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BLACK-ROBED JUSTICE IN NEW MEXICO, 1846-1912.

By ARIE POLDERVAART

CHAPTER IV

TRANSITIONAL JUSTICE

Shortly before the military occupation of New Mexico gave way to the civil government of the Territory, an alcalde at Tomé demanded the church keys from the Catholic priest who was stationed there and removed from the House of God its sacred vestments and consecrated vases, then turned them over to Nicolas Valencia, a former priest who had been suspended from the clergy for his non-conformist views.

In Santa Fe Donaciano Vigil, acting governor of New Mexico following the assassination of Governor Bent, suspended the Vicario, chief representative of the Church, from exercising ecclesiastical functions on the ground that his ministrations were inimical to the American institutions which were gradually being introduced.

These and similarly unwarranted infringements upon the rights of the Catholic church soon caused threats of rebellion. Colonel R. H. Weightman, a churchman and one of its staunch defenders, sent a pointed warning to Colonel Monroe on June 18, 1850, about the likely consequences of this interference by secular authorities in affairs of the church. Nevertheless, such incidents of molestation continued.
Jesus Silva was the duly constituted alcalde at Sabinal in 1850. On June 16 of that year he ordered the good people of his community to accept Father Benigno Cardenas, a refugee from justice and a suspended padre, as parish priest. The alcalde based his authority for so doing upon the spurious ground that inasmuch as the regular priest, a Father Otero, had been derelict in his duty by not saying mass for some time, the spiritual well-being of the people required that mass be said. The reason the priest wasn't on the job was that some time previously Alcalde Silva had incarcerated him. The priest, seeing that it was useless to minister to the needs of the parish while the alcalde was in office and expecting a repetition of his confinement, had left the community. More than a hundred citizens of Sabinal petitioned vigorously to the authorities in Santa Fe, protesting the presence of the outlawed Cardenas, but no action was ever taken on their petition.

When the alcalde, the prefect and other officials were candidates for re-election in 1850, an order was issued and placed in the hands of the constable to arrest the entire hundred persons who had protested the alcalde's action. On the eve of election these Sabinalians, who were obviously opposed to return of the alcalde and his followers to office, were spirited off some thirty miles to the northern limits of the county to the residence of the prefect, Ramon Luna, where their offenses were to be looked into. The charge trumped up against Jose Armijo, leader of the defendants, was that he had openly objected to Father Cardenas and had told the alcalde that the people didn't want that man Cardenas to say mass. At this the alcalde became enraged and shouted, "I have the power, and do not recognize the people." Don Armijo then replied that, "If you do not recognize the people, the people will not recognize you as alcalde." Armijo's rebellious attitude, the authorities adjudged, was a most dangerous disregard of the duly constituted authorities. Judges Otero and Houghton presumably gave their tacit if

not overt approval to this action which effectively eliminated Armijo and his hundred followers as a factor in the 1850 election.

Typical, too, of the civil authorities' disregard for the rights of the church was their sequestration and unauthorized use of church property. In Santa Fe on the south side of the plaza stood a military chapel, known as the Castrensa, a property of the church. Civil officials were in possession and had used it for secular purposes since the occupation. When Bishop John B. Lamy arrived in Santa Fe he promptly set about to regain possession of the churches and the ecclesiastical properties belonging in them.

With the newly constituted Territorial government came appointment by President Millard Fillmore of the first regular Territorial chief justice of the New Mexico Supreme Court, the Hon. Grafton Baker. Judge Baker was a man splendidly trained in the law in direct contrast to Judge Houghton. He was fully conscious of the dignity of the judgeship, but as a native of the deep south, he was totally unacquainted and uninitiated in the political and frontier conditions prevailing in the new Territory.

Judge Baker promptly took an active interest in Territorial affairs beyond the scope of his regular judicial duties, and made numerous reports and recommendations to the officials in Washington respecting the conditions which he found on his arrival in New Mexico. He reported among other things that serious hostilities prevailed between the military and the natives in the area, a situation which he felt "bred the strongest distaste . . . for the United States." This meddling by the judge promptly brought him into disfavor with such men as William G. Kephart, a missionary, printer and newspaper editor, and with the former chief justice, Joab Houghton. Kephart charged that Judge Baker was "going about the streets trying to pick quarrels and get up fights with our citizens." A further factor which Kephart and Judge Houghton held against him was the fact that he had brought with him from Mississippi a negro servant. On one occasion Kephart charged through the columns of his
Weekly Gazette that Judge Baker was “lying in a state of beastification in one of our lowest doggeries.”  

Scarcely had the new judge arrived in Santa Fe when he clashed headlong, too, with Bishop Lamy. Judge Baker held his first session of the district court in Santa Fe at the Castrensa. Upon impaneling the jury, it developed that Governor Donaciano Vigil was one of the number summoned and that His Excellency objected to being sworn for the reason that “the court was being held in a place consecrated to sacred objects”; that the forefathers of himself and many others present were there buried; that with all due respect to the civil authority, which both he and the judge represented, he protested against the use of the chapel for civil purposes, and begged to be excused from serving the court where he could not help feeling that he was treading upon the ashes of his ancestors.

Whereupon Judge Baker, having apparently indulged a bit freely in distilled spirits, publicly announced that he would have both the bishop and Father Joseph P. Machebeuf, the prelate’s right-hand man, hanged from the same gibbet.

The morning following these indiscreet remarks public indignation seethed through the city. A petition was circulated and signed by over a thousand residents, Catholics and Protestants, civilians and soldiers alike, asking for justice and a return of the church property to the bishop. In the meanwhile an excited mob gathered near Judge Baker’s residence. Fearing the temperament of the agitated mob, His Honor called upon the military authorities for protection, but they respectfully declined to intercede. It remained for Father Machebeuf and a subordinate officer from the post to stand between the mob and the judge, who finally begged for mercy and promised to do justice. In the evening Judge Baker called on the bishop, apologized for his indiscretion and the next day in open court turned the chapel over to

3. Twitchell, Military Occupation of New Mexico, p. 223.
Bishop Lamy in the presence of the governor and other civil and military leaders. A room in the old Palace was thereafter engaged for use of the court.

W. W. H. Davis describes one of the first meetings of Judge Baker's court which he attended in Santa Fe. A trial was in progress upon an indictment for murder. Four Nambe Indians were charged with murdering two of their fellow tribesmen for having practiced witchcraft and for consuming the little children of the pueblo. The accusers maintained they saw the two victims pulling the bones of the infants apart with their mouths. The evidence indicated that the Indians had assembled their council which had condemned the unfortunate victims to death and that at dusk that same day, the latter had been conducted a short distance from the pueblo and shot. They had been made to kneel down side by side and were thus killed by the same fire. Only four of the responsible Indians had been indicted for the reason that their part in the slaying could be more easily proved than that of the others. Fortunately for the defendants, the killing had occurred on or near the line between two counties. They were eventually turned loose because it could not be shown on which side of the line the crime was committed!

Mr. Davis also calls attention to one of several perjury cases which grew out of a most serious problem confronting the courts during the first few years following the American occupation; namely, the political status of native Mexicans within the Territory. The eighth article of the Treaty of Guadalupe Hidalgo provides that all Mexicans who lived in the territory ceded to the United States might, if they desired, retain their rights as citizens of Mexico by making an election to that effect within one year after ratification of the treaty. Nothing was specified as to the manner in which this election was to be evidenced, and the entire procedure seems to have been left to the government to decide or to the persons individually to determine. In any event, in the

5. Davis, El Gringo, pp. 175-177.
6. Ibid., pp. 177-180.
The spring of 1849, Colonel Washington, then military governor of the Territory of New Mexico, had proclaimed that all those who desired to retain their Mexican citizenship should appear before the probate judges of their respective counties on or before the following first day of June and then and there signify their intention to remain citizens of Mexico. The clerk of the probate court was required to attach a certificate to the record in which the names were enrolled, and to deliver the record thus authenticated to the Secretary of the Territory who was instructed to have the record published and to send a copy to each county.

Complications resulted when in the 1853 election many of these persons whose names appeared on this record as electing to remain Mexicans sought to exercise the right of franchise in the Territory. Some of them now upon being challenged swore that they were citizens of the United States. Several of these were afterward indicted for perjury. After listening to lengthy arguments on both sides, Judge Baker held that the book containing the list of names was not a legal record and not admissible as evidence. He further concluded that the proceedings on the part of Colonel Washington were without authority of law and illegal, and that those who attempted to make their election in this manner had not parted with their rights as citizens of the United States.

Growing out of this same troublesome question was the election contest suit of Quintana v. Tompkins (1 N. M. 303) in which Chief Justice Baker wrote the opinion for the Supreme Court. The case involved two candidates for justice of the peace in the September, 1852, election. Nicolas Quintana was declared elected by the probate judge, but R. H. Tompkins contested his election, and on appeal to the district court, the latter reversed the judgment of the probate judge on the ground that Quintana was not a citizen of the United States and was, accordingly, disqualified from holding office.

The Supreme Court in reviewing the facts in the case found that Quintana had acted under the provision of the
treaty and had signified his intention in proper form to retain his Mexican citizenship. Though there was some showing that he had later repented this action, the Court upheld the district court in its finding that Quintana was still a Mexican and accordingly was not entitled to the office.

Early in 1853, Chief Justice Baker wrote the opinion in a case in which his opponent and predecessor, Judge Houghton, was a party. The partnership of Eugene Leitensdorfer and Joab Houghton had been served with a writ of attachment to recover some $8,297.92 under a contract which had been entered into on the basis of the old Mexican laws. The case had been initiated in the pre-Territorial Superior Court in Santa Fe which had given judgment against the partnership. Judge Houghton and his attorneys on appeal presented the argument that the old court in reality was not a court in contemplation of law, and hence that the cause did not have legal existence. The Supreme Court ruled against Judge Houghton's contention, finding that the laws and courts established as part of the provisional government were valid, and that the legislative assembly could and properly did transfer causes from the provisional tribunals to the Territorial courts.

In the year 1846 a conquest was made of this territory by the Americans under General Kearny. The civil government then existing here having been completely overthrown and destroyed, a provisional or temporary government was established in its stead by the conquering general, under and by authority of the president of the United States, as commander in chief. This was recognized and sanctioned by the law of nations. By that authority the circuit courts were established, their jurisdiction vested, and the proceedings therein regulated.

Judge Houghton, Kephart and others continued their bitter attacks upon Judge Baker and sought through devious devices to secure his removal from office. Far-fetched letters and even pamphlets were forwarded to Washington derogating the judge's official conduct. James L. Collins wrote the president that Judge Baker had come to New Mexico "for

7. Leitensdorfer v. Webb, 1 N. M. 34.
8. Ibid., p. 43.
the purpose of purchasing slaves to work the mines of New Mexico."

As a result of these charges President Fillmore was seriously considering dismissing Chief Justice Baker when the judge himself, aware of the seriousness of the situation, hurried to Washington. In replying to the indictment against his behavior, Judge Baker named William S. Messervy, a disgruntled member of the Weightman faction, as originator of most of the charges. Messervy, who was at the time paying a visit to his old home in Boston, also turned up in Washington, where he joined with Hugh N. Smith in making an unsuccessful protest against continuing Judge Baker in office. The judge convinced the president of his satisfactory conduct, and issued the warning that Houghton's party in New Mexico was bent on ridding the Territory of all southerners. He added that Kephart, Collins and Judge Houghton were so bitter in their onslaught against southerners, and had aroused such resentment among New Mexico emigrants from Dixie, that his enemies would reap an unjust victory if he were not continued at his post.

President Fillmore did not disturb the judge, but President Franklin Pierce, upon his inauguration in March, 1853, failed to continue him in office. Upon the expiration of his term Judge Baker returned to Mississippi.

CHAPTER V
DAVENPORT FROM DIXIE

Most colorful among the prominent freighters and explorers of New Mexico during the period following immediately upon the American occupation was an iron-nerved Canadian named Francis X. Aubry. By 1847 he had established a prosperous business transporting goods to Santa Fe from the Missouri river towns. Unlike his competitors who usually made one expedition in the summer,

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10. This is based upon the fact that Judge Baker's personal property re-appeared upon the personal property tax rolls in Mississippi after the expiration of his term in 1853. Letter from Miss Charlotte Capers of Jackson, Miss., Aug. 24, 1944.
Aubry made several trips a year. The speed with which his caravans pushed along soon won for his freighting service the title of "Lightning Express."

Early in 1848 after arriving in Santa Fe on one of these expeditions from Missouri, Aubry made a bet—a wager of $1,000 that he could be back in Independence, Mo., in eight days. Preposterous and impossible was the reaction of many throughout Santa Fe. Others felt that if anyone could, this man Aubry would, and, as George D. Brewerton, writing an article entitled "In the Buffalo Country" for Harpers' Magazine declared, "many were the boots, and numerous the hats, to say nothing of the 'tens' and 'twenties' which were hazarded upon Aubry's intentions."

Aubry won his wager, reaching Independence on the eighth day, but as Albert D. Richardson reports in his Beyond the Mississippi, he was so stiff he had to be lifted from the saddle. Aubry himself broke this record the following year. From a friend in Santa Fe he brought with him to an Independence newspaper man, a message which bore this most appropriate prefatory note, "Allow me to introduce to you the man to whom the telegraph is a fool."

In December, 1852, new markets having opened in California, Aubry set out for the Pacific with 5,000 head of sheep. The return trip was beset with many difficulties—hostile Indians attacked savagely, wounding twelve members of his party, and his favorite mare was sacrificed along with many other horses as a source of food when supplies gave out; but on Sept. 10, 1853, he reached Albuquerque, completing the first investigation of a route along the thirty-fifth parallel to California. Aubry made an elaborate report about his findings on this trip which was printed in Major R. H. Weightman's newspaper, the Amigo del Pais.

Aubry made a second California trip in the summer of 1854 in thirty-five days. On August 18, shortly after returning from this expedition, while in Santa Fe, he stopped in at

2. Ibid., pp. 3-4.
Mercure’s bar. Major Weightman walked in and after an amiable greeting the two men had some drinks. Aubry questioned Weightman, who was serving as the New Mexico delegate to Congress at that time, about his paper and Weightman replied that he had let it die for lack of subscribers. Aubry, who was irked about an article contradicting his claim of having found a new pass to California that had appeared in the *Amigo del Pais* the preceding fall, replied that any such lying paper ought to die. Weightman picked up his container with liquor and soused Aubry in the face. Aubry drew a pistol from the side of his belt and accidentally (presumably while cocking it) sent a bullet whizzing through the ceiling. Weightman instantly drew his Bowie knife and sank it into the freighter’s body.\(^3\)

Chief Justice J. J. Davenport, who had been appointed by President Franklin Pierce as successor to Grafton Baker, and like his predecessor a barrister from Mississippi, sat as the committing magistrate for Weightman. Judge Davenport released Weightman under a $2,000 bond pending trial. Despite much conflicting evidence, what appears to have been a very fair trial was had before Judge Kirby Benedict. Benedict instructed the jury that inasmuch as Aubry had drawn his pistol, Weightman had no reasonable and safe means of escaping the danger in which he had been placed without taking the life of Aubry, and Weightman was acquitted on grounds of justifiable homicide.

One of the problems which confronted the Supreme Court during Davenport’s term as chief justice was to define the proper relationship between justices of the peace and the district courts because they were constantly crossing swords. Under the Territorial organic act jurisdiction of justices of the peace was limited by providing that such precinct officers

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3a. Twitchell in *Leading Facts of New Mexican History*, vol. 2, pp. 307-308, quotes from testimony of Henry Mercure taken at Weightman's trial which indicates Aubry was stuck "in the belly below the navel" and that Aubry died in about ten minutes. Read in *Illustrated History of New Mexico* quotes another eye-witness account by Don Demetrio Perez, who said that Weightman, drawing his dagger, "plunged it into Aubry's heart, dying that very instant."
did not have jurisdiction in any controversy where title or boundaries to land were in dispute, or where the debt or sum claimed exceeded a hundred dollars. Nothing was said, however, as to whether there was any restriction on the district courts when the debt or sum claimed was below one hundred dollars. Chief Justice Davenport wrote the opinion for the Supreme Court which was designed to settle this argument. He held that the district courts had concurrent jurisdiction with justices of the peace in cases where the amount involved was less than a hundred dollars.4

In another case further clarifying the relationship between district courts and justice of the peace courts, Judge Davenport set forth the now well-established rule that on an appeal from a justice of the peace to the district court, the case is tried de novo (anew) on its merits in the district court, thereby giving that court original jurisdiction rather than the status of an appellate tribunal.5

One of the most interesting and novel cases which ever went through the courts of New Mexico reached the Supreme Court during the January term of 1857. This is the well-known controversy which arose between the two Indian pueblos of Laguna and Acoma over the ownership of an oil painting of San Jose, the patron saint of the pueblo of Acoma.6

Early in the days of the Spanish conquistadores, some of these adventurers left with the pueblo of Acoma an oil painting of San Jose upon cloth or linen which had been placed by the Indians in their church as an adjunct of worship. The painting came to be regarded by them as essential in their devotion to God and was thought to bring them fortune by drawing rain and yielding bountiful crops. The pueblo of Laguna, some years past, had borrowed the painting under pretense of a loan to celebrate semana santa (holy week), but after the feast they set up a claim to the impasto and refused to return it to Acoma. The people of Acoma

5. Archibeque v. Miera, 1 N. M. 160.
sought relief through the ecclesiastical authorities. Under the direction and supervision of the curae (priests) lots were cast for the painting. Twelve slips were placed in a vessel covered with a white cloth. All of these slips were blank except one which had on it a picture of San Jose. Two little girls, one from each pueblo, were then placed on a table and drew the lots one by one in turn. The first, second, third and fourth tickets were blanks, but on the fifth the little girl from Acoma drew the likeness of San Jose. The priests thereupon declared that God had decided the case and the painting was returned to Acoma.

A short time later, a party from Laguna climbed the Acoma citadel and headed toward the church. Asked as to their mission, they menacingly declared that they had come to get the painting of the saint and threatened to demolish the door if it was not delivered. The priest, asked what should be done and shivering at the sight of the militant Laguna Indians, advised the Acomas to give up their heirloom.

The case was tried before Associate Justice Benedict in Valencia county. Judge Benedict decreed that the canvas should be returned to the Acomas. The Indians from Laguna appealed to the Supreme Court and Chief Justice Davenport wrote the court's opinion affirming the lower court.

The people of Acoma, however, had still another serious problem which endangered their very homes upon the famous rock. The title documents to the lands upon which their pueblo had been built had vanished from their legal repository. The petition to the third judicial district court alleged that these muniments of title which had come to them through the King of Spain or his Viceroy, had been deposited in the archive at Santa Fe, but had through some unknown medium come into the hands of Victor de la O and others, and that these persons refused to return them unless the Acomas paid them the prohibitive sum of six hundred dollars.

Justice Benedict wrote the opinion of the Supreme Court in which the trial court was upheld in its decision.
that the finders or holders of the documents upon their
delivery could not exact tribute from the true owners. In
concluding his opinion in the case, Justice Benedict made the
following descriptive and colorful observation:

Having closed our review of the merits of the case, we may be
indulged in reflecting, that of the highly interesting causes we have
had to consider and determine during the present session, this is the
second in which this pueblo has been the party complainant. The
first keenly touched the religious affections of these children of the
Rock of Acoma. They had been deprived by a neighboring pueblo of
the ancient likeness in full painting of their patron or guardian saint,
San Jose. However much the philosopher or more enlightened Chris­
tian may smile at the simple faith of this people in their supposed
immediate and entire guardian of the pueblo, to them it was a pillar
of fire by night and a pillar of cloud by day, the withdrawal of whose
light and shade crushed the hopes of these sons of Montezuma, and
left them victims to doubt, to gloom, and to fear. The cherished object
of the veneration of their long line of ancestry, this court permanently
restores, and by this decree confirms to them, and throws around them
the shield of the law's protection in their enjoyment of their religious
love, piety and confidence. In this case, the title that Spain had given
this people, confirming to them the possession and ownership of their
lands, and the rock upon which they have so long lived, was found in
the hands of one professing to be of a better-instructed and more
civilized race, and turned by him into the means of extortion and
money-gathering from the unoffending inhabitants.

It is gratifying to us to be the judicial agents through which an
object of their faith and devotion, as well as the ancient manuscripts,
that is the written evidence that established their ancient rights in
their soil and their rock, are more safely restored and confirmed to
their possession and keeping.?

CHAPTER VI
WHEN BENEDICT WAS CHIEF
1858-1866

The most bizarre of all New Mexico Territorial Supreme
Court judges was the man who succeeded Chief Justice
Davenport. He was Kirby Benedict, appointed by President
Abraham Lincoln as chief justice, although he had pre-

7. Victor de la O v. The Pueblo of Acoma. 1 N. M. 226 (Chicago, Callaghan &
Co., 1897), pp. 237-238.
viously served as an associate justice under appointment from President Franklin Pierce in 1853.

Little is known of Judge Benedict's early life except that he was born in Connecticut in 1811. When he was still quite young he came to Illinois where he grew up and became an intimate friend of both Stephen A. Douglas and Lincoln. After being admitted to the bar in Illinois Benedict enjoyed a successful law practice until he was appointed associate justice on the New Mexico Supreme Court April 5, 1853. Upon arrival in Santa Fe he was assigned to the old third district which comprised the counties of Taos and Rio Arriba with headquarters at Taos. Here he continued as the presiding judge for five years, after which time he was named chief justice and moved to Santa Fe. In 1860 Taos and Rio Arriba counties were added to the first district.

When Lincoln ascended the presidential chair he was besieged by political aspirants to remove Benedict and to appoint a man of his own political party to fill the position, but Lincoln emphatically rejected the proposal. Questioned for his reason, he told them that throughout the years he had enjoyed too many happy hours in Benedict's company and that the judge was too good and glorious a fellow for him to remove, and he didn't.

Judge Benedict was opposed to secession in any form and deemed it the duty of every citizen to aid in maintaining the Union. Even when the Confederates under Brigadier General H. H. Sibley occupied Santa Fe, Judge Benedict maintained a strong position in this regard.

When news reached Santa Fe that Fort Sumter had been fired upon by the Confederate Army, Judges Benedict and Houghton, according to a prominent Santa Fean of that day, spent a whole day closeted in a room at the rear of one of Houghton's wholesale establishments in Santa Fe, excitedly debating the proper course to be followed by them. The result was a decision to stick with the Union whatever happened.¹

¹ N. M. Bar Association, Minutes, 1890, p. 51.
It was Benedict's belief that many of the exponents of neutrality in the Civil War were advising such because of the pressure of the Federal troops in New Mexico and that they were Confederates at heart. In what he termed "an entirely private letter" to President Lincoln, he expressed misgiving concerning the loyalty of many residents of New Mexico. He attributed much of the trouble to President Buchanan's failure to give any of the free states much chance in the appointments for New Mexico. According to Judge Benedict southern officials had been instrumental in bringing into the Territory southern extremists who not only wanted to improve their economic position but were determined to impose their own customs on the inhabitants.

Judge Benedict testified that a veritable system of peonage existed in New Mexico. He reported that in addition to Indian captives, orphans and children of the destitute continued to be sold into slavery as they had been during the former Mexican days, by their own relatives. He said that a sound, healthy and intelligent girl of eight years was worth around $400. The children of peons were not regarded as salable property, however, but were treated as citizens. He estimated there were from 1,500 to 3,000 peons in the Territory. Judge Benedict pointed out that though under various court decisions the Indians were entitled to their freedom, they did not seek the aid of the courts to obtain their release from bondage. He observed further that persons who held such Indians in servitude were extremely sensitive of their supposed interests in them, and would quickly seek to stop any movement to resort to the courts which might appear as an effort at dispossessing them of what they considered their property rights.

As a writer Judge Benedict was a master of satire, sarcasm and ridicule. He was a man of fine literary taste and ability and some of his opinions are masterpieces of legal literature. Few are those New Mexicans who are not familiar with the interesting anecdote relative to Judge Benedict.

Benedict's famous sentence pronounced upon the convicted murderer, Jose Maria Martin, in the Taos county district court. The state of facts proved upon the trial showed utmost brutality on the part of the murderer, and there were no mitigating circumstances to lessen the sharpness of Judge Benedict's historic sentence:

JOSE MARIA MARTIN, stand up! Jose Maria Martin, you have been indicted, tried and convicted by a jury of your countrymen of the crime of murder, and the court is now about to pass upon you the dread sentence of the law. As a usual thing, Jose Maria Martin, it is a painful duty for the judge of a court of justice to pronounce upon a human being the sentence of death. There is something horrible about it, and the mind of the court naturally revolts from the performance of such a duty. Happily, however, your case is relieved of all such unpleasant features and the Court takes positive delight in sentencing you to death!

You are a young man, Jose Maria Martin—apparently of good physical condition and robust health. Ordinarily you might have looked forward to many years of life, and the Court has no doubt you have, and have expected to die at a ripe old age; but you are about to be cut off in consequence of your own act. Jose Maria Martin, it is now spring-time. In a little while the grass will be springing up green in these beautiful valleys, and on these broad mesas and mountainsides flowers will be blooming; birds will be singing their sweet carols, and nature will be putting on her most gorgeous and her most attractive robes, and life will be pleasant and men will want to stay, but none of this for you, Jose Maria Martin. The flowers will not bloom for you, Jose Maria Martin; the birds will not carol for you, Jose Maria Martin; when these things come to gladden the senses of men, you will be occupying a space about six by two beneath the sod, and the green grass and those beautiful flowers will be growing above your lowly head.

The sentence of the Court is that you be taken from this place to the county jail; that you be kept there safely and securely confined, in the custody of the sheriff until the day appointed for your execution. (Be very careful, Mr. Sheriff, that he have no opportunity to escape and that you have him at the appointed place at the appointed time.) That you be so kept, Jose Maria Martin, until—(Mr. Clerk, on what day of the month does Friday, about two weeks from this time come? March twenty-second, your Honor). Very well,—until Friday, the twenty-second of March, when you will be taken by the sheriff from your place of confinement to some safe and convenient spot within the county (that is in your discretion, Mr. Sheriff, you are only confined to the limits of this county), and that you be there hanged by the neck.
until you are dead, and the Court was about to add, Jose Maria Martin, 'May God have mercy on your soul,' but the Court will not assume the responsibility to asking an Allwise Providence to do that which a jury of your peers has refused to do. The Lord will not have mercy on your soul!

However, if you affect any religious belief, or are connected with any religious organization, it might be well for you to send for your priest or your minister and get from him,—such consolation as you can; but the Court advises you to place no reliance upon anything of that kind!

Mr. Sheriff, remove the prisoner.³

The sequel to the story is that Martin in all probability did see the green grass and beautiful flowers of the spring. He escaped and was never heard of or seen again to answer to the law.

Judge Benedict had little faith in the ability of justices of the peace. In the case of Sanchez v. Luna, decided in 1857, he held that a district court may in its discretion grant leave to amend the pleadings on an appeal from the justice of the peace court, if it appears the justice had jurisdiction over the subject matter and the parties. Said he:

The [district] court is to be in no wise trammeled in its mode of proceeding by the irregular and untechnical act of the justice of the peace. . . . To forbid the courts this power to amend in this class of cases, . . . would in this country amount to almost a denial of justice through the means of appeals. The justices of the peace are, for the most part, unskilled, if not uninstructed, in legal forms and technical proceedings. The records in appealed causes in the courts manifest how defective and inartificial the business in the precinct tribunals is transacted. The dockets are rare that can exhibit strict regularity. If, where a litigant presents himself before the district bench with his appeal in hand, the court is powerless in granting to the parties the privilege to correct and perfect what unskillfulness or ignorance has defectively done, the result must be that suitors will be turned from the court with heavy bills of costs, and confidence in legal justice be destroyed.⁴

The first opinion written by Kirby Benedict as chief justice answered an important legal question—whether a

³ N. M. Bar Association, Minutes, 1890 (Report of Committee on History of Bench and Bar of New Mexico), pp. 56-57.
⁴ Sanchez v. Luna, 1 N. M. 238, at p. 242.
county in this Territory could be sued. Conceding that at common law it could not, Judge Benedict held in Allen T. Donalson v. San Miguel County (1 N. M. 263) that a county is a quasi-corporation and that it could sue and be sued by virtue of a territorial statute which extended the legal meaning of the word "person" to include bodies politic and corporate.

In the case of Leonardo v. Territory, Judge Benedict in a specially concurring opinion brought out the interesting suggestion that the language in which a law is enacted in New Mexico may have a bearing upon the exact interpretation of the statute. He said:

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. In the interpretation of the law the 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.5

Many of the early Territorial laws were originally enacted in Spanish.

When the common law followed the Americans into the area ceded by the Treaty of Guadalupe Hidalgo in 1848, it encountered two phases of the law of the West and Southwest which did not yield to its superior force. These two innovations were the doctrine of community property from the Mexican civil law, and the conception of water rights by appropriation to beneficial use which had its beginning in the rules, regulations and customs adopted by the miners during the California gold rush.6 These two legal concepts were in striking contrast to the English system of tenure by the entirety and that of riparian rights in water. Because of the nature of this southwest country, its limited rainfall, and the necessity of conducting water from streams considerable distances to irrigate farm land, the invaders quickly

5. Leonardo v. Territory, 1 N. M. 291, at p. 299.
recognized the necessity of retaining this law of water appropriation.

Two years before the first water right controversy was decided in California (1855) a great litigation appeared upon the civil docket of the third judicial district of New Mexico in Valencia county before Judge Benedict. The water right in dispute was centuries old and had been a matter of bitter feeling between the Acoma and Laguna pueblos for two hundred years or more. The suit was hard fought; every trick of the law was put in use and not until 1857 was a settlement reached which disposed of the dispute by an agreement between the parties. The lawyers who tried the case were, of course, trained in the common law, but they skillfully adapted its forms to enforcement of a right not known to the common law system. The attorney for the plaintiff was Spruce M. Baird, later a Territorial attorney general, whose pleading in the case was designated as a "bill to quiet title," a remedy ordinarily used to determine title to land. Since, however, this pleading was well adapted to the matter in hand, water rights when appurtenant to land have since been treated as a special form of real estate.

The Acoma attorney in setting forth his allegations recited the importance of settling all the questions between the Pueblo of Acoma and the Pueblo of Laguna touching the boundaries of their lands and the water of the streams to avoid the multiplicity of suits that would necessarily grow out of these questions if they were not settled in a court of equity. To illustrate what he meant he filed thirteen separate suits against members of the Laguna tribe and against the Rev. Samuel Gorman, Baptist minister of the Laguna mission.

Judge Watts as attorney for the defendant Laguna pueblo disputed Acoma's claim of earlier title to the water, setting up the contention that the Laguna claim ante-dated that of the Acomas by three days! He further pleaded

non-user and abandonment of the water rights on the part of the Acomas.

The case was settled on July 6, 1857, when the attorneys for both sides filed a memorandum in court awarding to Acoma all the irrigable lands down to the Cañada de la Cruz, on the Gallo or Cock Creek, thus preventing the use of its waters to the Lagunas except as to any surplus which might run below that point—a clear cut victory for Acoma.

Land grant controversies have played a major role in New Mexico judicial history, resulting in the eventual establishment of a Court of Private Land Claims. Kirby Benedict, however, appears to have been the first of the Territorial Supreme Court judges who was called upon to write an opinion in a land grant controversy.

Suit was brought by plaintiffs Justo Pino and others to eject Alexander Hatch from a block of territory in San Miguel county which had been granted, as plaintiffs claimed, to Juan Esteban Pino, father of Justo and Manuel Pino. To show the authenticity of the grant, they offered in evidence a document purporting to have been executed to their father by Bartolome Baca, political chief pro tempore of the province of New Mexico on Dec. 23, 1823. With it also was offered Juan's petition to Baca, requesting the grant. The lower court had excluded these documents from evidence and as a result the Pinos lost their case and appealed.

Judge Benedict concluded that a political chief (Jefe político) such as Baca had no power after Mexico's separation from Spain, without express authority from the Mexican government having first been received, and hence could not give away any part of the public domain. It meant that the Pinos' claim could not prevail upon such evidence, although Judge Benedict did point out that it could nevertheless be used in evidence against one having no better right.

Judge Perry A. Brocchus did not agree with Judge Benedict in this conclusion and wrote a dissenting opinion in which he said that a grant of a part of the public domain

executed by a political chief in 1823 upon a petition of the
grandee, reciting the fact that it had been made pursuant to
legal authority, must be presumed to have been duly author-
ized and to be valid, particularly since such grant and pos-
session under it had remained without objection from the
United States government for twenty-five years. He fur-
ther relied upon the Treaty of Guadalupe Hidalgo and its
provisions protecting Mexican grants in New Mexico.

The stories and anecdotes told about Kirby Benedict are
numerous. At one time, it is related, Judge Benedict was
holding court in the old Exchange hotel at Las Vegas. With-
in this hotel also were some of the most notorious gambling
rooms in northern New Mexico. In making his charge to
the grand jury, Judge Benedict made a particular point of
covering the subject of gambling, giving a most definite and
specific charge to investigate fully all cases of gambling
brought before it. Soon after the grand jury began its work
rumors became prevalent that every lawyer in attendance
at that term of court was to be indicted for gambling, includ-
ing the Hon. Thomas B. Catron.

Catron resolved to fight the indictment, should it come,
from start to finish and with all the legal tenacity and ability
at his command. Having heard that Judge Benedict himself
was not adverse to playing a little poker now and then, Cat-
ron made an informal investigation to see if the fact could
be substantiated. On finding that it could be, he cleverly
engineered an indictment for gambling against the Judge
himself.

The grand jury, as expected, brought in a large number
of true bills, most of them for gambling. One by one the
lawyers were brought in. They pleaded guilty, for the most
part, as the easiest way out, and were in each case assessed
a $50 fine and costs. Finally the sheriff called, "Kirby Bene-
dict, for gambling." The judge stood up, said in a loud
voice, "Kirby Benedict enters a plea of guilty and the
court assesses his fine at $50 and costs; and what is more,
Kirby Benedict will pay it." That settled the matter
and Mr. Catron saw no way out of making payment of his fine.\textsuperscript{10}

Judge Benedict was particularly fond of the so-called game of "draw." He had an unfortunate habit of borrowing money from others while playing the game. Once while holding court in Las Vegas he sat in a game in which a man by the name of Richard Kitchen held a hand and in a short while the judge began borrowing from him. Kitchen happened to be on the petit jury at the time and the next morning when court opened, the jury was called and Kitchen was found absent when his name was called. Benedict directed that a fine of ten dollars be entered against him. By and by Kitchen meandered into the court room and the judge informed him of his fine. "Dick" responded, "That's all right, your honor," and took his seat, wrote a note and passed it up to the judge. Benedict took out his glasses, read the note, and immediately announced: "Your excuse, Mr. Kitchen, is satisfactory. Mr. Clerk, the fine against Mr. Kitchen is remitted." There was a good deal of curiosity to know what Kitchen had written and after court the lawyers gathered around Kitchen to draw him out. He said he didn't write much, only a line. Upon being pressed he elucidated that it said, "Pay me the money you borrowed of me last night and I will settle the fine."

As presiding judge of the first judicial district, Judge Benedict looked seriously upon his obligations. One of the best illustrations of his conscientiousness in discharging the responsibilities of his position was the regularity with which he held court in every county throughout his area. The New Mexican took pains to call attention to Judge Benedict's discharge of duty when it observed:

The people of this district may congratulate themselves in possessing as efficient a judge as they now have in the person of Chief Justice Benedict. While in other districts term after term has passed and no courts been held, to the great detriment of parties who had causes to be tried and determined, Judge Benedict has always been at his

WHEN BENEDICT WAS CHIEF

post and held every term, as provided by law, in every county in his large district, besides not unfrequently [infrequently] holding terms in other districts for absent judges.\textsuperscript{11}

Even in the second or Albuquerque district numerous terms of court were missed during the early sixties. In April, 1865, newspaper accounts reported that with one or two exceptions no courts had been held in the two southern districts for seven years! No wonder that complaints were registered with the authorities in Washington that a large amount of business had accumulated which remained unsettled to the detriment and annoyance of the parties.

Not least among the difficulties with which the Territorial Supreme Court contended from the days of the provisional courts under General Kearny had been the perpetual interference, both feigned and actual, of the military authorities. Perhaps, at no time, however, did the tension between the civil judiciary and the military authorities become as acute as it did during the administration of Brigadier General James H. Carleton whose iron hand was felt throughout the Territory.

Judge Benedict took considerable interest in journalism and for a time was either the owner of, or at least substantially interested in, the \textit{Santa Fe New Mexican}. After the Confederates, led by General Sibley, had fled New Mexico, Brigadier General James H. Carleton took over in Santa Fe in 1862 and soon became owner of a rival newspaper, the \textit{Santa Fe Gazette}.

Judge Benedict, through his paper, made some charges of graft against the general and prominent officers in his command, as well as accusations of unsatisfactory management of military affairs in the Territory. As a result of this criticism, a movement was set under way to secure removal of Judge Benedict as chief justice. Complaints were formulated declaring his unfitness for the bench. Unfortunately, Benedict, who always had been fond of the little brown jug, gradually became more and more addicted to the use of

\textsuperscript{11} \textit{Santa Fe (Weekly) New Mexican}, Aug. 19, 1864.
intoxicants and this played into his opponents' hands who made it the principal basis for the charges preferred against him. These were then forwarded to Washington and presented to the president by New Mexico's delegate in Congress and a number of influential officers in the army. The president, after reviewing these charges, said:

Well, gentlemen, I know Benedict. We have been friends for over thirty years. He may imbibe to excess, but Benedict drunk knows more law than all the others on the bench in New Mexico sober. I shall not disturb him.12

This was indeed sobering news for Benedict's adversaries and as long as Lincoln remained in the White House no amount of criticism and intrigue could change the president's mind. The bitterness of the attacks levelled against Benedict by his political opponents, however, did not cease while he remained on the bench. Not the least of these critics was James L. Collins, the editor of Carleton's Santa Fe Gazette. Typical of Collins' invectives against the chief justice is the following:

Upon completing the fall trip of his political machine, which he calls a court, [Chief Justice Benedict] has returned to the city and through his organ has given Chief Justice Benedict another of those semi-annual editorial puffs which to Chief Justice Benedict are so delightful, and to write which does give Chief Justice Benedict so much pleasure. Chief Justice Benedict in the estimation of Chief Justice Benedict is one of the most remarkable men of the age, that is if we are to believe what he says in his editorials about Chief Justice Benedict... He must dabble, dabble, dabble in the dirty pool of politics, which he himself stirs up and from which he constantly bespatters himself with mire the most filthy.13

These vituperative attacks can not be taken, of course, as representative of the public opinion of the time. Political prejudice, business competition and a clash of personalities were responsible for the tirades. Judge Benedict was leader of the then dominant political party in the Territory. Bene-

12. Twitchell, Old Santa Fe, p. 351.
13. Ibid., p. 254.
dict numbered as his friends most of the powerful and best men of the Territory. Though his personal habits were deplored, yet they did not appear shocking then, what with the free and easy conditions surrounding life on the frontier.

Serious as Judge Benedict's conflicts were with the military authorities, they still did not compare with the troubles of Associate Justice J. G. Knapp of the third judicial district. His conflicts extended from every military station and sub-depot from Santa Fe to the border.

The situation reached its peak of intensity in 1864 and 1865. Judge Knapp openly charged that "this Territory is under a military despotism," and that "the civil courts are embarrassed by the military." Carleton communicated with the Attorney General of the United States bitterly denouncing the judge and leveling serious charges against his judicial conduct. Judge Knapp quickly retorted with an open letter addressed to Carleton, saying

>You deceived that officer [the Attorney General] into the belief that I made complaints against you for acts which you had not been guilty of, and thereby you have done another thing which you intended, you have injured my character and reputation with the administration at Washington.\(^{14}\)

In backing up his charge that the military had interfered with the administration of justice by civil authorities, numerous instances were cited by Judge Knapp which were later substantiated when General Carleton was removed from his New Mexico command. Among the instances brought out was the fact that in January, 1863, during the session of the Supreme Court, Judge Knapp had been arrested by the military without explanation while the Court was in session and had been placed in the guard house in Santa Fe.\(^{15}\) In August that same year Judge Knapp was held for three days in the guard house at Las Cruces for "no offense or cause except to gratify the personal spite of one of your [Carleton's] subordinates."\(^{16}\) While on his way to Santa Fe in November, 1863, Judge Knapp was taken from

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16. Ibid.
the stage in which he had engaged passage and as a result the term of the Supreme Court failed completely for lack of quorum. The military refused to permit him to leave his residence in the south to come to Santa Fe without first asking permission from Carleton's command to do so. To gain such permission he was required to travel fifty miles to Franklin, Texas, and back again to procure a passport. Failure to do so subjected him to liability for arrest for non-compliance. On one occasion the judge proceeded to travel without pass and was promptly intercepted and halted at Las Cruces. Even with his passport the judge was required to report at every military post between Mesilla and the capital, and at Santa Fe itself, immediately upon arrival. Failure to do so immediately subjected him to prompt incarceration in the guard house by any provost sergeant along the way. Once, in Albuquerque, hot and sticky from a long day's travel on the stage from the south, the judge took time out to wash up and change clothing before reporting, and was threatened with imprisonment.

Few men dared openly to defy the wrath and force of the military, but Judge Knapp unhesitatingly expressed his resentment toward this military domination. In July, 1865, the judge refused to sit and hear cases at the July term of the Supreme Court because he was reluctant to carry out the arbitrary orders of Brigadier General Carleton. He had, for the same reason, refused to hold a term of the district court at Mesilla in November, 1864. This course on the part of Judge Knapp, no doubt, was fully justified.

Carleton was responsible on February 25, 1864, for threatening a deputy United States marshal with death if he attempted to serve a writ of replevin issued by the district court over which Judge Knapp presided. In June, 1864, a military force was ordered out to prevent a United States marshal from entering a judgment by the court. On another occasion one Rafael Martinez was ordered tried by a military commission for an offense after he had been released on bond for trial before the district court, and was tried before a military tribunal instead.
To his letter addressed to General Carleton, heretofore mentioned, Judge Knapp appended this defiant note:

I shall send this letter and any reply you may see fit to make, to the President of the United States, the Secretary of War and the Attorney General and shall make such other use of it as I please. I shall insist that unless you do deny the statement of facts here made, that you be held as confessing their truth; and that you are the very man who does what you ask others to deny for you, and which you do not dare deny for yourself while the record of your acts remains in existence. If you do attempt to deny them, I am prepared to prove them all, and thus establish the fact that you are unworthy of your present position under the government of the United States, and of the society and companionship of honorable men.17

Judge Knapp's attitude toward the military, together with the fact that Judge Brocchus who had been reappointed had not returned to New Mexico, left Judge Benedict virtually the sole civilian judicial officer in the Territory. His, indeed, were the only Supreme Court decisions reported after the January term, 1862, until January, 1867. This situation caused the Arizona Miner to observe:

Chief Justice Benedict is doing all the judicial labor in New Mexico as usual. We do not wonder that he complains of such inefficient associates as Brocchus and Knapp—the one ever absent from his post, and the other constantly on the rampage. Knapp reminds us of the fellow of whom Dr. Johnson said—"if he had two ideas in his head, they would fall out with each other."18

Judge Knapp's clash with Brigadier General Carleton, to be sure, was generated largely by personal animosities between the two gentlemen and between their immediate friends and followers. Carleton's interference with the civilian administration of justice in Judge Knapp's district was counter-balanced by the judge's inter-meddling in Carleton's affairs. The general had proposed an elaborate plan for the resettlement of the beaten Navaho and Apache Indians at the Bosque Redondo on the Pecos. Carleton's major responsibility in New Mexico was subjugation of the marauding and murderous bands of these Indians who had been

17. New Mexican, Jan. 13, 1865.
18. New Mexican, June 17, 1864.
massacring white men across the Territory. This was fundamentally a military matter, but Judge Knapp lashed forth at Carleton's plan and left no loose stones unturned to upset the military leader's program.

A petition by members of the Doña Ana County grand jury on June 10, 1864, though undoubtedly influenced by Judge Knapp's hostility toward the military, reflected General Carleton's unpopularity in the southern district whose citizens were being treated by the military commander as representatives of a conquered enemy province. It said:

We do now thus solemnly protest in the sacred name of liberty, of right and of justice, and demand that the military shall restore to us all our rights, immunities and privileges guaranteed to us by the Constitution and laws of the United States, and by the bill of rights of New Mexico. . . . Instead of being protected in the rights thus secured to us, General Carleton, through his subordinates, 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. . . . Setting up courts of his own, . . . [he] has prevented the courts established by law from discharging their duty. . . .

On September 19, 1866, Carleton was removed from his command, due in large measure to his inability to work in proper harmony with the civil administration in New Mexico. This, however, was not until Judge Knapp himself had left the court.

Assassination of President Lincoln, too, sounded a death knell for Chief Justice Benedict's tenure on the bench. Early in February, 1866, Judge Benedict was removed. The imprint left by his court's feud with the military at a time when a victorious Union army was riding the crest of popularity throughout the country, coupled no doubt with a renewal of charges regarding the judge's intemperance, as well as Judge Benedict's personal friendship with the then chief justice of the United States, Salmon P. Chase, were Benedict's undoing. Seeking to reward the heroes of the Union army, President Johnson named Brigadier General

19. *New Mexican*, July 1, 1864.
John P. Slough, who was known throughout New Mexico for his gallantry in resisting the invading Texans, as Judge Benedict's successor.

Loss of the position was a profound shock to the judge and it caused him to become very irritable and morose. Taking up the general practice of law, Benedict soon exhibited personal habits which brought him into difficulties with the presiding judges.

At one time Judge Benedict, in presenting a motion before Judge Sydney Hubbell in Albuquerque, seemingly made a remark reflecting upon the intelligence of the court. "Sit down," admonished Hubbell, "you are drunk." "That is true," retorted the lubricated Benedict, "I am surprised that your honor is enabled to make so correct a decision." 20

On another occasion Judge Benedict was arguing a motion before Judge Brocchus at Socorro. Judge Brocchus was a bit hard of hearing but a man of elegant manners and a thorough believer in decorum in the court room. Benedict's motion was on a matter of relatively small importance, but in his argument the ex-judge worked himself up to a frenzy, sawed the air with his arms, spoke in an unpleasantly loud voice and banged upon the table with all his might. Judge Brocchus became nervous and stopped him, suggesting in the most courteous manner at his command, that it was unpleasant to the court to watch Mr. Benedict perform in this fashion. Benedict apologetically explained that in the heat of his argument and in his zeal for his client he quite forgot. He resumed his argument, somewhat subdued at first, but was soon yelling at the top of his vocal cords, hammering the table and churning the ozone. The court stopped him again, repeating his former remarks. Benedict did likewise, resumed the argument and soon was making a dreadful noise. Judge Brocchus hereupon ordered the sheriff to adjourn court. The judge then stepped down from the bench, grabbed Benedict by the collar and proceeded to administer a good thrashing. Judge Benedict apologized. Court reopened, and this time Benedict completed his argument.

20. Twitchell, Old Santa Fe, pp. 356-357.
upon the motion in an altogether dignified and courteous manner. 21

In January, 1871, at a session of the Supreme Court, when the Hon. Joseph G. Palen was serving as chief justice, new rules of practice for the Supreme Court and for the district courts were adopted. One of these required the attorneys to file briefs upon points of law relied upon by them for reversal or approval and to give citations of authorities. The rule further provided that if this was not done counsel would not be heard. One day Judge Benedict, res­ tive under these new requirements, rose to argue a case in which he was counsel for the appellant. When the court called for his brief it was discovered that none had been filed. Judge Benedict protested that he had not understood the requirement. The rule was read to him and the case postponed to give him an opportunity to comply. Benedict subsequently filed what he said was his brief. His state­ ment of facts read as follows: “The facts of this case will be found upon the record.” Next he stated his first point. “Vide, U. S. Statutes at Large” was his citation of authority. (There were thirteen volumes of the Statutes at Large at the time.) To his second point his citation was “Vide, Phil­ lips, Starkie and Greenleaf on Evidence.” 22

The court informed Judge Benedict that it was sorry but that his so-called brief did not meet the requirements of the rule and gave him additional time to perfect it. He later brought it into court, unimproved, whereupon the court announced that he would not be heard, and directed opposing counsel, Mr. Charles P. Clever, an intimate friend of Judge Benedict, to proceed with the case. Mr. Clever went ahead with his argument and Judge Benedict sat by, commenting, growling and cursing. The court repeatedly called Benedict to order and finally directed that a rule be entered upon him to show cause why he should not be suspended or otherwise punished for his misconduct. His answer to the rule further

22. Ibid., p. 58.
aggravated his offense, for instead of attempting an apology, he very bitterly assailed and vilified the court. He was thereupon suspended from practice in the Supreme and district courts until further order of the court.

At the next succeeding session of the tribunal, Benedict unceremoniously walked into the court room and without offering any apology whatsoever demanded his restoration to practice. The court ignored him. At the following term Benedict again sought reinstatement as a matter of course and of right. Again no attention was paid to him. Finally, the third time, he came into court with an apology for his conduct, together with an attempted explanation and a request that he be restored to practice. The court thereupon made an order referring the matter to ex-Judges Hubbell, Houghton and Mr. William Breeden, as a committee to ascertain and report back to the court whether in their judgment Benedict's habits and character were such as to make him a fit person to practice in the courts. To Benedict this was the last straw. He withdrew his application and thereby probably spared the committee an unpleasant task.

Judge Benedict tried one other move to regain admission to the bar—an appeal to his friends in the Territorial legislature. Accordingly, early in 1872, the legislature passed a bill to allow the Hon. Kirby Benedict to practice law in the courts of the Territory. The act, however, never became effective; it was recalled and reconsidered by the house of representatives, then by unanimous vote tabled indefinitely.

In 1874 Judge Benedict died of a heart attack, survived by a widow and two children.