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THE RIGHT OF ASYLUM IN NEW MEXICO IN THE
SEVENTEENTH AND EIGHTEENTH CENTURIES

ELIZABETH HOWARD WEST

THAT THE RIGHT of asylum still exists in the Orient is no more than is to be expected; that it lingered in some parts of continental Europe to a time within the memory of living man, and that it must at one time or another have been exercised within more than half of what is now the United States, as it certainly was in New Mexico, are rather startling facts.¹

Having its basis in a feeling of reverence for the place of worship, this right has doubtless existed ever since there have been shrines devoted to the worship of deity. To go no further back than the history of Europe, it played an interesting and important part in the history of Greece, being a recognized fact in the amphictyonic laws. The Greek temple-sanctuaries continued to furnish immunity after the Greek states fell under Roman rule, though their number was afterward limited when their working was found to interfere materially with the execution of Roman laws.

In Rome, the institution did not develop early. The Roman temper was essentially juridical, and in the long struggle between patrician and plebeian for equality of rights and privilege, a complicated system of purely legal checks upon despotic power was developed. Romulus's traditional asylum was not religious, and furnished no precedent in the republic; the right of a condemned criminal to exemption from the death penalty if he accidentally met a vestal, on the way to the place of execution, was closely akin, but not true religious asylum; so that the earliest native Roman religious asylum was that afforded under imperial law by the

temples and the statues of the deified Augustus, which was especially favorable to slaves.

Among the Hebrews, the well-known cities of refuge were the only legally recognized sanctuary; and they sheltered only the involuntary homicide from the private avenger of blood, so as to provide for a fair judicial trial. This form of asylum is, of course, distinct from true church sanctuary, though it did influence the latter's development. There are traces of an earlier altar-sanctuary, and of a long clinging of the Israelitish popular mind thereto, which also exerted an influence in the historic development of church asylum right.

The Christian right of asylum grew out of a number of causes working together. It must have developed gradually out of the Greek, tolerated under the Roman law. In fact, it doubtless existed side by side with the Greek, as it certainly did with the Roman form developed under the empire, for the earliest Theodosian institute, "concerning those who flee to the churches," is antedated only six years by one "concerning those who flee to the statues." It was only natural that the common people, familiar with the temple as a place of refuge, should continue to regard it as a place of refuge when it was turned into a Christian church. On the ecclesiastical side the basic influence was in the Christian ideal of mercy: leading to the conception of intercession for accused persons, or even known criminals as a necessary function of the episcopal office; reinforced by the well-known Germanic aversion to capital punishment; and having the Jewish cities of refuge as a biblical precedent.

At first, while the church was weak, the granting or withholding of clemency in response to the intercession of bishop or priest for the unfortunate who had, by taking refuge in the church, invoked such intercession, was necessarily recognized as being altogether dependent upon the ruler's will. Emperor Theodosius I, as a matter of fact, did away altogether with the right of asylum in the last years of the fourth century, A.D.; the first ecclesiastical legislation on the subject was the deliverance of the Concilium Africanum the following year, resolving to send an embassy to the emperor

praying for the restoration of the privilege or right on a regular legal basis. It was restored by the Emperor Honorius. With the growth of power of the church and the bishop of Rome, the right of legislation on ecclesiastical immunity and the right of judging cases arising under the laws were at least to a certain extent claimed by churchmen *ipso jure*, and there was many a struggle between the ecclesiastical and the temporal authorities. As the papal power declined, and the growth of strong civil governments made it less necessary, the struggle calmed down into agreements between church and state.

While far more extended than the Jewish, the medieval Christian right of asylum had a like purpose, that of preventing bloodshed, of mitigating the cruelties of a cruel age. He who "took sanctuary" was not thereby absolved from punishment, even though the episcopal intercession availed. In most cases the effect was to mitigate the civil penalty or, as in the English abjuration of the realm, to substitute a special for the ordinary form of penalty. If he were released altogether by the temporal power, he might be forced by the church to do penance. Moreover, from the time of the very earliest legislation, certain offenses of a peculiarly grave character were altogether excluded from sanctuary protection. Beginning with Justinian's exclusion of rapists, homicides, adulterers, etc., both the canon and the secular law (though law and practice varied at different times and in different countries), were, as time went on, fairly agreed in excluding also "public robbers," incendiaries, devastators of fields and vineyards, violators of sanctuary, those guilty of *lèse majesté*, and forgers. Debtors, too, from the earliest times, found themselves the subject of legislation to prevent the evasion of their just debts. In short, the privilege, once so widely granted, was so lopped off from time to time, so circumscribed, that by the middle of the nineteenth century it had been abolished by law in the greater part of Europe.

At first the immunity could be secured only by refuge within the church itself in the proximity of the altar. Later, to protect the altar and the divine service from disturbance and unseemly confusion, the privilege was extended to every part of the building, to

its porticoes, and its grounds within a circuit of forty paces for the more important church, and thirty for the less important church or chapel. The house of the bishops and other religious houses came in time to exercise the prerogative. One feature of the circumscription of the privilege, however, was the reduction of the number of asylums. In the Spanish dominions, by the close of the third quarter of the eighteenth century, an agreement had been reached between secular and ecclesiastical authorities that there should be only one asylum in each city—or two at most, in the case of the larger cities. For this purpose a certain church was designated, not in the neighborhood of a prison, not a dwelling of a religious order, nor with dwellings adjacent, except when no other was available.

Jew and Greek, barbarian, Scythian, bond or free—even heretics, when their offense was other than heresy—all were admitted to the privileges of the sacred place. Certain Jews are excluded in an early Theodosian institute, but only in case of making false pretence of repentance and conversion, from securing the benefits of sanctuary. There were differences in procedure, to be sure, as between a slave and free man, but the purpose was in all cases the same, namely, to protect from oppression and violence.

The procedure in extracting criminals from sanctuary differed widely at different times and in different places, just as did the degree of protection afforded. The norm established by the canon law after the Germanic influence made itself apparent, was that of some form of oath by the civil authorities to the ecclesiastic in charge of the asylum in question, that the penalty inflicted upon the accused should not extend to death or mutilation of members. This was the practice followed under the Spanish law. Whether the ecclesiastical, or the secular, court should decide whether in a given case immunity should or should not apply, and what should be done with the offender during the pendency of the question was long debated.

In Spain, as in continental Europe generally, the earliest legislation upon the right of asylum emanated from the sovereign, and secular authority was paramount in cases involving the principle.

Later the church claimed the right of legislation; and the claim was so far maintained that the Spanish laws of this second period show in a marked degree the influence of the canon law. Moreover, the claims of the church to more extended jurisdiction in cases involving immunity led to continual disputes with the secular magistrates, as a consequence of which the whole matter of procedure became greatly confused. It was but natural that criminals, taking advantage of the confusion, should become more and more audacious. The abuses which crept in made the need of reforms so evident that finally there came a time when agreements on these points were reached between the ecclesiastical and the civil authorities, gradually reducing the privilege, the first of which, between Felipe III and Pope Clement XII, was concluded in 1737.

Teodoro Gómez Herrera, in the *Diccionario-Guía legislativa español*, notes a decree "for the abolition of local immunity of the temples called asylum" promulgated on October 11, 1809, during the general upheaval attendant upon the Peninsular War. Whether this statute of abrogations was a part of the legislation of the junta, the regency, and the cortes, swept away by Fernando VII when he reëstablished the old absolute monarchy, and not a part of the legislation reënacted by him after the constitutional régime was again forced upon him, or whether it was like sundry other Spanish paper laws, the right of asylum was not really thereby done away with, but continued to be the subject of legislation as late at least as 1850, when it is expressly mentioned in an extradition treaty between France and Spain.

Under the laws of Castile, which were early adopted as the governing code for the Spanish colonies, as well as under the canon law, to which they were subjected on the establishment of the Roman Catholic Church, the right of asylum became transplanted to American soil as a result of the Spanish conquests. The special code for the Indies developed later of course introduced such modifications as circumstances required. And among the many interesting stories yet hidden in the mildewed records of our Spanish Southwest, none is more fascinating, perhaps, than is the

story of the late survival there of this immemorial institution. The first known case revealed in the records occurred in 1685, the last in 1796. When, a quarter of a century after the latter date, Mexico became independent of Spain, the right still existed in Spanish law, which was the basis of the Mexican; and it lingered in Mexico until 1860, when it was finally abolished by statute.

In 1685, the main points in the Spanish law affecting the Indies were the following:

1. Immunity was to be afforded only when the offender fled to sanctuary of his own free will.
2. Certain classes of offenders were wholly or in part excluded from sanctuary privileges—in the main, those already noted.
3. A taker of sanctuary was usually not to be withdrawn forcibly, but only by an ecclesiastic's permission, under oath of the magistrate not to injure the refugee in life or limb until the question of his right to immunity was settled. If the ecclesiastic refused such permission, the person was to be withdrawn forcibly. If it were decided that the offense was not one of the exempted classes, the offender was to be returned to the sanctuary; if it was, the law was to take its usual course.
4. The refugee in sanctuary must be given food by the ecclesiastics in charge.
5. Any part of the church and a 'space of forty paces' circuit about its walls, in the more important churches, or thirty in chapels, etc., could furnish protection.
6. The Indies were to be governed by the law of Castile.
7. Persons enjoying immunity were not to be allowed to remain long in church or monastery.
8. Ecclesiastics were not to be hindered in ecclesiastical jurisdiction, but to be aided according to law.
9. Soldiers, pilots, sailors, artillerymen, embarking in *armadas* and *flotas* to the Indies, etc., and taking refuge in churches and sacred places so as to remain in the Indies, were to be withdrawn and delivered to the commanders of their vessels to return to Spain.
10. Attorneys for the state were to prosecute causes of immunity before ecclesiastical judges in person or through their agents.

THE FACT that no case is recorded before 1685 does not necessarily mean that none had occurred before that time, but only that the New Mexico papers are very fragmentary, because of fire, flood, Indian revolt, and official neglect.² In fact, perhaps three-fourths of the whole number of papers have been destroyed. This first known case occurred five years after the terrible Indian revolt of 1680, which had driven the Spaniards to the extreme southern frontier of New Mexico, where they remained practically in exile for about fourteen years, grouped about the Real de San Lorenzo, and the later-organized pueblo of Guadalupe—El Paso del Norte, now Ciudad Juárez, Mexico—for much of the time in a most deplorable condition. Its interest lies mainly in the fact that it is the first, for it throws no light upon procedure. In a petition to the *cabildo* of Santa Fe, then still legally in existence, despite the enforced exile of the Villa at El Paso del Norte, Sargento Mayor Lorenzo de Madrid and Captain Sebastián González, stated that in the previous year, 1684, being then members of the *cabildo*, they had sent Captain Joseph Padilla, also a member of the *cabildo*, with a dispatch for the viceroy of Mexico in reference to conditions in New Mexico. A recent report, recently received they said, was that the messenger had fled to the convent of Nuestra Señora de Guadalupe. This action, together with his failure to report to the petitioners the delivery of the dispatch, led to the suspicion that he had failed to deliver it. If so he was guilty of

a serious offense, which should be punished to the fullest extent of the law, since the dispatch for his Excellency was signed and sealed with the great seal of this *cabildo*.

They therefore petitioned for a ruling as to whether jurisdiction in the case belonged to the present *cabildo* or to that of the year before.³

The first case in which the actual sanctuary procedure is recorded, occurred in 1697, the year which in England saw the final sweeping away of the last trace of the privilege of sanctuary lingering after the formal abolishment of the privilege by statute, seventy-three years before.

One Nicolás Ramírez was being tried on suspicion of having murdered an Indian servant and stealing sheep; and the evidence adduced against him seemed also to implicate one Nicolás Rodarte.⁴ Finding that the latter had taken church, the *alcalde* in charge of the case recorded his procedure in these words:

In this villa of Santa Fe, on the eleventh day of the month of June, 1697, I, Captain Diego Arias de Quirós, ordinary *alcalde* of this said villa, in order to proceed in the case instituted against Nicolás Ramírez and Nicolás Rodarte, refugee in sanctuary and convicted criminal . . . requested permission from our father guardian Fray Miguel Trizio, who gave it to me, to receive the declaration of the aforesaid Nicolás Rodarte; in testimony whereof I have signed this with the clerk of cabildo. . . .

The next record is of the declaration of Nicolás Rodarte:

And immediately thereupon, in the said day, month, and year, I, Captain Diego Arias de Quirós, ordinary *alcalde*, went in company with the clerk of cabildo to the parochial church of this villa of Santa Fe, to take the declaration of Nicolás Rodarte in due form of law, through God our Lord and the sign of the holy cross; and being bidden to make the sign of the cross, that his declaration might be taken, and being asked what was his name, he said that Church was his name; and being further questioned and cross-questioned, he said that Church was his name. In testimony whereof I have signed this with the clerk of cabildo.

The joint trial terminated with the sentence of Ramírez to three months labor on public works, his wages to be used to reimburse the owner of the stolen sheep for his loss, the latter having withdrawn his complaint in regard to the supposed murder of the Indian. The evidence is less strong against him than Rodarte, to be sure; but the latter, as he is not again mentioned, evidently succeeded in making good his stout insistence upon his asylum rights.

The third case, the trial of Captain Páez Hurtado,⁵ 1697-1698, the records of which, unfortunately, are incomplete, brings out some additional phases of procedure, and presents also very interesting features besides those merely legal, related as it is to the

turbulent conditions growing out of the reconquest of New Mexico, 1692-1694. Governor Diego de Vargas, who effected the reconquest, had incurred the enmity of the cabildo of Santa Fe in the course of the reconquest, especially, it seems, by certain measures which he adopted to maintain the good will of friendly Indian chiefs. The cabildo, therefore, united with his successor, Pedro Rodríguez Cubero, in prosecuting him and certain of his officials under very serious charges, notably of "graft" of the most shocking kind in recruiting families in Zacatecas, Sombrerete, and Parral to assist in the reconquest and colonization of New Mexico. The records of the case in point form a part of the proceedings in the prosecution.

It may be noted in passing that Captain Juan Páez Hurtado, the principal person here concerned, the deputy appointed by Governor Vargas to conduct the recruit, appears many times in later records, always in the guise of a person most highly respected and worthy of respect. This makes one inclined to take several grains of salt with the partisan proceedings here placed on record, since, making all due allowance for the inconsistencies of human nature, it is difficult to believe that he could have been quite so bad as his enemies charged. As in the second case, it seems worth while to tell the story mainly by extracts from the documents themselves.

The record opens with a statement by *Maestre de Campo* Luis Granillo, that having received an order from Governor Cubero for the arrest of Captain Juan Páez Hurtado, he sent Adjutant Juan de Dios Lucero de Godoy with two others to execute the order. They did not find him in his house, as he had gone to the convent. The statement continues:

And when twice or thrice I summoned him he sent word that he was in the land of the Pope, and that he had no mind to come out. If they had anything to say to him they should come thither to notify him; for he knew that Captain Valverde and Alférez Don Martín de Urioste and Don Félix Martínez had been arrested, and said that he would not come out of sanctuary, lest the same should be done to him; and that, having ascertained what had happened, since the com-

ing of the couriers he had lived in the convent and moved all his goods. And I proceeded to sequester his goods, and found nothing in his house but a musket without a stock. And again I gave orders to the officers and squadron commanders to let no beast be withdrawn from the drove (*caballada*) whether belonging to him or to General Diego de Vargas. Likewise I gave orders to the said officials that, if they should see him without the sanctuary, they should apprehend him and bring him under arrest to my presence.

From the testimony taken from recruited colonists, great in volume, though mercifully incomplete, Governor Cubero made formal charges, mostly of fraud in one form or another in connection with the recruiting and with the distribution of supplies for the colonists. The charges included also an accusation of social immorality and of tampering with the mails, to which offenses the accused had added that of "using his sacred refuge as headquarters from which to cause scandals, disturbing the peace among the folk of this kingdom." In view of these things the governor ordered Granillo to try to catch Páez Hurtado outside of sanctuary, and after securing his person with two pairs of fetters, to send him to Santa Fe; to sequester his horses and all his goods; and, if unable to seize him outside of sanctuary, to summon him by edict according to law. The report continues on May 21, 1698:

In the Pueblo of El Paso of the Río del Norte, I, Maestre de Campo Luis Granillo, captain and chief magistrate of this jurisdiction . . . , insomuch as I hold an order of the said governor and captain general, dated October 20, wherein he orders me to arrest and place under guard and send to him in the villa of Santa Fe the person of Captain Juan Páez Hurtado. In order that I might execute the said order I sent the adjutant of this presidio and the other officials and soldiers, and found he had taken refuge within the church of this convent of Nuestra Señora de Guadalupe del Paso, as appears from the first measure, which I put into execution on the last day of October, 1697; and as at present I find myself in possession of a new order of the said governor and captain general, in which his lordship orders me to apprehend him [*i.e.*, Páez Hurtado] if I do not find him in sanctuary; and, having taken steps to arrest him and given secret orders, and having been unable to seize him, I pro-

ceeded to summon him by edict, indicting him under all the charges found against the aforesaid; and since the said Juan Páez has committed frauds against the royal treasury and the citizens in the recruit which he made in the city of Zacatecas, and in view of the other charges made in the writ against the said Juan Páez, I ordered these edicts published outside the guardhouse, and in the other houses which I assigned for their dwelling-place; and I required him once, twice, and thrice to appear to make his defense before me within the space of nine days, counted from today, Wednesday, the date of the publication made by voice of the town-crier, there being no other military instruments in this presidio. If he do not appear within the said space of time, I shall proceed to the other measures of justice. . . .

The next record of the case declares:

In the said day, month and year, these edicts were published in the parts above mentioned by the voice of the herald, in a loud and intelligible voice, by the mouth of Miguel Romero, an Indian, native of the provinces of New Mexico, well-versed in the Castilian tongue, there being no other military instruments in this presidio. And I, Adjutant Juan de Dios Lucero de Godoy, caused it to be published with the greatest solemnity possible, in presence of the officers, *alférez*, and sergeant, and sixteen soldiers who were present at the said publication. . . .

On the thirtieth day of the month of May, of this present year of ninety-eight, was fulfilled the term of nine days, of the edicts in which was summoned Captain Juan Páez; and since he has not appeared, nor has any result accrued, I give a new order to the officers of this presidio, adjutant, *alférez*, and sergeant, that they observe all vigilance and arrest him if they find him outside of sanctuary.

This vigilance also being fruitless, Granillo issued another order, reiterating much of the wrongdoings of Juan Páez Hurtado, enjoining fresh vigilance on the part of the adjutant and the other presidial officers to arrest the accused outside of sanctuary, and directing that they should proceed

with all solicitude and secrecy; and to that end they shall summon all the soldiers that may be necessary; for this purpose spying upon him, if he issue forth from sanctuary, for all of which I have given

power and authority to the said adjutant, Juan de Dios Lucero, and to alférez Don Tomás Gutiérrez Carrera, and to Sergeant Juan García de Noriega that they put this order into execution.

He also ordered all the horses and mules belonging to Páez Hurtado not yet secured, to be sequestered and placed in the royal herd, and reiterated former orders that none should be given up without his express order. A later record shows that the orders in regard to the animals were executed.

The record closes abruptly with an order of Governor Cubero, late in the following summer, that all horses, mules, and cattle belonging to Páez Hurtado should be sequestered and sent to Santa Fe to the governor; also that Páez Hurtado's grain crop standing and harvested should be sequestered and delivered to a trustworthy person. The governor's order concluded:

I order the above said maestre de campo, Luis Granillo, that every day he know and inquire whether Captain Juan Páez Hurtado exists and is found in the convent or church of the said presidio of El Paso whither he is fled; and if perchance they answer that he is not there, and that he has departed for the kingdom of Vizcaya, that the said maestre de campo immediately and without delay set forth with the soldiers he may consider necessary, in his pursuit, until he overtake him and bring him to my presence. All the aforesaid the said maestre de campo, Luis Granillo, shall execute without any omission whatsoever, and of all that he does in virtue of this order he shall send me report in legal form.

Though the record gives no inkling of how this specific case came out, it may be interesting to note that when Cubero's term of office ended, in 1703, and Vargas succeeded him by virtue of a royal commission issued shortly after the close of his former term, Páez Hurtado seems to have come again into his own, since a person of the same name appears again in 1704 as acting governor and as testamentary executor of Vargas after the latter's sudden death; and that he lived to a good old age, serving in important official capacities, and being looked up to as one of the most respected citizens of the commonwealth.

The next known case, February-May 1712, is that of a troublesome individual, Juan de Tafoya,⁶ who caused great vexation to the governor by his success in slipping from one sanctuary to another, and thus protected continuing his pernicious activity in stirring up sedition and causing apostasy among the Christian Indians; and against whom charges of oppressing Indians were also preferred. This is more significant because the Indian uprisings of 1680 and 1696 were still fresh in memory and any rumor of Indian disaffection was enough to throw officials and people alike into panic. Any Spaniard who would deliberately work to create dissatisfaction or disturb the existing order was regarded as an undesirable citizen of the worst type. Governor Peñuela, therefore, when report was brought to him of suspicious meetings among certain Indians, issued orders designed to keep these Indians in check by restricting their movements. Tafoya, the reputed author of the mischief, who was said to be going "from pueblo to pueblo, taking refuge in their convents, whence very evil and pernicious consequences are ensuing," from his tampering with the Indians, causing inquietude and apostasy, he ordered

on pain of death and being held a traitor to the king not to emerge from the convent where he may be on receiving this notification, to any other of this jurisdiction, and that he leave in peace and quietude the Christian Indians of said pueblos; giving him express notice that in case of his disobedience I shall immediately withdraw him from the convent, and arresting him, place him under guard. . . .

Cristóbal de Góngora, clerk of Cabildo of Santa Fe, was ordered to go to the pueblo where Tafoya was in sanctuary, and read him this notice in person.

The records of this case are badly mutilated; it is impossible to know all that actually occurred or was said. Góngora at least records that he went to two pueblos where the offender was supposed to be, and asked permission of the religious in charge of their missions to serve the notice upon Tafoya, but failed to find him in either place. Peñuela thereupon issued an edict ordering Tafoya to appear, in person or through an agent, within the space

of nine days, to make his defense; otherwise the case should proceed against him according to law. This edict was to be published

in the customary places of this villa [Santa Fe] by the voice of the herald and to the sound of military instruments; and . . . in the said Pueblo of Nambé or in any one of this jurisdiction where the said Juan de Tafoya may be found.

The publication was effected, Góngora certifies, in Santa Fe and in the pueblos of the Teguas jurisdiction, the region where Tafoya resided.

As appeared by an *auto*, however, Tafoya did not appear within nine days, whereupon he was accused of "first rebellion," and ordered to appear within five days. The edict was published for the second time, but the second summons having been unheeded, he was accused of "second rebellion," and was given three days within which to appear. The civil and military secretary, at the governor's order, thereupon caused the third publication of the edict. The governor declared Juan de Tafoya a traitor to the king, ordering all to consider him as such; and empowered Captain Miguel Tenorio de Alva to arrest him wherever found "outside the immunity of the Church," and bring him to the governor's presence, all good citizens being required to give any necessary aid. Four days later, the governor accused Tafoya of "third rebellion," and ordered the papers filed; and, finally, the governor sent all the papers in the case to the viceroy of New Spain for such farther action as his Excellency might direct.

The next case—the trial of Diego Velasco for killing a sergeant of the Santa Fe presidial company—was pending at the same time as the one just noted, March-April 1712.⁷ The points of interest here are the fact that the father guardian of the Santa Fe church, whither the accused had fled, specified in granting permission to the alcalde to examine the convent to find out whether the prisoner were really present, that all the rights and immunities conceded to the said holy church by apostolic and pontifical bulls should be regarded; that the alcalde, in ordering the examination of the prisoner, directed that in case of the father guardian's re-

fusal to grant the interview, the necessary legal requisition should be made for the purpose of receiving his confession; that between the time of ascertaining the presence of the prisoner and the time of taking his confession a guard of twelve soldiers was placed about the church to prevent the escape; that Velasco, on being questioned, would not reply, except with the protective formula, "Church is my name;" that after the relatives of the deceased withdrew complaint against Velasco, saying that they would be satisfied with a money payment, the latter gave himself up voluntarily, and was regularly tried. The sentence passed is not the least curious feature of the case. For, although it was brought out in the course of the trial that the accused was a quiet, peaceable citizen, and that the killing was clearly in self-defense,⁸ Velasco was sentenced to have twenty-five masses said for the soul of the deceased; to make a millstone; to make a canoe on the crossing of the Rio Grande, at San Felipe, the timbers to be furnished him, but no pay to be given him; to stay in Santa Fe for four years, to be on hand for the building of the church, or whatever else might offer; wages to be allowed him at the rate of twelve *reales* a day; in default, to be sentenced to four years in the presidio of Pensacola; also to pay the costs of the suit, assessed at forty *pesos*. The governor-judge gave as the reason for his clemency in not inflicting death sentence the fact that Velasco was the only carpenter in all the country and also understood stone-masonry, and therefore could not be spared!⁹

The next case which possesses any especial interest is that of Captain Alonso Rael de Aguilar, junior,¹⁰ who killed a sergeant of the Santa Fe presidial company in a fight, and who took sanctuary

in the parish church of Santa Fe, which was surrounded by a cordon of fourteen soldiers, stationed within a radius of forty paces from the church, with orders to examine every one who entered or departed on foot or on horseback, men and women, whatever their dress.

All this was in December 1715; in the following May, the lieutenant governor, Juan Páez Hurtado, on going to the church with the pastor's permission and searching it thoroughly found the crim-

inal gone, despite these elaborate precautions. Páez Hurtado thereupon sent a messenger to the *alcaldes mayores* of four jurisdictions with orders to each to ascertain whether or not Rael de Aguilar had taken church in the jurisdiction, and apprehend him and send him under guard to Santa Fe, if found outside the sanctuary; if not, to certify the fulfillment of the order and send it under seal to the next jurisdiction. Following this order come the certificates of four *alcaldes* that such had been done, each certifying that no trace of the criminal had been found in his jurisdiction but promising arrest if he were found.

Fortunately for the accused, a royal *cédula* was published on August 1, 1716, promising pardon to all offenders in sanctuary who should volunteer within a week for military service in the Moqui [Hopi] Province.¹¹ Rael de Aguilar and two others presented themselves in the guardhouse of Santa Fe two days later, craving pardon under this royal *cedula*; and just within the limit came a fourth: all were pardoned; Rael de Aguilar—perhaps because his offense was the worst—being required to report after the campaign for complete acquittal.

The next case is connected in a way, not clearly shown by the documents, with political complications. Governor Flores Mogollón had resigned his office in 1715, and Captain Valverde Cossío, commandant at El Paso del Norte, had come to Santa Fe with an *ad interim* appointment from the viceroy. Captain Félix Martínez, the quarrelsome commandant of the Santa Fe presidial company, appears as acting governor in the same year. Whether he had contrived to keep Valverde Cossío from taking possession at all, or whether his own succession was perfectly legal, it is at any rate certain that the two disagreed, just as Flores Mogollón and Martínez had disagreed before the latter resigned. Valverde Cossío, being a guest at the time in the pueblo and mission of San Ildefonso, being ordered by Martínez in 1717 to come to Santa Fe to accompany the latter to Mexico, sent word that he was ill and unable to come. Martínez thereupon drew up writs for his civil and military secretary to serve upon Valverde Cossío and upon Francisco Montes Vigil, a soldier of the Santa Fe presidial com-

pany, who being summoned by the governor to give account of his stewardship of the Santa Fe company's fund, and realizing his inability to render a satisfactory account, had taken refuge in the same convent. The request was referred by the religious in charge to the custodian, who refused to allow service in the case of Valverde Cossío, on the ground that he was merely a guest of the convent, and that the religious had orders from their superiors in view of the discredit they had suffered in connection with the late quarrels between Flores Mogollón, the soldiers, and Martínez, to keep out of such entangling complications; in the case of Francisco Montes Vigil, the custodian gave permission to the religious to allow the writ to be served,

with the understanding that there is to be no judicial action within the convent, nor can he be withdrawn until it appear to the reverend father whether or no the immunity of the Church may shelter him.¹²

The next case, occurring in a trial for fighting, differs in two points from any which have preceded. The defendant, who was the aggressor, on being questioned in sanctuary made a full confession; and the reading of the indictment found in the preliminary trial having made it clear that he would find it to his advantage to be heard in his own defense, since otherwise his goods would be confiscated, presented himself in the prison. Thereupon, the case was brought to a conclusion. As his antagonist's wounds were found to be healed, the defendant's sentence was very light—only four months' banishment to Albuquerque and the costs of the suit; afterwards he was pardoned at the intercession of some unnamed influential person.¹³

The next case, February 1723, presents nothing new, except that the sanctuary man concerned is spoken of as having been found clinging to a cross by the roadside, before he took church, suggesting that there was some idea of protection attaching to the cross.¹⁴

The next case, in July of the same year,¹⁵ presents another instance of the defendant's presenting himself in response to the summons in the indictment similar to the one previously noted.

The defendant, who was under trial for disobedience to certain irrigation orders, to orders following this first disobedience, resistance to arrest, etc., defended himself vigorously; and further pleaded that in view of

the misfortunes that may follow me from my absence from my house and loss of crops and livestock, for since the day when I took refuge to the present they have not been herded, and I have been told that one of my cattle has died in the brush: in view of all the aforesaid, I appeal before the superior tribunal of your honor as deputy governor and captain general of this kingdom that I be liberated and acquitted of the false accusations of the said cause declaring that I am innocent thereof. . . .

Páez Hurtado, after duly considering the case, liberated the prisoner,

noting that the case is not in a state of sentence . . . looking upon him with my wonted piety, in order that he may not lose his crops and his cattle . . . enjoining upon him the implicit obedience which he ought to render to the mandates of the royal justice, and that he shall take oath before me to be ready whenever the governor shall summon him. . . .

In September 1731, two hot-headed fellows of Santa Clara fell to blows one day, as a consequence of which one was severely wounded and the other took church betimes. When the matter was reported to the alcalde, he took the wounded man's declaration, and, a few days afterward, went with two witnesses to the mission of the pueblo of Santa Clara; here, after obtaining permission of the minister, he proceeded to take the declaration of the refugee;

who, when I bade him make the sign of the holy cross, answered that Church was his name; when I urged him to say wherefore he was fled to sanctuary, he answered that Church was his name; when I asked who had taken him to the church, he answered that Church was his name; when I asked him who had wounded him, he answered that Church was his name.

The officer, apparently of the opinion that nothing was to be gained by further questioning, closed the interview, and signed his record. Two days later, he recorded another attempt.

I, Captain Domingo Vigil, deputy alcalde mayor and captain in war passed . . . to the convent of Santa Clara to take the confession of the said Joseph Naranjo. Asked what was his name, he answered that Church was his name; asked of what place he was a citizen, he answered that Church was his name; asked if he were a bachelor, he answered that Church was his name; asked if he were married, he answered that Church was his name; asked what had been the motive wherefore he had betaken him to sanctuary, he answered that Church was his name.

Again the deputy stopped to rest and to sign his record; nothing daunted, however, he returned to the attack the same day.

When asked where the quarrel took place, he answered that Church was his name; asked who was with them when they fought, he answered that Church was his name; asked if he were a Spaniard, he answered that Church was his name; asked if he were a mulatto, he answered that Church was his name; asked what was his business, he answered that Church was his name; and asked how he supported himself, he answered that Church was his name.

Evidently the deputy felt that he had done his duty, and that nothing more could be expected of him in that line, so he recorded no further attempts to wring a confession from the offender. Two days before, he had laid an embargo upon Naranjo's goods, and on the same date had certified to Governor Cruzat y Góngora that with his own eyes he had seen the burial of the other party to the fight. After taking farther testimony, therefore, he turned over the case to the governor, who, two months later, solemnly ordered both parties to the difficulty to appear before him within thirty days, on pain of being proceeded against for rebellion and contumacy! The deputy recorded as solemnly that the edict was published as ordered, but that neither dead man nor sanctuary man appeared.

The final outcome of the case is not stated. About two years

after its beginning the widow of the slain man withdrew the complaint she had earlier filed against Naranjo, praying that he be restored to his poor wife and children, which document the governor ordered filed, just nine months and three days after the date of its presentation to the *alcalde mayor*.¹⁶

In the next case, the offender, a soldier of the Santa Fe presidial company, who had attacked a commanding officer with his musket, left the church of Isleta "under the word of" that officer. The governor cited this fact together with the imprisonment—of three and a half months—suffered by the offender, as reasons for reducing his sentence to that of dismissal from the service.¹⁷

The next two cases, both occurring in September 1733, and running for several months each, were both for assault. In both cases the defendant took sanctuary; was interviewed, and made a full statement. In both, the wounded man recovered, and the assailant was liberated, being required to pay the costs, medical attendance, and any losses incurred by the wounded because of enforced absence from his business.¹⁸

The next case,¹⁹ also a trial for assault, is in many respects similar to the two just preceding. One point of interest, however, lies in the fact that the two assailants, both of whom had taken church, at first answered each question with the usual protective formula, "Church is my name;" after the question was thrice repeated each dropped the formula and made a full declaration, the first answers doubtless having been intended to impress more strongly upon the questioner the fact of church protection.²⁰

In case twenty-one, Governor Mendoza recorded that eight soldiers with their commanding officer, detailed for service at Albuquerque, had neglected their duty, and that the Indians had stolen their horses. He continued:

Whereupon I, Lieutenant Colonel Don Gaspar Domingo de Mendoza, governor and captain general of this kingdom of New Mexico, sent an order in writing that said commander with his command return to this capital, to determine what might be most expedient; and, my order having been made known to them by the deputy of said jurisdiction . . . they treated it with contempt and fled to the sanctu-

aries of the churches of Albuquerque and those of the Pueblos of Zía and Isleta; and I having pledged to them my word of *caución juratoria*, the said commander and eight soldiers appeared in this capital, where they are now prisoners in the public prison of said capital. I caused them to be summoned to my presence, questioning them under the accustomed oath, that they might present their defense and declare what moved them to take flight and not come at my summons. . . .

The commander responded that he had disobeyed superior orders and fled into sanctuary because the lieutenant had exhibited orders to collect arms and sequester the commander's goods for 440 pesos he owed the presidio; the eight soldiers, that they had feared punishment for the recent loss of the horses.

Thereupon the governor recorded that in view of their repeated disobedience to his summons to appear before him, their conspiring together, their desertion and flight,

having retired to the immunity of the sanctuary . . . although I ought to inflict the extreme penalty which his Majesty orders against military offenders, who betake themselves to sacred immunities, I have deemed it expedient, departing from the severity of the edicts and proclamations with which they ought to be summoned to appear to present their defense, and in default thereof to apply to them the law of contumacy and rebellion with the penalty of death and of inability to live in all the dominions of the king our lord, and of liability to be apprehended whensoever they be found outside of sanctuary by the ordinary justices, who may inflict upon them the penalty for rebellion and contumacy, without being obliged to surrender them to the military judge, if only they know that sentence has been passed upon them by the council of war: yet, considering the newness of this country and the possibility of their ignorance of the above-mentioned, I have determined to discharge all the deponents, and replace them by persons fit for service; pronouncing them by way of sentence disqualified for the service of the king and for drawing their salaries; disobedient, abusive of their superior's orders, being all implicated in one offense.²¹

It is difficult to determine just what law the governor here cites. The only royal declarations found on the subject of soldiers' sanc-

tuary rights between the date of the laws already summarized and the date of this case, provide only for the official withdrawal of deserters for service, under *caución juratoria* not to punish them unless they commit new offenses, and for the procedure in determining soldiers' rights to immunity.

In case twenty-three²² the offense is not stated; there is merely the correspondence between the ecclesiastical judge, Miguel de Oleachea, of Las Caldas, and Captain Alonso Victores Rubín de Celis, of the presidio of El Paso del Norte, over the claim of Pedro García Jurado to ecclesiastical immunity as against a sentence of banishment by Governor Codallos y Rabal. The ecclesiastical judge stated that he was the proper judge of García Jurado's right to immunity, and ordered the commandant to see that the sentence of exile be not carried out, but that the appellant be kept in security at the presidio, without the least mistreatment,

at the account and charge of this my ecclesiastical court, until a new order . . . under penalty of major excommunication. . . .

The commandant replied that he knew there were higher tribunals competent to determine the case; that he had no one to advise him whether he should defend the royal jurisdiction; that he would keep the prisoner, as requested, but could not guarantee his security, since the adobe prison was unfit, and the soldiers too much occupied to serve as guards; and that he would refer the case to the viceroy.²³

Case twenty-four (1751-1752) is of a *lobo* (Indian),²⁴ who, being under trail for assault upon the governor's steward within the governor's storehouse, fled to sanctuary in the Santa Fe church. Being questioned there, he answered the first question as to why he had gone to the governor's palace, but parried the rest with the protective formula. Later, he escaped to Santa Cruz, where he again took church. Some seven months afterward, a complaint was filed against him for committing assault, with intent to kill, upon another man. This time, he was arrested in Santa Fe, and, his trial being finished, he was sentenced to one hundred stripes; and, in mercy, since his imprisonment for one and one-half years

had in part purged his offense, to ten years and one day's banishment in the district of Tomé, jurisdiction of Albuquerque.²⁵

In case twenty-five (1757) occurs for the first time a request for the delivery of the refugees to the secular authorities by the ecclesiastical. Two prisoners escaped from the Santa Fe guard-house and took refuge in the Santa Fe church. Guards were placed about the church, the offenders were thrice summoned by edict cried by the herald and posted on the doors of the *casas reales*; but still they failed to give themselves up. Thereupon the alcalde mayor of Santa Fe sent the following communication to the ecclesiastical judge:

I, Don Francisco Guerrero, alcalde mayor and captain in war of this villa of Santa Fe and its jurisdiction, to you vicar and ecclesiastical judge of this kingdom, Don Santiago de Roibal, give notice that two criminals who were in the prison of this villa, named Diego Antonio Márquez and Juan de Benavides, have taken flight therefrom . . . and it appears that they are fled into the parish church of this villa of Santa Fe. I exhort you in the name of his Majesty (may God preserve him), and on my part I pray and charge you that you be pleased to provide well for the security of said criminals, and in such form that they may not flee or become apostate, passing to the *rancherías* of infidel Indians of the barbarous nations who inhabit these environs (on account of the serious hurt which may result therefrom, since I have information that said criminals have presented to you a writing setting forth that if you surrender them to the royal justice, they will rather apostatize; and he who has the audacity to suggest it will not be above executing it); and so until the sentence is pronounced; and if this involve the shedding of blood, the point of immunity will be discussed. . . .

The ecclesiastical judge replied that, although always ready to comply with requests of the royal justice he could not do so in this case, because the refugees had presented a writing

by which they beseech and supplicate that I shelter them, and that if I surrender them, or send them to the prison of this villa, they lay upon me the charge of the loss of their spiritual and corporal life . . . which weighs heavily upon my conscience; for the only means

that I had to secure them was to ask royal aid from governor and captain general of this kingdom, that he order them to be secured in his prison, because I have none. And in this many difficulties are presented to me by what the said criminals say in their above-cited writing, namely, that only if they be quartered will they return to the jail. Therefore I dare not, nor do I decide for fear they will do as they say, and that blood be shed, and I be involved in an irregularity; for which very weighty reasons I cannot secure them, much less imprison them in the house and dwelling of the reverend missionary fathers of this villa, because they may not permit it.

He stated further that he had asked for instructions from the bishop of Durango; that if the *alcalde* were not satisfied with this answer, he might appeal to the bishop or to the vice-custodian of the New Mexico missions.

The *alcalde* transmitted the papers to the governor, who in view of the refusal of the ecclesiastical judge to secure the prisoners issued orders to the commandant of the presidio for the withdrawal of the sentinels hitherto stationed about the church, and to the *alcaldes* of the villas and six most important pueblos of New Mexico for the arrest of the criminals wherever found outside of sanctuary, any citizen or Indian failing to give due notice to the *alcaldes*, or helping the prisoners in any escape, to be punished as accomplices. All these officials certified the receipt and publication of the orders, but no farther account of the criminals appears.²⁶

From this time forward, the "secular arm" was stronger. A royal cedula of April 5, 1764,²⁷ provided that if a crime whereof a refugee in sanctuary was accused were notably one of those not entitled to sanctuary protection, the refugee might be at once withdrawn, if there were imminent danger of his escape, under *caución juratoria* only, without the necessity of showing the record of the preliminary trial, that he might be prevented from fleeing or committing new excesses, until the question of immunity should be decided. The ecclesiastical permission should first be asked; but if it were withheld the criminal should nevertheless be withdrawn.

In November of this same year,²⁸ the withdrawal of a man on trial for assault was demanded of the same ecclesiastical judge,

Santiago de Roibal, on the ground that he had no right to immunity. Roibal answered that he would give up the offender as soon as he should receive *caución juratoria* that the criminal should be secure from death or mutilation of members or bloodshed. For some reason not recorded, the refugee was not withdrawn.

In March of the following year, complaint was lodged against the assailant for coming out of sanctuary at night and mutilating an ass belonging to the soldier whom he had attacked the fall before. Thereupon the governor sent by the *alcalde mayor* of Santa Fe a letter to the ecclesiastical judge setting forth the facts in the case, and requiring that the criminal be secured in sanctuary, or else the judge would be held responsible should any further trouble ensue. Roibal answered this time by requesting the governor to take charge of the offender and imprison him, specifying that until the question of his right to immunity should be decided, he should be secure from extortion or mutilation of members, and that the governor should give as security either *caución juratoria* or a receipt stating that he would be personally responsible for the criminal on the part of holy church.

The governor answered that he did not ask the person of the criminal, but his security; that the ecclesiastical judge, if he so desired, might place the criminal in the public prison under ecclesiastical immunity until the latter of his own will submitted to the secular law and jurisdiction. Roibal thereupon agreed to give up the criminal, stipulating that "he is still to enjoy ecclesiastical immunity."

On the same day Vicente Sena, the criminal, petitioned the governor to look upon him with mercy in view of the mysteries that day celebrated by our Mother Church, in order to his punishment; saying that since he could not meet his obligations without using his trade, his refuge being a prison, he was ready to satisfy the injured and doubted not that the latter would forgive as a Christian act; he placed himself in the governor's hands and prayed that his punishment might be mitigated.

On the following day, the governor, as he had promised in his application to the ecclesiastical judge, summoned Sena to appear

within four days to be tried in the secular court, saying that if he should not appear freely without the refuge and law of the church in the time specified, definitive sentence would be pronounced against him. This edict was to be thrice published by the voice of the herald at the door of the guardhouse, twice in one day, morning and afternoon, the third time on the second morning. After the first crying, however, the criminal presented a writing to the governor submitting himself entirely to secular law. On ascertaining the genuineness of this document the governor sent it to the ecclesiastical judge, who certified to the genuineness of the paper, approved the governor's action, and stated that he had nothing to ask, allege, or defend. The trial now proceeded to its end in the usual form.

The sentence pronounced imposed three years' exile in Albuquerque with liberty to work as he chose, to take his wife and family, to leave the kingdom once a year if necessary; the costs of the suit; with arbitrary punishment should he return to Santa Fe before the expiration of the three years. The injured man was to serve two months among those detailed to guard the horses.

Case twenty-seven,²⁹ which occurred in the trial of two brothers as principals, and their mother as accessory, for robbing the public warehouse in Santa Fe of supplies for the soldiers of the Santa Fe presidial company, contains a request from the governor for the surrender of one of the criminals, who had taken church in Albuquerque. The ground for the request was fear lest he escape and apostatize and influence the Indians to commit atrocities. Fray Manuel Rojo, to whom the request was addressed, answered that, with the aid of the justice of the district he had secured with fetters in the mission the person of the criminal; and he referred the governor to the ecclesiastical judge, Santiago Roibal. The governor accordingly preferred his request to Roibal, who answered that his own jurisdiction extended no farther than to Santa Fe and its district. Again, therefore, the governor addressed himself to Fray Manuel Rojo, stating that the security of the prisoner was not assured, that the guards could not be maintained at the prisoner's expense and would be a burden to the public. Under the cedula of

April 5, 1764, he demanded the surrender of the prisoner,

under *caución juratoria* which I make, that no injury shall be inflicted upon him, nor any extortion, until you, as ecclesiastical judge, shall determine whether or no he is entitled to the benefits of sanctuary; and that the said deputy will give a receipt after his surrender; and if your paternity shall resist the extraction of the said criminal I shall see myself obliged to put into practice the mandates of the above cited *cédula*.

Father Rojo³⁰ thereupon surrendered the criminal "in the name of our holy Mother Church," in view of the governor's *caución juratoria*; though the offense is not one of those exempted by the Gregorian bull of May 25, 1591. The prisoner was then duly placed in the guardhouse and his confession was taken in due form. About a month later, so the record runs, the other brother, a prisoner in Santa Fe, broke jail and took sanctuary in the Santa Fe parish church. His surrender was also asked—this time of Roibal, on the same ground and conditions as his brother's. The two being now in prison under *caución juratoria*, the governor referred the case to the viceroy. With this the record ends.

This trial also enjoys the distinction of being the only one extant in which a woman took church; the mother of the two criminals, becoming implicated early in the trial, fled to the Santa Fe parish church to avoid arrest; no further mention is made of her.

In case twenty-eight (1768-1772)³¹ two men on trial for cattle-theft, took church in Albuquerque. Fray Manuel José Rojo,³² asked by the *alcalde mayor* of Albuquerque for their surrender, again tried to evade responsibility, referring the case to Fray Miguel Gómez Cayuela, [then *Custos*], who refused the surrender till after the question of immunity should be settled. Afterward, however, the criminals voluntarily surrendered to the secular authorities. Thereupon the trial proceeded, and they were sentenced to work until they had repaid the owner for the value of the stolen cattle. The other persons accused were released.

In case twenty-nine,³³ also a trial for cattle-theft, one of the four accused men, named Yendo, took church in Santa Cruz, whence

he was surrendered promptly by the ecclesiastical judge, under *caución juratoria*, by virtue of the *cédula* of April 5, 1764; and the trial continued. When the sentence was pronounced, Yendo was released—the ecclesiastical judge being notified—in view of the fact that he had already been punished by a deputy *alcalde*, though he was to be bound to a master to keep him from vagrancy. The others concerned were acquitted or fined according to their degree of guilt. Yendo's taking of sanctuary may have helped him somewhat, though the failure to state what his previous punishment was precludes such an assertion; and the confused account of the trial makes it as hard to say how his guilt compared with that of those who received heavier punishment.

In case thirty [1769]³⁴ the *alcalde mayor* of Abiquiú went to the church and asked permission to take the confession of an Indian [*genízaro*] refugee on trial for assault. The ecclesiastic, having no means of securing the criminal, and fearing apostasy, offered to give him up, "on account of the Church." But as the wounded man afterward recovered, and as he made no complaint against the Indian, the latter was released on a sort of suspended sentence.

In case thirty-one (1796)³⁵ the refugee, on trial for manslaughter, was withdrawn under *caución juratoria*, and placed in the royal prison (the guardhouse) by the commander of the Santa Fe presidial company, who tried the case. An interesting point in the record of the succeeding trial is the plea of the "procurator" assigned for the defense of the accused, who pleaded as extenuating circumstances the necessity of self-defense, the temperate conduct of the accused, etc., ending with a plea for the efficacy of his taking sanctuary. The laws from time immemorial have freed from all capital punishment any criminal who in time takes refuge under ecclesiastical immunity, taking church regularly designated as a sacred refuge, even when the homicide was committed with infamy and premeditated intent. There are no such unfavorable circumstances in this case. The fact that the homicide was committed in natural and proper self-defense, and that "holy Church

under its ecclesiastical immunity declares him free in the very act of opportunely taking its sacred refuge" ought to free him from all penalty.³⁶

The judge, as usual, transmitted the papers to Governor Chacón for final judgment. The latter referred the case to the royal audiencia of Guadalajara. That body ordered the defendant to be released somewhat more than a year after the opening of the trial.³⁷

Of the thirty-second and last case,³⁸ there is no record save a letter of Pedro de Nava, commandant general of the internal provinces, dated December 21, 1796, to Fernando Chacón, governor of New Mexico, approving the latter's action in sending back a deserter from the presidio of San Buenaventura, who had taken church in Santa Cruz on November 3 of the same year.

IN ATTEMPTING to draw any general conclusions from these records, one is confronted by the fact that their fragmentary character renders any great amount of reliable generalization impossible; notwithstanding this limitation, however, the recorded cases afford some exceedingly interesting glimpses into the way things went when offenders took church to evade paying the penalty of their misdeeds.

In the first place, it is interesting to note that no defendant to a civil suit is recorded as taking sanctuary. This may be explained by the fact that under the law only the person of the debtor and not his goods could be sheltered thereby; though of course it is possible that such cases may have occurred, and that the records may have been lost.

As to the crimes and misdemeanors involved in these thirty-two recorded cases, even a somewhat liberal construction of the laws of Castile would have excluded several cases of violence; and a judge learned in the law and conscientious in enforcing it would doubtless have reduced the number even more. But New Mexico judges were not learned in the law; and with all the advantages of the secular over the ecclesiastical authorities under the New Mexican mission system, with all their characteristically Spanish zeal to keep the

church in its place, the civil magistrates had a reverence for the church, and an aversion as characteristically Spanish to coming under churchly ban.

Moreover, New Mexico was a long way from Castile. Bernard Moses quotes a most charming paragraph from Paul Groussac to the effect that certain provincial governors of South America invented

this exquisite formula, which, when these decrees [of the Council of the Indies] were not agreeable to the governors, was gravely placed on the margin of the document: "*Se obedece, pero no se ejecuta*" [obeyed, but not executed].

Although I have found no such formula written upon the margin of any New Mexican document, practices in New Mexico were not greatly unlike those in South America.³⁹

Besides, it is but fair to state that much of the time comprehended in the period under question was included in the period already noted in the hasty survey of Spanish legislation, in which church and state were so at variance in matters touching ecclesiastical immunity that it must have been hard to tell just what was the law.⁴⁰

It is not surprising, therefore, to find the right so long invoked in cases where the offender might have reason to fear violence to his person. Nor is it surprising, in view of the notoriously hot tempers of the Hispanic Latin races, to find crimes of violence predominating in the recorded cases; it is likely that such offenses would be found to predominate if the records were all extant. After these in order of frequency come cases of theft or fraud, neglect of duty, political offenses, resistance to official authority, gambling, and in one case the offense is not stated.

No record has been found of any question ever being raised in all the hundred and more years covered in this account as to the right of any refugee to the protection of the sanctuary, except in one case, the record of which is not complete, in which the governor banished an offender claiming ecclesiastical immunity. If only one had forethought enough to take sanctuary before his

offense was reported to the *alcalde*, or failing that, if he had better legs and longer wind than his pursuers, it was enough. Once within the convent, church, or mission, he could not be touched or even questioned save by the consent of the *padre* in charge of the sacred place; nor when questioned was he obliged to answer. In the case of serious offense, the most that was done by the secular authorities was to place guards about the sanctuary, with orders to arrest the accused if he could be caught without the traditional limits. If he obstinately remained within cover, or if he contrived to elude his guards and escape to another sacred place he might be summoned by edict, published by the herald, to appear voluntarily before the court and subject himself to trial; or the governor, who was also the highest judge of the province, sent a messenger throughout the jurisdictions of the province, requiring every *alcalde* to make sure of every sacred place in his district, and enjoining vigilance with a view to arresting the offender outside of sanctuary.

There was no distinction of persons; all classes, from the Indian or half-breed who could not sign his name, to the deputy governor, are represented among the forty or forty-five persons involved in the thirty-two cases. As noted above, there was only one woman among them, the mother of two thieves, herself accused of receiving their booty.

Nor was there any distinction as between one sacred place and another. Any parish church, mission, or convent in the whole province could shelter a refugee within its walls, or within the traditional space of thirty to forty paces' circuit without. The royal *cédula* dated November 2, 1773, ordering that not more than one church or two, at most, in any municipality should enjoy the right of immunity, had practically no effect in New Mexico, as there was not in all the province a *pueblo* or *villa* which had more than one church, except possibly Santa Fe, whose presidial chapel, mentioned specifically in 1796, probably existed earlier, a presidial chaplain being mentioned as early as 1727.⁴¹

It goes without saying that abuses of this privilege were bound to occur; for human nature in New Mexico was not essentially

different from human nature everywhere else. It was possible for such pestilent fellows as several here noticed (especially the fomenter of sedition among the Indians, who in spite of the edicts thrice cried by the herald, and in contempt of the royal justice, had so convenient—but from the authorities' point of view, so provoking—a fashion of slipping from one sanctuary to another) to make themselves nuisances of the first degree by constituting the sanctuary of their choice headquarters whence they sallied forth to repeat their offenses.

In the extant records the largest number of instances occurred in the three villas, Santa Fe, Albuquerque, and Santa Cruz, in the order named. After them come the pueblos of Guadalupe (El Paso del Norte), San Ildefonso, Santa Clara, Isleta, Zía, San Juan, Bernalillo, and Abiquiú. As one enterprising hunter of sanctuaries seems to have honored pretty well every sacred place in the province by fleeing thither, it is possible that each one named and sundry others might be credited with at least one case more.

The fragmentary quality of the record precludes any positive statement in regard to the exact effect of this practice upon legal procedure. It is impossible to tell whether the thirty-two cases of which I find records or citations in the hundred and eleven years between the first and the last instance represent the total number in which this right was exercised, or what proportion they bear to the total number of criminal cases of the time. Even if the number of recorded cases should be assumed to represent the total, it would hardly be possible to estimate with any degree of assurance its precise influence. Theoretically, of course, it operated as a mitigating influence, yet it is doubtful whether there was after all any great practical result. In the early instances the offender could be got out of sanctuary only when he voluntarily gave himself up to the secular authorities. If he chose to spend his entire life in the church or mission where he had taken refuge, and avoid being apprehended outside a space of thirty or forty paces' circuit about the walls, he could escape the penalty altogether in spite of the law against long continuance in sanctuary. If he thought it better

policy to give himself up and end his troubles at once, there was apparently little difference between his fate and that of persons who had not invoked the aid of Mother Church. No sentence of death, to be sure, could be passed upon him, but the death sentence was very rare even for murder, the Germanic principle of compensatory damages being preferred in most cases where conviction was secured. As time went on, and more and more restrictions were thrown about the exercise of the right, and as laws were more strictly enforced, even the satisfaction of choosing his prison was no longer his, since he could be withdrawn under oath of the magistrate not to injure him in life or limb.

There is little, too, to throw direct light upon the economic and social effects. Of course, the refugee who remained in sanctuary for a long time must perforce let his ordinary business go by the board. One offender, in a petition for his trial and release asserted that things had gone badly with his property since he took church. It is equally a matter of course that the possibility of an offender being able to evade the just deserts of his misdeed, must have had a bad effect upon the morals of the people, and that it must have reinforced the tendency of a blighting paternalism in government to take away the sense of personal responsibility. Yet, as New Mexico was not widely famed for either thrift or inherent law-abiding qualities, it is possible that no great change was wrought by the practice.

On the whole, therefore, so far as New Mexico is concerned, the right of asylum in that region is of greatest interest as a survival of age-long laws and customs which in their inception and early development offered some element of mercy to offenders or suspected persons. As practiced in New Mexico, the right is not devoid of a certain element of picturesqueness. To what extent it shaped civil law in that region or in any of the other parts of the Americas can not be told without very extensive and intensive study of civil and ecclesiastical courts in all their ramifications. Naturally as the civil courts became stronger, the practice lost in efficacy and was bound in the natural course of events to disappear.

NOTES

1. This article was originally published in the *Hispanic American Historical Review*, vol. 8, no. 3 (August 1928) and is reprinted here by permission of the Duke University Press. With the exception of some minor editing of spelling and accentuation and a few corrections explained in the notes, the text of the paper follows the original printing. Miss West summarized her sources in the following footnote at the end of the article: "The part of the foregoing paper which refers to New Mexico itself is based wholly upon source material in the manuscript records of New Mexico, found by the writer as a by-product of her work upon a calendar of these papers (published in Ralph Emerson Twitchell's *Spanish Archives of New Mexico*, in 1914), while they were in the Library of Congress. They had been transferred thither by the federal government from the Territory of New Mexico; they were returned to Santa Fe some years after New Mexico became a state. Despite the gaps noted in the body of the paper, these records are invaluable, especially for the reconquest and the following century and a half. The background and interpretation are based partly upon primary and partly upon secondary sources. The most noteworthy items among the primary sources are the English Bible; *Bullarium Romanum*; *Corpus Juris Canonici*; *Codex Theodosianus*; *Codex Justinianus*; *Fuero Juzgo* (mostly as cited in *Enciclopedia española*, in article 'Asilo'); *Las Siete Partidas*; *Novísima Recopilación de las leyes de España*; *Recopilación de leyes de Indias*; cédulas, orders, decrees of Spanish kings, 1498-1835; and extradition treaty between France and Spain, August 26, 1850 (cited in *Enciclopedia española*, article 'Asilo'). Among the numerous secondary sources used may be mentioned the *Cyclopedia of Law and Procedure* (article 'Asylum'); Joaquín de Escriche, *Diccionario razonado* (Madrid, 1874-6; article 'Inmunidad eclesiástica'); Bernard Zeger van Espen, *Jus Canonicum universale*. IV. 'Dissertatio canonica de intercessionis sive interventionis . . . et de confugientibus ad ecclesias'; Teodoro Gómez Herrera, *Diccionario-guía de legislación española*; and 'Right of Asylum' in *Green Bag*, VIII, 422)." All other notes have been added by the Editor. EBA

2. Shortly after Miss West wrote, much new documentation for the history of New Mexico was brought to light by researchers in Mexican and Spanish archives and libraries. The right of asylum was recognized in New Mexico as early as 1613. In June of that year Governor Pedro Peralta appointed alcalde ordinario Juan Escarramad to accompany some of the citizens to a roundup as mediator of the quarrels usual on these occasions. In a dispute with one Simón Pérez, Escarramad received a serious

sword wound. Pérez fled to sanctuary in the Santa Fe convent. Even though the wounded man was a loyal adherent of the governor, who was then engaged in serious controversy with the local Franciscans, Peralta took care not to violate the right of asylum. France V. Scholes, *Church and State in New Mexico, 1610-1650* (Albuquerque, 1937), pp. 29, 43-45; also NMHR, vol. 11 (1936), pp. 37, 51-53. In 1626, however, Governor Felipe Sotelo Osorio was accused of ordering a soldier to seize a fugitive servant even if the man had taken refuge in a church and was found "clinging to the crucifix itself." Scholes, "The First Decade of the Inquisition in New Mexico," NMHR, vol. 10 (1935), pp. 203-04. According to Fray Andrés Juárez, Governor Fernando de Argüello (1644-1647) actually violated the right of asylum and threatened the Franciscan prelate who protested. Scholes, *Church and State*, pp. 188-89; also NMHR, vol. 12 (1937), pp. 98-99. In 1663 Don Pedro Durán y Chávez, while being taken to Santa Fe under arrest, escaped from his guards at the pueblo of Santo Domingo and took sanctuary in the church. Three days later, by order of Governor Peñalosa, the soldiers removed Durán y Chávez by force and took him to Santa Fe, where he was imprisoned in the Casa Real. This interesting episode and its repercussions are discussed at some length by Scholes in *Troublous Times in New Mexico, 1659-1670* (Albuquerque, 1942), pp. 203-12; also NMHR, vol. 16 (1941), pp. 22-31.

3. Spanish Archives of New Mexico, Santa Fe (cited hereinafter as SANM), no. 36. The documents cited by Miss West are listed in Twitchell, *Spanish Archives*, vol. 2, and the document numbers used here refer both to this calendar and the original documents.

4. SANM, no. 66.

5. *Ibid.*, no. 74d.

6. *Ibid.*, no. 171.

7. *Ibid.*, no. 172.

8. He was a cripple.

9. Although Twitchell states that the defendant was "discharged," Miss West's summary of the sentence is correct. It should be noted that all the work to which Velasco was sentenced was for the public welfare. Flores Mogollón had decreed the building of a mill to alleviate "the excessive labor" of grinding all the wheat on metates. The "canoa" at the crossing of the river at the pueblo of San Felipe was needed because when aid went from the presidio to "those frontiers" against raids by enemy Indians, the soldiers often got their arms wet or lost them when they had to cross the river. SANM, no. 172.

10. *Ibid.*, no. 239g (listed in Twitchell as 239j). Miss West omits the case of Francisco Xavier Romero (no. 239c), a shoemaker of Santa Cruz, who enjoyed a reputation as a medical practitioner. After lengthy proceed-

ings; Governor Flores Mogollón found him guilty as the chief offender in the killing of an ox belonging to the Indian governor of the pueblo of Pojoaque in August 1715. On November 20, 1715, the governor sentenced Romero to two years' exile to General Antonio de Valverde's obraje at the presidio of El Paso. He was to be taken there by an escort party then on the point of departure. The next document in the case is a petition from the citizens of Albuquerque, presented before Governor Martínez, Santa Fe, April 4, 1716, from which it appears that Romero must have escaped to sanctuary in the Albuquerque church on the way south. The Albuquerque delegation complained that since the founding of the villa there had not been in it "nor for many leagues around, any person who understands the faculty of healing the wounds and diseases that are commonly suffered. And for this reason many people have died in this said Villa without diagnosis of their illness and some have died even when the nature of the ailment was known, without being given the usual treatment, such as blood-lettings or cuppings or similar things, because, as we have said, there is no one who knows how to apply them. . . . And in a matter of such great importance, it is a lamentable state of affairs when, in a Spanish villa, there is not a surgeon, or at least a barber, who can cure wounds and ease the sick in some way." Therefore they asked him to order that Xavier Romero, "who is in sanctuary in this holy church of said villa," instead of going to expiate his crime in El Paso, "remain there to exercise the trade of surgery, since he is a person with knowledge of it, as is of record in the certifications he holds, as well as in the licenses the lords governor, your Lordship's predecessors, have granted him to exercise said trade." They were willing to pay his fees in accordance with what he was usually given in Santa Cruz and elsewhere, and asked that he continue to render his services at the Albuquerque friary. Martínez commuted his predecessor's sentence to service for the same two-year period as sacristan in Albuquerque, where he was also to treat the sick without pay. The alcalde mayor and war captain of Albuquerque notified Romero on April 15; the culprit was delighted to accept the terms of the new sentence.

11. *Ibid.*, no. 256a.

12. *Ibid.*, no. 280. Valverde arrived in Santa Fe to take office as governor *ad interim* on December 9, 1716. With the support of the cabildo and other prominent citizens, Martínez refused to turn the government over to him, alleging that his interim appointment had been obtained on the basis of false information. When Martínez left for Mexico City in compliance with the same viceregal order, he left Juan Páez Hurtado as acting governor. Meanwhile, Valverde sent his version of the affair to the authorities and remained at San Ildefonso pending further instructions. The decision was in his favor, and he took office as governor of New Mex-

ico on June 15, 1717, serving until March 2, 1722. See Ted J. Warner, *The Career of Don Félix Martínez de Torrelaguna, Soldier, Presidio Commander, and Governor of New Mexico, 1693-1726* (unpublished doctoral dissertation, University of New Mexico, 1963), chapters 4 and 5 *passim*.

13. Causa criminal de oficio de la real justicia contra Juan de Paz Bustillos y Juan Lorenzo de Medina, en que resultó culpado el dicho Juan Lorenzo de Medina. Año de 1718. SANM, no. 291.

14. *Ibid.*, no. 319.

15. *Ibid.*, no. 317a. The date is incorrectly given by Twitchell as 1722.

16. *Ibid.*, no. 363a.

17. *Ibid.*, no. 363c.

18. *Ibid.*, nos. 390, 392.

19. Miss West apparently overlooked the case of two Indians who stole some ribbon in Albuquerque in April 1734. They were imprisoned and admitted their guilt to Capt. Juan González Baz, alcalde mayor of the district. Before he began judicial proceedings, they managed to break their fetters and take sanctuary in the parish church. The priest gave the alcalde permission to take their statements. One of the culprits, a young Ute, replied only with the formula, "Church is my name," for which he must have been coached by the father or some other person. The other, a fourteen year old boy, answered all questions. In May the friar turned the Indians over to the alcalde under caución juratoria, whereupon the first Indian also made a full statement. The proceedings were remitted to Governor Gervasio Cruzat y Góngora, who passed sentence, Santa Fe, May 10, 1734: "... although the criminals have confessed . . . penalty in accordance with their guilt cannot be imposed because they enjoy the immunity of the Church." He ordered that they be sent to reside in the pueblo of Santa Ana. SANM, no. 398.

20. *Ibid.*, no. 416a.

21. *Ibid.*, no. 446.

22. "Case 22," which Miss West does not discuss, is probably Causa criminal de querella de José Manuel Trujillo contra Antonio Valverde y dos hijos suyos, vecinos de la jurisdicción de Santa Cruz de la Cañada, por unas heridas que dieron al dicho José Manuel Trujillo. Año de 1748. SANM, no. 498. Valverde took sanctuary in the convent of the pueblo of San Juan, and his son Juan Domingo at Santa Clara. Both made statements when questioned by permission of the priests. The assault may have occurred in a quarrel over an accusation of rape and breach of promise of marriage against Juan Domingo Valverde. The case was referred to Governor Codallos y Rabal, who fined the defendants twenty regional pesos to pay the curandera who tended the wounded man, and ten pesos costs.

As for Juana Trujillo's accusation against young Valverde, the governor told her to present her case before the Vicar and Ecclesiastical Judge Don Santiago de Roybal.

23. *Ibid.*, no. 501.

24. Of mixed Indian and negro blood.

25. SANM, no. 517.

26. *Ibid.*, no. 539.

27. The date 1753 in HAHR must be a typographical error. See p. 141, *infra*, and SANM, no. 624, in which Governor Mendinueta cites a cedula dated El Pardo, April 5, 1764. It is unlikely, however, that a cedula issued in April would have reached New Mexico by November of the same year. In any case there was earlier legislation on the right to immunity. For a good summary of the laws of asylum as they applied in America, see Lic. Juan N. Rodríguez de S. Miguel, *Pandectas Hispano-Megicanas, ó sea código general comprensivo de las leyes generales, útiles y vivas de las Siete Partidas, Recopilación novísima, la de Indias, autos y providencias conocidas por de Montemayor y Beleña, y cédulas posteriores hasta el año de 1820*, 3 vols. (Mexico, 1852), vol. 1, pp. 131-50.

28. Autos criminales seguidos contra Vicente de Sena por haber herido al soldado Antonio de Armenta, concluidos en este juzgado el de 1765. The assault occurred on October 17, 1764. SANM, no. 579.

29. *Ibid.*, no. 624.

30. Name of the accused substituted for the name of the friar in HAHR.

31. SANM, no. 636.

32. See note 30, *supra*.

33. SANM, no. 643.

34. *Ibid.*, no. 649.

35. *Ibid.*, no. 1368.

36. We note that José Rafael Sarracino was reluctant to accept the responsibility of defending the accused, pointing out his lack of learning in the law. "And out of pure compassion, at the second instance I have agreed to undertake this obligation, promising henceforth to conduct myself in this defense according to my loyal knowledge and understanding in favor of my client, expounding the arguments that seem to me most Christian, conducive, and conformable to the laws of humanity."

37. SANM, no. 1469.

38. *Ibid.*, no. 1374.

39. These are rather naive views of the famous formula. Since it took several months for communications from Spain to reach the Indies, viceroys and other high officials were legally empowered to delay putting into effect orders they considered ill-advised or inopportune in the light of their

knowledge of local problems. In such cases they were expected to report their reasons to the King and Council of the Indies so that a more informed resolution could be made. *Recopilación de leyes de los reynos de las Indias* (Madrid, 1681), Bk. II, tit. 1, law 24.

40. This is perhaps too strong a statement. See Rodríguez de S. Miguel, and Francisco Javier Hernáez, *Colección de bulas, breves y otros documentos relativos a la iglesia de América y Filipinas*, 2 vols. (Brussels, 1879), for the progressive clarification of the laws regarding asylum.

41. In addition to the parish church at Santa Fe, the first chapel, or hermita, of San Miguel was built in the late 1620's, destroyed in 1640, and rebuilt sometime before 1680, when it was burned by the Indians. The present church of San Miguel dates from 1709-1710. (Its continuing claim to be the "oldest church in the United States" has long been discredited by the historical and archaeological evidence.) A military chapel, La Castrense, or Our Lady of Light, was built on the plaza in 1760-1761.

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