New Mexico Historical Review

Volume 68 | Number 2 Article 3

4-1-1993

An Excess of Law in Lincoln County: Thomas Catron, Samuel Axtell, and the Lincoln County War

Joel K. Jacobsen

Follow this and additional works at: https://digitalrepository.unm.edu/nmhr

Recommended Citation
Jacobsen, Joel K.. "An Excess of Law in Lincoln County: Thomas Catron, Samuel Axtell, and the Lincoln County War." *New Mexico Historical Review* 68, 2 (1993). https://digitalrepository.unm.edu/nmhr/vol68/iss2/3

This Article is brought to you for free and open access by UNM Digital Repository. It has been accepted for inclusion in New Mexico Historical Review by an authorized editor of UNM Digital Repository. For more information, please contact disc@unm.edu.

An Excess of Law in Lincoln County: Thomas Catron, Samuel Axtell, and the Lincoln County War

JOEL K. JACOBSEN

New Mexico's Lincoln County War of 1877–1878 has spawned endless retellings, from nineteenth-century dime novels to the movie *Young Guns* and including any number of books and articles, some more faithful to the facts than others. It lives in popular imagination as a series of violent encounters, from the assassination of Sheriff William Brady to the gunfight at Blazer's Mill. Through the dust and gunpowder smoke rides the image of Billy the Kid. But the Lincoln County War was also, to an underappreciated extent, a legal battle involving lawyers, judges and juries, and the hyper-civilized rituals of the courtroom. Indeed, it might even be said that the cause of the Lincoln County War was not lawlessness but an excess of law, or at least an excess of tricky and occasionally dubious legal maneuvers.

The general outline of the Lincoln County War is well known and

---

Joel Jacobsen received a bachelor of arts degree in literature from the University of California, and a law degree from Northwestern University. He is currently an assistant attorney general for the state of New Mexico. His narrative history of the Lincoln County War is forthcoming in 1994 from the University of Nebraska Press.

will be only very briefly sketched here.[1] The bloodshed had its origin in the commercial rivalry between two competing stores located in Lincoln, New Mexico. One, "the House," the outgrowth of the post sutler store at nearby Fort Stanton, was founded in 1873 by Lawrence Murphy. Murphy was later bought out by his assistant, Jimmy Dolan. The other store was founded in 1877 by a twenty-four-year-old Englishman, John Tunstall. Calling the establishments "stores" understates their function and importance, for they advanced credit to their farmer-rancher customers against the fall's harvest, much as do modern small town banks, and also purchased bulk commodities to satisfy government procurement contracts, making them the biggest purchasers of the region's grain and beef. Lincoln County's isolation from the communities of the Rio Grande meant that the stores were the only reliable market available to Lincoln County farmers and ranchers, a fact that had given the House monopoly power. The opening of Tunstall's store in 1877 was the first organized challenge to the House's power, and naturally was resented by the House forces.[2]

Alexander McSween, the central figure of the Lincoln County War, a lawyer who lost his life in the climactic "Five Days Battle," was at

---

1. The primary sources for all accounts of the Lincoln County War are companion reports prepared by federal investigator Frank Warner Angel entitled "In the Matter of the Lincoln County Troubles" and "In the Matter of the Causes and Circumstances of the Death of John H. Tunstall, a British Subject." The latter report is supported by numerous affidavits, depositions, and newspaper clippings. The reports and supporting evidence (referred to collectively as "Angel Report" herein) are found in National Archives Record Group 60 as File No. 44-4-8-3, Records of the Department of Justice. Classic secondary accounts of the background to the Lincoln County War are found in William A. Keleher, *Violence in Lincoln County, 1869–1881: A New Mexico Item* (Albuquerque: University of New Mexico Press, 1982), 22–82; Maurice Garland Fulton, *History of the Lincoln County War* (Tucson: University of Arizona Press, 1980), 45–117. Other accounts of note include Robert M. Utley, *High Noon in Lincoln: Violence on the Western Frontier* (Albuquerque: University of New Mexico Press, 1987), 1–48, and the early chapters of Frederick Nolan's monumental *The Lincoln County War: A Documentary History* (Norman: University of Oklahoma Press, 1992). Utley has addressed further aspects of the story in two additional books, *Billy the Kid: A Short and Violent Life* (Lincoln: University of Nebraska Press, 1989) and *Four Fighters of Lincoln County* (Albuquerque: University of New Mexico Press, 1986). A useful summary is found in Jon Tuska, *Billy the Kid: A Handbook* (Lincoln: University of Nebraska Press, 1986), 12–24. Dozens of other books also address the story, with varying degrees of accuracy.

2. The House was accused of using sharp practices. *See* testimony of Juán Patrón, George Van Sickle, Florencio Gonzales, John Newcomb and José Montano (joint affidavit), Robert Widenmann, Godfrey Gauss and Alexander McSween, "Angel Report." For an analysis of the economy of Lincoln County in the mid-1870s, an era of national depression, *see* John P. Wilson, *Merchants, Guns and Money: The Story of Lincoln County and Its Wars* (Santa Fe: Museum of New Mexico Press, 1987), 27–41.

one time the attorney for the House. Following the death of one of the House's partners, Emil Fritz, McSween was dispatched to New York to attempt to obtain $10,000 due on an insurance policy on Fritz' life issued by an insurer that had since become insolvent. McSween succeeded in obtaining the money from the receiver in the summer of 1877, but by that time he had had an acrimonious falling out with Murphy and Dolan and had begun representing their rival, Tunstall. Rather than turning the proceeds over to the House, which had no claim against it, or even to the estate's administrators, he kept the money in his bank account awaiting action by the probate court.

McSween never satisfactorily explained why he kept the money. He may simply have wanted it—which, however, was inconsistent with his stated willingness to obey the orders of the probate court. Without dismissing greed or economic necessity as a motive, it seems reasonable to speculate that McSween was prompted by a combination of several factors, not all of them disreputable. He stated in court documents that he was concerned that the administrators of the estate could not be trusted to see that the money found its way to Fritz' heirs in Germany. This was a matter of particular importance to McSween for two reasons. First, it might be that the estate, rather than the admininstrators, was his client, and that he owed his ethical duty of loyalty to the estate (and hence to the heirs) rather than to the administrators. Second, McSween was a bondsman to the administrators and consequently could have been found personally liable for their defalcations. In addition, one of the administrators was indebted to the House. It is likely that McSween was concerned that the insurance proceeds would flow through the administrator to the House, which in turn was heavily indebted to the First National Bank of Santa Fe, controlled by Thomas B. Catron, the United States Attorney and political boss of New Mexico.[3] Of course, it was in Tunstall's interest that the House remain in default on its debts.

McSween made plans to visit St. Louis over the Christmas holidays in 1877. On the first leg of the journey, he was detained and, on December 27, 1877, arrested in Las Vegas by the sheriff of San Miguel County. In a letter he wrote to the editor of a newspaper, McSween said that "[a]fter reaching Las Vegas I was informed that certain parties had telegraphed to know if I were there. I told my informant to telegraph that I was. I waited 24 hours to know what was wanted. The sheriff of San Miguel [County] was ordered by telegraph to arrest me;

3. Utley, *High Noon*, 190n.

he did so."[4] In later testimony, McSween was less circumspect about who telegraphed the original inquiry to the sheriff: none other than Thomas B. Catron.[5] The telegraphed query is the only known instance of Catron directly intervening the Lincoln County troubles, but it reveals a much greater degree of involvement than has been generally recognized, as will be shown.

McSween was arrested on the charge of embezzlement. The charge was preferred by the administrators of the Fritz estate, who accused McSween of embezzling the insurance proceeds. (A grand jury later refused to indict McSween, finding no probable cause that he had committed the crime.) McSween was held by the San Miguel County sheriff until late January, when he was transported under guard to Mesilla for his first appearance before the judge who was to hear his case, Warren Bristol. Immediately upon the conclusion of the initial hearing in McSween's criminal case, Judge Bristol issued a writ of attachment in a separate civil suit brought by the administrators of the estate to recover the insurance proceeds.[6] McSween's arrest and Judge Bristol's issuance of the writ of attachment were not isolated events, but rather were two steps in a single unfolding plan. To understand the connection, and hence the significance of Catron's involvement in McSween's arrest, it is necessary to know something about the New Mexico law of attachment in the 1870s.

Attachment is a legal proceeding that allows a creditor to seize the property of a debtor before trial. Attachment in the 1870s was generally an *ex parte* proceeding; that is, the defendant was not notified in advance of the proceedings against him and had no opportunity to present his side of the case until after the fact. These two characteristics of attachment create obvious risks of abuse. For that reason, the New Mexico attachment statute strictly limited the issuance of the writ to certain specific factual situations, and prescribed detailed procedures that were to be followed in enforcing the writ.

Under the Kearny Code, which was imposed in 1846 by General Stephen Watts Kearny as an aspect of the military occupation of New Mexico and remained in force following the establishment of a civilian

---

4. McSween to *Eco del Rio Grande*, January 10, 1878, quoted by Fulton, *Lincoln County*, 98–100.

5. McSween testimony, "Angel Report," 23. It is possible that a reference to Catron was edited out of McSween's letter by the newspaper's editor, who might reasonably have feared prosecution for criminal libel. Catron had previously prosecuted a newspaper editor who criticized him by name. *See* Simeon H. Newman III, "The Santa Fe Ring: A Letter to the *New York Sun*," *Arizona and the West* 12 (Autumn 1970), 274.

6. Keleher, *Violence*, 76–77; *see also* Dolan testimony, "Angel Report," 240.

government,[7] the writ was available only in the following cases (the portion relevant to McSween's case is set out in boldface):

> A. when the debtor is not a resident of nor resides in this territory;
> B. when the debtor has concealed himself or absconded, or absented himself from his usual place of abode in this territory, so that the ordinary process of law cannot be passed upon him;
> C. **when the debtor is about to remove his property or effects out of this territory; or has fraudulently concealed or disposed of his property or effects so as to defraud, hinder, or delay his creditors;**
> D. when the creditor [debtor] is about fraudulently to convey or assign, conceal or dispose of his property or effects, so as to hinder, delay or defraud his creditors;
> E. when the debt was contracted out of this territory, and the debtor has absconded or secretly removed his property or effects into the territory, with the intent to hinder, delay or defraud his creditors.

The statute was amended by an Act of 1874 to include the following situations (again, with the relevant portion in boldface):

> Creditors may sue their debtors by attachment, in the following cases in addition to those now provided by law, to wit:
> 1st. Where the defendant is a corporation whose principal office or place of business is out of this Territory, unless such corporation shall have a designated agent in the Territory, upon whom service of process may be made in suits against the corporation.
> 2d. **Where the defendant fraudulently contracted the debt or incurred the obligation respecting which the suit is brought, or obtained credit from the plaintiff by false pretenses.**[8]

The list of situations in which attachment is available to a plaintiff reveals its purpose: to provide a plaintiff with recourse in those cases in which it is unlikely that the plaintiff will be able to enforce a judgment awarded at the end of trial. In effect, attachment freezes the status quo pending trial. It should be noted that attachment proceedings are dif-

---

7. The Kearny Code is reprinted in volume 1 of the 1978 compilation of New Mexico Statutes Annotated. The material that follows in the text is found in that volume, in the pamphlet entitled "Territorial Laws and Treaties" under the heading "Attachments," Section 1, at 6. The punctuation and capitalization in the 1978 compilation, reproduced here, has been modernized.

8. Compiled Laws of New Mexico §1923 (1884). All of the statutes cited in this article were in effect in 1877–1878. The 1884 compilation is the official statutory compilation published closest in time to the events discussed. (An unofficial compilation was published in 1882.)

ferent from debt collection lawsuits. As stated by Judge Bristol in a later case, "a common law action [for debt] may be commenced, attended with common law proceedings and practice; and, simultaneously, proceedings by attachment auxiliary thereto may be instituted and attended with statutory pleadings."[9] The point is that the common law and statutory proceedings, while complementary, are distinct. No judicial finding that McSween was indebted to the Fritz estate had been made at the time Judge Bristol issued the writ of attachment.[10]

The administrators of the Fritz estate could obtain a writ of attachment against McSween only if they demonstrated facts that fit the case into one or more of the narrow statutory categories. They sought to do so by filing an affidavit that invoked the two categories set out in boldface above.[11] The affidavit first alleged that McSween obtained the insurance proceeds by false pretenses. But this argument was undercut by the administrators' own criminal complaint charging McSween with embezzlement. The same actions cannot simultaneously constitute embezzlement and obtaining money by false pretenses. The New Mexico Supreme Court has explained why not:

> "Embezzlement differs from swindling or obtaining money by false pretenses in that in embezzlement the property is fraudulently appropriated by the person to whom it had been intrusted, whereas in swindling the property is wrongfully acquired in the first instance by means of some false pretense or device."[12]

This distinction was explicitly made in the statutory definitions of the crimes themselves. In 1878, embezzlement was defined in New Mexico as the appropriation of money that came into a person's hands "by virtue of [his] employment" as "officer, agent, clerk," etc.[13] By contrast, one who obtains money by false pretenses—a swindler—is not entrusted with the money, and indeed has no right to handle the money.[14] Because McSween was the estate's attorney, and was retained by the administrators for the express purpose of obtaining the insurance money, he did not acquire the money by false pretenses. This distinc-

---

9. *Staab* v. *Hersch*, 3 N.M. (Gildersleeve) 209, 214, 3 P. 248, 250 (1884).

10. It is thus incorrect to state that the seizure of McSween's property was made in execution of a judgment against him, as Victor Westphall does in *Thomas Benton Catron and His Era* (Tucson: University of Arizona Press, 1973), 80.

11. The affidavit filed by the administrators is quoted by Keleher, *Violence*, 77.

12. *State* v. *Seefeldt*, 54 N.M. 24, 26, 212 P.2d 1053, 1054 (1949) (quoting 29 C.J.S. *Embezzlement* §1 at 671).

13. Compiled Laws of New Mexico §749 (1884).

14. *Ibid.*, §758.

tion is critical, since embezzlement was not a basis for issuing the writ of attachment.[15] If McSween embezzled the money, as the administrators alleged in the criminal action, the false pretenses provision of the attachment statute provided no basis for the writ.

But the administrators gave two reasons why the writ should be issued. Their second argument was that McSween was "about to remove his property or effects out of this Territory." The evidence to support this argument, of course, was the fact that he was on his way to St. Louis when he was overtaken by Catron's telegraphed message to the sheriff of San Miguel County and arrested on the criminal charge of embezzlement. But for the arrest, the administrators argued, he would have left the territory. Thus, Catron's telegram constituted the manufacture of evidence to support the writ of attachment.

Catron was federal prosecutor for the territory, but that gave him no responsibility, and indeed no jurisdictional power, to involve himself in the arrest of a suspected embezzler, since embezzlement was a territorial rather than federal crime. This point was admittedly less obvious in New Mexico Territory than it would be if a similar case arose today in the state of New Mexico, since the basis of the American system of dual criminal justice systems is the sovereignty of the states, and United States territories were not sovereign states. However, the United States Supreme Court addressed and resolved the question in an 1873 case arising out of Utah Territory, which had an Organic Act very similar to New Mexico's. The Supreme Court ruled that "the proper business" of the United States Attorneys "relat[ed] to cases in which the government of the United States is concerned." Cases in which the territorial government was concerned were left to territorial officers.[16] Since embezzlement, the crime with which McSween was charged, was not a federal crime, Catron's involvement in the case was not the result of his official duties as United States Attorney. Rather, Catron was protecting his private interests, and in particular his bank's large outstanding loan to the House. The intended result of the attachment proceedings was to eliminate the House's only serious competition, the Tunstall store, in a way that benefited the House—and, thus, Catron's bank.

Following his preliminary examination on the criminal charge be-

15. *See* Vern Countryman, "Attachment in New Mexico—Part 1," *Natural Resources Journal* 1 (November 1961), 336. ("Embezzlement of property obtained from defendant without fraud will not do."). The New Mexico attachment statute had not greatly changed from 1878 to 1961, when Countryman published his exhaustive two-part article.

16. *Snow* v. *United States*, 85 U.S. (18 Wall.) 317, 322, 21 L.Ed. 784, 786 (1873).

fore Judge Bristol in Mesilla, McSween returned to Lincoln. He found the Lincoln County sheriff in possession of his house.[17] This was in itself irregular, because the statute unambiguously required the sheriff to provide notice to McSween before he began attaching property:

> The manner of serving writs of attachment shall be as follows: *First.*—The writ, petition, or other lawful statement of the cause of action, shall be served on the defendant as an ordinary citation.[18]

The purpose of the notice requirement was to give the defendant an opportunity to post bond in lieu of attachment. McSween was not given that opportunity.

The sheriff also attached the Tunstall store, shutting it down and placing it under the guard of four deputy sheriffs, none of whom were full-time peace officers. Indeed, three of the four worked for the House.[19] In a literal sense, Tunstall's store was taken over by employees of its competitor.

The writ of attachment authorized Sheriff Brady to seize McSween's property, not Tunstall's property. Tunstall's property was seized under the pretext that Tunstall and McSween were partners. It is generally agreed by historians that McSween and Tunstall were not partners.[20] Robert Utley has written that "their affairs had become so intertwined that no one . . . could be blamed for believing they were already partners."[21] But the issue was of the utmost legal significance. If they were not partners, the sheriff had absolutely no authority to seize Tunstall's property, since Tunstall was not a defendant in the attachment action. But if Tunstall and McSween were partners, owning property in common, the sheriff was entitled to seize commonly owned property. This was an ancient rule, derived from English common law. In an attachment action against one partner, the sheriff could not simply attach half the partnership property, since the partners owned each individual article of partnership property in common. Rather, the sheriff had to seize all of the partnership property and then sell the defendant partner's share; the person buying the defendant partner's share would

17. McSween testimony, "Angel Report," 32–33.

18. Compiled Laws of New Mexico §1935 (1884).

19. Widenmann testimony, "Angel Report," 194; Longwill testimony, *ibid.*, 248–49.

20. *See* Utley, *High Noon*, 42; Fulton, *Lincoln County*, 111–12. There is no evidence that Alexander McSween and John Tunstall were partners other than the bare assertions of their adversaries, and McSween specifically denied it while admitting he and Tunstall contemplated entering into a partnership in the future. McSween testimony, "Angel Report," 33.

21. Utley, *High Noon*, 42.

then own the property in common with the other partner(s).[22] Thus the sheriff seized Tunstall's store and everything in it on the pretense that Tunstall and McSween were partners.

Catron's telegraphed inquiry to the Las Vegas sheriff concerning McSween was the first link in a chain of events that led directly to the elimination of the Tunstall store as a competitor to the House—to the financial benefit of the House and thus to its major creditor, Catron's First National Bank of Santa Fe. The link between cause and effect, and the financial advantage to Catron's business interests, strongly suggest that Catron orchestrated the arrest of McSween, and the attendant seizure of the Tunstall store, as part of a plan to return the House to a financial condition in which it could pay its debts.

The sheriff's seizure of Tunstall's store led directly to Tunstall's murder and, in short order, the chaotic violence of the full-blown Lincoln County War, in which Tunstall's hired hand Billy the Kid earned his reputation as one of the West's most notorious killers. The governor of New Mexico Territory, Samuel Beach Axtell, intervened in Lincoln County by issuing an official proclamation shortly after Tunstall's death. Axtell's intervention influenced subsequent events in a way that was both decisive and, it will be shown, of dubious legality.

Some of the events leading up to Tunstall's death remain obscure, but the previously cited sources on the Lincoln County War generally support the following account: After the attachment of his store, Tunstall asked the sheriff to release several horses on the grounds that they belonged to him personally rather than to the supposed partnership existing between him and McSween. The sheriff agreed, and over the course of the next few days several of Tunstall's men (including Billy the Kid) drove the horses from Lincoln town to Tunstall's ranch on the Río Felix, some thirty miles to the south. A sheriff's deputy, leading a posse that included several outlaws who had escaped from the Lincoln County jail just a few months before, rode up to the ranch and announced his intention to seize Tunstall's entire herd of cattle (at least two hundred head) on the grounds that they were all half-owned by McSween and thus subject to the writ of attachment. After a tense confrontation, the deputy backed down but said he would come back. After he left, Tunstall (still in Lincoln) and his men separately heard rumors that the deputy intended to come back and "get"

22. *See* the discussion in A. Bromberg, *Crane and Bromberg on Partnership* §43 at 241 (1968). Particular aspects of this common law rule were codified in Compiled Laws of New Mexico §§1846, 1886 (1884).

Samuel Beach Axtell, governor of New Mexico Territory, 1875–1878. Photograph courtesy of the New Mexico State Records Center & Archives, Shishkin Collection, negative number 22719.

Tunstall and his men.[23] Tunstall decided not to offer armed resistance to the seizure of his herd. He rode to his ranch and led his men back to Lincoln, driving the horses that had been released from the writ. The deputy sheriff and his posse, including the jailbreakers, did indeed return to the ranch two or three hours after Tunstall and his men left. They pursued Tunstall, eventually overtaking and killing him.

The justice of the peace of Lincoln town was a Mexican War veteran named John B. Wilson. Under New Mexico criminal procedure statutes then in effect, it was Wilson's duty as justice of the peace to conduct an inquest, empaneling a jury to hear evidence as to the circumstances of Tunstall's death. The inquest jury heard several witnesses and issued a verdict concluding that Tunstall was murdered and naming six suspects. The verdict form was taken from the statute book; the jury merely filled in the blanks for the date, name of deceased, cause of death, and name of perpetrator(s).[24] Justice Wilson then issued arrest warrants for

23. McSween testimony, "Angel Report," 37. Tunstall's cook, Godfrey Gauss, testified that Tunstall's men were told that the posse was "coming to 'round us up'" and "if we remained we would be killed." Gauss testimony, "Angel Report," 299.

24. The verdict form can be found in Compiled Laws of New Mexico §445 (1884). The verdict itself is quoted in Keleher, *Violence*, 82–83.

the six individuals named in the verdict and gave the warrants to his constable, Atanacio Martínez, to serve. In each of these actions, Wilson was doing no more than his duty, strictly following proper procedure as set forth in the relevant New Mexico statute.[25]

The six men named in the warrants were, however, all members of the sheriff's posse. Constable Martínez gamely tried to arrest the six posse members, but for his efforts he himself was arrested by the Lincoln County sheriff. When asked why he arrested the constable, the sheriff reportedly replied "because he had the power."[26] Justice Wilson dealt with this setback by commissioning a special constable and giving that official the warrants for the arrest of the six posse members. Wilson's persistence in trying to arrest the posse members despite the obstruction of the sheriff might indicate no more than commendable devotion to duty, but his choice of special constable was provocative: he commissioned Dick Brewer, the foreman of Tunstall's ranch and one of the cowboys who was with Tunstall when he was killed. With his legal authority as constable, Brewer organized a posse known as the Regulators, which proved highly successful at tracking down the wanted men.

The Regulators were, at this stage, not a band of vigilantes, although they have been characterized as such by some historians. Brewer's commission as special constable was legally effective, and his powers as peace officer included the power to raise posses to serve arrest warrants,[27] and the warrants for the six men had been issued by a sitting justice of the peace following the deliberations of a jury. Nonetheless, it is anomalous to have one group of peace officers attempting to arrest another, but that anomaly was the outgrowth of the still-stranger inclusion of jail escapees as part of the sheriff's posse. The Regulators' choice of name indicates how they viewed the situation. The name has a long history in the United States, but perhaps its most celebrated use prior to the Lincoln County War was by a band of settlers in the South Carolina hill country who found themselves unprotected by officials headquartered in the coastal towns. Those South Carolina Regulators saw themselves as a regular, albeit extrajudicial, police force protecting the citizens from bandits.[28] When Lincoln County's Regu-

25. Compiled Laws of New Mexico §443 (1884).

26. Florencio Gonzales testimony, "Angel Report," 328.

27. Compiled Laws of New Mexico §§2333, 2612 (1884).

28. Richard Maxwell Brown, *The South Carolina Regulators* (Cambridge: Belknap Press, 1963), 39.

lators appropriated the name, they revealed their understanding that they were performing a similar function.

Against this background, Governor Axtell traveled to Lincoln County in early March 1878. His stated reason for making the four-day journey from Santa Fe was to calm the sectarian passions aroused by Tunstall's murder. But Axtell may also have been motivated by feelings of obligation, for in 1876 he had accepted an eighteen-hundred-dollar loan from Dolan's partner in the House, John Riley.[29] To put the amount of the loan in perspective, Axtell's annual salary as governor was thirty-five hundred dollars.[30] As the federal investigator Frank Warner Angel wrote: "certainly his official action lays him open to serious suspicion that his friendship for Murphy, Dolan and Riley was stronger than his duty to the people and the government he represented."[31] Immediately upon arriving in Lincoln, on March 9, 1878, Axtell issued a proclamation that was intended to put an end to the battle between the special constable's posse and the sheriff's posse. The governor's proclamation read in pertinent part:

> To the Citizens of Lincoln County: . . .
>
> To enable all to act intelligently it is important that the following facts should be clearly understood.
>
> 1st.
>
> John B. Wilson's appointment by the County Commissioners as a Justice of the Peace was illegal and void, and all processes issued by him were void, and said Wilson has no authority whatever to act as Justice of the Peace. . . .
>
> 3rd.
>
> It follows from the above statements that there is no legal process in this case to be enforced except the writs and processes issued out of the Third Judicial District Court by Judge Bristol and there are no Territorial Officers here to enforce these except Sheriff Brady and his Deputies.[32]

If Wilson was not a justice of the peace, then it followed that Brewer and the Regulators were not a constable's posse. They were vigilantes at best, subject to prosecution for their actions in tracking down the six men named in the inquest verdict.

When asked by Special Agent Angel to explain his proclamation,

---

29. Keleher, *Violence*, 91.

30. Act of January 23, 1873, chapter 48, 17 U.S. Statutes at Large 416.

31. Quoted by Keleher, *Violence*, 91.

32. McSween testimony, exhibit 16, "Angel Report." The proclamation is quoted in full in Keleher, *Violence*, 93 and Fulton, *Lincoln County*, 144.

Axtell accurately pointed out that Wilson had been appointed to his position by the Lincoln County Commissioners to fill out the unexpired portion of the term of the previous justice of the peace, who had resigned shortly after being elected. The appointment was made in accordance with a legislative act signed into law by Governor Axtell himself, which provided:

> In the event of any vacancy in any county office now existing or which may hereafter occur in any county or in any precinct or demarcation in any county, by reason of death, resignation, removal or otherwise, the county commissioners of said county shall have power to fill such vacancy by appointment until an election can be held as now provided by law.[33]

Despite the apparent regularity of Wilson's appointment, however, Axtell concluded that "the appointment was good for nothing—that a Justice of the Peace must be elected, could not be appointed, that it was so established by our Territorial Constitution, the Organic Act."[34] Axtell's explanation has been accepted by some historians. Donald Lavash writes: "The Organic Act that established New Mexico as a Territory of the United States provided for all county officials to be elected."[35] Utley agrees that "New Mexico's organic act . . . required justices to be elected" but concludes, more guardedly than Lavash, that the issue is "[c]louded."[36]

In fact, the Organic Act Establishing the Territory of New Mexico said no such thing. The Organic Act, with just nineteen brief sections, was a very model of brevity.[37] Section 8 stated: "All township, district and county officers, not herein otherwise provided for, shall be appointed or elected, as the case may be, in such manner as shall be provided by the governor and legislative assembly of the territory of New Mexico." In other words, the Organic Act provided that inferior officials (such as justices of the peace) could be either elected or ap-

---

33. Compiled Laws of New Mexico §371 (1884). This statute was approved January 13, 1876.

34. Quoted by Keleher, *Violence,* 91.

35. Donald R. Lavash, *Sheriff William Brady: Tragic Hero of the Lincoln County War* (Santa Fe: Sunstone Press, 1986), 53.

36. Utley, *Four Fighters,* 85n. *See also* Utley, *High Noon,* 202n, and Utley, *Billy the Kid,* 59 and 227–28n.

37. Organic Act Establishing the Territory of New Mexico, chapter 49, Statutes at Large 446 (September 9, 1850). The Organic Act is reprinted in volume 1 of the 1978 compilation of New Mexico Statutes Annotated, in the pamphlet entitled "Territorial Laws and Treaties."

pointed unless the Organic Act itself specifically held otherwise. And in the case of justices of the peace, the Organic Act did not hold otherwise. Section 10 of the Organic Act established JP courts and limited their jurisdiction; otherwise, justices of the peace were not even mentioned in the Organic Act except on lists of officers entitled to administer oaths to officeholders.

In short, Axtell's proclamation was not forced upon him by the Organic Act Establishing the Territory of New Mexico; quite the reverse. Nonetheless, Axtell's proclamation had a legal basis. During the course of the nineteenth century, Congress passed various laws that applied to all the territories equally, and this body of miscellaneous statutes was also sometimes rather loosely referred to as the "Organic Acts." Axtell's reference was to this general body of law rather than to the Organic Act, which established the territory of New Mexico. But whether this general body of law required justices to be elected in all circumstances was an exceedingly close legal question.

The basis of Axtell's proclamation was the following statute, passed by Congress in 1844 as part of an act relating to reapportionment of territorial legislatures:

> *And be it further enacted,* That justices of the peace, and all general officers of the militia in the several Territories shall be elected by the people in such manner as the respective Legislatures thereof may provide by law.[38]

The question whether Wilson was properly holding office as justice of the peace thus turns on the interplay between the New Mexico statute, the New Mexico Organic Act, and the 1844 federal statute. The federal Constitution establishes that federal law is "supreme" over territorial enactments,[39] but that principle does not help us choose between the two federal statutes. Resort to general rules of statutory construction is not entirely helpful. For example, one rule of statutory construction holds that, when two statutes are in conflict, the statute

---

38. Act of June 15, 1844, chapter 69, 5 U.S. Statutes at Large 670. The statute is reprinted, with some unimportant textual alterations, in Compiled Laws of New Mexico (1884), as §1856 of the section entitled "Organic Acts of the Territory of New Mexico Common to All Territories." To avoid confusion, the name "Organic Act" is used in the text of this article exclusively to refer to the act of September 9, 1850, establishing the territory of New Mexico.

39. U.S. Constitution art. VI, §2.

that was passed last in time controls.[40] This would give the nod to the Organic Act of 1850 over the 1844 statute. But another rule holds that the statute that is more specific controls over the more general.[41] Under this rule, precedence is given to the 1844 statute, which specifically refers to justices of the peace, over the Organic Act, which refers more generally to "township, district, and county officers." A clouded issue, indeed.

Congress revisited the subject in 1880, two years after Governor Axtell's proclamation, passing a statute specifically stating that whenever a territorial justice of the peace died in office or resigned, his replacement could be chosen either by appointment or election.[42] The 1880 statute repealed "all laws and parts of laws in conflict with the provisions of this act," which presumably referred to the 1844 statute. Arguably, Congress would not have found it necessary to include the repealer provision unless it agreed that the 1844 statute was a flat prohibition on the appointment of justices of the peace.

On the other hand, it might be argued that the 1844 statute did not apply in New Mexico Territory at all. It was passed six years before the territory was formed, and two years before the American occupation of Santa Fe. When it was first enacted, the statute obviously did not apply in New Mexico. The question then becomes whether the statute was retroactively made applicable, and to answer that question we must refer to the Organic Act itself, which provided in Section 17:

> The constitution, and all laws of the United States *which are not locally inapplicable,* shall have the same force and effect within the said territory of New Mexico as elsewhere within the United States. [Emphasis added]

This section suggests that if the 1844 statute was in conflict with

---

40. *See United States* v. *Tynen,* 78 U.S. (11 Wall.) 88, 93, 20 L.Ed. 153, 155 (1871) ("When repugnant provisions . . . exist between two acts, the latter act is held, according to all the authorities, to operate as a repeal of the first act . . ."). *Accord Geck* v. *Shepherd,* 1 N.M. 346, 352 (1859).

41. *See Townsend* v. *Little,* 109 U.S. 504, 512, 27 L.Ed. 1012, 1015 (1883) ("According to the well settled rule, . . . general and specific provisions, in apparent contradiction, whether in the same or different statutes and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general. . . .")

42. Act of April 16, 1880, chapter 56, 21 Statutes at Large 74. This statute, too, is reprinted in Compiled Laws of New Mexico (1884), in the section entitled "Supplemental Acts," included under the general category of "Organic Acts of the Territory of New Mexico Common to All Territories."

Section 8 of the Organic Act, it was for that reason "locally inapplicable" and therefore of no force and effect.

Axtell later became Chief Justice of the New Mexico Supreme Court, so his opinion is worthy of respect. In 1876, when he signed the territorial statute into law, he evidently did not believe it was contrary to any congressional enactment. Perhaps he simply overlooked the issue until March 1878—or perhaps his approval of the statute reflects his honest opinion of the matter when he was not pressed by considerations of politics, friendship, or finances.

Axtell's March 9 proclamation suffered from a more basic and much less ambiguous legal flaw, one that has not been remarked on by historians. Most historians seem to accept that Axtell's proclamation had the legal effect of preventing Wilson from acting as justice of the peace. For example, Utley writes that the proclamation "demolished McSween's legal edifice, invalidating Dick Brewer's commission as special constable as well as the warrant he carried, and dissolving the color of law under which the Regulators operated."[43] Similarly, Maurice Fulton refers to Wilson's "removal from office."[44] But even Governor Axtell acknowledged that he had no power to remove Wilson from office, writing to Special Agent Angel: "I did not remove him from office—he was not in office."[45]

That Axtell was at pains to make this distinction shows his awareness of the irregularity of his own actions, for he had no power or authority to remove Wilson. Section 3 of the Organic Act set forth the powers of the territorial governor, and it did not grant the power to summarily remove judges from the bench. (Imagine the uproar if a modern governor tried to do it.) This point was conclusively established by the New Mexico Supreme Court in a case decided nine years later, in which it ruled: "Under our governmental system all power is inherent in the people, and the executive has the express and incidental powers conferred by law, and no more. For the right [to remove an officer from office] he must affirmatively show legal authority."[46] While the case had not been decided in 1878, and so obviously was not binding on Axtell, its basic point was as true in 1878 as it was nine years later: New Mexico's governor could not affirmatively show legal authority to remove a sitting judge from office.

---

43. Utley, *High Noon*, 59. *See also* Utley, *Four Fighters*, 11.

44. Fulton, *Lincoln County*, 146.

45. Quoted by Keleher, *Violence*, 92.

46. *Territory ex rel. Wade* v. *Ashenfelter*, 4 N.M. (Gildersleeve) 93, 133, 12 P. 879, 894 (1887). The principle is discussed at great length in the succeeding text of the opinion.

The territory rather than the governor personally had the power to question an officeholder's bona fides, and a procedure existed for the orderly resolution of the issue in a court of law: a *quo warranto* action. *Quo warranto* (law Latin for "by what warrant") is an ancient writ, nearly as old as the English legal system itself. It was codified as the Statute of Anne, which was enacted in England in 1710 and became part of the common law of New Mexico. The New Mexico Supreme Court described *quo warranto* in the 1887 case as "a most speedy and convenient mode for ousting one who wrongfully intruded himself into office."[47] Axtell could have encouraged the proper local authorities to institute a *quo warranto* action against Wilson, and not only would Wilson's right to hold office have been resolved in a "speedy and convenient" manner, but Wilson would have been afforded the protections of due process of law.

Axtell made his most fundamental legal error when he proclaimed that "all processes issued by [Wilson] were void, and said Wilson has no authority to act as Justice of the Peace" and that there were no territorial officers to serve court orders except the sheriff and his deputies. This portion of the proclamation was false both as to what it said and what it failed to say. It failed to say that there were other justices of the peace and constables in Lincoln County who unquestionably had legal authority to act. Moreover, because Wilson was appointed to his position by the County Commissioners pursuant to statute, and because his appointment had been accepted by the citizens of his precinct for some fifteen months without question, he did, in fact, possess authority to act as justice of the peace.

In considering an 1842 challenge to another justice of the peace's bona fides, the Vermont Supreme Court stated that "[t]he distinction between an officer, *de jure,* and *de facto,* is well known and well established, and the consequences naturally arising from the distinction are equally well settled."[48] The court explained that an officer *de jure* is one who is lawfully in office, while an officer *de facto* is one who has succeeded to an office but is subsequently found to have no legal right to hold the office.[49] If Axtell was right, and Wilson's appointment was void because the County Commissioners were acting beyond their constitutional authority, then Wilson was merely a justice of the peace *de facto* rather than *de jure.* The crucial point, however, is that the acts

47. *Ibid.*, 4 N.M. (Gildersleeve) at 122, 12 P. at 889 (1887).

48. *McGregor* v. *Balch,* 14 Vt. 428, 435–36 (1842).

49. *Ibid.* A more comprehensive definition can be found in *State* v. *Carroll,* 38 Conn. 449, 471–72, 9 Am. Rep. 409, 427 (1871).

of a judge *de facto* are conclusive and binding on all parties who appear before him.[50] In 1871 the Connecticut Supreme Court of Errors counted "more than one hundred and fifty cases" applying the *de facto* doctrine in America.[51] The Connecticut court traced the doctrine back to a 1431 case involving an English abbey, and cited this venerable precedent: "In 1461, on the accession of Edward IVth, Parliament declared the previous Henrys of Lancaster usurpers; but, to avoid great public mischief, also declared them kings *de facto*. . . ."[52]

As the reference to "great public mischief" suggests, the *de facto/de jure* distinction is not based on any abstruse legal theory. On the contrary, as explained by the New Mexico Supreme Court in 1918, "the principle is one founded in policy and convenience, for the right of no one claiming a title or interest under or through the proceedings of an officer having an apparent authority to act would be safe, if it were necessary in every case to examine the authority of such officer to its original source."[53] If a judge's acts retroactively became void when the judge was found ineligible to hold office, prisoners jailed by the judge would have to be freed, couples who thought they were married (or divorced) would receive a nasty surprise, creditors would have to repay judgments collected from their debtors, and so on. The *de facto/de jure* doctrine was developed to avoid such difficulties.

Consequently, Axtell was wrong: even if Wilson's appointment might eventually have been found invalid in a *quo warranto* proceeding, the warrants he issued for Tunstall's murderers remained legally valid, and so did Brewer's commission as special constable.

Because Axtell did not have the power to remove Wilson from office or to annul his appointment of the special constable, his proclamation had no more legal effect than the opinion of any other citizen

---

50. Thus, when a Nevada justice of the peace was appointed by county selectmen rather than elected as required by the territorial law in effect at the time of his appointment, his acts were nonetheless valid. *Mallet* v. *The Uncle Sam Gold and Silver Mining Co.*, 1 Nev. 188, 197–98 (1865). *See also Phillips* v. *Payne*, 92 U.S. 130, 23 L.Ed. 649 (1876); *Commonwealth* v. *Taber*, 123 Mass. 253, 254 (1877); *in re Boyle*, 9 Wis. 264, 266–67 (1859); *Burton ex rel. Reeves* v. *Patton*, 47 N.C. 119, 122–23 (1854); and *Aulanier* v. *The Governor*, 1 Tex. 653, 667 (1846). The earliest New Mexico case, *Bull* v. *Southwick*, 2 N.M. (Gildersleeve) 321, 349 (1882), is fully in accord with the above authority.

51. *State* v. *Carroll*, 38 Conn. at 465, 9 Am. Rep. at 422.

52. *Ibid.*, at 458, 459, 9 Am. Rep. at 415, 417. The source of the story is William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Chicago: University of Chicago Press), 1:197.

53. *State* v. *Blancett*, 24 N.M. 433, 448, 174 P. 207, 209 (1918), *appeal dismissed*, 252 U.S. 574 (1920). A similar rationale is advanced in *State* v. *Carroll*, 38 Conn. at 467, 9 Am. Rep. at 423.

of the territory. The governor's expression of opinion was, however, effective to accomplish the short-term political goal he had set for himself. Wilson was cowed into ceasing all activity as justice of the peace (though he was later returned to his old position in a special election) and the Regulators understood that they had been transformed into outlaws—and also that the legal and political machinery of the territory was intent on frustrating and perhaps destroying them.

Even though the proclamation did what Axtell wanted it to do, however, it utterly failed to stem the sectarian violence. It had precisely the opposite effect, as a shrewder judge of human character might have foreseen. McSween and the Regulators gave up any hope that Tunstall's murderers would be brought to justice in the courts of law, and instead took the law into their own hands by engaging in the acts of vigilante vengeance that today are known, rather too grandly, perhaps, as the Lincoln County War.

There was no shortage of law "west of the Pecos." The extreme violence of the Lincoln County War was not the result of an absence of courts and law enforcement agencies, but of their manipulation. Influential businessmen and politicians such as Catron and Axtell grasped the cynical truth that the law is not found in statute books but in a judge's orders, and then only if the particular judge succeeds in having his orders enforced. Catron and Axtell used the machinery of the law to achieve ends that, while "legal," were fundamentally corrupt.

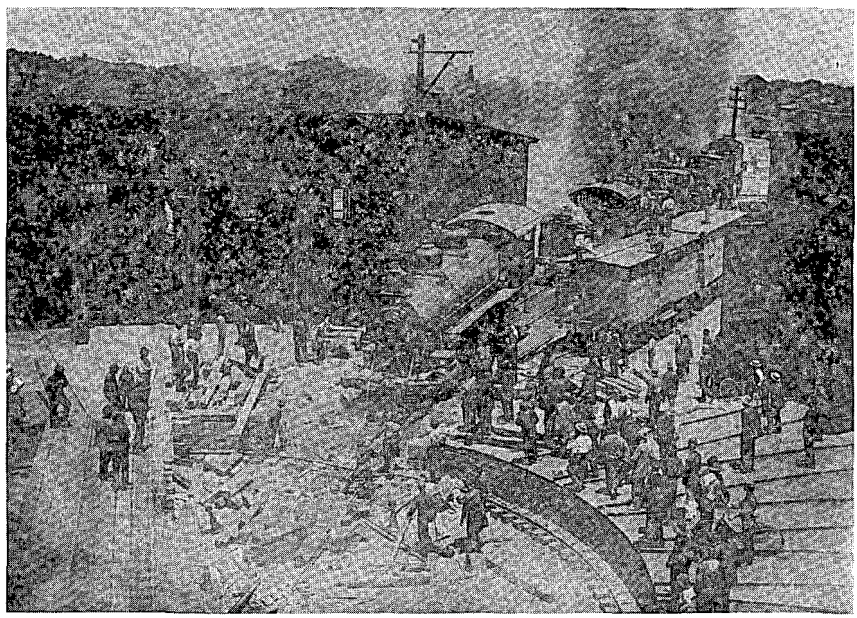
In Lincoln on April Fool's Day, 1878, Sheriff Brady was shot and killed from ambush by Billy the Kid and several other Regulators. The Kid was wounded and could not flee with his companions. United States soldiers and Brady's surviving deputies searched every house in town that day but were unable to find him. Evidently he was hidden by sympathetic townspeople.

The Lincoln County War was not a battle of good versus evil, white hats and black hats. There was no shortage of ruthlessness and greed on either side. Still, it is extraordinary that a town's citizens would protect their sheriff's killer. The Lincoln County War was many things, but it was also a revolt against legal oppression.

Historical Society of New Mexico

Annual Conference
Albuquerque, New Mexico
La Posada Hotel
April 22–24, 1993

For further information, contact:
John Grassham, at 277-6451 in Albuquerque
or
Robert J. Torrez, at 827-7332 in Santa Fe



Roundhouse turntable incident involving a Baldwin locomotive, Albuquerque, New Mexico, June 18, 1900. Photograph courtesy Albuquerque Museum of Photoarchives.