounds of legitimate and proper criticism of the trial court, I have done so unconsciously. In view of the severe opinion of the court, and in view of the respect which every member of the bar ought always to exhibit toward the courts before which he appears, I desire to express my regret that any act of mine could have called forth from any court such condemnation, and to say, although guiltless of any intentional offense, that anything which even appears to the court improper is a fit subject for apology, which I now offer to the highest tribunal of the territory.[12]

The rights of a municipality to levy special assessments against property owners came under the reviewing eye of the Supreme Court in July, 1891. Chief Justice O'Brien, writing the opinion of the court, decided that where it did not appear that two-thirds of the owners of the property charged with the assessment had petitioned that improvements be made, a property owner could appeal his grievance, in case such an assessment was levied, to a court in equity in the district where taxes had been levied.[13]

As early as August, 1892, rumors became prevalent that Judge O'Brien desired to be relieved from his position as chief justice. His resignation followed shortly afterward and it became effective early in 1893. Judge O'Brien then

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11. *Tomlinson v. Territory*, 7 N. M. 195, at p. 214.
12. *Ibid.*, at p. 210.
13. *Albuquerque v. Zeiger*, 5 N. M. 674, 27 Pac. 315.

returned to Minnesota to resume the practice of law. He died there in Caledonia on November 5, 1909.

A memorial by the Minnesota State Bar Association pays the following tribute to an able jurist:

> Judge O'Brien's many friends bear witness that, as a teacher, he was thorough and energetic; as a writer, fluent and forcible; as a speaker, pleasing beyond the great majority of even good speakers; and as a lawyer and judge, he was able and painstaking, honorable and upright.[14]

14. Minnesota Bar Association, *Proceedings*, 1910, pp. 189-190.