A Future Supreme Court Justice Looks Back

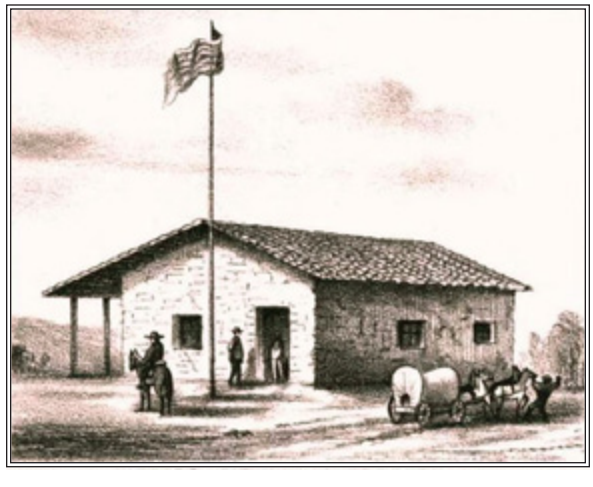
JOHN E. RICHARDS

Editor's Note: The author was an associate justice of the California Supreme Court from 1924 to 1932, and previously of the Court of Appeal, First District, from 1913 to 1924. The following article appeared in Shuck's 1901 *History of the Bench and Bar in California* under the title, "The Early Bench and Bar of San Jose." Portions have been omitted here for reasons of space but it is otherwise unaltered.

I have undertaken to prepare a sketch of the Bench and Bar of San Jose from the era of the American Alcaldes inclusive down to a time when well-established institutions and forms of legal procedure supplanted the ruder and freer methods of pioneer days. The purpose which moves me to this congenial task is the preservation of those traditions, reminiscences, anecdotes and incidents which now rest mainly in the memories of the members, and especially the pioneers, of the profession; and which, as time and fate affect their number, are in danger of being lost. This fund of personal recollection is too rich in humor and in wisdom to go down into forgetfulness. If the product of my leisure can but preserve a modicum of this wealth with somewhat of its original luster, I shall deem the time spent in its collection not entirely thrown away.

The American Alcaldes

Old John Burton, *Capitan Viejo*, the natives called him, was appointed to office by Captain Montgomery, military commander of the Northern District of California, on October 19, 1846, about three months after Captain Thomas Fallon had hoisted the Stars and Stripes in front of the Juzgado. The old alcalde was a pioneer of the pioneers. He had deserted from a New England merchantman away back in 1830, and, coming to the pueblo of San Jose, had married a Mexican woman, assumed the title of captain and lived an easy existence among the natives until disturbed by the American occupation. He was a native of Massachusetts, but he seems to have neglected those opportunities for book learning which that home of culture afforded. He was a man, however, of considerable common sense, is reputed to have been very honest and to have had the esteem and confidence of the native population. The office of alcalde required these qualities in an eminent degree just at that time when the loose garments of Mexican rule were being replaced with the close-fitting fabric of American institutions. The alcalde's courts of California had, prior to the change in government, possessed a very wide and quite undetermined jurisdiction and been conducted with a freedom from the formalities of jurisprudence which was primitive in the extreme. Alcalde Burton continued to exercise the jurisdiction of his predecessors with much the same laxity in forms. No fusty lawyers ever profaned the sacred precincts of Alcalde Burton's Juzgado to either hinder or hasten his judgments with pleas or writs sustained by musty precedents. There was a patriarchal simplicity about the administration of justice in Alcalde Burton's court. The old Juzgado stood in the center of what is now known as Market Street, at its intersection with El Dorado. It was a low adobe building, divided into three compartments — the alcalde's rooms and court, the smaller rooms for the clerk of the court, and the calaboose. A picture of this structure is to be found in Hall's "History of San Jose." There old Captain Burton sat and administered justice in his own original way, following somewhat loosely the forms of the Mexican law relating to alcaldes' courts. The method of procedure was as interesting as it was unique. Every grievance which a complainant had against a person for which he had, or hoped to have, a legal remedy, he carried to the alcalde and orally stated his case. Thereupon Alcalde Burton called his *aquazil*, or constable, and delivering to him his silver-headed cane, as the symbol of his authority, directed him to bring the person against whom the complaint was urged before the alcalde. The cane was an important part of the judicial system. It was the *vara de justicia*, or "staff of justice," and in the hands of the *aquazil* symbolized the State. Bearing the alcalde's silver-headed cane before him, the *aquazil* sought out the defendant and holding up the staff delivered his oral



The Mexican Juzgado of San Jose, from Frederic Hall's History of San Jose (1871)

summons to appear immediately at the Juzgado. The defendant never disobeyed the command of the alcalde, but at once came before him. When he arrived, the complainant was sent for and the parties met in the presence of the alcalde. What was technically called, what in fact was, an "altercation" then ensued between the parties. The alcalde sat and heard their dispute and endeavored to adjust their differences and strike a balance of justice between them upon their own statement of facts. Very frequently he was successful and a sort of compromise judgment was rendered at once. When, however, the parties were too widely apart for compromise the cause proceeded as follows: Each party chose an arbitrator, and these two *buenos hombres*, as they were termed, sat with the alcalde and heard the evidence in the case. If, then, they and the alcalde could agree upon a judgment, it was rendered accordingly, but if not, the alcalde dismissed the *buenos hombres*, and decided the case himself. So ran the wheels of justice in Alcalde Burton's Juzgado.

The patriarchal simplicity with which old Captain Burton administered justice within the undefined but unquestioned jurisdiction of his Alcalde's Court, it was not permitted his successors to enjoy or exercise. The influx of strangers following the westward course of Empire, disturbed all of the Mexican institutions which had survived the American occupation, and before the close of the year 1848 disorder ruled in quaint old Pueblo of San Jose. The passive vices of Mexican society, such as gambling, bull fighting, horse stealing and loose domestic morals, became active social sores as the two civilizations met and mingled under the new regime. Cases multiplied before the alcaldes involving serious offenses against society beyond the reach of the simple legal remedies of Captain Burton's day. Not only did these causes put to test the efficiency of the alcaldes courts, but another state of facts tugged at their anchorage in the old Mexican forms and modified the manner of conducting cases before them. The American jurisprudence forced itself into the Juzgado and insisted upon recognition in the trial of causes involving the rights of American citizens. We find, for example, indications of trials by jury, even in Captain Burton's time, and these became common in cases before the later alcaldes. The common law pleading and process also began to supplant the old oral complaint and the *vara de Justicia*. The reverence which the natives were wont to pay to the alcalde was not felt by the strangers from many lands, and both his staff and his judgments were frequently set at naught. It was this evil condition of society in 1848-9 which caused the alcaldes who succeeded Burton to resign after brief attempts to administer justice at the Juzgado. It was this which called into existence the "Courts of First Instance" in California.

Courts of First Instance

The conditions of change and of disorder which caused the alcaldes' courts to be insufficient agencies of justice in our early society were not confined to San Jose. All over California the need of a better judicial system was felt with increasing force. The alcaldes themselves in various sections gave increase to the discontent by the inefficiency, or worse, with which they conducted their offices. In 1849 J. S. Ruekle, writing to Governor Mason on the condition of things in San Jose, said: "Matters which were originally bad are growing worse; large portions of the population, lazy and addicted to gambling, have no visible means of support, and, of course, must support themselves by stealing cattle or horses. Wanted, an alcalde who is not afraid to do his duty and who knows what his duty is." In Monterey, Walter Colton, who was alcalde, gained the enmity of the large gambling class in the following way: Colton concluded that the town of Monterey needed a public hall and took this novel way of raising the revenue to build it. Whenever he would be informed of a faro game of any size in progress, he would take his staff of justice and repair to the scene of the game. When he thought the pile of gold on the table large enough to suit, he would lay his *vara de Justicia* across the pile and then gather it in. Out of the proceeds of this novel form of judicial tribute, Colton Hall, which still stands in Monterey, was built, but Alcalde Colton lost caste with the gamblers of Monterey, and with a lustiness worthy of our modern days, they clamored for a change. It is to San Francisco, however, that the credit is due for having precipitated the formation of "Courts of First Instance" throughout California, and the tale of how this came about forms an interesting story which until now has not been told in print. I have it from one who received it from the lips of old Governor Riley himself, and it is too good to go untold. Soon after the change from Mexican to American rule, the town and harbor of San Francisco began to assume importance as a commercial center. In the latter part of 1848 it was made a port of entry and a custom-house was established there which became quite an important affair. A good deal of litigation arose, and a strong demand for a better form of government than California then enjoyed. The special grievance of San Francisco was the loose administration of the law in the Alcalde's Court. Early in 1849 the people of San

Colton Hall, site of the Constitutional Convention of 1849

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Francisco importuned Congress urgently to establish a territorial government here, but Washington was a long way off and Congress failed to respond. So the people of San Francisco, thinking California ripe and ready for Statehood, undertook to organize a State and to that end sent out invitations to the people to send delegates to a convention to meet in San Francisco. It seems that the idea of a State was not yet ripe in the popular mind, and hence only a few of the districts outside of San Francisco responded to the call. When the convention met it proceeded to form a sort of State, which was called the State of San Francisco and comprised a territory which included the young city, and extended down the peninsula to somewhere in San Mateo county. They formed a legislative body, elected three justices, abolished the office of alcalde, and of the *Ayuntamiento*, and ordered the officials to turn over their books to the officers of the new State. The alcalde at that time was T. M. Leavenworth and he refused to be abolished or to give up his books, whereupon one of the new justices, assisted by a number of volunteer deputy sheriffs, went over to the alcalde's office and *vi et armis* took his records away. In the meantime Governor Mason had been relieved of his office as Military Governor of California, and General Bennet Riley, his successor, arrived in Monterey while the "State of San Francisco" was organizing itself within his jurisdiction. To him hied hastily Alcalde Leavenworth on a mule, and related his tale of woe. Governor Riley, according to contemporary accounts, was "a grim old fellow" who had an impediment in his speech. He is, nevertheless, also described as "a fine free swearer." This is not the first instance I have heard of that satanic quality which enables a man who stutters badly to swear with ease. He concluded, from the alcalde's story, that the "State of San Francisco" was a revolutionary body, and accordingly he issued a proclamation so declaring and commanding them to disorganize. The testy old Governor took his proclamation to San Francisco himself, resolved to reinstate Alcalde Leavenworth and assert his authority there at all hazards. [Gov. Riley then threatened to bring a warship to San Francisco.] This threat struck terror to their commercial hearts, and they disbanded forthwith, and Leavenworth was alcalde once more.

General Bennet Riley, oil painting by Lars Sellstedt (1863)

When Governor Riley returned to Monterey after this brilliant *coup d'etat* he proceeded to investigate the many complaints against the existing judicial system of Alcaldes' Courts. He found that an urgent necessity existed for a better judicial system and cast about him for the way to its establishment. He examined the only law book which he could find in Monterey, which was an old Mexican statute passed in 1837, providing a system of government for California. It had never been carried into effect in the territory beyond the organization of the alcaldes' courts. Governor Riley proceeded to organize the remainder of the judicial system this old statute called for, by the creation of Courts of First Instance throughout the territory, and by the formation of a Superior Tribunal, which was a sort of Appellate Court, and sat at Monterey.

With this Superior Tribunal we shall have little to do, for it occupied a very short space in the history of California jurisprudence. The Courts of First Instance, on the contrary, were quite important factors in the judicial history. Their jurisdiction was both civil and criminal. They superseded the alcaldes' courts in all but petty cases. A copy of the Mexican statute of 1837 showing in detail the jurisdiction and rules of practice of Courts of First Instance is to be found in the appendix to Hall's History of San Jose.

It may be interesting to notice one peculiar feature of the practice before these courts. Article X of the Mexican law above cited provides that "No complaint, either civil or criminal, involving simply personal injuries, can be admitted without proving with a competent certificate that conciliatory measures have been attempted by means of arbiters (*buenos hombres*);" and in Article XI it is provided that should a formal complaint have to be made which would cause a litigious process, then "conciliacion" ought first to be attempted. This effort at a settlement by "conciliacion" was a curious proceeding, unlike anything in our American law. I am informed that a similar plan for the settlement of disputes is in vogue in Switzerland, but with that exception I have not elsewhere discovered the duplicate of this proceeding. The "conciliacion" was conducted before the alcalde. The parties appeared at the Juzgado, each with his *buenos hombre* and the alcalde, and the arbiters endeavored to effect a compromise. If they succeeded the matter ended there, but if they failed the alcalde gave to the complainant a certificate showing a vain attempt at a "conciliacion," as required by the law. He then was entitled to carry his cause into the Court of First Instance.

The Court of First Instance was established in San Jose in the spring of 1849. R. M. May was the first occupant of the bench as judge of the court. He was shortly succeeded by Judge Kincaid, who remained on the bench until the court was abolished by the formation of the State.

With the creation of these Courts of First Instance, the "genus lawyer" began to be heard and seen in the land, and litigation multiplied. One of the earliest cases

tried before Judge Kincaid was the famous "mule" case, entitled Caldwell vs. Godey. The plaintiff sued the defendant for the possession of a mule, which he averred was his property. The defendant denied the allegation, and the case came on. Caldwell produced a dozen or more reputable witnesses who swore that they had known the plaintiff in Missouri, where he had owned the mule; that they had crossed the plains with him when he brought the mule to California; that there was no doubt as to the identity of Caldwell's mule. On the other hand, the defendant produced as many witnesses equally reputable, who swore they had known the defendant Godey and his mule in Texas, and that they had come to California with the mule, and there was no earthly doubt that this was Godey's mule. They also swore that the mule was branded with a diamond on its hip. The court was sitting in the old Juzgado, and was in a quandary indeed. At this point John Yontz, the sheriff, came into court and asked his honor if he should bring in the witness. The Judge, all innocent, told the sheriff to "bring him in." The sheriff brought "him" in and the witness was the mule. He filled the courtroom with his presence, and the court with righteous indignation. "Mr. Yontz," said his honor, sternly, "take that mule out of here, sir." "But your honor ordered me to bring him in," responded Yontz, "and I obeyed the order." The scene was ludicrous in the extreme; the sober face of the facetious sheriff; the still more sober aspect of the innocent mule; the Judge's withered face pale with indignation, and the countenances of the spectators red with mirth. The witness was taken out, but his introduction won the case for the defendant, for there upon his newly-shaven hip appeared the diamond brand to which the other witnesses had sworn.

The Old Third District Court

The first legislature of California, which met in the fall of 1849 in San Jose, provided the State with a judicial system, consisting of a Supreme Court and nine District Courts, which met in as many judicial districts throughout the State. The counties of Santa Clara, Contra Costa, Santa Cruz and Monterey constituted the Third Judicial District under this statute, and John H. Watson was appointed its Judge. Judge Watson was a man of considerable ability, but of not a very vast fund of legal knowledge. He it was who delivered the famous and humorous charge to the jury at Monterey in the case of Dean vs. McKinley, and which has heretofore been recorded. One day while the Judge was traveling from San Jose to Santa Cruz (to hold court there) in company with several members of the bar of his district, among whom was R. F. Peckham, the latter began to poke fun at Judge Watson for his charge to the jury in the McKinley case. "Now, Peckham," said the Judge, "don't you think I do about as well as anyone else would who don't know any more law than I do?" "Before I can answer that question, Judge," answered Peckham, "I would have to ascertain just how much law you do know."

Judge John H. Watson
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"Well, to tell you the truth, Peckham," said the Judge, "I don't know any, for I never read a law book in my life." "Well," laughed Peckham, "I must say that for a judge who never read a law book you do remarkably well, but how do you manage to get along with your cases?" "I'll tell you the secret, Peckham," said Judge Watson; "I make use of two presumptions in the trial of my cases. When I have heard the evidence I first presume what the law ought to be to do justice between the parties, and after I have settled that presumption I next presume that the law is what it ought to be, and give judgment accordingly."

This method of administering presumptive law was well enough in an era when law libraries were few and far between and when lawyers were even less learned in the law than was the court. But the great tide of population into California during the early fifties brought with it as good lawyers as the older states could produce, and their law books soon followed them. The result was that the Supreme Court found very frequent cause for reversal of the Judges of the District Court. In this connection a good story must be told on the Fourth District Court, which was one of those most frequently reversed. One day Delos Lake, Esq., arose in the Supreme Court to argue an appeal. "May it please the Court," he said, "this is an action in which we have appealed from a judgment of the Fourth District Court; but your Honors, *we have other grounds of error.*"

The year 1872 marks the opening of a new era in the history of the bench and bar of California. The codes were in that year adopted and more settled forms of procedure began to prevail. The twenty-six years which intervened between the American occupation and that date belong to one epoch; the twenty-eight years which have passed since the adoption of the codes, form another. With the latter it is not the scope or purpose of this article to deal. The writer of this anecdotal sketch of the Early Bench and Bar has felt himself reasonably secure behind the mists of tradition, and he deems it the part of wisdom to remain so and not tempt contradiction by entering upon the recital of veracious tales of existing courts or of many living members of the profession to which he has the honor to belong. ✯