
California Reports, Volume One: The Backstory to a Constitutional First

BY RAMONA MARTINEZ*

The ubiquitous availability of California Supreme Court decisions is taken for granted today. Practitioners and researchers from anywhere can access decisions online through several paid subscription databases and freely from the Court's website and other sources like FindLaw and Justia. Printed sources also are available of course: the official bound volumes of final opinions and the softcover "advance sheets," both now published by Lexis-Nexis, as well as reporter series publications by West and the Daily Appellate Reports printed in the *Los Angeles Daily Journal*. But what if you were a California pioneer? What if you had arrived in California during the Gold Rush era and the California Supreme Court was just deciding its first cases? Print would have been your only option and obtaining a print copy would not have been a simple matter. Three different men held the position of State Printer (the person responsible for printing the volumes containing the decisions of the California Supreme Court) before any volume was actually produced. Two of these men believed they held the position of State Printer at the same time, and both produced a version of volume one of the California

Reports. It was not until 1872 when Sumner Whitney and A.L. Bancroft & Co. joined to reprint the California Reports from the beginning that the entire series of California Supreme Court cases was produced by one publisher.

I first discovered that there was more than one edition of the first volume of the California Reports when a professor asked me to find the Report on Civil and Common Law, which appears in the appendix to that volume. The report was prepared by the Senate Judiciary Committee in February 1850 in response to a petition that John Dwinelle and other practicing members of the Bar of San Francisco had presented to the Legislature recommending that the English common law be adopted in California, rather than a civil law system. The volume we had on the shelf in our main reading room did not contain an appendix. I asked a colleague at the Stanford Law School library if she would look for the report in their set of California Reports. When I received the report, I saw from the title page that it had come from a different edition of the California Reports, and that we were not simply missing some pages in ours. Later, I discovered that we had another set of early California Reports volumes in storage. When I looked at the first volume of that set, I

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*Reference and Interlibrary Loan Librarian, University of California, Berkeley, School of Law.

DAVID ROTHMAN, *continued from page 12*

compiled in a book titled "The Glass Menagerie" — a dig at the glass-walled, modernist law school building designed by Eero Saarinen. (Whether the faculty found the drawings as humorous as the students did is open to question.)

His drawings done as a young Deputy Attorney General, reproduced on pages 11 and 12, speak for themselves. He began taking formal drawing classes in the 1970s and has studied portrait oil painting since the 1980s with noted Los Angeles artist Stephan Douglas. Although he concentrates on portraits, he also paints landscapes, with some watercolors of flowers in the Sierra. Recently, Gallery 6020 in Los Angeles presented 20 of his paintings at a one-man show. The paintings exhibited included a group of portraits illustrating Judge

Rothman's values as well as his skill. Titled "Zeal for Good," they featured portraits of civil rights leader and Congressman John Lewis, Judge Harry Pregerson of the United States Court of Appeals for the Ninth Circuit, a Bedouin-Israeli lawyer and women's rights activist, and a yoga instructor and spiritual leader.

An article about Judge Rothman in the *Los Angeles Daily Journal* concludes he "looks back fondly on his legal career, but he's glad he never gave up on his artistic side." Judging from his splendid portrait of former Chief Justice Ronald M. George, reproduced on page 10, all Californians can be glad that he pursued his passion for art. Let us hope that this fine piece will avoid the fate of some other works of art entrusted to the California Supreme Court during the last century. ★



Eugene Casserly, elected to the position of State Printer by the Legislature, challenged the validity of his predecessor's appointment by the Governor.

PHOTO COURTESY WIKIPEDIA

noticed that it was yet another edition — one that also contained the report I had been looking for. This paper will attempt to explain the reasons for the existence of three different editions of volume one of the California Reports.

In the late 1840s and early 1850s, California was faced with an exploding population and a lack of both physical and governmental infrastructure. A brand new government was trying to establish law and order in a political entity that had never gone through any period of U.S. territorial government. In contrast to other states admitted to the Union in the same era,¹ the fledgling state of California had no chance to establish legislative or judicial structures or to “try on” its new form of government as a territory of the United States as opposed to being a part of Mexico, occupied by the American military. Rather, circumstances forced a hasty organization of governmental structures, much of which took shape even before Congress approved California’s admission as a state on September 9, 1850.

General Bennett C. Riley, the last military governor of California, received no guidance from the federal government for more than a year after the Treaty of Guadalupe Hidalgo had ended the war with Mexico in May 1848. Ultimately he concluded that a constitution was necessary to bring some order to the affairs

of the old “Alta California” and, in June 1849, called a constitutional convention. California voters ratified the Constitution on November 13, 1849. At the same time, the first governor and members of the first state Legislature were elected; the Legislature appointed the first judges to the Supreme Court the following month. Displaying an understanding of the importance of preserving history and the records of the state, the first law passed by the California Legislature created the “Public Archives” and the second created the office of the “State Printer,” whose duty it would be to print the laws, legislative documents, and the cases decided by the state Supreme Court.² Thus began the saga of legal publishing in California.

The law creating the position of State Printer provided that the printer would be “elected by, and under the entire control of the Legislature.” (Stats. 1850, ch. 2, § 1.) On January 10, 1850 the Legislature elected Henry Robinson as State Printer “for the term of two years, and until his successor shall have been duly elected and qualified.” (Sen. Journal, 1849, p. 83.) Robinson held the position for a mere four months, resigning in May 1850, 12 days after the first legislative session ended. The law setting the procedure for filling vacancies in offices during the recess of the Legislature provided: “Vacancies that may happen in offices, the appointment of which is invested in the Governor and Senate, or in the Legislature, shall be filled by the Governor during the recess of the Legislature, by granting commissions that shall expire at the end of the next session.” (Stats. 1850, ch. 85, § 44.) Upon Robinson’s resignation, the Governor appointed Jonas Winchester. “General” Winchester, as his family called him, was enthusiastic about his opportunity to serve as State Printer. His papers, held by the California State Archives, contain letters to his wife, Susan, explaining how lucrative the state printing business could be. In August 1849, he wrote “there is not a better or more profitable business in this country than printing” and the following month he reported that “the prospects of a large profit are better and better every day.” However, by September of 1850 his enthusiasm had waned and he complained to Susan that he “had bills against the State for over \$36,000 . . . not a dollar have we yet received for all our heavy outlay.” In January 1851, Winchester presented a report to the Legislature reviewing the work done and the expenses incurred. He said “instead of the immense fortune which it has been thought the State Printer has accumulated from the proceeds of the public work, he has not yet realized a sufficient amount from the Treasury to meet the obligations already incurred.” (Sen. Journal, 1851, p. 873.) Nevertheless, the Printing Committee recommended reducing the State Printer’s compensation and the Legislature passed a law on March 28, 1851 cutting the rate of pay by forty percent. (Stats. 1851, ch. 36.) Winchester resigned

his position that same day in a letter addressed to Governor McDougal, stating “[w]hen my earnings will not pay the wages of honest labor, I should be dishonest not to abandon the business.” The Governor then appointed James Devoe to replace Winchester, even though the Legislature was still in session. A few weeks later, on May 1, 1851 (the last day of the legislative session), the Legislature elected Eugene Casserly to the post by a vote of 21 to 13 over Devoe, who was also a candidate. The very next day, however, James Devoe resigned and, the Legislature now being in recess, the Governor promptly appointed George Fitch to replace him. (The selection of Fitch may have been influenced by his newspaper’s editorial support for the Democratic Party ticket — including Governor McDougal — at the preceding election.) In the brief interval between Devoe’s appointment and the election of Casserly, the Legislature revised the procedure for recess appointments. The law, as amended, provided that such appointments would thereafter expire “whenever the Governor and Senate or the Legislature shall appoint a person or persons to fill said offices.” (Stats. 1851, ch. 104, § 41.) The limitation on the duration of recess appointments was a response by the Legislature to the continuing struggle between it and the Governor over the scope of gubernatorial appointment powers.

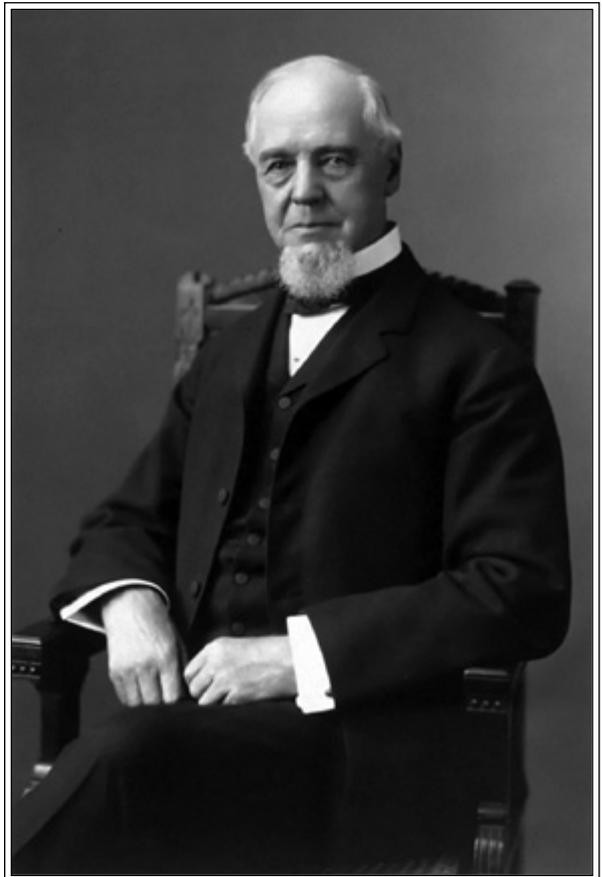
Governor McDougal’s appointment of James Devoe, the Legislature’s subsequent election of Eugene Casserly, Devoe’s resignation and the Governor’s appointment of George Fitch created a controversy over who rightfully held the position. Resolution of the controversy turned on the question of legislative versus executive power. And the answer to that question required interpretation of several provisions of the new state Constitution and the law establishing the office of the State Printer as well as the law relating to recess appointments.

Eugene Casserly brought suit against George Fitch, asking the court to declare that he, by virtue of his election by the Legislature, was legally entitled to the office of State Printer. Fitch prevailed in the trial court and Casserly appealed directly to the Supreme Court, there being no intermediate appellate court at that time. The dispute between Casserly and Fitch was decided in the October 1851 session of the California Supreme Court and the opinion was printed in the very volume that is the subject of this article. (*The People ex rel. Casserly v. Fitch* (1851) 1 Cal. 519.)

Casserly’s argument began with the foundational principle established by article XI, section 6 of the state Constitution that “officers shall be elected by the people or appointed by the Legislature.” He asserted: (1) The law creating the office of the State Printer made clear that the position was to be under the control of the Legislature. (2) Because the printer is elected by the Legislature, the power to fill vacancies in office naturally belongs to

the Legislature as well, unless some law explicitly provides to the contrary. (3) There is no such countervailing law — the Governor is given only a limited, contingent power to fill vacancies that occur while the Legislature is not in session. (4) Because the Legislature was in session when “General” Winchester resigned, the appointment of Devoe was void. Casserly acknowledged that the Governor’s later appointment of Fitch, made the day after the Legislature’s term had ended, was made while the Legislature was not in session. He maintained, however, that there was no vacancy in the office needing to be filled at that time, the position having been filled through the Legislature’s valid election of Casserly the preceding day.

Fitch, in response, relied on a narrow reading of the law relating to recess appointments. He maintained that the law applied only to appointments made during a recess and was silent about appointments made while the Legislature was still in session. Fitch asserted that there was no other law addressing that situation and, as a result, another constitutional provision came into



George Fitch, appointed State Printer by Governor McDougal, prevailed in the trial court but lost in the California Supreme Court.

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play. Specifically Fitch pointed to article V, section 8, which provided: “When any office shall become vacant, and no mode is prescribed by the Constitution and laws to fill the same, the Governor shall have power to fill such vacancy”

The Court agreed with Mr. Casserly. It held that “the power to appoint to an office carries, by implication, the power to fill a vacancy in such, and all necessary authority to carry out the original power and prevent its becoming inoperative.” Hence there was no absence of a law providing the mode of filling vacancies while the Legislature was in session and the “backstop” authority given to the Governor in article V, section 8 of the Constitution was not relevant. “We are of the opinion that, on the resignation of Winchester, the power of filling the vacancy reverted to the Legislature; that the appointment of Devoe and subsequently of [Fitch] was irregular and void; and that [Casserly] was properly elected, and entitled to exercise the rights and duties of the office.” Fitch was thereupon “ousted and excluded” from the office of State Printer. (1 Cal. 519 at p. 536.)

During the period of uncertainty in the State Printer’s office, two different editions of the first volume of the California Reports were produced. The first was printed in 1851 and listed Eugene Casserly as State Printer. The publisher was the San Francisco firm of Marvin & Hitchcock. The appendix included presentations of the following:

- ♦ The Alcalde System of California (pp. 559-579)
- ♦ The Mexican Appellate Court (pp. 579-582)
- ♦ San Francisco and its Provisional Government (pp. 583-587); and
- ♦ Report on Civil and Common Law (pp. 588-604)

The second edition of volume one was produced in 1853 and listed both Fitch and Devoe as State Printers, employing the same pagination as the first edition. To distinguish itself from that earlier edition, and attract customers, this version included, in addition to the same four matters in the 1851 edition’s appendix, four more documents in a further appendix as follows:

- ♦ The Laws of Miners and Mining Companies (pp. 659-667)
- ♦ Sketches from the History of California (pp. 668-676);
- ♦ The Mexican Conquest of California (pp. 677-679); and
- ♦ Land Titles in California (pp. 680-682)

The 1872 edition produced by Bancroft and Whitney included “notes and references to subsequent cases” but did not include any appendix.

Returning to the Report on Civil and Common Law — the original subject of my research assignment —

contemporary researchers will not easily find the document using today’s online legal research tools. Entering the citation “1 Cal. 588” in Westlaw retrieves the opinion in *People v. Fitch*, the last case reported in volume one of California Reports. The result is the same in Lexis, except that an explanatory note appears saying that page 588 does not exist. No result will appear in Loislaw because its coverage of California cases does not begin until 1899. Findlaw’s coverage does not begin until 1934. Fortunately, searching Google Books *will* yield good results, and obviate the need for seeking interlibrary loans of these extremely rare volumes. Copies of both the 1851 Casserly edition of volume one, and of the 1853 Fitch and Devoe edition of that volume, were scanned by the Google Books project.

Although the underlying dispute between Casserly and Fitch and the resulting three different editions of the first volume of the California Reports may be of interest only to a few law librarians, Mr. Casserly’s case brought before the California Supreme Court the issue of the allocation of powers between the executive and legislative branches with regard to appointments during a vacancy in an office. The Court confirmed the Constitution’s intent that the legislative branch is predominantly responsible for appointments to executive branch offices not elected by the people and that the power to appoint an officer implies the power to fill a vacancy during that officer’s term. *People v. Fitch* was cited with approval several times later in the nineteenth century. And it remains good law. Most recently, the case was cited in *Marine Forests Society v. California Coastal Commission* (2005) 36 Cal.4th 1, in which the Court observed, at page 33, “Very early decisions of this court confirmed both the primacy of the Legislature’s constitutional role in determining how and by whom executive officers should be appointed, and the very limited nature of the role that the state Constitution granted to the Governor with regard to this function. See, e.g., *People v. Fitch* (1851) 1 Cal. 519, 536.” ☆

ENDNOTES

1. Florida, after 14 years as a territory, was admitted to the Union on March 3, 1845; Texas, after 9 years as a Republic, was annexed on December 29, 1845; Iowa, after 8 years as a territory, was admitted to the Union on December 28, 1846; Wisconsin, after 12 years as a territory, was admitted to the Union on May 26, 1848; Minnesota, after 9 years as a territory, was admitted to the Union on May 11, 1858; and Oregon, after 11 years as a territory, was admitted to the Union February on 14, 1859.

2. See Statutes 1850, chapter 2 (“An Act to create the office of State Printer, and define his duties”). The duties of the State Printer were clarified in Statutes 1850, chapter 26 (“An Act defining the duties of State Printer, and fixing his compensation”).