BOOK SECTION

A HISTORY OF THE CALIFORNIA SUPREME COURT IN ITS FIRST THREE DECADES, 1850–1879

A HISTORY OF THE CALIFORNIA SUPREME COURT IN ITS FIRST THREE DECADES, 1850–1879

ARNOLD ROTH*

PREFACE

"The history of the United States has been written not merely in the halls of Congress, in the Executive offices, and on the battlefields, but to a great extent in the chambers of the Supreme Court of the United States."[1] It is no exaggeration to say that the Supreme Court of California holds an analogous position in the history of the Golden State.

The discovery of gold made California a turbulent and volatile state during the first decades of statehood. The presence of the precious ore transformed an essentially pastoral society into an active commercial and industrial society. Drawn to what was once a relatively tranquil Mexican province was a disparate population from all sections of the United States and from many foreign nations.

Helping to create order from veritable chaos was the California Supreme Court. The Court served the dual function of bringing a settled

* Ph.D., University of Southern California, 1973 (see Preface for additional information).

[1] Charles Warren, *The Supreme Court in United States History*, vol. I (2 vols.; rev. ed., Boston; Little, Brown, and Company, 1922, 1926), 1.

order of affairs to the state, and also, in a less noticeable role, of providing a sense of continuity with the rest of the nation by bringing the state into the mainstream of American law.

This study presents the story of the Court for the entire thirty-year period during which California's 1849 Constitution served as the state's organic law. In spite of the importance of the State Supreme Court to the history of California, no attempt has yet been made at a full study of the Court's work during its formative years, although there have been articles and books treating specific aspects of the Court, its personnel, and its decisions. This study attempts to fill at least part of the void. The bulk of the materials used, and indeed the basis of this study, was the decisions of the Court, but this work has not been designed as a legal treatise, but an examination of an active, living institution in a certain period of time, and within the context of that period.

* * *

In its present form, this study combines two prior works: my 1969 master's thesis covering the period of 1849–59,[2] and my 1973 doctoral dissertation covering the period of 1860–79.[3] They have been combined to read as a single work — but without attempting to update the contents, as this seems both unnecessary and futile: in one sense, the record of the cases decided by the Court is a closed one; and in another, scholarship on the history of the Court remains ongoing.

I wish to quote the closing statement from each of my prior works —

From 1969: "Special thanks must be extended to Dr. Doyce B. Nunis, Jr. for his guidance and encouragement, to my wife Carol for her patience and typing ability, and to my son Joseph, who made my work easier by not crying during his first year of life."

From 1972: "The author of any lengthy work such as this incurs numerous obligations for help received, and I am no exception. First, many thanks to Louis Lipofsky and Daniel Shafton, members of the California Bar, for helping me resolve some legal questions; to Dr. Doyce B. Nunis, Jr. for his guidance, encouragement, and patience; to Joseph, Sharon, and

[2] Arnold Roth, "The California State Supreme Court: 1850–1859" (M.A. thesis, University of Southern California, 1969).

[3] Arnold Roth, "The California State Supreme Court: 1860–1879, A Legal History" (Ph.D. diss., University of Southern California, 1973).

Deborah, for letting daddy "work"; and to my wife, Carol, who has shared the burden of this work in a very real way."

And, now in 2019, I wish to add:

Reflecting back on this research and writing has instilled me with a sense of accomplishment of task and validation of topic. Similarly, while I did not end up a college history professor, I definitely reached career satisfaction as a public school administrator and math teacher in Northern California for twenty-seven years, afterwards expanding into teaching both history and math college courses at night, and ultimately becoming a full-time retiree in 2012. This course of my life has run from my birth in New York City in 1934 to graduation from Fairfax High School in Los Angeles in 1951, followed by a B.A. in Anthropology in 1955 from the University of California, Los Angeles, and an M.A. in History in 1969 and Ph.D. in History in 1973, both from the University of Southern California.

Beyond just this work, I have been fortunate to continue sharing life experiences and burdens with my wife of fifty-three years, Carol, a nurse who transitioned into a college health professional, in the City of Stockton[4] (where we moved following receipt of my Ph.D. and continue to reside). With our three grown children living their own lives, four grandchildren, travel, bridge and a bevy of other retirement activities, I periodically have produced some additional historical work:

- "Sunday 'Blue Laws' and the California State Supreme Court," *Southern California Quarterly*, LV, no. 1 (Spring 1973), 43–47; available at https://scq.ucpress.edu/content/55/1/43.
- "Stockton's Jewish Community and Temple Israel," with an outline of Stockton Jewish history (December 17, 2011); available at https://templeisraelstockton.com/about-us/our-history/#long.
- *General Sir Ernest Dunlop Swinton*, a paper written while I was a docent at the Haggin Museum in Stockton for use by docents leading tours. (Dunlop was a leader in 'Tank Warfare' in World War I, and came to Stockton to meet with Benjamin Holt about the use of the caterpillar drive for tanks.)
- *The KKK in Stockton in the 1920s*, a study still in progress.

[4] Ironically, both Commodore Stockton (the person) and the City of Stockton are referenced repeatedly in this work.

I am grateful for the diligence and interest of the California Supreme Court Historical Society and *California Legal History* editor-in-chief Selma Moidel Smith, Esq. to find, appreciate and publish my combined works about the early years of the California Supreme Court. I am glad history remains relevant, and hope it provides useful background and context for studying future eras of California's history and the Court.

— ARNOLD ROTH

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Chapter 1

ORGANIZATION OF THE SUPREME COURT

American forces raised the American flag at Monterey July 7, 1846. That same day their commander, Commodore John D. Sloat, proclaimed California a part of the United States.

HISTORICAL BACKGROUND

Sloat's proclamation notwithstanding, California did not legally pass into the possession of the United States until May 30, 1848, when Mexico ratified the Treaty of Guadalupe Hidalgo. Until that date California remained in the military possession of the United States as an incident of the war, and was governed as a conquered territory under the laws of war. When the peace treaty was signed, California's status changed; it now became a possession of the United States subject to congressional action in regard to civil government.[1] But Congress did not act, and California remained under military rule until December 18, 1849, when Peter H. Burnett was inaugurated as California's first elected governor.

[1] See Theodore Grivas, *Military Governments in California 1846–1850 . . .* (Glendale: The Arthur H. Clark Company, 1963), 80.

Before the Treaty of Guadalupe Hidalgo, the military governor, who was the commander of the American military forces in California, had no constitutional limitations on his dealings with the inhabitants. The treaty, however, placed certain restrictions on the military commander; he was now limited by the United States Constitution. Any law, including municipal laws of the province, not in conflict with the Constitution remained in force until changed by congressional action; others were illegal. In addition, political laws, such as tariffs, were automatically extended to the new territories.[2]

Both before and after the American occupation of California, the most important local administrative official was the alcalde, whose role was much the same as a small-town mayor or English justice of the peace. Sometimes the alcalde acted in conjunction with a town council, or *ayuntamiento*, but his jurisdiction was always limited, at least in theory. That the limitation was not always apparent, particularly after the discovery of gold, was noted by Stephen J. Field, who became alcalde of Yubaville (later Marysville) in 1850. He wrote that "in the anomalous condition of affairs under the American occupation, they [alcaldes] exercised almost unlimited powers."[3]

By using the existing alcalde system, the military governors were not forced to develop a new system, and at the same time they were able to claim that it was a form of civil government, thereby hoping to still the demand for self-government. But this demand, together with the lack of appropriate legislation by Congress, eventually forced General Bennet Riley, military governor at the time, to call for a convention to frame either a state or a territorial government.

Riley's proclamation was issued June 3, 1849, only two days after the news had arrived that Congress had adjourned without organizing a territorial government for California. He designated August 1 as the day for electing delegates to a convention to meet at Monterey on September 1. Riley clearly lacked the authority to call such a convention, but he apparently wanted to retain his authority and prestige by assuming leadership of the statehood movement. In assuming this position of leadership, he

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[2] Ibid., 80–81.

[3] Stephen J. Field, *California Alcalde* (Oakland: Biobooks, 1960), 27.

would also enable himself to keep close to the convention proceedings and modify any possible "wild schemes."[4]

The elections were held as scheduled, and the delegates met at Colton Hall in Monterey on September 3. The first serious question to be faced by the delegates was whether a state or a territorial government was to be formed. The convention opted for a state government, passing a resolution to that effect introduced by William Gwin.[5]

Once having made the decision to prepare a state constitution, the delegates made generous use of the handiwork of other states, particularly that of Iowa and New York.[6] The convention completed its work in just under six weeks, and the Constitution was submitted to the people for their approval on November 13. The delegates were so confident that the Constitution would be approved, they set the first general election for the same day. The Constitution was ratified overwhelmingly, and remained, with certain subsequent modifications, California's fundamental law for thirty years.

ORGANIZATION OF THE JUDICIARY

At the afternoon session of Tuesday, September 25, the Select Committee on the Constitution made its initial report about how the judiciary would be organized.[7] This proposed plan provided for the establishment of four judicial districts, each with a circuit judge; the four circuit judges, sitting en banc, would constitute the Supreme Court. The Supreme Court was to be a court of appeals with three justices in attendance, but no justice could sit in judgment on a case in which he had rendered an opinion in his own judicial district.

Two other plans were proposed, one from the floor of the convention, and the other by a minority of the committee itself. All plans were rejected, and that evening a Special Committee on the Judiciary, made up of Kimball H. Dimmick of San Jose, Myron Norton of San Francisco, and James M. Jones of San Joaquin, met to separate the circuit and Supreme

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4 Grivas, *Military Governments*, 143–44.

5 J. Ross Browne, *Report of the Debates in the Convention of California . . .* (Washington, D.C.: John T. Towers, 1850), 19.

6 Ibid., 22–23.

7 Ibid., 212–39.

Courts, "and to bring in a report on the different propositions modeled on that plan."[8] The committee reported back the next day and presented a plan in which the judicial power was vested in a Supreme Court, district courts, county courts, and justices of the peace. When submitted to the convention, this scheme was adopted without debate[9] and became part of the Constitution.[10]

The Special Committee on the Judiciary did not limit the appellate jurisdiction of the Supreme Court, but on the floor of the convention Pablo de la Guerra of Santa Barbara suggested that such a limitation be included.[11] He claimed that limiting the Supreme Court's appellate jurisdiction to cases where the amount in dispute exceeded $200 would prevent capricious appeals by wealthy litigants who were not particularly interested in the amount involved, but in the satisfaction of their personal whims. De la Guerra's view prevailed, and the fourth section of the Sixth Article gave the Supreme Court "appellate jurisdiction in all cases when the matter in dispute exceeds two hundred dollars, when the legality of any tax, toll, or impost or municipal fine is in question, and in all criminal cases amounting to a felony or questions of law alone."[12]

The same article gave the district courts original jurisdiction in civil cases in which the amount in controversy exceeded $200, and unlimited jurisdiction over criminal cases not otherwise provided for, and in issues of fact joined in the probate court. The county courts had appellate jurisdiction in civil cases originating in the justices' courts, that is, cases involving less than $200, and original jurisdiction in such "special cases" provided for by the Legislature. The county court also acted as a probate court, and the county judge, together with two justices of the peace from the same county were to constitute a court of sessions with such criminal jurisdiction and duties as prescribed by law.[13]

The third section of the article provided that the first three members of the Supreme Court would be selected by the Legislature at its first session,

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8 Ibid., 224.

9 Ibid.

10 Cal. Const. (1849), art. VI, § 1.

11 Browne, *Report of the Debates*, 225, 228.

12 Cal. Const. (1849), art. VI, § 4.

13 Ibid., §§ 8, 9.

but thereafter justices were to be elected.[14] No objections were made to the direct election of justices at the Constitutional Convention, although Elisha O. Crosby, representing Sacramento, later claimed to have opposed the idea of an elective judiciary. He said that it "was not the safest, nor calculated to bring to the bench the best talent or the best decisions. That a man who depended in the popular vote for his election was likely to cater more or less to popular sentiment irrespective of the exact enforcement of the law."[15]

Crosby felt that judges should be removed from the turmoil and influences of a popular election and be appointed by the governor, with the approval of the Legislature, for life or good behavior, and that they be given an adequate salary and a remittance upon retirement.

Adoption of the Constitution did not still objections to an elective judiciary. William J. Shaw, in a speech delivered before the State Senate on February 7, 1856, called for a new state constitution, which among other things, would abolish juries because he felt judges were too subservient to them, and urged that the election of judges be ended. In this latter matter Shaw agreed with Crosby that judges should be above partisan politics. The constitutional changes effected in 1862 retained the election of judges, and Shaw continued his drive, again without success, as the Constitutional Convention of 1878–1879 also provided for the election of judges in the Constitution it wrote.[16]

The practice of electing judges in California continues until the present time, although not without occasional recurring criticism. Hubert Howe Bancroft, in discussing the California judiciary of the 1850s, expressed his views about an elective judiciary in general:

> The administration of justice, particularly of the higher courts, is beyond everything the most important part of the government. By the degree of enlightenment in the jurisprudence of the country, its advancement in national greatness is to be estimated. But it is irrational to expect of an elective judiciary, nominated in party

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[14] Ibid., § 3.

[15] Elisha O. Crosby, *The Memoirs of Elisha Oscar Crosby* . . . (San Marino: The Huntington Library, 1945), 44.

[16] William J. Shaw, *An Appeal to Californians* . . . (San Francisco: A. L. Bancroft and Company, 1875). Shaw expressed his views on the Judiciary in this pamphlet and offered his 1856 speech as further support for his stand.

> conventions, taking part in exciting campaigns, cognizant of, and sharing in the personal abuse of the rostrum, that dignity, purity, or learning which constitute an enlightened judiciary. The judicial ermine which has been dragged through the political pool in any state must have lost its whiteness.[17]

THE THREE-MAN COURT

The first state legislature passed the act organizing the Supreme Court on February 14, 1850. One provision was that a quorum would consist of two justices, and another that no justice could leave the state without the permission of the Legislature.[18] The small number of justices proved a hardship, as due to death, resignation, or freely granted leaves of absence, there were oftentimes only two justices available to hear cases, and if they disagreed, no decision could be rendered. In the seven-year period prior to Stephen J. Field's appointment to the Court by Governor J. Neely Johnson, in October 1857, eight judges had retired from the Court. This constituted a rapid turnover because no more than three justices sat at any one time. Field's biographer has also pointed out that with this turnover, reversals of decisions were likely, and little could be done toward establishing a system of precedents.[19] In all, fifteen men served on the three-man Court in the fourteen-year period 1850–1863. Only twelve different men saw service on the five-man Court established by the 1862 amendments. This covered the years 1863–1879, a period of sixteen years.

An attempt was made in 1852 to aid the work of the Court by the use of temporary or interim justices, but failed. In that year Chief Justice Henry A. Lyons resigned just prior to the start of the April term, and at the same time the Legislature granted a six-month leave of absence to Justice Solomon Heydenfeldt.[20] Justice Hugh C. Murray became chief justice, and Alexander Anderson was appointed by Governor John Bigler to fill the remainder

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[17] Hubert H. Bancroft, *History of California*, vol. VII (7 vols., San Francisco: The History Company, 1884–1890), 222.

[18] Cal. Stats. (1850), chap. 14.

[19] Carl B. Swisher, *Stephen J. Field: Craftsman of the Law* (Washington, D.C.: The Brookings Institution, 1930), 73.

[20] Cal. Stats. (1852), 287.

of Lyons' unexpired term. In order that there be a full complement on the supreme bench the Legislature passed an act authorizing the filling of temporary vacancies by the governor.[21] Governor Bigler appointed Alexander Wells to serve in Heydenfeldt's place for six months, but when the new term opened April 12, Wells said that the constitutionality of the act had been called into question, and that he would not sit until the matter had been resolved. He suggested that the attorney general be directed to initiate proceedings to test the act. The Court so ordered,[22] and state Attorney General Serranus C. Hastings brought the question before the Court in *People v. Wells*.[23] Chief Justice Murray and Justice Anderson were unable to agree, and thus no decision was rendered. Wells was told to do as he thought best, and he assumed his place on the bench May 5, 1852. When Heydenfeldt returned and resumed his seat, he prepared an opinion agreeing with Murray that the law was unconstitutional. Their reasoning was that there had been no vacancy to be filled; in order to have a vacancy, there could not be an incumbent, even though on leave. Interestingly enough, no one questioned the legality of the decisions in which Wells participated even though such participation was predicated on an unconstitutional law.

The Supreme Court could thus function with only two justices, although not with the same dispatch as it could with a full bench. If two justices were incapacitated in any way the Supreme Court could not act at all. This latter possibility occurred during the summer of 1856, when, with Heydenfeldt in Europe again, Justice David A. Terry ran afoul of the San Francisco vigilantes and was imprisoned by them for assaulting and attempting to kill Sterling A. Hopkins, one of their members. Terry was held for six weeks, during which time the Supreme Court was powerless, and could not resume deliberations until Terry was released.

THE CHANGES OF 1862

In his introduction to volume 24 of the *Supreme Court Reports*, Charles A. Tuttle, Supreme Court reporter for the years 1863 to 1867, pointed out the

21 Cal. Stats. (1852), chap. 87.

22 Order of Court, 2 Cal. 152.

23 People v. Wells (1852), 2 Cal. 198.

need for changes in the Supreme Court, citing in particular the litigation involving land titles and mining problems:

> The Court had thrown upon it the labor not only of working out the intricacies in which titles to real estate had become involved, but also, in some measure, of elaborating a new system, suited to the peculiar condition of the mineral districts. The Court, as organized, was unable to dispose of the cases brought before it with the celerity which particularly in new communities, is desirable.[24]

In 1861, the Legislature passed certain constitutional amendments dealing with the judiciary, as well as with the legislative and executive departments. The 1862 Legislature concurred and the amendments were presented to the people of the state at the general election of that year. The amendments were implemented in 1863 and the revised judicial system became effective in January 1864.

The Supreme Court now consisted of a chief justice and four associate justices, any three of whom would constitute a quorum.[25] In order to ensure the presence of this quorum, the Legislature was specifically barred from granting a leave of absence to any judicial officer, and any such officer who would be absent from the state for thirty or more consecutive days was to be deemed as having forfeited his office.[26] The term of office for a justice was extended from six to ten years from the first day of January after election, except for the five men elected at the first election. These justices were to classify themselves by lot so that one justice would leave office every two years; the justice drawing the shortest term was to become the chief justice.[27] These steps were all designed to increase the stability and continuity of the Court, as well as easing its work load. Unfortunately, there was a lack of success in at least this last matter. The new Court created by the Constitution of 1879 was made to consist of a chief justice and six associate justices who were to sit together on important cases, but on

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[24] 24 Cal. iii.

[25] Cal. Const. (1849), art. VI, § 2 (amended 1862).

[26] Ibid., § 5 (amended 1862).

[27] Ibid., § 3 (amended 1862).

most cases they were to sit in two departments, so two cases could be heard at once.[28]

As noted earlier, the 1862 amendment still provided for the election of justices, but an attempt was made to remove judicial elections from politics at least in part by having special judicial elections at which no nonjudicial officer could be elected except the superintendent of public instruction.[29]

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[28] Cal. Const. (1879), art. VI, § 2.

[29] Cal. Const. (1879), art. VI, § 2. (amended 1862).

Chapter 2

THE JUSTICES

THE THREE-MAN COURT

Under provisions of the third section of the article on the judiciary, the first Legislature elected Serranus C. Hastings, Henry A. Lyons, and Nathaniel Bennett the first three justices of the Supreme Court by a joint vote of both houses.[1] They were sworn into office in January 1850, and on February 1 the Legislature classified them so that Hastings was to serve two years and become chief justice, while Lyons and Bennett, as associate justices, were to have four- and six-year terms, respectively.[2] In March 1851 the Legislature provided for the election of future justices by having one justice elected that year and one at the general election every second year thereafter. The same section also stated that after the first election of a justice, the senior justice in point of service would become the chief justice.[3] The next section provided for the filling of a vacancy on the Court

Serranus C. Hastings

[1] California. Legislature, Senate and Assembly. Journals (1849–50), 53–54.

[2] Cal. Stats. (1850), 462.

[3] Cal. Stats. (1851), chap. 1, § 3.

HENRY A. LYONS

NATHANIEL BENNETT

by gubernatorial appointment, such appointment lasting until the election and qualification of a successor elected at the first general election after the vacancy occurred.[4]

The office of Supreme Court justice drew the attention of men with quite diverse backgrounds and interests. In the earliest years of statehood many of the justices, together with many of the leaders in the other two branches of the state government, were men who had held high positions in other states before coming to California.[5] Serranus C. Hastings, California's first chief justice, had already been a member of Congress from Iowa and chief justice of that state's supreme court. He arrived in California in 1849 at the age of thirty-five, and went into the practice of law in Sacramento. In the two years he served on the Court, he wrote thirty-five opinions for the majority, but his most notable opinion (discussed below) was his dissent in *Woodworth v. Fulton*, which was later to become law.[6] After leaving the Court, Hastings served as attorney general for a term, and he later founded the Hastings College of the Law as a part of the University of California.

When Hastings' term expired, Henry A. Lyons, who had been elected to the four-year term, acceded to the position of chief justice, but resigned after three months. "About the only distinguishing feature relating to Henry A. Lyons' legal career in California is the fact that he was one of the first three men to come to its Supreme Court. His work on the Court was of a role so minor as to justify little notice."[7] Lyons wrote only about a dozen opinions, and does not appear to have made any lasting contribution.

The third of the initial justices, Nathaniel Bennett, was the strongest and the most productive member of the first Court. Bennett, who had

4 Ibid., § 4.

5 Richard Dale Batman, "The California Political Frontier: Democratic or Bureaucratic?" *Journal of the West* VII (October, 1968): 461–70.

6 Woodworth v. Fulton (1850), 1 Cal. 295.

7 J. Edward Johnson, *History of the Supreme Court Justices of California*, vol. 1 (2 vols., vol. 1 San Francisco: Bender-Moss Company, 1963; vol. 2 San Francisco: Bancroft-Whitney Company, 1966), 31. The biographical data used in this chapter is derived from this work.

been chairman of the State Senate Judiciary Committee, wrote more than twice the number of opinions than did Hastings and Lyons together. Even though he drew the longest term, he was the first to resign, leaving the Court in October 1851 to become the court reporter, in which capacity he became responsible for the publication of the first volume of the *Supreme Court Reports*.

To fill the vacancy created by Bennett's resignation, Governor John McDougal appointed Hugh C. Murray to the Court. Murray was only twenty-six at the time, and when Henry A. Lyons resigned the next year, Murray, by now the senior justice, became chief justice, the youngest ever to hold this position in California. Murray was elected to succeed himself in 1852 (to fill the rest of Bennett's term, originally to terminate at the close of 1855), and for a full term in 1855. Murray did not care for change in the law as he had learned it in Illinois; he was also a follower of John C. Calhoun's theories as to states' rights. He died in 1857 at the age of thirty-two of tuberculosis, complicated by heavy drinking.[8]

Hugh C. Murray

Solomon Heydenfeldt

The honor of being the first justice to be elected by the people belonged to Solomon Heydenfeldt, who was elected in 1851 to succeed Hastings. As noted above, Heydenfeldt was granted a leave of absence from his duties in 1852 in order to return to Alabama to get his family (during which time Alexander Wells served as temporary justice, as noted above). Heydenfeldt served until January 1857 when he resigned; during his five years on the Court he wrote some 450 opinions, generally marked by their brevity and soundness. A South Carolinian by birth, Heydenfeldt was extremely pro-Southern, almost to the point of being a Secessionist; he refused to take the test oath of loyalty, and consequently was not able to practice law in California during the Civil War, although he remained in the state.

Alexander Anderson, a native of Tennessee, was the only member of the Supreme Court to be born prior to 1800. He had fought with Andrew Jackson at New Orleans, and was later a United States senator from his native state.

[8] Ibid., 43.

Arriving in California in May 1850, he was by September of 1851 an elected member of the State Senate from Tuolumne County. He was appointed to succeed Henry A. Lyons in April 1852 until a successor could be elected to finish the term. Anderson wanted this position himself, but lost the Democratic nomination to Alexander Wells, who won the election as well. After leaving the Court in January 1853, Anderson left California completely.

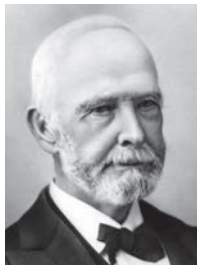
Alexander Wells arrived in California in 1849 from New York City, where he had been active in politics, being associated with Tammany Hall. As mentioned above, he served temporarily on the Court during Solomon Heydenfeldt's absence, and was elected to finish Henry A. Lyon's term. In 1853 he was elected to a full six-year term, but he served less than a year of the new term, dying suddenly in October 1854.

Wells' death brought about the appointment of Charles H. Bryan to the Court by Governor John Bigler. Bryan had come to California from Ohio in 1850 or 1851, settling in Marysville where he practiced law. He became district attorney of Yuba County in 1852, and in 1853 he was elected to the State Senate. Once on the Supreme Court he attempted to succeed himself and finish Wells' term; he was the candidate of the Democratic Party, but lost the election to the Know-Nothing candidate, David S. Terry. Bryan was considered an outstanding lawyer, but his career on the bench, although lasting only a year, "was nevertheless a disappointment to those who had beheld his brilliant performances at the bar. It was the consensus of opinion that he did not show much aptitude for judicial work."[9]

The man who defeated Charles Bryan in the 1855 election, David S. Terry, was possibly both the most controversial and colorful figure ever to become a justice in California. While on the California Supreme Court, he killed a United States senator in a duel, and had been imprisoned, tried, and convicted of stabbing a member of the Vigilantes. Terry was born in Kentucky in 1823, moving to Texas with his mother in 1835, where he fought in the Texas War of Independence when he was but thirteen. He came to California in 1849, settling down to the practice of law in Stockton, where a number of Southerners had settled. When he won the 1855 election, he was thirty-two, and during his first year on the bench he became involved with the Vigilantes. On Hugh C. Murray's death in 1857, Terry

9 Johnson, *Supreme Court Justices*, vol. 1, 50.

DAVID S. TERRY



PETER H. BURNETT

became chief justice. "Terry's greatest attribute as a judge was his personal integrity."[10] This statement by J. Edward Johnson may not do Terry justice, for even Stephen J. Field's biographer wrote that Terry was "a man with a great deal of legal ability."[11] Terry believed very strongly in the separation of powers in a state, and was not interested "in unduly increasing the authority of the supreme court at the expense of lower courts."[12]

In 1859, Terry lost the Democratic nomination to Warner W. Cope, but did not finish his term in office, resigning in September when he took part in the famous duel with David C. Broderick. After the duel, Terry left for Nevada, returning to Texas during the Civil War to serve in the Confederate army. After the South was defeated, Terry went to Mexico, but eventually returned to Stockton to practice law. He became the lawyer for Sarah Hill against William Sharon, an association that was to cost him his life; he was fatally shot by the bodyguard of Stephen J. Field, then a United States Supreme Court justice, as the result of an unfavorable decision rendered by Justice Field.

One of Terry's associates on the Supreme Court was Peter H. Burnett, California's first governor, who was twice appointed to the bench. Governor J. Neely Johnson appointed Burnett in January 1857 to replace the resigned Solomon Heydenfeldt. Burnett resigned in October of that year to allow the appointment of Stephen J. Field who had been elected to a full term, and the next day Governor Johnson appointed Burnett to take Hugh C. Murray's place. Burnett remained on the Court until October 1858 when he again resigned so that Joseph G. Baldwin, who had been elected to finish Murray's term, could be appointed. There are conflicting views as to Burnett's judicial ability. J. Edward Johnson wrote that "his

[10] Ibid., 56.

[11] Carl B. Swisher, *Stephen J. Field; Craftsman of the Law* (Washington, D.C.: The Brookings Institution, 1930), 73.

[12] A. Russell Buchanan, *David S. Terry of California* (San Marino: The Huntington Library, 1956), 73.

opinions are of a high quality."[13] Terry's biographer, A. Russell Buchanan, said that Burnett was "generally considered to have been well-meaning and honest but not exceptionally able."[14] Carl Swisher wrote in the same vein that Burnett "was probably a fair administrator and a man of sound integrity, but he was not more than "mediocre in his capacity as a Judge."[15] Most of the criticism of Burnett was based on his refusal to apply the law strictly in the Archy slave case.[16] Burnett himself did not even mention being on the Supreme Court in his memoirs.[17]

The position of justice of the Supreme Court was one to challenge the best of men. The Court was faced with new types of situations which were quite puzzling. Even though the common law had been adopted, problems arose that were different from those that had been settled by use of the common law. True, there were principles that could be used, but they were not always in harmony with one another. The judges had to select the principles that would provide the greatest welfare for the state. Thus, recognition by the justices of the state of affairs was, in a sense, as important as their legal knowledge. These considerations helped make the Supreme Court influential as a legislative as well as a judicial body.[18]

The most prominent of the justices to sit on the Court in the period of this study was Stephen J. Field, who was chief justice from 1858 to 1863. Field was one of five sons of a well-known New England clergyman, but he was not the only one of his brothers to gain national recognition. His eldest brother, David Dudley Field, was a prominent member of the New York Bar and was responsible for codifying New York's laws, and Cyrus West Field was to become a well-known New York financier and merchant and promoter for the laying of the Atlantic cable. Field practiced law in New York with his brother David Dudley for several years before coming to California in 1849; these were also the years in which the elder brother was proceeding on his work of codification. Field settled in Marysville

13 Johnson, *Supreme Court Justices*, vol. 1, 63.

14 Buchanan, *David S. Terry*, 72.

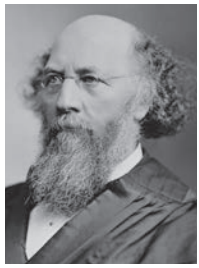
15 Swisher, *Stephen J. Field*, 73.

16 Ex parte Archy (1857), 9 Cal. 147.

17 Peter H. Burnett, *Recollections and Opinions of an Old Pioneer* (New York: D. Appleton and Company, 1880).

18 See Swisher, *Stephen J. Field*, 75.

and was elected alcalde there soon after his arrival. He was a member of the State Assembly, where he served on the Judiciary Committee, taking the lead in the preparation of the civil and criminal practice acts, both of which were based on the work of his brother, David Dudley. A most important and far reaching part of the civil practice act was the section upholding local mining laws and customs as legally binding in mining cases.[19] In 1857, the Democrats nominated Field for the Supreme Court,[20] and he was elected for the term of office that was to begin January 1858. Peter H. Burnett, who was occupying that seat on the Court, resigned to allow Governor J. Neeley Johnson to appoint Field until Field's elected term began. Field served until appointed to the United States Supreme Court by President Abraham Lincoln in 1863. While on the California Supreme Court bench, Field's most important work lay in stabilizing California land titles and interpreting the laws involving water and mineral rights.



Stephen J. Field

Joseph G. Baldwin

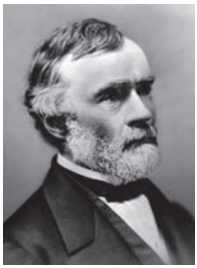
Field's best work probably took place during the years that Joseph G. Baldwin served with him in the Court. Baldwin practiced law in Mississippi and Alabama for nearly twenty years before coming to California in 1854, and had served in the Alabama Legislature in the mid-1840s. While living in the South, he also managed to write and have published two volumes of sketches, the most famous of which was *Flush Times in Alabama and Mississippi*. Baldwin's writings, according to one historian, made him one of the "heralds of realism in literature" in the rebellion against literary traditionalism.[21] Baldwin wrote some 550 opinions from October 1858 to December 1861, when he left the Court, having declined to run for reelection. In the period during which the three-man Court functioned, Baldwin was considered to be second only to Field in

[19] Cal. Stats. (1851), chap. 5, § 621.

[20] Winfield J. Davis, *History of Political Conventions in California*, 1849–1892 (Sacramento: The California State Library, 1893), 77.

[21] Ray Allen Billington, *America's Frontier Heritage* (New York: Holt, Rinehart and Winston, 1966), 93.

Warner W. Cope



Edward Norton

ability, and "did much to give the Court standing before the public."[22]

Forming a most harmonious triumvirate with Field and Baldwin was Warner W. Cope, who was nominated in 1859 by the Lecompton Democrats over the controversial David S. Terry, then chief justice.[23] Cope won the election, and when Terry resigned because of his duel with David C. Broderick, Cope was appointed to the vacancy by Governor John B. Weller. When Field moved to the federal bench, Cope became chief justice, serving in that capacity until the five-man Court commenced in 1864. After leaving the Court, Cope remained active in the law, in private practice, as one of the original trustees of the Hastings College of the Law, president of the San Francisco Bar Association, and Supreme Court reporter for volumes 63 to 72 of the *California Reports*.

Baldwin's successor was Edward Norton, a New Yorker, who practiced law with marked success both in his native state and California before joining the ranks of the judiciary. He was the first judge of the Twelfth District, serving in that capacity the entire decade of the 1850s, and gaining renown as a fine jurist. After refusing to stand for election to succeed himself, he went to Europe for a vacation. While abroad, he was nominated by the Republican party to the Supreme Court, and was elected in 1861, but was not able to equal the acclaim received for his earlier judicial work. Norton did not get along with Field; the latter questioned Norton's ability for appellate work. Field wrote:

> This gentleman was the exemplar of a judge of a subordinate court. He was learned, patient, industrious, and conscientious; but he was not adapted to an appellate tribunal. He had no confidence in his own unaided judgment. He wanted someone upon whom to lean. Oftentimes he would show me the decision of a tribunal of no reputation with apparent delight, if it corresponded with his own views, or with a shrug of painful doubt, if it conflicted with them. He would

22 Swisher, *Stephen J. Field*, 74.

23 Davis, *Political Conventions*, 104.

> look at me in amazement if I told him that the decision was not worth a fig; and would appear utterly bewildered by my waywardness when, as was sometimes the case, I refused to look at it after hearing by what court it was pronounced.[24]

Acceptance of Field's comment must be tempered by the realization that Field and Baldwin were very close personal friends as well as associates on the Court; Baldwin took Field's name for one of his sons, Sidney Field Baldwin. Field notwithstanding, Norton served until the constitutional amendments went into effect in January 1864.

Edwin Bryant Ceocker

Field's own replacement on the Court was also a New Yorker, Edwin Bryant Crocker. Crocker received a degree in civil engineering from Rensselaer Institute, but became unhappy with engineering, and decided to enter the law profession. He read law in Indianapolis, where his family was then living, and settled down to practice law until 1852 when he came to California. While living in Indiana, Crocker became active in the anti-slavery movement and aided fugitive slaves on their way to Canada. In California, Crocker settled in Sacramento, where his brother Charles and Leland Stanford were establishing their mercantile business. Crocker practiced law and became active in politics, being one of the founders of the Republican party in the state. He remained active in the party and was a firm Lincoln supporter. When Field was appointed to the federal bench, Stanford, then governor of California, appointed Crocker an associate justice, although he was to serve only the seven months until the new Court was inaugurated. In those seven months, though, Crocker wrote 237 opinions that appeared in the *Reports*. This production did not go without public comment; Crocker was criticized for his speed at reaching decisions and writing opinions, a far cry from the usual complaint that the wheels of justice grind too slowly.[25]

After leaving the Court, Crocker became attorney and general agent for the Central Pacific Railroad, and also became closely associated with his brother Charles in the actual building of the railroad. He spent part of the time in the field where construction was taking place, most probably

[24] Stephen Field, *California Alcalde* (Oakland: Biobooks, 1950), 85.

[25] Johnson, *Supreme Court Justices*, vol. 1, 87.

putting his engineering training to good use. Unfortunately, Crocker's rapid pace led to a collapse in 1868; he was unable to work the remaining seven years of his life. Crocker's involvement with the railroad enabled him to amass the largest fortune of any California Supreme Court jurist.

THE FIVE-MAN COURT

As noted earlier, the 1862 amendment to the article on the judiciary provided for five justices, each to serve ten years except that "those elected at the first election, who, at their first meeting, shall so classify themselves by lot that one Justice shall go out of office every two years. The Justice having the shortest term to serve shall be the Chief Justice."[26] The five men elected were Silas W. Sanderson, John Currey, Lorenzo Sawyer, Augustus L. Rhodes, and Oscar L. Shafter.

Silas W. Sanderson, the first chief justice under the amended Constitution, was born in Vermont, but studied law and was admitted to the bar in New York. He came to California in 1851 to try his hand at mining, but like other lawyers who made like attempts, he returned to the practice of law. In 1859 he was elected district attorney of El Dorado County, and later served in the Legislature, where he authored the specific contract law. On the Court he drew the short two-year term, ran for reelection, and won a full ten-year term. He served as an associate justice until 1870, when he resigned to become a counsel for the Central Pacific Railroad.

The man to draw the second shortest term was John Currey, another one of the New Yorkers to serve on the Court. In the 1850s, he practiced law in Benicia, where he handled much land-grant litigation. He received a percentage of the lands for which he settled the titles, and held several thousand acres of farmland which provided him an ample income for the rest of his long life. Currey unsuccessfully sought election to the Court in 1858, losing to Joseph G. Baldwin, and lost a bid for the governorship to Milton S. Latham in 1859. On the Court he served two years as an associate justice, and served as chief justice after Sanderson. He returned to private practice, retiring in 1880, and lived on the income from his land holdings until his death in 1912 at the age of ninety-eight.

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[26] Cal. Const. (1849), art. VI, § 3 (Amend. 1862).

The third of the jurists to join the Court in 1864 was Lorenzo Sawyer, another native of New York, although educated in Pennsylvania and Ohio. He came to California in July 1850 and was elected city attorney of San Francisco little more than a year later. In May 1862, Governor Leland Stanford appointed Sawyer to fill the vacancy as judge of the Twelfth District. He held this post until he took his place on the Supreme Court. He served six years, the last two as chief justice, and ran for a ten-year term to succeed himself, losing to William T. Wallace. Sawyer had barely left the Court when he was appointed federal circuit judge for the Northern District of California, holding court in San Francisco. This was an important position because the circuit court had original federal jurisdiction in law, equity, and serious criminal cases and appellate jurisdiction over the district courts. One scholar has compared Sawyer's work on the state and federal benches by stating, "while Sawyer's work on the Supreme Court of California was important and creditable, his reputation mainly stems from his twenty years as a federal judge."[27]

As a federal judge Sawyer often worked with Stephen J. Field, the circuit justice. Together they rendered decisions protecting the Chinese in California from discriminating legislation,[28] and in holding corporations to be artificial persons under the Fourteenth Amendment.[29] "The Field–Sawyer opinions thus today stand as the highest — indeed in most respects the only — authoritative judicial statement and justification of the corporate constitutional 'person.'"[30] Sawyer died in office in 1891.

The third native of the Empire State to be an original member of the reorganized Court was Augustus L. Rhodes. Educated in his native state, Rhodes read law in the South, and was admitted to the bar in Indiana, where he practiced until coming to California in 1854. Rhodes took up farming near San Jose, but the dry year of 1856 saw him return to the law, opening a practice in San Jose. His entry into California law practice was quickly followed by participation in politics, as in quick succession he was county

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27 Johnson, *Supreme Court Justices*, vol. 1, 96.

28 In re Ah Fona (1874), 3 Sawyer 144; Ho Ah Kow v. Nunan (1879), 5 Sawyer 552.

29 County of San Mateo v. Southern Pacific R. R. (1882), 8 Sawyer 238; County of Santa Clara v. Southern Pacific R. R. (1883), 9 Sawyer 165.

30 Howard Jay Graham, "An Innocent Abroad: The Constitutional Corporate 'Person,'" *UCLA Law Review* II (February, 1955): 160.

attorney for Santa Clara County, district attorney, and state senator. In the latter capacity he served on the Judiciary Committee and helped prepare the constitutional amendments of 1862. Rhodes went directly from the Legislature to the Supreme Court, where he drew the next-to-longest or eight-year term. He served six years as associate justice, two as chief justice, and then eight more years as an associate justice by being reelected to a full term in 1871. He was the only man to serve for the entire sixteen-year existence of the five-man Court, but failed in his bid to become a member of the seven-man Court organized under the Constitution of 1879. Except for an eight-year period as a judge of the San Jose superior court from 1899 to 1907, Rhodes kept up his law practice until his death at the age of ninety-eight in 1918.

Like Silas W. Sanderson, Oscar Lovell Shafter was a native of Vermont, making that state and New York the birthplace of all five justices on the new Court. Unlike the other four, however, Shafter was born into a legal family, and rose to prominence himself in his native state. Shafter's father was a lawyer, judge, legislator, and unsuccessful gubernatorial candidate. Shafter was also the only one of the five justices to attend law school, and practiced successfully for some eighteen years before coming to California in 1854. He was unable to attain office in Vermont, although attempting to do so on several occasions. In California Shafter developed a lucrative practice, particularly in the area of land claim litigation. When elected to the Court in 1863, he drew the ten-year term, but resigned due to failing health in 1867, dying in 1873. Without citing specific instances, Oscar T. Shuck wrote:

> While his methods at the bar — his investigation, his preparations, his presentation — were the admiration of his associates and of the judiciary, it must be recorded that his judicial career was a disappointment to the profession — that is, his judicial successes were not commensurate with his triumphs at the bar.[31]

The first man to come to the five-man Court after the initial justices was Royal Tyler Sprague, another native of Vermont. Sprague began his study of law after first teaching in New York state and operating a private school in Zanesville, Ohio. He was admitted to the Ohio Bar and practiced in Zanesville until 1849, when he left for California, arriving at Shasta.

[31] Oscar T. Shuck, *History of the Bench and Bar of California* . . . (Los Angeles: The Commercial Printing House, 1901), 575.

He took a turn at mining, then business, but returned to law, and by 1851 already had a thriving practice. In 1850 Sprague helped organize Shasta township. Although defeated for county judge in 1850, and for Supreme Court positions in 1859 and 1863, Sprague served in the State Senate the third through the sixth Legislatures; in the last term he was president pro tem. He was elected to a ten-year term to the Court in 1867, beginning his service the following January. In 1872 he acceded to the position of chief justice, but died the next month, his death attributed to a heart condition.

The first man to "break" the New York–Vermont monopoly in the Supreme Court was Kentucky-born Joseph Bryant Crockett. Crockett was admitted to the bar in Kentucky, served in that state's legislature, and was state's attorney for his county, but even though he was well on the way to financial independence, he moved to St. Louis in 1848. His stay in Missouri lasted only until 1852, when he left for California, but in that brief period he served in the Missouri Legislature and edited a St. Louis newspaper. Settling in San Francisco, he joined the practice of Alexander Wells, the "interim" justice of the 1850s, and became involved in land grant litigation. In 1857 he formed a partnership with Joseph G. Baldwin until the latter's elevation to the Supreme Court, and in December 1867 Crockett was himself appointed to the Court by Governor Henry H. Haight, a close personal friend, to replace the resigned Oscar L. Shafter. In the election of 1869 Crockett won a full ten-year term, which he completed, although he suffered from failing eyesight for several years. Crockett had a continuing interest in education and in helping young people. He represented the Court at the founding of the Hastings College of the Law, and was also instrumental in establishing the first industrial school for delinquents in San Francisco.

A second Kentuckian, William. T. Wallace, was the next justice to assume a place on the Court. Wallace arrived in California in 1850, when he was only twenty-two, but had already completed his legal training. He set up practice in San Jose, and in 1851 became district attorney for the third judicial district. In 1853 Wallace married a daughter of Peter H. Burnett, California's first governor, a two-time appointee to the Court himself, and joined his father-in-law in practice. Two years later Wallace was elected attorney general, in which position he served two years, and then sought election to the Court three times, failing in 1861 and 1863, and defeating incumbent Lorenzo Sawyer in 1869 by 300 votes. Although elected to a full ten-year

term, Wallace actively sought to be sent to the United States Senate, and was in the running in both 1872 and 1879. Wallace was an associate justice for two years, and spent the remainder of his term as chief justice. After leaving the Court, Wallace remained active in politics and as a regent of the University of California. He and Stephen J. Field did not like each other, and Wallace actively opposed the other's presidential ambitions. In 1882 Wallace was elected to the Assembly, and two years later went to Washington to aid his friend Barclay Henry, who had been elected to Congress. Upon completing his stay in Washington, Wallace returned to San Francisco and was elected to the superior court, and it was as the presiding judge of the court that he led the grand jury investigation into San Francisco corruption.

Jackson Temple holds the distinction of having been a member of the Supreme Court on three separate occasions, although only once in the years before 1880. Temple was born in Massachusetts and educated at Williams College and Yale University, graduating in law from the latter institution. Immediately after graduation he left for California, arriving in San Francisco April 15, 1853. After staying in San Francisco for about six months, he moved to the area near Petaluma, where he joined his brothers, who had preceded him to California, in their ranching operations. This arrangement lasted about a year, after which time Temple entered the practice of law in Petaluma, then county seat of Sonoma. When the county seat moved to Santa Rosa he followed, and Santa Rosa was to remain his home for the rest of his life. Temple generally practiced in association with other lawyers, and tried to avoid criminal practice. Curiously enough, although Temple began his law work in California in 1855, he was not admitted to Supreme Court practice until 1859, which meant that for four years he could not appear before the state's highest tribunal. Thus, having associates who could continue with a case on appeal was a practical necessity. In 1867, when Henry H. Haight was about to run for governor, he offered his practice to Temple, who accepted and moved to San Francisco. Haight repaid Temple by appointing him to the Supreme Court when Silas W. Sanderson resigned. Temple only served two years, as his bid to succeed himself was defeated by Addison C. Niles at the October 1871 election. Haight and Jackson left office at the same time and they went into practice together in San Francisco, with Jackson returning to his Santa Rosa home on weekends. He later moved his practice to Santa Rosa, and in 1876 he was appointed a district judge, remained in the superior

court until 1886, and served on the Supreme Court from 1886 to 1889, and 1894 to 1902, each time by vote of the electorate.

Still another native of the Empire State to serve on the Court was Addison Cook Niles. Niles graduated from Williams College, read law in his father's office, and was admitted to the New York Bar, although he came to California instead of starting his practice. Niles arrived in the winter of 1854–55, settling in Nevada City, where his sister and her husband had settled. Niles' brother-in-law, Niles Searls, was also a cousin, and was himself to become a Supreme Court justice in 1887. Niles formed partnerships with various lawyers until 1862 when he was elected county judge, in which capacity he continued until winning election to the Supreme Court in 1871, defeating the incumbent Jackson Temple. Niles remained on the Court until the seven-man Court took office, and then returned to Nevada City. In the mid-1880s he moved to San Francisco where he maintained a small practice and assisted Warner W. Cope in reporting decisions of the Court.

Isaac S. Belcher, a graduate of the University of Vermont, came to California in 1853, after practicing in his native Vermont only briefly. He landed in San Francisco, went to Oregon for a month, and then tried his hand at mining on the Yuba River. He returned to the practice of law, though, settling in Marysville, where he also became active in Republican party politics and won several positions. In 1855 he was elected Yuba County's district attorney, in 1859 he was city attorney in Marysville, district judge from 1864 to 1869, and finally a justice on the Supreme Court, being appointed by Governor Newton Booth March 4, 1872. Belcher did not choose to succeed himself and returned to practice in Marysville, although he continued to be active in public affairs. In 1878 Belcher was elected a delegate to the Constitutional Convention, where he was one of the conservatives opposing many of the provisions of the Constitution. He unsuccessfully ran for one of the positions on the new Court. The 1885 Legislature passed an act authorizing the Supreme Court to appoint three commissioners to aid it with its work, and Belcher was one of those selected.[32] "While Belcher had been a member of the Court two years, it was as a commissioner that

[32] Cal. Stats. (1855), chap. 120.

he made the great judicial showing of his life."[33] He continued his work as a commissioner until his death in 1898.

The last justice to take part in the deliberations of the Supreme Court prior to the adoption of the new Constitution was Elisha Williams McKinstry, a native of Michigan. He was educated in Michigan and Ohio, but read law and was admitted to the bar in New York. He came to California as a member of the international boundary commission, and stayed to become a leader of the California Bar. By 1850 he was in practice in Sacramento, and represented that community in the first Legislature. The next Legislature elected him adjutant general even though he was only twenty-four; he never entered office, though, because the Legislature neglected to provide a salary. In 1851 McKinstry shifted to Napa, practiced law there, and served as district judge for ten years. In 1862 he resigned to run for lieutenant governor in 1863. Defeated in that election, he went to Nevada, but failed there in a bid to be on that state's high tribunal. McKinstry returned to California in 1867, locating in San Francisco. After his return he was, in successive order, county judge, district judge, justice on the five-man Court, and justice on the seven-man Court, the only justice to carry over directly to the new Court. In 1888 he resigned to join the faculty at Hastings College of the Law, while also maintaining his practice. In 1895 the trustees felt that faculty members should not also maintain practices, and McKinstry resigned. While on the Court, McKinstry wrote opinions for many important cases, most important of which was the key water rights case of *Lux v. Haggin*.[34]

While it is admittedly difficult to generalize about the justices as a whole without more information about them, some conclusions may be essayed nonetheless from what is known. The most obvious factor was the relative youth of the justices; only Joseph B. Crockett, Edward Norton, and Royal T. Sprague had reached the half-century mark, while Warner W. Cope, Silas W. Sanderson, and Addison C. Niles were not yet forty.

Based on the available evidence, the backgrounds of the justices show a similar homogeneity. For one, twelve of the seventeen justices hailed from New England or New York, and ten of the twelve from either New York or

[33] Johnson, *Supreme Court Justices*, vol. 1, 122.

[34] Lux v. Haggin (1886), 69 Cal. 255.

Vermont. Of the five from other areas, one, Elisha McKinstry, although born in Detroit, came from an old New York family, and Virginia-born Joseph Baldwin could trace his ancestry to the early days of New England.

Not only was there a preponderance of men from the Northeast, it would also seem that these justices came from families long established in the New World, and were members of established religious groups. The family lineages of only six justices are known, and five of these were of old English stock that came to the New England–New York area early in the colonial period. The sixth, Kentuckian Joseph Crockett, was of Scotch-Irish and French extraction. The religious affiliations of six justices are definitely known. Two were Roman Catholics and the other four were members of established Protestant denominations: Congregational, Presbyterian, and Unitarian. Three justices whose religious preferences are not known were nonetheless buried in cemeteries belonging to Protestant groups. Absent were members of evangelical or revival groups. Interestingly enough, none of the six men whose religion is known were men who could trace their ancestry, although two of the men buried in Protestant cemeteries were of old English stock. The relative geographical homogeneity and what is already known about the religions and lineages of the justices probably indicate that even more justices came of old English stock and belonged to established religious groups.

To add to the similarities between the justices, all seventeen were born in rural areas, although only the fathers of Lorenzo Sawyer and Isaac Belcher were farmers. The rest lived in small towns, but by no means could rural life be equated with poverty. Several of the justices were born into educated, professional families. The fathers of Edward Norton and Addison Niles were lawyers, William Wallace's father was a doctor, and Stephen Field's father was a Congregational clergyman. In addition, Jackson Temple, Elisha McKinstry, and Joseph Crockett had fathers who were engaged in various types of business enterprises.

Elisha McKinstry and Addison Niles were both members of wealthy families, but the families of the other justices, if not wealthy, had the wherewithal to provide the future justices with some education. Eight of the men graduated from college, and three others spent at least some time as college students. The seven who did not attend college were by no means illiterate, however. Joseph Baldwin, for example, spent only a limited amount of time attending a common school in Virginia, but worked for a newspaper and

was able to write the critically acclaimed books mentioned earlier. Warner Cope attended an academy and was well grounded in the classics, while Lorenzo Sawyer was able to teach school without the benefit of a college education prior to his entry into legal studies.

The judges, then, were rural-born members of the middle class from New England or New York. They came from well-established families and belonged to established religious sects. None were themselves immigrants or members of newer evangelical groups. The lack of Southerners on the Court was probably no coincidence or mere accident due to the passage of a law requiring a loyalty oath of lawyers; the effect was to exclude many prominent men from judicial work during the Civil War years. Among those so affected were Solomon Heydenfeldt, the oft-traveling justice of the 1850s, and Gregory Yale, a noted expert on land and water law.[35] Without this law there probably would have been more Southerners on the Court, but it is doubtful that any of the similarities given would be affected except that of geography.

In discussing the beginnings of the California Supreme Court, writers often times use terms such as "unprecedented state of affairs" or "anomalous conditions" in California's early years of statehood. These statements refer to the tremendous growth of population and other consequences of the discovery of gold. Many of the problems that arose were settled in the 1850s; others were not settled at all, and others incorrectly. An incorrect solution to a problem was not unique in the Western states where judicial experience was far more limited than in the older states of the union. Western courts, while continuing the use of precedents, realized that some of their early decisions were erroneous and had to be overruled. The California Supreme Court faced this problem in 1858, and stated that the doctrine of stare decisis was not to be used merely to protect a new innovation against a settled principle of law.[36] The period after 1859 saw the Court settle some old problems, such as the ownership of minerals on the public lands, and face new ones — such as the loyalty oath and greenback controversies of the Civil War period.

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[35] See Ex parte Yale (1864), 24 Cal. 241.

[36] Aud v. Magruder (1858), 10 Cal. 282.

Chapter 3

COMMON LAW AND MEXICAN LAW

In order to bolster his claim of being a civil governor, General Bennet Riley appointed men to fill the judicial posts that existed under Mexican government. Joseph G. Baldwin combined his legal background and literary ability to write:

> However easy it may have been to establish the Mexican system, it was not so easy to carry it out — seeing that that system of law was an inscrutable mystery to the American population, now constituting the mass of the people, who did not know whether an Alcalde was a sheriff or a Judge, . . . and seeing, further, that the Natives, even if they could make themselves understood to the Americans, knew but little more of the jurisprudence than the names and general nature of the duties of the public officers. The old colonists were in a state of unsophisticated innocence in regard to conventional law: with the exception of a few in authority who only knew the rudiments. They had, indeed, but little use for law; and what little they *did* have use for, was guessed at or improvised for the occasion. In such a state of primitive innocence and social felicity were they, that no lawyers infested the country before the invaders came in; and no law books were in the province. Justice was administered in its primeval purity, and the

> quirks and quibbles, the forms and ceremonies which surround litigation and embarrass justice, were wholly absent.[1]

Baldwin may have been guilty of taking literary license in claiming an absence of lawyers in Mexican California, although Theodore H. Hittell reached the same conclusion. A somewhat different view was taken by W. W. Robinson:

> Under the Spanish and Mexican regimes there was little practice of law by professional lawyers in . . . all of California.
>
> Lawyers then did not hang out shingles. Their services were not available to the public. The few trained lawyers who came from Mexico to California acted as legal advisors (*asesores*) to governors or held appointive offices, which permitted them to carry on other activities as *rancheros*. To say there were *no* lawyers in California during certain years of the Mexican period, as did historian Theodore H. Hittell, seems to have been an exaggeration. Law practice . . . was almost exclusively in the hands of non-professionals during the whole of California's Spanish-Mexican period.[2]

The lack of practicing attorneys in California before the conquest together with the lack of familiarity with the civil law on the part of the new American settlers, some of whom were trained in the law, made Riley's attempt to keep the Mexican system intact impractical if not totally impossible, for "the American settlers . . . brought with them from the Atlantic side of the continent common law principles and common law forms, which either amalgamated with or supplanted the old customs and procedures."[3] Some lawyers, of course, did practice in the courts staffed by Riley, but with statehood the Mexican system was doomed.

ADOPTION OF THE COMMON LAW

The legislative and executive branches of the new California government began functioning some months before the Supreme Court held its first

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[1] Joseph Glover Baldwin, *The Flush Times of California*, edited by Richard E. Amacher and George W. Polhemus (Athens: University of Georgia Press, 1966), 35.

[2] W. W. Robinson, *Lawyers of Los Angeles* . . . (Los Angeles: Los Angeles Bar Association, 1959), 14.

[3] Theodore H. Hittell, *History of California*, vol. II (4 vols., San Francisco: N. J. Stone & Company, 1885–97), 663.

session in March of 1850. The Legislature had organized the courts, and the executive branch took the lead in attempting to establish the basis of jurisprudence that would be followed by the judiciary.

Governor Peter H. Burnett, who had also been chief justice under General Riley, delivered his first annual message December 21, 1849. In it, Burnett asked for the adoption of civil and criminal codes of justice to establish the basis of jurisprudence of the state, a matter of prime importance. He recommended a mixture of the English common law and the civil law, the latter to be taken from the Louisiana Civil Code and Code of Practice, since the Bayou state was the only one that had chosen the civil law over the common law up to that time.[4]

As already noted, there was a lack of familiarity with the civil law as practiced in Mexican California, and this was further accentuated by the continuing influx of settlers from the East. The majority of these migrants were of English stock and had lived under the common law. It was natural that they favored this system over the civil law in California. Further, the lawyers in California for the most part had studied and practiced under the common law system and knew little of the civil law.

Petitions representing both views were presented to the Legislature, where they were referred to the Senate Judiciary Committee. The committee's chairman, Elisha O. Crosby, with the assistance of Nathaniel Bennett, wrote a report comparing the two systems, and found the common law system superior. He observed: "Of course being from the Common Law country and in favor of it, and a great majority of the people coming to California being from the Common Law States I thought it was vastly important that we should adopt the common law."[5]

The statute as finally passed read, "The Common Law of England, so far as it is not repugnant to or inconsistent with the Constitution or Laws of the State of California, shall be the rule of decision in all Courts of this State."[6]

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[4] Cardinal Goodwin, *The Establishment of State Government*, 1846–1850 (New York: The Macmillan Company, 1914), 281.

[5] Elisha Oscar Crosby, *Memoirs of Elisha Oscar Crosby; Reminiscences of California and Guatemala from 1849 to 1864*, edited by Charles Albro Parker (San Marino: The Huntington Library, 1945), 57.

[6] Cal. Stats. (1850), chap. 95.

At the same session, the Legislature passed another act abolishing all laws in force in California except those passed by the first Legislature. A saving section stated that all rights acquired before the statute's passage were not to be affected, including suits then pending.[7]

The Court's decisions were affected by this law in several ways. For one, the common law was to be used to decide cases where there were no statutory provisions in point. The law also made the civil law of Mexico the rule of decision in cases originating, or dealing with events that took place, prior to statehood, thus giving formal legal recognition that a different system of law was in force prior to statehood.

THE COMMON LAW IN PRACTICE

As early as 1851, the Supreme Court used the common law to hold a faro debt uncollectable because such debts could not be collected under the common law, and no state statute dealt with the question.[8] By 1869 there was a statute dealing with gaming debts, but the Court resorted to the common law to declare that a wager on which presidential candidate would carry California in the 1868 election was void, as being against public policy.[9] Justice Silas W. Sanderson spelled out the use of the common law when he said, "There is no statute in this State on the subject of wagers, except the statute against gaming, which does not include wagers of this character, and hence the question, whether these facts are a defense, must be decided by a reference to the principles of the common law."[10] Likewise, there was no modification in the common law rule that an alien could not hold public office, so Leopold Rabolt could not serve as county treasurer of Amador, an office to which he was elected.[11]

The common law was also the support for a Court decision that the state librarian was not a public officer of the highest station, but a ministerial agent, and as such could hold his office past the date of his term's

7 Cal. Stats. (1850), chap. 125.
8 Bryant v. Mead (1851), 1 Cal. 441.
9 Johnston v. Russell (1869), 37 Cal. 670.
10 Ibid., 672.
11 Walther v. Rabolt (1866), 30 Cal. 185.

expiration until his successor took office.[12] The same source was also available if the proper statute was in some way incomplete. In a suit for damages under provisions of a statute providing compensation to persons whose property might be destroyed by riots or mobs, the Court found that the statute did not establish a rule of damages.[13] Said Justice Sanderson, "For the measure of damages we must,[14] therefore, look to the common law."[15]

The respect that the American lawyers and judges felt for the common law was very great indeed, for if a law was passed that was at variance with the common law rule on the subject, such law was to be construed very strictly.

LAWS OF MEXICO IN THE COURTS

It was well accepted that the California courts had jurisdiction over cases that had begun in the civil law system prior to statehood.[16] Most of these cases were decided in the 1850s, although as late as 1874 the Supreme Court reaffirmed the 1850 transfer of jurisdiction from the Mexican-era Courts of First Instance to the newly established District Courts of the state.[17] Likewise, in 1869, the Supreme Court approved probate proceedings initiated in 1849 by San Francisco Alcalde John Geary and transferred to the Court of First Instance in 1850. Justice Joseph Bryant Crockett admitted, "If the validity of these proceedings were to be tested by our present Probate Act, they would be held to be void . . . . But they must be tested by a wholly different standard."[18] He went on to discuss conditions in California just prior to statehood, and mentioned that the law used was sort of a conglomerate of civil and common law. He continued:

> Nevertheless, the judgment of the Court of First Instance was the judgment of a *de facto* Court, exercising general and unlimited jurisdiction in civil cases and in matters of administration on the estates of deceased persons. It was the only Court then in existence in California exercising these functions, and its authority

12 Stratton v. Oulton (1865), 28 Cal. 44.
13 Cal. Stats. (1868), chap. 344.
14 Chamon v. San Francisco (1869), 1 Cal. Unrep. 509.
15 Gilmer v. Lime Point (1861), 19 Cal. 47.
16 Loring v. Illsley (1850), 1 Cal. 24.
17 Clark v. Sawyer (1874), 48 Cal. 133.
18 Ryder v. Cohn (1869), 37 Cal. 86.

> was universally acquiesced in and respected by the people. Being a Court of general jurisdiction, its judgments . . . would be upheld.[19]

In another case upholding probate proceedings in a Court of First Instance prior to statehood, Justice Sanderson noted that the jurisdiction of such courts and their use of the civil law were both long accepted in the state, and added, "It is impossible to estimate the mischief which might result from a departure from a rule which for so long a time has been regarded by both the bench and the bar as finally settled."[20]

A key case was *Fowler v. Smith*, first decided by the Supreme Court at its January 1852 term, which held that all contracts made before the common law was adopted were to be construed by the civil law.[21] In return for the conveyance of land, Peter and Mary Smith executed seventeen $1,000 promissory notes at 2 percent per month interest to De Grasse B. Fowler in January 1850; this was after the adoption of the Constitution but before the passage of the acts adopting the common law and saving previously acquired rights. In 1851, Fowler brought suit to collect on five of the notes; he won in the lower court, and the Smiths appealed. Among the points raised by the Smiths was that under Mexican law the conveyance was void and the interest rate usurious.

In affirming the decision of the lower court, Justice Murray admitted that as a general rule the laws of a conquered or ceded territory remained in force until changed by the new sovereign. In his words:

> In an acquired territory, containing a population governed, in their business and social relations, by a system of laws of their own, well understood and generally accepted, it is but reasonable that the inhabitants should continue to regulate their conduct and commercial transactions by their own laws, until the same are changed.[22]

But Justice Murray refused to apply this rule to this instance, saying it would be unjust in many cases, and that the Mexican laws in question in this case were in effect annulled by the customs and usages of American emigrants even before the act abolishing them was passed on April 22,

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19 Ibid., 89.

20 Coppinger v. Rice (1867), 33 Cal. 408.

21 Fowler v. Smith (1852), 2 Cal. 568.

22 Fowler v. Smith (1852), 2 Cal. 47.

1850. He pointed out that the newly arrived settlers were not familiar with the Mexican laws, which in any event were written in a language foreign to the American settler. Justice Murray seemingly proved his point by noting that he himself had been unable to get a copy of the Mexican laws under discussion. He summed up:

> From these considerations, I am of opinion, that from the adoption of our State constitution — a period antecedent to the execution of the present contract (or even a still more remote period), the Courts ought not, on grounds of public policy, to disturb these contracts, whenever they have been entered into under the sanction of well known and recognized custom.[23]

In the last sentence of his opinion Justice Murray did leave a slight opening when he noted, "There are doubtless many cases arising, to which it will be the duty of the Courts of this State to apply the rules of the Mexican law; but this is not one of them."[24]

The attorney for the Smiths petitioned for a rehearing; it was granted and the cause again came before the Court at the October 1852 term. Since January the personnel of the Court changed somewhat, Henry A. Lyons having resigned as chief justice, with Alexander Anderson taking his place, and Justice Murray becoming chief justice.

The decision at the rehearing affirmed the January ruling, but used an entirely different basis. In his opinion Justice Heydenfeldt referred to the provision of the state constitution that stated, "All rights, prosecution, claims and contracts . . . and all laws in force at the time of the adoption of this Constitution, and not inconsistent therewith, until altered or repealed by the Legislature, shall continue as if the same had not been adopted."[25] Since the act repealing previous laws was not passed until April 22, 1850, "[i]t must, therefore, be considered beyond dispute, that all contracts made here before the 22nd April, 1850, must have their effect and construction by the rules of the civil law."[26]

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23 Ibid., 50.

24 Ibid.

25 Cal. Const. (1849), art. XII, § 1.

26 Fowler v. Smith (1852), 2 Cal. 569.

Having established the civil law as the basis for his decision, Justice Heydenfeldt affirmed the lower court, holding that the conveyance was correct and the interest not usurious under Mexican law. Justice Anderson concurred, and Chief Justice Murray reaffirmed his January opinion, saying he could not give his "assent to any other rule of decision."[27]

Thus, any contract that did not conform to the California Statute of Frauds would be enforced if it met civil law requirements.[28] In *Havens v. Dale*, the Court declared a land sale valid even though no price or consideration was shown in the deed.[29] Perhaps in an attempt to justify this ruling in light of the common law, the Court later said that the word "sold" on a deed implied a price paid as a consideration,[30] although in *Schmitt v. Giovanari* the Court said that no consideration was needed under Mexican law.[31] The Court moved even further from the common law by acknowledging that under Mexican law the sale of real property was on the same footing as the sale of personal property, and such sale could be either written or parol.[32]

Although not always scrupulous in recognizing Mexican law, the Court did on occasion sanction custom, particularly in regard to wills. In *Von Schmidt v. Huntington*, Justice Bennett noted in passing that, under Mexican law, custom was sometimes allowed to change the positive written law.[33] Although not the decisive point in that case, later Courts seized upon that statement and used it as precedent in succeeding years for various ends. In *Panaud v. Jones*, certain formalities as to the number of witnesses were not a bar to the execution of a will when it was shown that this had generally been the custom for a long time,[34] or that starting a will one day and completing it several days later was not unusual,[35] or that upon the death of witnesses to a codicil their proven signatures would validate the document.[36]

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27 Ibid., 571.
28 Cal. Stats. (1850), chap. 114.
29 Havens v. Dale (1861), 18 Cal. 359.
30 Merle v. Mathews (1864), 26 Cal. 455.
31 Schmitt v. Giovanari (1872), 43 Cal. 617.
32 Long v. Dollarhide (1864), 24 Cal. 218.
33 Ibid., 64.
34 Panaud v. Jones (1851), 1 Cal. 488.
35 Castro v. Castro (1856), 6 Cal. 158.
36 Tevis v. Pitcher (1858), 10 Cal. 465.

One continually arising question had to do with the powers of alcaldes, particularly that of granting land, and of their jurisdiction during the period of military rule in California. "It was expedient for the military commanders of the United States to continue the office of alcalde and to retain as many loyal Californians in the office as was practicable."[37] Some native Californian alcaldes did not care to serve under American military rule, and these were replaced by the military governor, Commodore John D. Sloat, generally with American naval officers.

Commodore Sloat's successor, Commodore Robert F. Stockton, pursued a more vigorous policy as a result of which many alcaldes were replaced with Americans. With these appointments Commodore Stockton felt the province to be more secure. The American alcaldes made a real contribution by introducing trial by jury, the actual credit belonging to Walter Colton, the alcalde of Monterey. The successors to Commodore Stockton, General Stephen W. Kearny, Colonel Richard B. Mason, and General Bennet Riley, replaced naval officers with civilians, but these were almost invariably Americans,[38] and they were not familiar with Mexican law. The most important question in regard to the American alcaldes was whether they could make grants of land, and the court was soon called upon to answer this question.

The first case involving a grant by an American alcalde to reach the Supreme Court was *Woodworth v. Fulton*, decided at the December 1850 term. The plaintiff based his title to the land on a grant, dated April 15, 1847, made by Edwin Bryant, the second American alcalde of San Francisco. Speaking for himself and Chief Justice Lyons, Justice Bennett declared that Bryant had not been appointed by, nor did he hold office under, the authority of the Mexican government, and that the grant had been made to a United States citizen while the two countries were at war. Since he was not appointed by Mexico, he had neither the right nor the power to make the grant, even though he might have followed the formalities of Mexican law. Further, Bryant had no authority from the United States government, nor was there anything in international law to sanction grants since the property in question was not public, but belonged to the pueblo of Yerba

37 Theodore Grivas, *Military Governments in California 1846–1850* (Glendale: The Arthur H. Clark Company, 1963), 165.

38 Ibid., 177.

Buena. Bennett went on to say that the title of the United States to the land related back to the time of the occupation of the country, at which time Mexican laws dealing with the disposition of land ceased, but this did not give any color of title to Woodworth.[39] Chief Justice Hastings dissented, saying that even if no authority vested in the alcalde, "his conveyances being in the usual form, and fit to transfer a title, an adverse possession under such a deed for the time the law requires will grow into sufficient title to prevail against the true owner."[40]

In the next case reported, *Reynolds v. West*, Justice Bennett affirmed *Woodworth v. Fulton*, holding a grant by a Mexican alcalde made before the war valid, and voiding a grant of the same land by an American alcalde. The grant by the Mexican alcalde, having been made according to the laws and customs of Mexico, created a legal presumption of its validity.[41] The decision in the *Woodworth* case stood only three years, until the October 1853 term, when it was overturned in the case of *Cohas v. Raisin*. Following Chief Justice Hastings' dissent in *Woodworth v. Fulton*, Justice Heydenfeldt spoke for a unanimous Court when he held that the alcalde could grant lots within a town, when that town held the title to the land, and that the 1847 grant in San Francisco, "made by an Alcalde, whether a Mexican, or of any other nation, raises the presumption, that the alcalde was a properly qualified officer, that he had authority to make the grant."[42] This later view became the rule; it was reviewed at length and affirmed in the later case of *Welch v. Sullivan*. In that case Chief Justice Murray said that if the *Cohas* case were to be overturned, every title in San Francisco except the few made before 1846 would be void; thus, a grant of pueblo lands by an American alcalde was a grant by the pueblo of its own property, which it had a right to transfer.[43]

The alcalde also had some judicial powers, but the Supreme Court tended to limit such jurisdiction strictly. The alcalde as a magistrate could not issue an order to vacate land, as this was within the power of a Court of First Instance, even if both parties consented to the jurisdiction of the

39 Woodworth v. Fulton (1850), 1 Cal. 295.

40 Ibid., 318.

41 Reynolds v. West (1850), 1 Cal. 322.

42 Cohas v. Raisin (1853), 3 Cal. 453.

43 Welch v. Sullivan (1857), 8 Cal. 165; Welch v. Sullivan (1857), 8 Cal. 511.

alcalde,[44] and an alcalde could not issue a judgment for $1,000, when his jurisdiction was limited to $100.[45]

In two cases arising from the San Francisco fire of December 1849, the Court rendered differing opinions as to the powers of the alcalde and *ayuntamiento* to blow up goods and buildings in the path of the fire. In both cases the alcalde, John W. Geary, claimed to be acting under orders of the *ayuntamiento*. In *Dunbar v. The Alcalde and City of San Francisco*, the Court held that the powers of the *ayuntamiento* were less than those of a United States municipality, and it had acted beyond the scope of its authority in blowing up the building.[46] In *Surocco v. Geary*, the Court stated that the house and goods were a nuisance which the municipality had the right to abate.[47] The difference in the two cases would seem to be that Murray, who was then chief justice, wrote the later opinion based on common law without any mention of Mexican law.

In *Von Schmidt v. Huntington*, a case involving a dispute between members of a mining association, the Court felt that the lack of an attempt at conciliation (*conciliación*) by an alcalde as required by Mexican law, was unnecessary, as "amongst the American people it can be looked upon in no other light than as a useless and dilatory formality, unattended by a single profitable result, and not affecting the substantial justice of any case."[48] In this opinion Justice Bennett also stated that since the acquisition of California by the Americans, the use of *conciliación* had become obsolete, having passed into disuse.

The adoption of the common law was indeed a victory for the American conquerors, and upon the native Californians was placed the burden of becoming acquainted with a new legal system. Very little has been done to see how the native population reacted to the new system of laws. In his diaries, Benjamin Hayes, district judge of Los Angeles, wrote, January 28, 1861:

> Don Casildo Aguilar calls. A man of the city [of Los Angeles] was out yesterday shooting birds, and set fire to the woods, burning up some 8 acres before Don D. could with his servants put a stop

44 Ladd v. Stevenson (1850), 1 Cal. 18.

45 Horrell v. Gray (1850), 1 Cal. 133.

46 Dunbar v. The Alcalde and City of San Francisco (1850), 1 Cal. 355.

47 Surocco v. Geary (1853), 3 Cal. 69.

48 Von Schmidt v. Huntington (1850), 1 Cal. 65.

> to its progress. He calls upon me to "issue an order that the man shall settle with him for the damage." He was surprised to learn that he would be the loser in the end, if the culprit should have no property wherewith to pay, and left me, no doubt disgusted with our system of laws.[49]

While the adoption of the common law did provide a hardship upon the native Californians, it was certainly not an unusual event, because Louisiana was the only state with a civil law heritage to reject the common law as a rule of decision. By using common law and civil law in the appropriate instances, the Court took another step toward placing California within the larger framework of American law.

LAND GRANTS BY MEXICAN GOVERNORS

"The unsettled condition of the land titles of the State gave occasion to a great deal of litigation and was for a long time the cause of much bad feeling toward the judges who essayed to administer impartial justice."[50] This comment by Justice Field was an understatement, since the land question was more difficult in California than on any other American frontier.[51] "The land question in California was of a threefold character: the adjudication upon the validity of land titles claimed under the Mexican Government; the disposition of the public domain; the control and disposition of the gold fields."[52] Most land cases did not reach the California Supreme Court largely through the operation of the Federal Land Act of 1851, which established a Land Commission to settle land disputes in the states.[53] Certain land questions did arise in the state courts, principally having to do with the power of the Mexican governors to make grants. These will be discussed here (and problems dealing with the mineral lands will be discussed in chapter 10).

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[49] Benjamin Hayes, *Pioneer Notes from the Diaries of Judge Benjamin Hayes, 1849–1875*, edited by Marjorie Tisdale Wolcott (Los Angeles: Marjorie Tisdale Wolcott, 1929), 252.

[50] Field, *California Alcalde*, 79.

[51] William H. Ellison, *A Self-Governing Dominion; California, 1849–1860* (Berkeley: University of California Press, 1950), 102.

[52] Joseph Ellison, *California and the Nation, 1850–1869*, University of California Publications in History, vol. XVI (Berkeley: University of California Press, 1927), 7.

[53] 9 U.S. Stat. at L. (1851), 631–34.

In the case of *Suñol v. Hepburn*, the Supreme Court upheld a grant by Governor Manuel Micheltorena to an emancipated Native American named Roberto, and also upheld the limitation placed on the grant that Roberto could not alienate or encumber the land in any way. Thus, the plaintiffs, to whom Roberto had conveyed the land, could not claim sufficient title to eject another person from an unoccupied portion of it.[54] In *Leese and Vallejo v. Clarke*, a grant by Governor Juan B. Alvarado was held to be imperfect, as the map of the grant was not shown to have been made, the Court here construing the powers of the Mexican governors very strictly.[55]

At the same October 1852 term, the Court, in *Vanderslice v. Hanks*, a case similar to the *Leese* case in its facts, upheld the title of another grant by Governor Micheltorena even though the grant may not have been forwarded to the territorial *deputación* for its sanction as was required under Mexican law. It was held here that a presumption arose that the governor had fulfilled his duty, and the contrary would have to be proved.[56] Thus the two cases were at variance.

Because of the importance of these two cases, they were not reported in the 1852 volume of *Supreme Court Reports*, but appeared in the 1853 volume together with the report of the rehearing of the *Vanderslice* case, which decided which of the two earlier cases would be controlling. Thus, at the next term, January 1853, *Vanderslice v. Hanks* came up again. Now the Court upheld the *Leese* case, and overruled its earlier decision in *Vanderslice v. Hanks*, saying that it would not presume the fulfillment of any requirement; the meeting of all requirements would have to be proved.[57]

At the July 1855 term, Justice Heydenfeldt, with Chief Justice Murray concurring, went back and in effect reaffirmed the first *Vanderslice* case, but refused to apply it to a grant from a municipal corporation.[58] To show the return to the doctrine of the first *Vanderslice* case, Heydenfeldt wrote, with Murray concurring, "*Prima facie* the Governor of California under the Mexican dominion had the power . . . to grant . . . under the general

54 Suñol v. Hepburn (1850), 1 Cal. 254.
55 Leese and Vallejo v. Clarke (1852), 3 Cal. 17.
56 Vanderslice v. Hanks (1852), 3 Cal. 27.
57 Vanderslice v. Hanks (1853), 3 Cal. 47.
58 Touchard v. Touchard (1855), 5 Cal. 306.

doctrine that an officer will not be presumed to have exceeded his authority especially the officer of a foreign government."[59] The change was brought about by decisions of the United States Supreme Court to the effect that a conditional grant under Mexican rule conveyed a title sufficient to maintain an action of ejectment even without performance of the conditions,[60] although Murray continued to defend his own views.[61]

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[59] Den v. Den (1856), 6 Cal. 82.

[60] Ritchie v. United States (1854), 17 Howard, 525; Fremont v. United States (1854), 17 Howard, 542.

[61] Gunn v. Bates (1856), 6 Cal. 263.

Chapter 4

DEFINING THE POWERS OF THE COURTS

As the highest appellate body in the state, the Supreme Court had the final say in disputes involving the jurisdictions of the various courts. A few of these disputes involved courts of equal jurisdiction, more involved conflicts between higher and lower courts, but the vast majority involved merely determining the powers of each type of court. If the Supreme Court was in the position of having to define and draw the limits of its own powers, it had to do the same for the other courts. In deciding these disputes, the Court *attempted* to establish a uniform pattern, with each court having well-defined powers within an equally definite area of jurisdiction.

THE SUPREME COURT

In dealing with the powers and jurisdiction of the various courts, the Supreme Court, above all, had to deal with its own position in the judicial system.

As originally passed, the Constitution placed a rigid limitation on the Supreme Court's appellate power in that the Court could not hear an appeal unless the amount in dispute exceeded $200, or "when the legality of any tax, toll, or impost or municipal fine is in question, and in all criminal

cases amounting to a felony, or questions of law alone."[1] The 1862 amendments made $300 the minimum that could be in controversy, and added appellate jurisdiction in all cases in equity and cases involving the title or possession of real estate.[2] The dollar value needed for an appeal was rigidly adhered to and had been since the very first session of the Court in 1850.[3] But the "amount in dispute" depended on which party sought to appeal. When the plaintiff appealed from a judgment for the defendant, the "amount claimed by the complaint . . . is to be considered in determining whether this Court has appellate jurisdiction or not."[4] In the 1850s the Court allowed costs awarded in the lower court to be considered,[5] but reversed itself in 1858.[6] Later, Chief Justice Stephen J. Field, who wrote the earlier opinion disallowing costs, succinctly noted, "Costs are merely incidental to the action. They constitute no part of the matter in dispute."[7] In Meeker v. Harris, decided at the October 1863 term, only the costs assessed by the lower court were appealed, and being over the constitutional amount, the Supreme Court held that it had jurisdiction because the costs had become the amount in controversy.[8] Normally, interest awarded with a judgment was not considered part of the amount in dispute, but when a demand was scheduled to draw interest, the interest was to be considered part of the demand sued for.[9]

The Supreme Court followed the Legislature and Constitution closely on other points as well. Since the Legislature extended appellate jurisdiction to cases originating in district courts only,[10] the Court refused to hear appeals from county courts.[11] "Its [Supreme Court] appellate jurisdiction extends only to those cases in which the legislature authorized it to

1 Cal. Const. (1849), art. VI, § 4.
2 Cal. Const. (1849), art. VI, § 4 (amended 1862).
3 Luther v. Master and Owners of Ship Apollo (1850), 1 Cal. 15.
4 Gillespie v. Benson (1861), 18 Cal. 411.
5 Gordon v. Ross (1852), 2 Cal. 157.
6 Dunphey v. Guindon (1858), 13 Cal. 28.
7 Votan v. Reese (1862), 20 Cal. 89.
8 Meeker v. Harris (1863), 23 Cal. 285.
9 Matson v. Vaughn (1863), 23 Cal. 61; Skillman v. Lachman (1863), 23 Cal. 198.
10 Cal. Stats. (1850), chap. 23, § 35.
11 Warner v. Hall (1850), 1 Cal. 90.

entertain appeals. The legislature has conferred upon us no power to review judgments of the county court, on appeal, or in any other way."[12]

Further, the Supreme Court would not hear an appeal to review the facts of a case, unless a new trial was asked for at the lower court, and there refused,[13] as the statute so stated.[14] Nor would the Court accept a case involving original jurisdiction, turning down a petition by the attorney general to hear a case in order to test the constitutionality of the foreign miners' tax.[15] Chief Justice Hastings, speaking for the Court, said that any miner who felt his rights violated could commence an action in the proper court, and the matter might eventually reach the Supreme Court on appeal.[16]

The Court was not always satisfied with the restrictions placed upon it. In one case the Court refused to hear an appeal from a court of sessions on a conviction of a misdemeanor, but added that the courts of sessions did not have the best legal talents on their benches, and it would be better if the more serious of the misdemeanors were to be tried at the district court level instead. Chief Justice Murray, speaking for all three justices, recommended this to the Legislature at the conclusion of his opinion.[17]

In one instance the Court itself found a way around the Constitution when it answered an objection to its appellate power in a divorce case by saying that the framers of the Constitution could never have meant to deny appellate powers over civil cases where the relief sought could not be weighed in dollars and cents.[18]

In some instances, the Court had more room in which to exercise its discretion. Thus, while the law stated that an appeal could only be taken from a "final judgment,"[19] that term was open to varying interpretations. At its first term the Court said that the final judgment was the determination of the issue in which the rights of the litigants were absolutely fixed.[20] At

12 White v. Lighthall (1850), 1 Cal. 348.
13 Brown v. Graves (1852), 2 Cal. 118.
14 Cal. Stats. (1851), chap. 5, § 347.
15 Cal. Stats. (1850), chap. 97.
16 Attorney General, ex parte (1850), 1 Cal. 85.
17 People v. Applegate (1855), 5 Cal. 295.
18 Conant v. Conant (1858), 10 Cal. 249.
19 Cal. Stats. (1851), chap. 5, § 336.
20 Loring v. Illsley, 28.

the next term the Court broadened its definition so that the final judgment only determined a particular suit, and not necessarily the rights involved.[21]

In 1857 the Court was called upon to decide whether a reversal of a case on appeal was a bar to further proceedings. This point never having come up before, the Court had no precedent in the state, nor any law on the subject, so it applied a common law principle to the effect that after a reversal of an erroneous judgment, the parties in the inferior court had the same rights they originally had.[22] As to the appellate power of the Supreme Court, the Court said that the Legislature could not impair the right of appeal, but could regulate the mode in which appeals were to be made.[23]

The Supreme Court's jurisdiction in criminal appeals was limited to felonies. A felony was any offense "which is punishable with death, or by imprisonment in the State prison."[24] But certain offenses could be punished either as felonies or misdemeanors, and in such cases the punishment decided the grade of the offense,[25] but the prosecution had to be in the form of a felony.[26] The application of the last two cases may be seen in *People v. Apgar,* where the defendant was indicted and prosecuted for assault with a deadly weapon, a felony, but convicted of simple assault, a misdemeanor. The conviction for simple assault was an acquittal for all felonies involved, and since the judgment was for a misdemeanor, the Supreme Court lacked the jurisdiction to hear an appeal.[27]

The 1862 amendments gave the Court appellate jurisdiction of cases in equity, and a suit to abate a nuisance was an example of such an equity case.[28] The appeal power over cases dealing with the title or possession of real estate was affirmed in *Doherty v. Thayer*,[29] and in the same October 1866 term the Court took appeal jurisdiction over a case involving a disputed election even though there was no specific constitutional authorization

21 Belt v. Davis (1850), 1 Cal. 134.
22 Stearns v. Aguirre (1857), 7 Cal. 443.
23 Haight v. Gay, 8 Cal. 297.
24 People v. Cornell (1860), 16 Cal. 188.
25 Ibid., 187.
26 People v. War (1862), 20 Cal. 117.
27 People v. Apgar (1868), 35 Cal. 389.
28 People v. Moore (1866), 29 Cal. 427.
29 Doherty v. Thayer (1866), 31 Cal. 140.

to do so.[30] In his opinion Chief Justice John Currey cited with approval the earlier opinion of Stephen J. Field in *Conant v. Conant*, noted above, regarding the intent of the framers of the Constitution. Currey noted the division of the state government into three departments, and the various courts of the judiciary, "among which the Supreme Court is of highest authority. To it, as the Court of dernier resort, it may fairly be presumed the people intended the citizen might go, in matters of gravest concern, for the enforcement of his rights or for the redress of wrongs sustained."[31]

No right was of greater value to a citizen than that of voting:

> Then to deny to him the right of appeal to the highest tribunal of the State in cases where he may have been deprived of a right which lies at the foundation of all others would . . . be depriving him of a privilege which it was designed to those who adopted the Constitution he should have and enjoy. To so interpret the provisions of the Constitution defining the jurisdiction of this Court as to close the door to his appeal would . . . be to refuse to appreciate the intention of the people who adopted the Constitution, . . . a charter of our liberties, and would . . . involve us in a contradiction of the manifest design of the Constitution as a whole; and further, we would thereby hold that in cases involving rights of the highest and most sacred importance the party concerned could be heard only in Courts of inferior grade, though reason and justice might demand that he should have a right of redress commensurate with the magnitude of the interest at stake.[32]

In 1871 a majority of the Court, in a three-to-two decision, disapproved of *Knowles v. Yeates*, in part, by refusing to give the Court jurisdiction to hear the appeal of a case involving a street assessment because provisions of the statute in question said that the report of the county court was to be final and conclusive.[33] Justice Joseph B. Crockett said that when the Legislature made the county court's report "final and conclusive," it intended that there be no appeal.[34]

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30 Knowles v. Yeates (1866), 31 Cal. 82.

31 Knowles v. Yeates, 88.

32 Ibid.

33 Cal. Stats. (1869–70), chap. 36, § 5.

34 Appeal of S. O. Houghton (1871), 42 Cal. 35.

The Constitution also empowered the Court to issue such writs as necessary to the exercise of its appellate powers.[35] The writs whose use caused the most controversy were those of mandamus and certiorari. The Court affirmed its right to use the writ of mandamus to review acts of subordinate bodies,[36] but refused to use the writ to order dismissal of a case in a district court when the action of the lower court's judge was judicial and discretionary.[37] As Justice Sanderson stated in *Lewis v. Barclay*, "Mandamus lies to compel an inferior tribunal to perform a duty enjoined by law, if it refused to do so; but if the duty is judicial, the writ cannot prescribe what the decision of the inferior tribunal shall be."[38]

Like mandamus, the writ of certiorari was to be used when there was no other available appeal. The purpose of this writ was only to see if a lower judicial body had exceeded its jurisdiction. Justice Edward Norton stated: "This Court has only appellate jurisdiction, and is only authorized to issue the writ of certiorari in aid of such jurisdiction."[39] The Court would not issue the writ if the lower tribunal had not exceeded its jurisdiction, even if a matter of law were involved. "It is now too well settled to admit of argument that we cannot on certiorari review mere errors of law committed by an inferior Court."[40] The writ also included the right to review the acts of nonjudicial bodies, if such bodies acted judicially. In *Robinson v. Board of Supervisors of Sacramento*, the Court said that while the defendants did not constitute an ordinary judicial tribunal, they were invested by the Legislature with power to decide on the property or rights of the citizen. "In making their decision they act judicially, whatever may be their public character."[41]

With the three-man Court, as noted earlier, it was not uncommon for only two justices to hear a case and then fail to agree on a decision. This was possible with the five-man Court if there were a vacancy or if a justice were disqualified for any reason, such as illness of having been counsel

35 Cal. Const. (1849), art. VI, § 4.
36 Tyler v. Houghton (1864), 25 Cal. 26.
37 People v. Pratt (1865), 28 Cal. 166.
38 Lewis v. Barclay (1868), 35 Cal. 213.
39 Miliken v. Huber (1862), 21 Cal. 169.
40 People v. Burney (1866), 29 Cal. 460.
41 Robinson v. Board of Supervisors of Sacramento (1860), 16 Cal. 210.

for one of the parties at a different hearing of the same cause. In 1867 the Court said that in such an instance:

> The rule seems to be that where the motion is such as to make an affirmative decision indispensable to the further progress of the action, the action must stop in case of an equal division; but where the motion is in arrest of the progress of the action, all equal division is equivalent to a denial of the motion.[42]

In practical effect, the action of the tribunal from which the appeal was taken was allowed to stand.

Occasionally, the Court had to spell out the legal import of its decisions. In a case at the January 1864 term the Court commented that a dismissal of an appeal was a legal affirmance of the lower court's judgment.[43] On several occasions the Court had to point out that when it decided a case, the decision became the rule of that particular case, and no appeal could be taken again on the same merits. In referring to a previous decision it made in the same case, the Court said that the earlier decision "stands as the judgment of the highest Court of record of the State; and it is not in our power now to retry it on appeal, for . . . we have no appellate power over our own judgment."[44] This meant that a decision on points of law by the Supreme Court in the same case on a former appeal was conclusive,[45] and binding on the court below.[46] Again: "The legal propositions which arose and were decided on the former appeal, whether they were correctly decided or not, have become the law of the case. . . . There would be no end to the litigation, if the same questions in the case once decided by the appellate Court were open to examination on every succeeding appeal."[47]

THE INFERIOR COURTS

The lower courts also had limited powers, and as with its own powers, the Supreme Court was called upon to examine the powers of these courts.

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42 Ayres v. Bensley (1867), 32 Cal. 633.

43 Rowland v. Krayenhagen — Krayenhagen v. Rowland (1864), 24 Cal. 52.

44 Davidson v. Dallas (1860), 15 Cal. 75.

45 Soule v. Ritter (1862), 20 Cal. 522.

46 Megerle v. Ashe (1874), 47 Cal. 632.

47 Page v. Fowler (1869), 37 Cal. 105.

The district courts had unlimited jurisdiction in all criminal cases not otherwise provided for and in all issues of fact in the probate courts, and had original jurisdiction, in both law and equity, in all civil cases where the amount in dispute exceeded $200, exclusive of interest.[48] In addition to these powers, the district courts, along with the Supreme Court and county courts, could issue writs of certiorari to determine whether lower judicial bodies had exceeded their jurisdiction.[49] The amendments of 1862 extended the jurisdiction of the district courts to include all cases involving the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, and raised the limit on the amount in controversy to $300 or more,[50] and the Legislature continued the use of the certiorari writ.[51]

The constitutional limitations on the powers of the district courts were similar to those of the Supreme Court, and as a consequence most cases heard by the high tribunal were from the district courts. In a suit to recover $550, the Supreme Court affirmed the district court's power to try the case, and its own power to hear the appeal, by saying that it had jurisdiction over any case the district court could try.[52] If a suit were brought for a sum below the constitutional amount the district court could transfer the case to the proper court, that of a justice of the peace.[53]

One way around the monetary limit after the 1862 amendments was to bring suit in equity rather than in law. In *People v. Mier*, the Court, in discussing a suit to recover taxes, noted that a complaint asking for a money judgment was an action at law, but a complaint asking for a foreclosure was an action in equity and the district court would have jurisdiction regardless of the amount in controversy.[54] The same reasoning also held true for a suit to collect for a street assessment,[55] and even in a suit to collect for damage done to real property by sheep.[56] In the latter case the

48 Cal. Const. (1849), art. VI, § 6.
49 Ibid., § 4; Cal. Stats. (1851), chap. 5, § 456.
50 Cal. Const. (1849), art. VI, § 6 (amended 1862).
51 Cal. Stats. (1863), chap. 260, § 225.
52 Solomon v. Reese (1867), 34 Cal. 28.
53 Hopkins v. Cheeseman (1865), 28 Cal. 180.
54 People v. Mier (1864), 24 Cal. 61.
55 Mahlstadt v. Blanc (1868), 34 Cal. 577.
56 Young v. Wright (1877), 52 Cal. 407.

plaintiff, rather than suing the owner of the sheep for money, brought an action in rem, against the animals, which had the same effect as enforcing a lien since the property (animals) were to be sold in the same manner as a foreclosure on real property. Another method used to bring an action to the district court for trial even though less than $300 was in controversy, was to put the title or possession of land in question. Prior to the amended Constitution this was simply a statutory method.[57] But whether before or after the amendments, if the title or possession of real property was an issuable fact upon which a plaintiff relied for a recovery, or a defendant for a defense, then the district court had jurisdiction regardless of the amount in controversy.[58]

By use of the writ of certiorari, as mentioned earlier, a district court could review actions of an inferior tribunal, but only to the extent of determining whether that tribunal exceeded its jurisdiction. In *Will v. Sinkwitz*, the district court modified a judgment of the county court, changing an award from $300 to $299, so as to keep the amount within the lower court's limits. This was wrong; the district court should have merely set aside the judgment because it had no authority to modify or reduce it.[59] The power to review the jurisdiction of judicial tribunals included normally nonjudicial bodies performing judicial functions, such as boards of supervisors. A judicial function involved, for example, the proceedings necessary to authorize the establishment of a road.[60] The Supreme Court said that district courts could also issue writs of mandamus, although the amended Constitution did not specifically grant district courts the use of this writ. The Court said that they could use this writ before the amendments, and if it were intended that they should not continue to do so, language limiting the district courts should have been used.[61]

The Legislature was left to decide the jurisdiction of justices of the peace and the classes of cases appealable to the county courts.[62] The 1862 amendment prescribed the areas of appeal, saying that the Legislature was

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57 Cal. Stats. (1851), chap. 1, § 23.

58 Holman v. Taylor (1866), 31 Cal. 338.

59 Will v. Sinkwitz (1870), 39 Cal. 570.

60 Keys v. Marin County (1871), 42 Cal. 253.

61 Perry v. Ames (1864), 26 Cal. 372.

62 Cal. Const. (1849), art. VI, § 14.

to fix the powers of the justices, and that such powers could not impinge on those of the other courts.[63] In 1850 the Legislature limited the jurisdiction of justices of the peace to civil cases involving personal property with a maximum value of $200.[64] After the 1862 amendments the monetary limit was raised to $300 and the justices were given jurisdiction over certain misdemeanors.[65] The monetary limitation was strictly adhered to,[66] and when a penalty stipulated in the original contract raised the award past $300, the justice of the peace court lost its jurisdiction even though the original amount in controversy was but $125. The reasoning of the Supreme Court was that the stipulation raised the amount in controversy beyond the legal maximum for a justice's court.[67]

The county courts were presided over by the county judge, who was also the probate judge. In addition to these duties he was to hold courts of sessions with two justices of the peace as associates, with such criminal jurisdiction as the Legislature allowed, and he was to "perform such other duties as shall be required by law."[68] The county courts themselves were given "such jurisdiction, in cases arising in Justice's Courts, and in special cases, as the Legislature may prescribe, but shall have no original civil jurisdiction, except in special cases."[69] The Legislature gave to the courts of sessions jurisdiction over all "cases of assault, assault and battery, breach of the peace, riot, affray, and petit larceny, and over all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding three months, or both such fine and imprisonment."[70] The county court was given appellate jurisdiction over civil cases arising in justices' courts, and as already mentioned, those courts had a $200, later $300, limit on the amount involved in cases they could hear.

The 1862 amendments did not include the courts of sessions but otherwise increased the powers of the county judge, one of whom described his job thusly in 1866:

63 Cal. Const. (1849), art. VI, § 9 (amended 1862).
64 Cal. Stats. (1850), chap. 73, § 3.
65 Cal. Stats. (1863), chap. 260, §§ 48, 51.
66 Cariaga v. Dryden (1865), 29 Cal. 307.
67 Reed v. Bernal (1871), 40 Cal. 628.
68 Cal. Const. (1849), art. VI, § 8.
69 Ibid., § 9.
70 Cal. Stats. (1850), chap. 86, § 5.

> County judges have jurisdiction in cases of forcible entry and detainers, insolvency, actions to prevent or abate a nuisance[.] They have appellate jurisdiction in all cases coming before justice of the peace. They are Ex officio Judges of Probate, have power to issue writs of Habeas Corpus [and] Mandamus and can grant Naturalization papers. There is no appeal from the County Court in civil cases . . . Justices have jurisdiction to $300. . . . Jurisdiction in criminal cases[:] all crimes short of murder and treason.[71]

In *People v. Moore*, the Supreme Court affirmed the constitutional mandate that gave the county courts jurisdiction in cases of nuisance,[72] but such actions could also be brought in equity, which would give the district courts jurisdiction as well, and the Supreme Court said that there was no reason why both county and district courts could not have concurrent jurisdiction. Though the Constitution may have given original jurisdiction over a class of cases to one court, other courts were not necessarily deprived of concurrent jurisdiction unless the Constitution also expressly excluded these other courts.[73]

The original jurisdiction of county courts in criminal matters was limited to cases in which an indictment had been found by a grand jury.[74] The same offenses, if there were no grand jury indictments, could be tried in a justice's court, providing another instance of concurrent jurisdiction.[75]

The Constitution, in both its original and amended forms, gave the county courts original jurisdiction in all "special cases" prescribed by the Legislature. In 1860 the Supreme Court said that the use of the writ of mandamus could be included as a special case,[76] but in 1873 the Court reversed itself, holding, "The familiar definition of a special case is that it is a case unknown to the general framework of Courts of law or equity."[77] Mandamus was certainly known to the general framework, and the act of

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71 Henry Eno, *Twenty Years on the Pacific Slope: Letters of Henry Eno* . . . edited by W. Turrentine Jackson. Yale Americana Series, no. 8 (New Haven: Yale University Press, 1965), 143–44.

72 People v. Moore (1866), 29 Cal. 427.

73 Courtwright v. B. R. & A. W. & M. Co. (1866), 30 Cal. 573.

74 People v. Halloway (1864), 26 Cal. 651.

75 Ex parte McCarthy (1879), 53 Cal. 412.

76 Jacks v. Day (1860), 15 Cal. 91.

77 People v. Kern County (1873), 45 Cal. 679.

the Legislature attempting to give county courts the power to issue such writs was unconstitutional.[78] A mechanic's lien was unknown to the common law, though, and was an acceptable special case,[79] as was a proceeding dealing with conflicting claims to town lots,[80] or an action to contest an election.[81]

The appellate jurisdiction of the county courts was limited to appeals from justices' courts and any other inferior courts established by the Legislature, such as the San Francisco police judge's court.[82] In civil cases appeals from a justice's court could only take place when the sum in controversy did not exceed $200 before the 1862 changes or $299 afterwards. This limitation was enforced here as with the other courts.[83] The appellate jurisdiction of the county courts in criminal matters was limited to misdemeanors, and the decision of the county court was final unless there was an excess of jurisdiction.[84]

Until they were abolished by the 1862 amendments, the courts of sessions had wide-ranging criminal jurisdiction of all indictments for public offenses except arson, murder, and manslaughter. Although the jurisdiction of these courts seemed clear-cut, questions still arose, such as whether a death caused by dueling was murder, manslaughter, or a separate offense. The Supreme Court in *Terry v. Bartlett* said that the Legislature enacted special legislation dealing with dueling and removed the death caused by the duel from the category of a murder.[85] The "Terry" in the name of the case was David S. Terry, and the duel involved was his famous duel with David C. Broderick, resulting in the latter's death.[86]

The first section of the article on the judiciary contained a provision that the Legislature could "establish such municipal and other inferior

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78 Cal. Code Civ. Proc. (1872), § 85, subdiv. 5.

79 McNeil v. Borland (1863), 23 Cal. 144.

80 Ryan v. Tomlinson (1866), 31 Cal. 11.

81 Kirk v. Rhoads (1873), 46 Cal. 398.

82 People v. Maguire (1864), 26 Cal. 635.

83 Bradley v. Kent (1863), 22 Cal. 169.

84 People v. Johnson (1866), 30 Cal. 98.

85 Terry v. Bartlett (1860), 14 Cal. 651.

86 A. Russell Buchanan, *David S. Terry of California; Dueling Judge* (San Marino: The Huntington Library, 1956), 83–112.

courts as may be deemed necessary."[87] The Legislature took advantage of the provision on several occasions to create new courts, particularly for San Francisco, where, because it was both the most populous city and the financial center of the state, additional courts were needed to keep up with the cases to be heard. One of these courts, the San Francisco Superior Court, even had the same powers as a district court, except that its jurisdiction in cases dealing with property was limited to land in San Francisco.[88] In 1870 the Legislature established a municipal criminal court for San Francisco with the power to try felony cases, but without the right of appeal to the county courts.[89] The Supreme Court held this provision constitutional, saying there could be no appeals unless the Legislature also provided the mode and means for making the appeals.[90] The Legislature created a similar court in 1876, again without providing for appeals to the county courts.[91] Without referring to its earlier decision, the Court said that the act creating the new court was unconstitutional and void because the Legislature did not provide the machinery for appeals.[92]

COURTS AND JUDGES

Without necessarily mentioning a particular court by name, the Supreme Court made decisions that applied to several courts or the whole judicial system at once. One such instance was *Hahn v. Kelly*, in which a decision in one district court was attacked in the court of another district.[93] Justice Sanderson wrote that when a judgment of a court of general jurisdiction was introduced as evidence, it could only be attacked by the opposition on the ground that the court rendering that decision lacked jurisdiction. He said that

> the presumptions of law are in favor of the jurisdiction and of the regularity of the proceedings of superior Courts, or Courts of general jurisdiction, . . . The rule itself is founded upon the idea that

87 Cal. Const. (1849), art. VI, § 1.
88 Vassault v. Austin (1869), 36 Cal. 691.
89 Cal. Stats. (869–70), chap. 384.
90 People v. Nyland (1871), 41 Cal. 129.
91 Cal. Stats. (1875–76), chap. 548.
92 Ex parte Thistleton (1877), 52 Cal. 220.
93 Hahn v. Kelly (1868), 34 Cal. 391.

> the peace and good order of society require that a matter once litigated and determined shall be regarded as determined for all time, or that rights of person and property, once determined ought not to be again put in jeopardy.[94]

This presumption, being limited to superior courts, did not apply to inferior courts, which in California meant any court not a court of record.

Nevertheless, the Supreme Court refused to interpret the Constitution so as to limit a district judge solely to his own district since districts could be altered at will by the Legislature. Thus, the Court refused to reverse a murder conviction solely because the presiding judge was from a different district.[95] Further, a court could not interfere with the decrees and judgments of another court of concurrent jurisdiction.[96]

Any court, whether of inferior or superior jurisdiction, could take judicial notice of readily known facts. In *People v. Potter*, Joel C. Potter was indicted for embezzling money from the city of San Jose.[97] The indictment stated that the money belonged to the city, whereas technically it belonged to the mayor and common council under the acts incorporating the city.[98] Justice Sanderson said that the misnaming was not important because the intention of the indictment was clear, and the acts incorporating the city were public acts that the courts were bound to notice judicially.

In discussing any judicial system constant reference is made to various courts, often without considering the judges who manned the courts, their duties, powers, and areas of direction. In 1858 the Legislature passed an act for the incorporation of water companies, and conferring authority upon county judges to hear and determine applications to appropriate land and water.[99] The Supreme Court admitted that such proceedings were "special cases" within the constitutional meaning of the term, and that while jurisdiction could be given to the county courts, the Legislature could not confer the jurisdiction on the county judge. The county judge was not the county court, and although the Legislature might authorize the judges of

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94 Ibid., 409.

95 People v. McCauley (1851), 1 Cal. 379.

96 Anthony v. Dunlap (1857), 8 Cal. 26.

97 People v. Potter (1868), 35 Cal. 110.

98 Cal. Stats. (1859), chap. 117, § 16; Cal. Stats. (1863), chap. 69, § 15.

99 Cal. Stats. (1858), chap. 262, § 2.

courts, at chambers, to perform certain duties in respect to a cause, yet some court had to have had jurisdiction.[100] But even with the court having jurisdiction, a judge could not settle the case in chambers.[101]

After rejecting part of the defendants' appeal in *Smith v. Billett*, the Supreme Court noted: "The other points involve only questions of discretion of the presiding Judge, in controlling and conducting the proceedings, which we never review, unless in extreme cases, where the power of the Court is grossly abused, to the oppression of the party."[102]

One area in which a judge was allowed to use a great deal of discretion was in attempts to change the place of trial, or venue. The Supreme Court had early said that the granting of a change of venue was discretionary in the hands of the lower courts and would only be reversed in cases of gross abuse.[103] What would be considered gross abuse, though, was open to question. In one instance a defendant claimed that the presiding judge had been an active member of the San Francisco Vigilance Committee of 1856, and that group had at that time banished the defendant from the city. There was no abuse here because the facts as presented dealt with past events and were unconnected to the present charge.[104] In *McCauley v. Weller*, the Court said that any change of venue based on the disqualification of a judicial officer would have to be for a cause listed in the statute.[105] Chief Justice Terry noted that partisan feeling or an opinion on the justice or merits of a case would not be within the causes given in the statute; the judge has only to decide on the law, not the facts, and if his opinion as to the law was erroneous, it could be reversed upon appeal.[106]

If a judge did allow the change of venue, the Supreme Court would not interfere. In *People v. Sexton*, the judge said he was not conscious of any bias, but he granted the change of venue, even though the plaintiff objected. "In making the order changing the venue, the Court acted judicially upon a matter within its cognizance."[107] But the plaintiff in civil suit

100 Spencer Creek Water Co. v. Vallejo (1874), 48 Cal. 70.
101 Brennan v. Gaston (1861), 17 Cal. 374.
102 Smith v. Billett (1860), 15 Cal. 23.
103 Sloan v. Smith (1853), 3 Cal. 410.
104 People v. Mahoney (1860), 18 Cal. 180.
105 Cal. Stats. (1853), chap. 180, § 87.
106 McCauley v. Weller (1859), 12 Cal. 500.
107 People v. Sexton (1864), 24 Cal. 78.

moved for a change of venue from San Joaquin to Stanislaus, because his witnesses and the property involved were in the latter county. The judge refused the change, but the Supreme Court, in reversing the lower court, said that if a defendant in a similar case asked for a change, it would be granted, and the plaintiff was entitled to the same consideration.[108]

One area in which there could be no discretion was when the judge was closely related to one of the parties. In *De la Guerra v. Burton*, the plaintiff and the judge were first cousins, and the judge was thus incompetent to try the case.[109] Not only could a judge not try such a case, he could not even examine the pleadings.[110] Punishment or contempt by a judge would not be upheld except under the circumstances and in the manner prescribed by law because such punishment was arbitrary.[111] Certain acts of judges were so irregular as to be reversed by the Supreme Court. These included the disbarment of an attorney for making a motion not supported by the facts of the case,[112] and ordering a woman not to remarry in her lifetime, when a divorce was granted.[113]

There is no pattern readily discernible in the cases enumerated in this chapter, but there is the picture of a young state attempting to regularize its judicial system along the lines of normally recognized legal procedure. Compounding the work of the Supreme Court was the problem of men, not always competent or lacking the same outlook in regard to the importance of uniform decisions in all the courts of the state, as the men on the supreme bench. Henry Eno, the county judge quoted earlier, also wrote, "I make it a rule to decide all cases according to my ideas of right and wrong and not according to the ideas of any of our Supreme Judges — for whom I dont [*sic*] have much respect."[114] The Court faced the need to settle important questions in numerous instances, such as *Teschemacher v. Thompson*, where the Court had technical grounds for a reversal because the lower court did not define key terms for the jury.[115] But, said Chief

108 Grewell v. Walden (1863), 23 Cal. 165.
109 De la Guerra v. Burton (1863), 23 Cal. 592.
110 People v. de la Guerra (1864), 24 Cal. 73.
111 Batchelder v. Moore (1871), 42 Cal. 412.
112 Fletcher v. Daingerfield (1862), 20 Cal. 427.
113 Barber v. Barber (1860), 16 Cal. 378.
114 Eno, Twenty Years on the Pacific Slope, 143–44.
115 Teschemacher v. Thompson (1861), 18 Cal. 11.

Justice Stephen J. Field, "We do not intend, however, to determine the appeal in this way. We prefer to place our decisions upon grounds which will finally dispose of the controversy between the present parties, and furnish a rule for the settlement of other controversies of a similar character."[116]

Field's desire to furnish a rule for the settlement of similar cases indicated that the justices themselves realized the importance of a consistent line of decisions as a stable element in a not always stable society.

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[116] Ibid., 21–22.

Chapter 5

DEFINING INDIVIDUAL JUDICIAL RIGHTS

A principal complaint made by American settlers during the period of military rule was that the power of the alcaldes was too arbitrary. Americans felt that they were being deprived of rights guaranteed by their government as part of their common law tradition. These rights were fully granted with the coming of state government, but unfortunately not all segments of the population were able to avail themselves of these various constitutional guarantees. The Chinese, the most prominent minority group in California, as well as African Americans, Native Americans, and other minority groups, were placed under various disabilities. The Supreme Court, while upholding individual constitutional rights, was called upon to decide many cases involving minorities and help define the position of these groups within the larger framework of a growing and developing California.

INDIVIDUAL RIGHTS

When the Constitution was drawn up in Monterey in 1849, the first article, designated a "Declaration of Rights," pledged various common law rights

such as trial by jury and habeas corpus. The Court supported that pledge by insisting that these rights be adhered to.[1]

The majority of cases dealing with these guaranteed rights coming before the Supreme Court involved trials and imprisonment. One constitutional guarantee was, "The right of trial by jury shall be secured to all, and remain inviolate forever."[2] As early as 1846, Walter Colton, soon after he became the American alcalde of Monterey, summoned California's first jury.[3] The practice of using juries became widespread, and Governor Richard B. Mason soon issued a general order that jury trials should be held in all cases where the sum involved was more than $100.[4]

With the jury system already in operation, and the common law background of the by-then majority of American settlers, it was natural for the jury trial provision to be included in the Constitution, although it could be waived by the parties "in all civil cases, in the manner to be prescribed by law."[5] Statutory provisions provided that waiver of a jury trial could be indicated by not showing up, and if there were no complete waiver, the parties could consent to less than twelve members on a jury, but the minimum needed was three.[6] In order to waive any aspect of the jury trial, though, the consent to do so had to be express and could not be inferred.[7] One way in which a jury could be waived in a civil case was through the use of a referee, but the parties had to consent, and the mere failure to object did not constitute consent.[8] Nor could a court send a case to a referee for a trial without jury against the objection of the defendant, even if the defendant subsequently waived his objection by participating in the trial.[9]

For the majority of civil cases there was no waiver of the jury, and the Court would not countenance irregularities by the jury. In *Donner v.*

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1 Cal. Const. (1849), art. I.

2 Ibid., § 3.

3 Walter Colton, *Three Years in California*, edited by Marguerite Eyer Wilbur (Stanford, Calif.: Stanford University Press, 1949), 47.

4 William H. Ellison, *A Self-Governing Dominion: California, 1849–1860* (Berkeley: University of California Press, 1950), 13.

5 Cal. Const. (1849), art. I, § 3.

6 Cal. Stats. (1851), chap. 5, §§ 159, 179.

7 Gillespie v. Benson (1861), 18 Cal. 409.

8 Smith v. Pollock (1852), 2 Cal. 92.

9 Grim v. Norris (1861), 19 Cal. 140.

Palmer, as one example, two jurors flipped a coin for their decisions, and this naturally vitiated the verdict.[10] The majority of cases involving juries arose from criminal cases, and the Court uniformly protected the rights of defendants. The Court said that a defendant was entitled "to all the protection which the statute intends to secure, against any interference with the action of the jury, . . . if such protection be not afforded, suspicions are excited and confidence in the justice of their decision is destroyed."[11]

This case contained two irregularities that could possibly have affected the verdict of the jury. The jury separated without permission after retiring, and while at dinner, the hotel proprietor admonished them to convict the defendant, which in point of fact they did. The Supreme Court reversed the decision, although it noted that there would have been no reversal if the prosecution could have shown that the defendant suffered no injury from the irregularity.

The Legislature enacted various qualifications for jurors, including provisions that each juror be a United States citizen and an elector of his county.[12] Any person not meeting these requirements could not sit as a juror in a criminal case even if the defendant waived either of them.[13] In *People v. Chung Lit*, an alien participated as a juryman unbeknown to the defendants or their counsel, and this was brought up in the motion for a new trial after the defendants' conviction. The Court said that it was too late at that point since the defendants could have examined the juror on that subject and challenged him earlier, "but having failed to do this, they must suffer the consequences of their own neglect."[14] Under Section 341 of the Criminal Practice Act a peremptory challenge could be used any time before a juror was sworn in, and after the swearing in, but before the jury was completed, for good cause.[15]

> This plain and express provision of the statute cannot be contravened by any arbitrary rule of the Court; on the contrary, the security which the law humanely affords to the prisoner in criminal

10 Donner v. Palmer (1863), 23 Cal. 40.
11 People v. Brannigan (1863), 21 Cal. 337.
12 Cal. Stats. (1851), chap. 30, § 1.
13 People v. March (1855), 1 Cal. Unrep. 6.
14 People v. Chung Lit (1861), 17 Cal. 320.
15 Cal. Stats. (1851), chap. 29, § 341.

> prosecutions, against public excitement and private animosity, ought in no degree to be impaired or diminished by any action on the part of the tribunal before which he is being tried.[16]

In several instances the Supreme Court was called upon to decide whether jurors had preconceived ideas before a trial. In a trial for grand larceny, a juror admitted that he approved of the death penalty for murder, but not for stealing. The court of sessions correctly said that this constituted bias, and the juror was challenged.[17] But in 1857 the Court reviewed a case in which a juror was asked if he had a conscientious opinion which would prevent him from finding the defendant guilty of murder. He answered that he was opposed to capital punishment on principle, and he was excluded. On appeal the Supreme Court reversed the cause for a new trial, holding that there was a great difference between conscience and principle; thus the juror had really not answered the question that was asked him.[18] Also reversed was *People v. Williams* where a juror admitted having formed an unqualified opinion as to guilt or innocence, but did not say what it was.[19] The Court also held that once a juror was passed upon by the defendant's lawyer, he could not later challenge that juror for cause.[20]

In *People v. Reyes*, the court of sessions did not allow the counsel for the defendant to ask a juror about his membership in the Know-Nothings and possible prejudice against Catholic foreigners. The Supreme Court held that this refusal was an error and "destroyed the surest method of determining whether the person called as a juror was that impartial and unbiased person which the law contemplates should sit upon a jury."[21]

If a juror were challenged for bias, a specific bias had to be shown, providing another area of decisions for the courts.[22] In *People v. Williams*, one juror admitted that he had heard rumors as to the facts and on the basis of the rumors, if correct, his mind was set. The Court said that this was not sufficient to show bias, for if the facts did not match the rumors, then his

16 People v. Jenks (1864), 24 Cal. 13.
17 People v. Tanner (1852), 2 Cal. 257.
18 People v. Stewart (1857), 7 Cal. 140.
19 People v. Williams (1856), 6 Cal. 206.
20 People v. Stonecifer (1856), 6 Cal. 405.
21 People v. Reyes (1855), 5 Cal. 350.
22 People v. Reynolds (1860), 16 Cal. 128.

mind was not set,[23] but the prosecution could challenge a juror in a murder case for conscientious scruples against the death penalty.[24]

During a trial the litigants had to be present during the proceedings. In *People v. Kohler*, the jury returned to hear two depositions in the absence of the prisoner.[25] The Supreme Court said that this was an error since the evidence in the depositions, although read after the jury had retired, was a part of the trial and the defendant should have been present. "In favor of life, the strictest rule which has any sound reason to sustain it, will not be relaxed."[26] When the jury returned for further instructions in the absence of the parties or their counsels, the Court said that this was also an error. "Such instructions will be considered important . . . from the very fact that the jury have asked for them."[27]

Another protection for the defendant in criminal cases was the statutory provision that all instructions be reduced to writing before being given, unless by mutual consent of the parties.[28] That provision was uniformly held to be mandatory,[29] and extended to verbal modifications of written instructions as well.[30]

> The cases are numerous and uniform to the point that the giving of an oral charge or instruction to the jury, in a criminal case, without the consent of the defendant, is error, and that his consent cannot be presumed from his presence and failure to make the objection, when the oral instruction is given.[31]

The mandatory nature of the provision made its violation error per se, even if the violation was merely a clarification or qualification to a written instruction.[32] The repeated violation of this provision by lower courts

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23 People v. Williams (1860), 17 Cal. 142.
24 People v. Sanchez (1864), 24 Cal. 17.
25 People v. Kohler (1855), 5 Cal. 72.
26 Ibid.
27 Redman v. Gulnac (1855), 5 Cal. 148.
28 Cal. Stats. (1855), chap. 208, 21.
29 People v. Beeler (1856), 6 Cal. 246.
30 People v. Payne (1857), 8 Cal. 341.
31 People v. Chares (1864), 26 Cal. 79.
32 People v. Sanford (1872), 43 Cal. 29.

brought some particularly acid comments from the Supreme Court at its January 1873 term.

> We have no time to go over again the numerous cases in which this has been held to be erroneous . . . the repetition of the error in the present case betrays a degree of ignorance of the plain provisions of the statute and of the uniform decision of this Court, which is wholly without excuse.[33]

Once a jury retired, it had to stay together.[34] In 1855 the Court ordered a new trial when at the original trial, one of the jurors absented himself from the jury room, possibly with the consent of the defendant's counsel, but without the court's permission. Even if he had the counsel's permission, the absence was irregular as the juror might have been improperly influenced by another.[35]

Other irregularities also came up for review, such as occurred in *People v. Keenan* when each counsel was limited to one and one-half hours in which to make his argument to the jury.[36] One of the defendant's lawyers did not finish in the prescribed time, he was not allowed to continue, and his client was convicted of first-degree murder. While the Supreme Court did not dispute the right of the judge to direct and control proceedings, or even limit counsel to a reasonable time for argument, "It is, unquestionably, a constitutional privilege of the accused to be fully heard by his counsel."[37] The case was remanded for a new trial.

Constitutional guarantees affecting those charged with crimes, and which were brought to the Court included the right to bail, the use of habeas corpus, and the guarantee that no one should twice be put in jeopardy for the same crime.

In *Ex parte Voll* the Court upheld the denial of a motion for bail after the defendant had been convicted of manslaughter.[38] The statute said bail was a matter of right before conviction, but a matter of discretion

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33 People v. Max (1873), 45 Cal. 254–55.

34 Cal. Stats. (1851), chap. 29, § 405.

35 People v. Backus (1855), 5 Cal. 275.

36 People v. Keenan (1859), 13 Cal. 581.

37 Ibid., 584.

38 Ex parte Voll (1871), 41 Cal. 29.

afterward,[39] and the Court said the constitutional section providing for bail only contemplated persons prior to conviction.[40]

The Supreme Court justices, district judges, and county judges were all empowered by the original Constitution to issue writs of habeas corpus,[41] and the Supreme Court took pains to justify their use. When Peter B. Manchester was placed in custody by order of the state's governor, on the request of the governor of Ohio under an act of Congress regulating fugitives from justice, the Court held that the judiciary had power in such a case:

> The very object of the habeas corpus was to reach just such cases; and while the Courts of the State possess no power to control the Executive discretion, and compel surrender, yet, having once acted, that discretion may be examined into, in every case where the liberty of the subject is involved.[42]

The liberty of Alfred A. Cohen was looked into at the July 1856 term, and he was freed from a contempt order of the district court. Cohen had been jailed for not complying with a court order, and was to remain jailed until he did comply, although an uncontradicted affidavit in the lower court showed he was unable to comply.[43]

In a series of three separate habeas corpus cases in 1857, all arising out of the refusal of Edwin R. Rowe to answer questions about the activities of Henry Bates as state treasurer, the Court upheld the *Cohen* case, discharging a prisoner still held for refusing to answer questions after the suit had abated[44] and holding that it was the right and duty of the Supreme Court to review the decisions of the lower courts in cases of contempt, and others,[45] and that refusing to answer questions because to do so might disgrace oneself was not a sufficient reason.[46]

The 1862 amendments to the Constitution limited the power of habeas corpus to the justices of the Supreme Court and judges of district and

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39 Cal. Stats. (1851), chap. 29, §§ 509, 512.
40 Cal. Const. (1849), art. I, § 7.
41 Cal. Const. (1849), art. VI, § 4.
42 Ex parte Manchester (1855), 5 Cal. 237.
43 Ex parte Cohen (1856), 6 Cal. 318.
44 Ex parte Rowe (1857), 7 Cal. 175.
45 Ibid., 181.
46 Ibid., 184.

county courts.[47] Nevertheless, irrespective of how many judges could issue the writ, the denial of a motion to issue it was not considered to be res adjudicata. The Court, in affirming the use of the writ in an 1852 case,[48] said that "a party in custody might apply in succession to every Judge of every Court of record in the State for his discharge on habeas corpus until the entire judicial power of the State was exhausted."[49]

On the other hand, in *People v. Shuster*,[50] the Court said there was no appeal after a lower court, acting on a writ of habeas corpus, reduced a defendant's bail from $15,000 to $10,000, as he was unable to raise the larger amount. The Court said that there was no provision in the Habeas Corpus Act permitting an appeal from an order given in a proceeding under that act.[51]

The cases involving the question of double jeopardy show both the protection afforded individuals by the Supreme Court and the evident respect of the justices for guaranteed individual rights, and also indicated the feeling of the time that imprisonment was to act as a deterrent against future criminal acts.

A question of double jeopardy arose in the case of *People v. Gilmore* where the defendant was tried for murder, but convicted of manslaughter, a lesser offense. The defendant appealed, and a new trial ordered, for which he was again arraigned for murder. He pleaded the former trial, and the question was raised whether he had to answer to the murder charge again, and if not, whether he could be tried for manslaughter on the murder indictment. The Supreme Court held that the manslaughter conviction acted as an acquittal to the murder charge, even if the prisoner wanted to be tried again. He could be tried for manslaughter on the murder indictment, however, since that indictment included indictments for all the lesser offenses included in a murder charge, as though each charge were made separately. Even though the Court ordered Gilmore to be retried, a *nolle prosequi* was

47 Cal. Const. (1849), art. VI, § 4 (amended 1862).
48 In the Matter of Perkins (1852), 2 Cal. 424.
49 Matter of Edward Ring (1865), 28 Cal. 251.
50 People v. Schuster (1871), 40 Cal. 627.
51 Cal. Stats. (1850), chap. 122.

entered, which showed that the prosecution was unwilling to continue, and the prisoner was discharged.[52]

In *People v. Hunckeler*, the defendant was indicted and stood trial for manslaughter, but before the case went to the jury, the judge, on motion from the state, remanded the defendant for an indictment for a greater offense. He was then indicted and tried for murder, but convicted of manslaughter.[53] The Court discharged the defendant and said that double jeopardy was more than being tried twice for the same offense. "A defendant is placed in apparent jeopardy when he is placed on trial before a competent Court and a jury empaneled and sworn."[54] Such jeopardy was real unless a verdict could not be rendered due to some necessity compelling the discharge of the jury, such as death or illness of a juryman or judge, or failure by the jury to agree. In such case there was no actual jeopardy. But

> when a person has been placed in actual jeopardy, the jeopardy cannot be repeated without his consent, whatever statute may exist on the subject . . . Once in actual jeopardy, a defendant becomes entitled to a verdict which may constitute a bar to a new prosecution; and he cannot be deprived of his right to a verdict by nolle prosequi entered by the prosecuting officer, or by a discharge of the jury, and continuance of the cause.[55]

In this case a verdict could have been reached as to the indicted offense, and "The mere opinion of the District Judge that the evidence showed the defendant to be guilty of a higher degree of crime, was not such a necessity as required the discharge of the jury, or authorized a re-trial of the defendant for the same offense."[56]

A most important case was *People v. Webb*, which for the first time in the nearly twenty years of deliberations up to that time, raised the question of whether, in a criminal case, the prosecution could appeal a not-guilty verdict. The Court said no appeal would lie, even if there had been an error, because a retrial would have placed the defendant in double jeopardy.[57]

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52 People v. Gilmore (1854), 4 Cal. 376.

53 People v. Hunckeler (1874), 48 Cal. 331.

54 Ibid., 334.

55 Ibid.

56 Ibid.

57 People v. Webb (1869), 38 Cal. 467.

The Court said this ruling was compatible with the federal constitution and constitutions of other states, and that it had not been able to find a single American case where an appeal had been allowed on the motion of the prosecution.

Peter Stanley, having been once convicted of petit larceny, was now convicted of assault with intent to commit robbery, and sentenced to fourteen years in prison under a section of the penal code providing for such a term in such instances.[58] In *People v. Stanley*, the defense claimed that Stanley was put in jeopardy twice on the argument

> that if the punishment of the second offense be increased because of a prior conviction for another offense, the accused will be twice punished for the first offense. The ready answer to the proposition is, that he is not again punished for the first offense, but the punishment for the second is increased, because by his persistence in the perpetration of crime he has evinced a depravity, which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offense.[59]

The question of freedom of religion arose in *Ex parte Andrews*, although this case was but a continuation of a debate over enactment of Sunday laws by the Legislature.[60] As early as 1855 the Legislature passed a law prohibiting all noisy amusements on the Christian Sabbath,[61] but a more important Sunday law was enacted in 1858, which forbade the keeping open of any store, workshop or business house, and the sale of all goods on Sunday, with certain exceptions.[62] The law was approved April 10, 1858, and late in its April term that year the Supreme Court was already deciding the act's constitutionality in *Ex parte Newman*.[63]

Newman, a Jewish clothing merchant in Sacramento, was convicted by a justice of the peace for selling on Sunday, and he then petitioned for a writ of habeas corpus, claiming the Sunday law was at variance with the constitutional provisions having to do with the protection of property and

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58 Cal. Penal Code (1872), § 667.

59 People v. Stanley (1873), 47 Cal. 116.

60 Ex parte Andrews (1861), 18 Cal. 678.

61 Cal. Stats. (1855), chap. 46.

62 Cal. Stats. (1858), chap. 171.

63 Ex parte Newman (1858), 9 Cal. 502.

freedom of religion.[64] Chief Justice David S. Terry said the Constitution was interested in protecting religious liberty in its largest sense, and the observance of a day sacred to one sect was a discrimination in favor of that sect and thus a violation of the religious freedom of all other sects. Justice Peter H. Burnett agreed that the law was unconstitutional, but stressed more what he felt was a violation of Newman's right to possess and protect property. Justice Stephen J. Field, whose father, one brother, and brother-in-law were all Protestant clergymen, dissented, saying there was nothing involving religion in the law; the law merely established a civil regulation as to secular pursuits, with the object being to afford rest to those who needed it and could not otherwise get it:

> The Legislature possesses the undoubted right to pass laws for the preservation of health and the promotion of good morals, and if it is of opinion that periodical cessation from labor will tend to both, and thinks proper to carry its opinion into a statutory enactment on the subject, there is no power, outside of its constituents, which can sit in Judgment upon its action.[65]

The fact that the term "Christian Sabbath" was used both in the title and body of the act was merely to designate the day selected by the Legislature.

Not everyone agreed with Field's interpretation, however. Discussing the background to the law's passage, Theodore Hittell wrote:

> Notwithstanding a certain portion of the community has always been in favor of a Sunday law and other similar enactments for the enforcement of religious observances as well as of what they conceive to be the dictates of correct Sunday living, there can be but little doubt that restrictive acts of this kind do not, and never did, suit the spirit of the people of California. In no other part of the United States has there ever been so much liberty of conscience, so much freedom from dictation and so much disregard of what other people may think in this respect as in California. But repeated clamors for such a law,

[64] Cal. Const. (1849), art. I, § 1, 4.

[65] Ex parte Newman, 520.

> commencing in the early days at length in 1858 brought about the passage of an act.[66]

The act was declared unconstitutional "after causing much trouble, without accomplishing any good . . . ."[67]

Not at all daunted by the rebuff of the Court, the Legislature enacted a similar law in 1861,[68] and it too was quickly brought to the Supreme Court via a habeas corpus proceeding that same year in *Ex parte Andrews*.[69] Andrews was convicted in San Francisco's police court for keeping open a store and transacting business on Sunday. In applying for the writ, he claimed the law was unconstitutional on the same grounds as were successfully used in the 1858 case. By now Field had been joined on the Court by Justices Joseph G. Baldwin and Warner W. Cope, and they unanimously upheld the new Sunday law. Justice Baldwin wrote the opinion, and in the process he affirmed the views expressed by Field in the latter's dissent in *Ex parte Newman*. Baldwin said that the Legislature could repress anything harmful to the general good:

> This is a great purpose and end of all government. It is just as true that in our theory the Legislature must generally be the exclusive judge of what is or is not hurtful. Within this wide range of power, the Legislature moves without further restraint than the limitations which the Constitution has fixed to its action.[70]

As to the charge that law was religious in nature, Baldwin said that the constitutional provision providing for the free exercise and enjoyment of religious profession and worship did not bar all legislation on religious subjects, merely legislation "which invidiously discriminates in favor of or against any religious system."[71] There were various laws to protect sects, but this law

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66 Theodore H. Hittell, *History of California*, vol. IV (San Francisco: N. J. Stone & Company, 1885–97), 239.

67 Ibid., 239–40.

68 Cal. Stats. (1861), chap. 535.

69 Ex parte Andrews (1861), 18 Cal. 678.

70 Ibid., 682.

71 Ibid., 684.

> does not discriminate in favor of any sect, system or school in the matter of their religion. It found a particular day of the week recognized by the large majority of the people of the country as a day consecrated to divine worship. It was regarded by all of this large class as a day of rest, but not by all as a day set apart exclusively for divine worship or religious observance. In selecting a day of rest from worldly labor, that day would seem to be most convenient, which, while it offended the scruples of none to observe, was most familiar to the usages, sense of propriety and sense of religious obligations of so many. At least, the mere fact . . . that the closing of shops on that day might be more convenient to Christians, or might advance their religious aims or views, is no reason for holding the law unconstitutional.[72]

Hittell commented about the 1861 law that "though for a time it also gave much trouble, it was not sustained by public opinion and by degrees fell into substantial desuetude."[73]

In 1880 another Sunday law was passed forbidding the baking of bread on the Sabbath,[74] but was declared unconstitutional because it was class legislation.[75] This left the 1855 and 1861 laws on the books until 1882 when the enforcement of Sunday laws became a political issue. Many arrests were made, but juries refused to convict.[76] The result was the repeal of all Sunday laws in 1883.[77]

Another legislative enactment that caused a great deal of controversy was the statute entitled "An Act to Exclude Traitors and Alien Enemies from the Courts of Justice in Civil Cases," passed April 25, 1863.[78] As one historian of loyalty oaths has noted, California was not alone in passing such a law. Other states as well as the federal government legislated loyalty for their citizens. Several states in particular enacted test oaths for

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72 Ibid.

73 Hittell, *History of California*, vol. IV, 240.

74 Cal. Stats. (1880), chap. 84.

75 Ex parte Westerfield (1880), 55 Cal. 550.

76 William A. Blakely, *American State Papers and Related Documents on Freedom in Religion* (4th rev. ed.; Washington, D.C.: The Religious Liberty Association, 1949), 453.

77 Cal. Stats. (1883), chap. 2.

78 Cal. Stats. (1863), chap. 365.

attorneys and it was from these laws that judicial comment on Civil War loyalty oaths first came.[79]

The general election of 1862 put control of the 1863 Legislature in the hands of the Unionists, and they proceeded to pass this law to exclude Confederate sympathizers from practicing in the courts of the state. By the terms of the act a defendant in a civil suit could challenge the plaintiff's loyalty, and if the plaintiff did not sign a specified oath, the court in which the suit had been brought was required to dismiss the action. The law also required all attorneys to file the oath; the penalties for not so doing were both fine and disbarment.

The test case for this statute was *Cohen v. Wright*, decided at the July 1863 term of the California Supreme Court.[80] The case itself involved a suit for $350 begun June 19, 1863. The defendant objected to further prosecution, alleging disloyalty on the part of the plaintiff, and on the appeal the plaintiff's attorney, H. E. Highton, was objected to because he had not filed his oath of allegiance. Thus, the Court was able to undertake deciding the constitutionality of both aspects of the law; that is, whether attorneys at law could be required to file loyalty oaths, and whether litigants should have to file them.

The attempt to challenge the section of the statute pertaining to attorneys was by trying to show that it violated the provision of the state constitution that an officer of the state need take only one oath.[81] The view presented was that an attorney was an "officer" within the meaning of the Constitution, and that the affidavit to be filed as required by the statute was another and different oath. Edwin B. Crocker, who wrote the opinion of the Court upholding the constitutionality of the statute, went over the oath for attorneys, and concluded that only the clause requiring a declaration that the signer had not committed a treasonable act against the national government since the passage of the act went beyond the letter of the oath already required by the Constitution.

> and we have therefore had a doubt of its validity. It does, however, but carry out the object, design, and spirit of the constitutional

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79 Harold M. Hyman, *Era of the Oath: Northern Loyalty Tests* . . . (Philadelphia: University of Pennsylvania Press, 1954), 95.

80 Cohen v. Wright (1863), 22 Cal. 293.

81 Cal. Const. (1849), art. XI, § 3.

> oath; and as it is not an unreasonable requirement, being confined to acts since the passage of the law, and does not clearly violate the constitution, we are unwilling to declare it void on a mere doubt.[82]

He added, "In our judgment it was not intended to limit the action of the Legislature to the particular set form of words used in the Constitution, and it is clearly within their power to prescribe any form, so that they do not go beyond the intent object, and meaning of the Constitution."[83]

Having established the constitutionality of the provisions in the statute affecting attorneys, Crocker argued that lawyers were not "officers of the state" as the term "officers" was generally used, and that an attorney did not fill an "office" within the meaning of the Constitution. "Attorneys are officers of the Court, and as such are subject to the control of the Court before which they practice."[84]

Other constitutional objections to the statute were that it forced an attorney to answer to a criminal charge without a grand jury indictment, prevented a lawyer from defending himself in person or by counsel, only by affidavit, and that a lawyer was thereby deprived of property, the practicing of his profession, without due process and without a jury. Crocker replied,

> The exclusion of the attorney from the practice of his profession by this law, is not because he had committed any crime, nor is it in the nature of a punishment for any criminal offense. The right to practice law is not a constitutional right . . . . It is a mere statutory privilege . . . . This privilege is, by the statute granting it, extended to all persons who comply with certain conditions . . . . It is not a crime for him to decline to comply with this new condition, by refusing to take the oath. The taking of it is now made a prerequisite to the exercise of the privilege. If the effect of his refusal is to exclude him from the practice, it is a result caused by his own voluntary act.[85]

Crocker also denied that the right to practice law was property. The right to practice law was not an absolute right, but a creature of a statute,

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82 Cohen v. Wright, 309–10.

83 Ibid., 310.

84 Ibid., 315.

85 Ibid., 317.

and after the license issued and the oath taken authorizing an attorney to exercise the right, an attorney had only a statutory privilege subject to the control of the Legislature. A statutory privilege conferred no property right unless it was in the nature of a contract or a vested right of property. But the right to practice law was neither of these. It was also noted that an attorney in this situation was deprived of nothing, since the law left it open for him to resume his practice at any time by taking the oath, "a failure to do which is his own fault."[86]

The Court likewise upheld the portion of the statute dealing with litigants, Justice Crocker saying "The Government owes the duty of protection to the people in the enjoyment of their rights, and the people owe the correlative duty of obedience, and support to the Government."[87] A citizen could not demand protection without rendering obedience and support in return. One who refused to do so could no longer claim government aid in enforcing his rights, and such refusal was voluntary. Further:

> There is nothing in the Constitution which prohibits the Legislature from closing the doors of !he Courts against traitors and their aiders and abettors; or which requires that this shall not be done until after conviction of the crime, or that prohibits the Legislature from requiring of those litigating in the Courts that they shall purge themselves, by their own oath, of the imputed offense, before they shall claim their aid. . . . The litigant has no just right to complain, for it is his own voluntary or willful act that closes the doors against him. The law warned him what the result would be, and although it may be severe, it is a consequence of his own voluntary violation of the fundamental rights of society.[88]

Without the oath, a party would lose all remedy for the enforcement of his rights, and such deprivation, it was claimed, was an impairment of the obligation of contracts. Not so, said the Court. The requirement of the oath was merely a new and further condition on litigants, and a denying of all remedies.

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86 Ibid., 319.

87 Ibid., 325.

88 Ibid., 325–26.

At its January 1864 term the Court heard a case with similar facts, now with attorney Gregory Yale refusing the oath. Justice Augustus L. Rhodes affirmed the decision in *Cohen v. Wright*, as well as Justice Crocker's reasoning. The fact that this case was heard by the new five-man Court under the amended Constitution, made no difference in the outcome.[89] When the laws were recodified in 1872, this statute was eliminated along with others considered obsolete.

RIGHTS OF MINORITIES

From the time of the gold rush through the internment of the Japanese Americans during the Second World War, and even beyond, the history of California has been replete with many instances of racial and religious prejudice.

A majority of Americans in California, regardless of the area from which they came, firmly believed in the innate superiority of Caucasians over the other races, the superiority of Protestant Christianity over other religious groups, and the superiority of Anglo Americans compared to those with differing national origins.

The deepest feelings, according to one California historian, were associated with the idea of racial superiority. This came about both because of the irrational aspects of racial hatred and because that idea was also closely associated with the economic self-interest of the American settlers.[90]

Reaction to those of national origins other than Anglo-American was shown as early as the first session of the Legislature, when a law taxing foreign miners was passed.[91] In *People v. Naglee*, the Court held that the law was not at variance with the taxing power of Congress because the state had the power to tax all persons within its territorial limits.[92] The license fee under this act was $20 per month, and was designed to exclude Spanish Americans, French, and all other foreigners from the mines. The effectiveness of the measure varied from group to group, however. The French, for

89 Ex parte Gregory Yale (1864), 24 Cal. 241.

90 Walton Bean, *California: An Interpretive History* (New York: McGraw-Hill Book Company, 1968), 162.

91 Cal. Stats. (1850), chap. 97.

92 People v. Naglee (1850), 1 Cal. 232.

one, were not affected by the tax law to the same extent as other groups, although they did suffer from it severely on occasion. But the tax law also had the effect of reinforcing the idea of Anglo-American superiority and encouraged the Americans to deprive other groups of claims on almost any pretext.[93]

The act was repealed in 1851,[94] but reenacted in 1852 with a relatively modest $3 per month tax,[95] which was raised to $4 in 1856.[96] The 1856 act remained in force until 1870 when the act was declared unconstitutional.

The reenactment of the statute in 1852 was the result of the influx of Chinese to the mining areas, and served to provide the state with a sizeable source of income. In the words of Mary Coolidge:

> The Foreign Miners' License tax, originally intended to exclude the Spanish-Americans, the French and other foreigners from the mines, was finally directed specifically against the Chinese. The State officials discovered that many of the counties could not exist without the income from this tax and the amount was therefore reduced to a point where the thrifty Chinese would just bear it without leaving the district.[97]

From the above quotation it would seem that the Chinese miners were not discouraged by the tax, and one historian claimed that until 1870 the tax on foreign miners brought in nearly one-fourth of the state's revenue.[98]

The *Naglee* case was not questioned by the California courts, although it was modified somewhat. In 1861 the Court said the foreign miners' tax could only be levied on aliens mining on public mineral lands. In the actual case, *Ah Hee v. Crippen*, the plaintiff was mining on part of the Mariposa estate, under a lease from the owners, one of whom was John C. Frémont.[99] The patent of the owners, as had been decided in *Moore v.*

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93 For the position of the French, see Rufus Kay Wyllys, "The French of California and Sonora," *Pacific Historical Review* I (September, 1932): 337–59.

94 Cal. Stats. (1851), chap. 108.

95 Cal. Stats. (1852), chap. 37.

96 Cal. Stats. (1856), chap. 119.

97 Mary Roberts Coolidge, *Chinese Immigration* (New York: Henry Holt and Company, 1909), 69–70.

98 Bean, *California: An Interpretive History*, 164.

99 Ah Hee v. Crippen (1861), 19 Cal. 491.

Smaw and *Fremont v. Flower*, transferred to them all the rights the United States government had in the mineral lands,[100] and:

> By force of this instrument, therefore, the owners possess whatever "mining claims" exist upon the estate, and their rights in that respect can neither be enlarged nor diminished by any license from the State. They hold such claims independent of the section in question, and may extract the gold themselves, or allow others to extract it, upon such terms as they may judge most advantageous to their interests.[101]

To be liable for the tax, the alien in question had to be actually engaged in mining. The 1861 Revenue Act said that any person ineligible for United States citizenship and living in a mining district was to be considered a miner. In *Ex parte Ah Pong*, the Court said this provision was unsupportable.[102] "The mere fact that the petitioner was a Chinaman residing in a mining district, does not subject him to the foreign miners' tax."[103]

Even though the Court did construe the taxing of foreign miners strictly, it did not void the law, that task falling to the federal courts after the passage by Congress of the Civil Rights Act of May 31, 1870.[104] One student of these discriminatory tax laws has suggested that Sections 16 and 17 of the 1870 Civil Rights Act were designed specifically to combat the California taxes on aliens.[105]

Following the passage of this act, several Chinese miners brought suits against the collectors of their districts. In a series of test cases the United States Circuit Court, meeting in San Francisco, found the tax collectors guilty of a misdemeanor for unlawfully collecting the tax. The tax was not collected after 1870, and although the state attorney general recommended that the Legislature help take the case up to the United States Supreme Court, no further defense of the tax collectors was attempted.

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100 Moore v. Smaw and Fremont v. Flower (1860), 17 Cal. 199.

101 Ah Hee v. Crippen, 497.

102 Cal. Stats. (1861), chap. 401, § 93.

103 Ex parte Ah Pong (1861), 19 Cal. 108.

104 16 U.S. Stat. at L. (1871), 140–46.

105 Leonard M. Pitt, "The Foreign Miners' Tax of 1850: A Study of Nativism and Antinativism in Gold Rush California" (M.A. thesis, University of California, Los Angeles, 1955), 190.

If the reenacted foreign miners' tax did not serve to keep the Chinese out of the mining areas, the Legislature passed a number of statutes designed to discourage, or prohibit outright, the further immigration of Chinese to the Golden State. In 1852 an act was passed requiring the master or owner of any vessel arriving in California to post a $500 bond for each foreign passenger aboard.[106] The act was not enforced for some years, and not brought before the Supreme Court until 1872, when it was declared unconstitutional in the case of *State v. S. S. Constitution*.[107]

The defense charged that the act violated the provisions of the United States Constitution giving Congress the right to regulate commerce, and barring a state, without Congressional approval, from placing a duty on any import or export.[108] The state claimed that the purpose of the statute was to provide police and sanitary regulations by excluding persons who might become public charges. The Court said that, conceding the authority of the State to enact police and sanitary conditions, the fact that the statute applied to persons perfectly sound in mind and body, it could not be considered a police regulation. But, continued Justice Crockett, it could still be a valid enactment if within the constitutional power of the Legislature to pass such a statute:

> The proposition here announced is, that when a regulation of our foreign commerce is national in its character — that is to say, when it is of such a nature that the power to enact it can be most advantageously and appropriately exercised by Congress under a general system, applicable alike to the whole nation and all its parts, then Congress has the exclusive power to legislate upon it, and the States, severally, have no power to deal with it. But, if the regulation be local in its nature, and demanding varying rules, so as to adapt it to particular localities, it is within the province of the State Legislatures to adopt such local rules and regulations, in the absence of legislation by Congress, on that particular subject.[109]

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106 Cal. Stats. (1852), chap. 36; Cal. Stats. (1853), chap. 51.

107 State v. S. S. Constitution (1872), 42 Cal. 578.

108 U.S. Const., art. III, §§ 8, 10.

109 State v. S. S. Constitution, 589–90.

Tested by this rule, the act was unconstitutional because it placed conditions on people landing in the state not placed on those landing in other states.

An act passed in 1855 placed a passenger tax of $50 on each Chinese immigrant brought into California,[110] but this statute was declared void in 1857 in *People v. Donner*,[111] because this point had already been adjudicated by the United States Supreme Court in the *Passenger* cases.[112]

Judicial rebuffs did nothing to sway the Legislature. In the next year after *People v. Donner*, despite the clear unconstitutionality of such laws, a law was again enacted to prohibit the further immigration of Chinese into the state. The title of this act specifically stated it was designed to prevent further Chinese immigration,[113] and its fate was noted by counsel for the appellant in *Lin Sing v. Washburn*,[114] who said, in referring to the act: "This act has never been repealed; but we have been informed from the Bench that an attempt was made to execute it; and that the Supreme Court, in an opinion which has never been reported, declared it unconstitutional and void."[115]

In 1862 the Legislature tried another form of capitation tax, by enacting a law taxing all Chinese not engaged in mining or in agricultural pursuits.[116] This law was declared unconstitutional in the leading case of *Lin Sing v. Washburn* because the California Supreme Court felt that it interfered with the power of Congress to regulate commerce. Justice Warner W. Cope stated that federal decisions had already held that states could not tax the commerce of the United States for any purpose, and such commerce included "an intercourse of persons, as well as the importation of merchandise."[117]

The difference between this case and the *Passenger* cases was that in those cases the tax was to be paid before the passengers landed, and here they were allowed to land, and the tax became a condition of residence:

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110 Cal. Stats. (1855), chap. 153.
111 People v. Donner (1857), 7 Cal. 169.
112 Passenger Cases (1849), 7 Howard, 283.
113 Cal. Stats. (1858), chap. 313.
114 Lin Sing v. Washburn (1862), 20 Cal. 534.
115 Ibid., 538.
116 Cal. Stats. (1862), chap. 339.
117 Lin Sing v. Washburn, 566

> The person is the same — the only difference is in the circumstances under which the tax is imposed; and if this difference does not relieve the tax of its objectionable feature as an interference with commerce, we conceive that the same rule must be applied. The act is limited in its terms to Chinese residing in the State; but immigration from China will necessarily be affected by it, and it will hardly be pretended that this is a matter in which the commerce of the country is not interested. Its tendency is to diminish intercourse without which commerce cannot exist; and it is obvious that to the extent of its influence in this respect the operations of commerce must suffer a diminution.[118]

In his concurring opinion Justice Edward Norton distinguished this case from *People v. Naglee*. That case merely taxed foreign miners, whereas in this case foreigners were to be taxed for the privilege of living in the state. Chief Justice Field dissented, saying the law was a legitimate exercise of the state's taxing power.

The last case dealing with attempted Chinese exclusion in the period prior to 1880 was *Ex parte Ah Fook*, decided at the October 1874 term of the Supreme Court.[119] At issue here was an amendment to the Political Code making it the duty of the commissioner of immigration at each port in the state to visit each vessel arriving from a foreign port to see if any aliens aboard were lunatics, infirm, etc., or paupers likely to become a charge, or criminals, or lewd or debauched women.[120] If any such persons were aboard, the commissioner was to prevent them from landing unless an official of the ship could post a bond. In addition, the master of the ship was to give the commissioner seventy cents for each person examined. The petitioner, Ah Fook, was classified as a lewd woman by the commissioner, and was detained by him due to the lack of a bond, and she was to leave on the same vessel. The Court held that this statute was not repugnant to that provision of the Burlingame Treaty between the United States and China giving Chinese subjects the same privileges in respect to travel and residence, as was enjoyed by citizens of the most favored nation.[121] The

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118 Ibid., 570.

119 Ex parte Ah Fook (1874), 49 Cal. 402.

120 Cal. Pol. Code (1874), § 2952; Cal. Stats. (1873–74), chap. 610, § 70.

121 16 U.S. Stat. at L. (1871), 739–41.

Court reasoned that the statute did not single out China, but applied to all passengers arriving from foreign ports. Further, it was not contrary to the due process clause of the Fourteenth Amendment to the United States Constitution,[122]because "to render effectual an inquiry which has for its purpose the carrying into operation of quarantine or health laws it must be prompt and summary."[123]

Interestingly enough, the statute upheld in this case was similar to the 1852 statute voided in *State v. S. S. Constitution*, but the Court, with Justice Elisha McKinstry writing the opinion, did not refer to previous decisions by either the California or United States Supreme Courts, even to show how this case differed from prior ones. Possibly the key to the *Ah Fook* case was the difference between the statutes, the later one attempting to prove through inspection by the commissioner that certain aliens were actually as described, enforcing the idea that the statute was a police regulation to protect the health and morals of the state, whereas the earlier statute required a bond without an inspection or other proof. Whatever the reasoning behind the decision in the *Ah Fook* case, the statute in question was declared unconstitutional by federal courts for violating the Burlingame Treaty, the Fourteenth Amendment, and the Civil Rights Act.[124]

A major legal disability affecting the Chinese was their inability to give testimony in cases involving a Caucasian. Although the bulk of the cases before the Supreme Court involving the right to testify dealt with Chinese, other nonwhite residents of the state were included in the legislative enactments. The original statutory provisions were passed in 1850 and 1851 and excluded the testimony of African Americans and "Indians" in all cases in which a white person was a party; included were both civil[125] and criminal actions.[126] In 1854, in the case of *People v. Hall*, the leading case for the exclusion of Chinese testimony, the Supreme Court interpreted the term "Indian" so as to include Chinese.[127] Chief Justice Hugh C. Murray, then but twenty-nine years old, said the intent of the Legislature was to exclude

122 U.S. Const., Amend. XIV, § 1.
123 Ex parte Ah Fook, 406.
124 Chy Lung v. Freeman (1875), 92 U.S. 275.
125 Cal. Stats. (1850), chap. 142, § 306; Cal. Stats. (1851), chap. 5, § 394.
126 Cal. Stats. (1850), chap. 99, § 14.
127 People v. Hall (1854), 4 Cal. 399.

non-Caucasians not only from the courts, but from all aspects of citizenship. Murray characterized the Chinese as "a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown."[128]

This case was affirmed without comment in 1859 in *Speer v. See Yup Company*,[129] but in another case that same year the Court warned against using color as the sole criterion.[130] In this particular instance there had been an objection to testimony by a dark-complexioned Turkish witness, but the Supreme Court ruled that since he was Caucasian, his testimony could be used.

The unacceptability of nonwhite testimony was a hardship not only to these minorities, but to the cause of justice itself. In *People v. Howard*, the Court refused to admit the testimony of a mulatto even though he was the injured party.[131] The state contended that the section of the act dealing with crimes and punishments that stated that the injured party shall be a witness was an exception to the next section, which barred nonwhite testimony.[132] Chief Justice Field said it was possible "that instances may arise where, upon this construction, crime may go unpunished. If this be so, it is only matter for the consideration of the Legislature. With the policy, wisdom, or consequences of legislation, when constitutional, we have nothing to do."[133]

Only three years after the rendering of this decision, testimony of African Americans in cases involving white persons became admissible under an 1863 statute[134] that came "As a result of the Civil War and the predominance of the Republican party."[135] At the same time, though, the Legislature enacted a new measure expressly prohibiting the testimony of "Mongolians, Chinese and Indians."[136] Ending the prohibition against

128 Ibid., 405.
129 Speer v. See Yup Company (1859), 13 Cal. 73.
130 People v. Elyea (1859), 14 Cal. 144.
131 People v. Howard (1860), 17 Cal. 63.
132 Cal. Stats. (1851), chap. 99, § 13.
133 People v. Howard, 64.
134 Cal. Stats. (1863), chap. 68, § 1.
135 Coolidge, Chinese Immigration, 76.
136 Cal. Stats. (1863), chap. 70.

testimony by African Americans was, in the words of Theodore Hittell, "one of the glories of the legislature of 1863."[137]

The continued prohibition against Chinese testimony brought additional cases to the Court. In *People v. Awa*, the Court turned down an attempt to bar Chinese testimony in a case where the defendant was also Chinese.[138] The prosecution claimed here that the state was a white person, but the Court said in a criminal prosecution the people as a political organization, and not as individual members, was the party mentioned in the complaint. In *People v. Jones*, the district court allowed the injured party, a Chinese, to testify, but the conviction was reversed, although Justice Lorenzo Sawyer said the rule was wrong, that there was no rational ground upon which to prohibit Chinese testimony.[139]

Both Chinese and African Americans were affected by an 1869 case that came before the Supreme Court. The defendant, George Washington, an African American, had been convicted of robbing a Chinese solely on the evidence presented by Chinese witnesses. In *People v. Washington*, the Court reversed Washington's conviction, saying that Chinese testimony could not be used in cases in which an African American was a party.[140] The Court first said that the federal Civil Rights Act of April 9, 1866,[141] was not repugnant to the United States Constitution, and "that its effect was to put all persons irrespective" of race and color, born within the United States and not subject to any foreign power, excluding Native Americans not taxed, upon an equality before the laws of this State in respect to their personal liberty.[142]

The Court also said that the section dealing with nonwhite testimony was null and void so far as it discriminated against persons on the basis of race or color, born in the United States, excluding Native Americans. In essence, the Court said that the Civil Rights Act gave the same civil rights enjoyed by Caucasians to non-Caucasians.

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137 Hittell, *History of California*, vol. IV, 340.

138 People v. Awa (1865), 27 Cal. 638.

139 People v. Jones (1867), 31 Cal. 565.

140 People v. Washington (1869), 36 Cal. 658.

141 14 U.S. Stat. at L. (1868), 27.

142 People v. Washington, 670.

Justices Joseph Crockett and Royal T. Sprague dissented, with Crockett writing the opinion in which he claimed the Civil Rights Act was unconstitutional because the Thirteenth Amendment, under which the Civil Rights Act was passed, only proposed to abolish slavery, and in order to have this end accomplished, gave Congress the power to pass appropriate legislation. The federal act, said Crockett, did more than abolish slavery. It made all native born, except Native Americans, citizens, and also extended the same property and contractual rights enjoyed by whites. As broad an interpretation of the Thirteenth Amendment as was needed to justify the act, Crockett felt, would limit the power of the states over their citizens.[143]

The next year, in *People v. Brady*, Justice Crockett's views were given greater weight, although the defendant was white and not an African American.[144] Another difference between this case and *People v. Washington* was that now the state act dealing with testimony was being tested by the Fourteenth Amendment, particularly that section providing that no state could pass a law abridging the privileges or immunities of any United States citizen or deprive any person of due process of law or equal protection of the laws.[145]

The state contended that the disability to testify deprived Chinese of a degree of legal protection because the ability to testify would tend to deter crimes against them. Of course, there was no problem if a Chinese were accused of robbing either a white or another Chinese, because in such circumstances the testimony of either white or Chinese could convict a Chinese. But if a white man were accused of robbing a Chinese, the latter being unable to testify,

> is less protected. That although the law threatens the same punishment for a crime committed upon the person of a Chinaman as when committed upon the person of a white man, the certainty of the punishment, and therefore the amount of protection afforded, is necessarily lessened by his exclusion as a witness.[146]

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143 U.S. Const., Amend. XIII.

144 People v. Brady (1870), 40 Cal. 198.

145 U.S. Const., Amend. XIV, § 1.

146 People v. Brady, 208.

Justice Jackson Temple, speaking for the majority, rejected this argument, saying that whether someone was permitted to testify or not had nothing to do with being the injured party, but on other grounds. Temple emphatically stated that the Legislature had the power to declare classes of persons incompetent to testify, and that every state had done so. The exclusion of Mongolians was not because they were Mongolians, but because their testimony would not advance the cause of justice. He said the Fourteenth Amendment simply did not apply here, and also dissented from the opinion in *People v. Washington*, agreeing with Justice Crockett's dissent in that case. Chief Justice Rhodes dissented, upholding the decision in *People v. Washington*.

The last two cases involving Chinese testimony both came before the Court at its October 1872 term in *People v. McGuire*[147] and *People v. Harrlngton*.[148] In the first of these cases the Court refused to reopen the questions raised in *People v. Brady*. The Court took cognizance of the fact that the Legislature repealed the law prohibiting Chinese testimony by not including that provision in the new codes. The codes were to go into effect the following January, and the Court felt:

> There is, therefore, now left very little, and after the Codes take effect there will be no practical importance to the question whether that decision is right or wrong.
>
> In view of the circumstances and of the pressure upon our time, whatever might be our opinion, if it were important to enter again upon the discussion, we decline to review that case, or to consider the questions therein passed upon as open ones in this State.[149]

People v. Harringtoll merely affirmed both *People v. Brady* and *People v. McGuire*.

Another group to be placed at a disadvantage was California's small African-American population, although many restrictions against Blacks were removed at the end of the Civil War. One recent study has shown that the removal of these restrictions was in large part due to the inability to

147 People v. McGuire (1872), 45 Cal. 56.

148 People v. Harrington (1872), 1 Cal. Unrep. 768.

149 People v. McGuire, 57.

enforce the laws and because the relatively small African-American population was not the dominant minority problem in the eyes of Californians.[150]

Even prior to the Civil War, neither the Legislature nor the state constitution placed any disability on the right of African Americans to claim homestead rights, and the Court would not infer any disability either.[151] In 1875 the Court recognized a marriage between a Caucasian and his African-American wife because the marriage was valid where it took place, Utah, and the Court also said that the African-American widow could inherit the estate.[152]

The Court heard two cases in 1868 dealing with claims of African-American passengers that the North Beach and Mission Railroad Company had refused them service because of their color. In the first case the plaintiff, Emma J. Turner, claimed the conductor pushed her off the car even though there was room in the car. She was awarded $750 damages in the lower court. The Supreme Court reversed the cause, saying that the damages were excessive and also because there was no malice or willful injury shown on the part of the defendant. The Court declared, "We are unable to conceive it possible that a jury free from passion or prejudice upon so trivial a cause of action as that exhibited by the plaintiff in her own testimony could have found a verdict for so large a sum.[153] The Court added that there was no proof of malice on the part of the defendant. If there were any malice, it was by the conductor. Any liability of the defendant's would only be for the actual damage suffered, to make the defendant liable for punitive damages the plaintiff would have to have shown that the conductor's act was done with the authority, express or implied, of the company.

In *Pleasants v. N. B. & M. R. R. Co.*,[154] there was evidence that the conductor specifically stated that African Americans could not ride the cars. The jury at the trial found a verdict for the plaintiffs for $500, but the Supreme Court reversed the cause on the authority of the *Turner* case in spite of a strong appeal by George W. Tyler, counsel for the plaintiffs. The

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150 Eugene Berwanger, *The Frontier Against Slavery*; . . . (Urbana: University of Illinois Press, 1967), 76.

151 Williams v. Young (1861), 17 Cal. 403.

152 Pearson v. Pearson (1875), 51 Cal. 120.

153 Turner v. N. B. & M. R. R. Co. (1868), 34 Cal. 598.

154 Pleasants v. N. B. & M. R. R. Co. (1868), 34 Cal. 586.

Court said, "the damages were excessive. There was no proof of special damage, nor of any malice, or ill will, or wanton or violent conduct on the part of the defendant.[155]

There was, in the period 1850–1879, a paucity of Supreme Court cases involving California's other two racial minorities, the Native Americans and Hispano-Americans. The citizenship of the latter group under the treaty of Guadalupe Hidalgo was unsuccessfully challenged in *People v. de la Guerra*[156] and in *People v. Antonio*.[157] The Court also held in the *Antonio* case that the act of 1850 for the protection and punishment of Native Americans was intended to be applied to those in tribes, and not to those living among whites.[158] At the same time the Court also declared unconstitutional that portion of the 1850 law prescribing whipping as punishment as being a cruel and unusual punishment.[159]

Whatever the relaxed attitude of the state toward the African-American population, African-American and Native-American children were uniformly excluded from attending schools with white children unless separate schools were not provided, in which case all the children went to the same school. In 1876 the pertinent provisions read as follows:

> The education of children of African descent, and Indian children, must be *provided* for in separate schools; provided, that if the Directors or Trustees fail to provide such separate schools, then such children must be admitted into the schools for white children.
>
> Upon the written application of the parents or guardians of such children to any Board of Trustees or Board of Education, a separate school must be established for the education of such children. [160]

Children of Chinese parentage were originally included in earlier, similar provisions,[161] but were excluded altogether in the California School Law

155 Ibid., 590.
156 People v. de la Guerra (1870), 40 Cal. 311.
157 People v. Antonio (1865), 27 Cal. 404.
158 Cal. Stats. (1850), chap. 150.
159 Ibid., § 16.
160 Cal. Pol. Code (1874), §§ 1669, 1670.
161 Cal. Stats. (1860), chap. 329, § 8

of 1870,[162] and remained under this disability until the 1880s. The legality of segregated, or "separated but equal," schools came before the Supreme Court in 1874 in the case of *Ward v. Flood*.[163]

Mary Frances Ward, an eleven-year-old girl, sought a writ of mandamus directing Noah F. Flood, principal of the Broadway Grammar School in San Francisco, to accept her as a pupil. This school, she alleged, was the closest one to her home, far closer than the segregated school she was then attending. The writ was denied, the Court upheld the provision for separate schools found in the 1870 school act, and declared that the state law was not contrary to the Thirteenth and Fourteenth Amendments of the United States Constitution, a view not surprising when the Court's opinion in *People v. Brady* is remembered. In regard to the Thirteenth Amendment, Chief Justice William T. Wallace said that segregated schools did not place the petitioner into slavery or involuntary servitude, and there was no lack of equal protection or due process as spoken of in the Fourteenth Amendment. The youth of the state were equally entitled to be educated at public expense. Only if African-American children had been excluded completely would there have been a denial of equal protection,

> and in the circumstances that the races are separated in the public schools, there is certainly to be found no violation of the constitutional rights of the one race more than the other, and we see none of either, for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense.[164]

Chief Justice Wallace cited for support the 1849 Boston segregation case of *Roberts v. City of Boston*,[165] the same case used by the United States Supreme Court in *Plessy v. Ferguson*.[166] He concluded by stating that the exclusion of African-American children from white schools could only be supported under circumstances like these, where there were actually

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162 Cal. Stats. (1869–70), chap. 556, § 56.

163 Ward v. Flood (1874), 48 Cal. 36.

164 Ibid., 52.

165 Roberts v. City of Boston (1849), 5 Cush. 198.

166 Plessy v. Ferguson (1896), 163 U.S. 537.

separate schools for African Americans. If such schools were not maintained, all children would go to the same school.

The disabilities suffered by minority groups in California, while not justified by today's standards, were not atypical of the period as a whole. California attitudes toward nonwhites, all nonwhites, were consistent with those attitudes generally observed in the United States. But the cases as brought before the California Supreme Court also showed another typical facet, the struggle between state and federal authority. Stephen J. Field, for one, supported the state in the use of its "police powers," as may be seen in his dissent in *Lin Sing v. Washburn*. As a member of the federal bench, he held unconstitutional two San Francisco municipal ordinances, not mentioning specifically, but aimed at Chinese residents of that city.[167] In the second of these cases he stated that the courts would not inquire into the motives that inspired an ordinance so long as it was enforced without unjust discrimination.

The case of *Lin Sing v. Washburn* settled the question that when a police power of the state interfered with the central government's power to regulate commerce, the state enactment had to give way. The point, though, was to decide at which point a legislative enactment encroached on a federal power, and this varied from case to case.

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[167] Barbier v. Connolly (1885), 113 U.S. 27; Soon Hing v. Crowley (1885), 113 U.S. 703.

Chapter 6

THE LEGISLATURE AND THE STATE CONSTITUTION

In common with other state supreme courts, the Supreme Court of California took upon itself to decide the constitutionality of acts of the state legislature. At its second term the Court interpreted its own authority, saying that it was "clothed with all the powers necessary for the exercise of a general appellate jurisdiction."[1]

In *Caulfield v. Hudson*,[2] the Supreme Court declared unconstitutional that section of an act that allowed appeals to the district court,[3] since the Constitution gave the district courts original jurisdiction only.[4] In the opinion, Justice Heydenfeldt referred to *Attorney General, ex parte* as to the Court's appellate jurisdiction, and said that if the Legislature were allowed to give the district court appellate powers, it could go even further and give the Supreme Court original jurisdiction, which would be contrary to the Constitution. Citing *Marbury v. Madison*, the case that established judicial review by the United States Supreme Court over

1 Attorney General, ex parte (1850), 1 Cal. 89.
2 Caulfield v. Hudson (1853), 3 Cal. 389.
3 Cal. Stats. (1851), chap. 1, § 24.
4 Cal. Const. (1849), art. VI, § 6.

acts of Congress,[5] he went on to declare a portion of the California act unconstitutional.

By 1864 the Court, in *Bourland v. Hildreth*, could say that the power of the judicial branch to set aside a legislative act was unquestioned. The key was to ascertain the intent of the framers of the Constitution and of the law in question.[6] The Legislature had broad power to enact laws, and over the years the constitutionality of many of the statutes passed by the Legislature was tested before the Supreme Court of the state, as the Court continued its role as a stabilizing influence in the state.

INTERPRETING ACTS OF THE LEGISLATURE

While the Court in *Bourland v. Hildreth* may not have had any doubts about its authority to declare acts of the Legislature unconstitutional, it was also careful to make it known that in declaring a law unconstitutional, it was not acting in an arbitrary or capricious manner. Justice Oscar L. Shafter said:

> It is, however, to be borne in mind that the Constitution is not a grant of power or an enabling Act to the Legislature. It is a limitation on the general powers of a legislative character, and restrains only so far as the restriction appears either by express terms or by necessary implication, and the delicate office of declaring an Act of the Legislature unconstitutional and void should never be exercised unless there be a clear repugnancy between the statute and the organic law. These principles were repeatedly asserted by the late [three-man] Supreme Court, and have never been questioned by us.[7]

Justice Shafter may have had in mind Justice Joseph G. Baldwin's words in *Smith v. Judge of the Twelfth District*, when that literary judge wrote that the power to declare acts unconstitutional was "not to be exercised in doubtful cases, but that a just deference for the legislative department enjoins upon the Courts the duty to respect its will, unless the act declaring it be clearly inconsistent with the fundamental law, which all members

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5 Marbury v. Madison (1803), 1 Cranch 137.

6 Bourland v. Hildreth (1864), 26 Cal. 162.

7 Ibid., 183.

of the several departments are sworn to obey."[8] With the "just deference" mentioned by Justice Baldwin in mind, the Supreme Court developed a system for the interpretation of acts of the Legislature.

In *People v. Frisbie*, the Court said that if an act were susceptible of two different constructions, one consistent, and the other inconsistent with the Constitution, it was "the plain duty of the Court to give it that construction which will make it harmonize with the Constitution, and comport with the legitimate powers of the Legislature."[9]

Sometimes the problem was not one of harmonizing a law with the Constitution, but of reconciling two laws on the same subject. In such an instance the law first passed had to yield to the later one, because the later enactment was the last will of the Legislature.[10] The later act had to show a clear intention of repealing the earlier act,[11] but the intent to repeal could be shown either by express words or necessary implication. If the latter, the subsequent legislation would have to show that the Legislature did not intend the former act to remain in force. In the words of Justice Joseph Crockett: "If a later statute be wholly repugnant to an older one, so that, upon any reasonable construction, they cannot stand together, the first is repealed by implication, though there are no repealing words."[12]

The rule was different, however, in the case of two acts relating to the same subject matter passed the same day. In such an instance they were to be read together, as if parts of the same act.[13] If the meaning of an act were doubtful, the Court could also use the title of the act in order to ascertain the intention of the Legislature, although the title could not be used to restrain or control a positive provision of the act.[14] It should be noted, however, that the Court said the title could be used. It did not state that the title was conclusive, even though the Constitution stated that the object of each law should be stated in its title.[15] In construing statutes, "the universal rule

8 Smith v. Judge of the Twelfth District (1861), 17 Cal. 551.
9 People v. Frisbie (1864), 26 Cal. 139.
10 Matter of the Estate of Wixom (1868), 35 Cal. 320.
11 Attorney General v. Brown (1860), 16 Cal. 441.
12 Christy v. B. S. Sacramento Co. (1870), 39 Cal. 10.
13 People v. Jackson (1866), 30 Cal. 427.
14 Flynn v. Abbott (1860), 16 Cal. 358.
15 Cal. Const. (1849), art. IV, § 25.

is that all parts of the statute must be considered, in order to ascertain from the whole what was the real intent of the Legislature."[16]

Another problem involved in interpreting statutes was in determining whether a law was special or general, and if the latter, whether the law was within the constitutional rule that "All laws of a general nature shall have a uniform operation."[17] An act passed in 1852 to provide for the appointment of a gauger for the port of San Francisco[18] was considered to be a special act because there would be no need for a gauger at any other port in the state,[19] but an act passed April 17, 1861 to lower the maximum interest charged by pawnbrokers from 7 to 4 percent per month,[20] was of a general nature and uniform operation, since it dealt with pawnbrokers in general, and affected all in that occupation.[21] Also considered a general law was an act taxing costs against the losing party in litigated cases in San Francisco.[22] The Court said that the law operated "equally and uniformly upon all parties in the same category — upon all upon whom it acts at all."[23] Corporations as well as individuals were also within the purview of this constitutional provision, and any law granting special privileges to a corporation not granted to all other similar corporations was unconstitutional and void.[24]

Although elected to office like other public officials, the members of the Supreme Court attempted as much as possible to keep their personal opinions of laws out of their judicial decisions. Justice Crockett said that

> it is not our province to discuss the expediency or wisdom of a Legislative Act. Our sole duty is by applying just rules of construction to ascertain the true intent of the Legislature, and carry it into effect. If the Act is unwise or oppressive in its provisions, the fault is with the Legislature and we have no power to remedy the grievance.[25]

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16 People v. San Francisco (1869), 36 Cal. 600.
17 Cal. Const. (1849), art. I, § 11.
18 Cal. Stats. (1852), chap. 58.
19 Addison v. Saulnier (1861), 19 Cal. 82.
20 Cal. Stats. (1861), chap. 19, § 2.
21 Jackson v. Shawl (1865), 29 Cal. 267.
22 Cal. Stats. (1865–66), chap. 91, § 6.
23 Corwin v. Ward (1868), 35 Cal. 198.
24 Waterloo Turnpike Road Co. v. Cole (1876), 51 Cal. 381.
25 People v. San Francisco, 601.

Acts of the Legislature examined by the Supreme Court extended to many areas of government, with a large number of cases dealing with judicial matters, elections, and offices.

JUDICIAL POWERS

The Legislature, in addition to its power to create courts, also enacted laws dealing with specific courtroom procedure ranging from the amount of interest allowed on a judgment to the rules of evidence.

In *Fitzgerald v. Urton*,[26] the Court upheld a law giving jurisdiction in nuisance cases to the county courts,[27] while the Constitution gave such cases to the district courts.[28] The granting of this jurisdiction by the Legislature to the county courts did not take jurisdiction from the district courts; both could exercise the jurisdiction.

The case of *Parsons v. Tuolumne Water Company* explained the "special cases" in which the Legislature could provide for county courts.[29] The Court said: "we think that the term 'special cases' was not meant to include any class of cases for which the Courts of general jurisdiction had always supplied a remedy."[30] These "special cases" were limited to new areas of cases as created by statutes, and whose proceedings were unknown to the general rule of courts of equity and common law. One such example was the Insolvent Debtor's Act of 1852, which gave jurisdiction in cases of insolvency to both county and district courts.[31] In *Harper v. Freelon*, the Supreme Court held that the Legislature had the right to give any court in the state jurisdiction over these cases, and the two had concurrent jurisdiction.[32]

In *Zander v. Coe*,[33] the Court voided a statute giving justices' courts jurisdiction in cases where the sum in dispute exceeded $200, affirming

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26 Fitzgerald v. Urton (1854), 4 Cal. 235.
27 Cal. Stats. (1851), chap. 5, § 249.
28 Cal. Const. (1849), art. VI, § 6.
29 Cal. Const. (1849), art. VI, § 9.
30 Parsons v. Tuolumne Water Company (1855), 5 Cal. 44.
31 Cal. Stats. (1852), chap. 34, § 1; Cal. Stats. (1853), chap. 180, § 44.
32 Harper v. Freelon (1856), 6 Cal. 76.
33 Zander v. Coe (1855), 5 Cal. 230.

Holden v. Caulfield.[34] In 1850, the Legislature passed an act creating a municipal court for San Francisco, called the Superior Court, and gave it all the powers of a district court.[35] Since a district court had jurisdiction beyond its district, so then did the Superior Court. The granting of such jurisdiction was declared invalid by the Supreme Court in *Meyer v. Kalkmann*[36] as being in conflict with the state constitution, which stated, "The Legislature may also establish such municipal and other inferior courts as may be deemed necessary."[37]

The Court said that any courts created by the Legislature had to be "of inferior, limited and special jurisdiction."[38] This meant that the jurisdiction of a municipal court had to be confined to its municipal territory, and the Legislature could not extend its jurisdiction, thus letting its processes go beyond its territory.

In *Ex parte Harker*, the Supreme Court upheld the right of the Legislature to abolish a writ, noting that "the mere procedure by which jurisdiction is to be exercised may be prescribed by the Legislature, unless, indeed, such regulations should be found to substantially impair the constitutional powers of the Courts, or practically defeat their exercise.[39]

By an act of March 30, 1868, the Legislature reduced interest rates on judgments from 10 to 7 percent.[40] The power of the Legislature to enact such a measure was not questioned, the Court saying only that such an act could only operate prospectively, and interest could only be computed at the lower rate from the act's passage, and not from the still-earlier judgment.[41] In *Mitchell v. Haggenmeyer*,[42] the Legislature changed the rules of evidence dealing with the admissibility of depositions after the deposition in question was taken, but prior to the time the cause was tried.[43] Said the

34 Cal. Stats. (1851), chap. 1, § 87.
35 Cal. Stats. (1850), chap. 63, §§ 1, 4; Cal. Stats. (1851), chap. 1, §§ 37, 42.
36 Meyer v. Kalkmann (1856), 6 Cal. 583.
37 Cal. Const. (1849), art. VI, § 1.
38 Meyer v. Kalkmann, 590.
39 Ex parte Harker (1875), 49 Cal. 465.
40 Cal. Stats. (1867–68), chap. 429.
41 White v. Lyons (1871), 42 Cal. 279.
42 Mitchell v. Haggenmeyer (1875), 51 Cal. 108.
43 Cal. Stats. (1873–74), chap. 383, § 218; Cal. Code Civ. Proc. (1874), § 1880.

Court, "It is competent for the Legislature to change or modify the rules of evidence at any time."[44]

One legislative act that caused a sharp division among the justices of the Supreme Court was a statute passed March 30, 1868, and amended February 1, 1870, dealing with the grading of streets in San Francisco.[45] Under the provisions of these statutes the supervisors were to appoint commissioners to assess the damages suffered and benefits accruing to the affected property owners. The commissioners' report was to be submitted to the county court for approval. Section thirteen of the 1870 amendatory act said that the action of the county court was to be "final and conclusive," which seemed to rule out the possibility of an appeal.[46] At its October 1871 term the Supreme Court interpreted the statute as precluding an appeal.[47] In considering the question Justice Crockett said that

> it is our duty so to interpret the Act . . . as to uphold the right of appeal; for it is not lightly to be assumed that the Legislature intended to deny a right of appeal in a case involving so large an amount and affecting the interests of so many persons. If, therefore, the statute is capable of being so construed as to maintain the right of appeal without violating the well established rules for construing statutes, I should deem it, to be my duty to give it that construction.
>
> On the other hand, if the Legislature has clearly expressed its intention that there shall be no appeal in this case, the Courts have no right to defeat this manifest intention by torturing or disregarding the language of the statute.[48]

Justice Crockett added that the Legislature intended the words "final and conclusive" to be binding; that the judgment of the county court was to be

> conclusive for all purposes whatsoever, and shall end the litigation. This, in effect, is to deny an appeal from the judgment, and to make it absolutely conclusive on the parties. It is not our province to discuss the wisdom and policy of such Legislation. This

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44 Mitchell v. Haggenmeyer, 109.

45 Cal. Stats. (1867–68), chap. 449; Cal. Stats. (1869–70), chap. 36.

46 Cal. Stats. (1869–70), chap. 36, 25.

47 Appeal of S. O. Houghton (1871), 42 Cal. 35.

48 Ibid., 51–52.

> belongs solely to the legislative department, whose enactments it is our duty to expound, in accordance with the expressed will of the Legislature.[49]

Having decided that the Legislature fully intended that there be no appeals, the Court said that the statute was not unconstitutional, because proceedings under it were special and not cases in law involving an assessment, which would have given appellate jurisdiction to the Supreme Court. Justice William T. Wallace noted that a "special" case did not include any case for which courts of general jurisdiction had normally supplied a remedy, and had been appealable to the Supreme Court.

Chief Justice Augustus Rhodes, in dissent, said:

> The position cannot be maintained that the Court has or has not jurisdiction of special cases accordingly as the Legislature in providing for them has or has not allowed an appeal. The jurisdiction of the Court is derived from the Constitution alone, and the Legislature can neither enlarge or restrict it. When a special case is devised, the question whether this Court has appellate jurisdiction in the matter must be determined by an interpretation of the Constitution.[50]

He felt that while special cases were not mentioned specifically, they fell within the general grant of appellate jurisdiction. Justice Royal T. Sprague also dissented, saying that the words "final and conclusive" referred only to the county court, and were not used to bar an appeal. The majority view prevailed, and was followed in later cases.

The constitutionality of laws dealing with the judicial system was put in question in other cases, including *Uridias v. Morrill*, which upheld a law making the mayor of San Jose ex officio justice of the peace;[51] *People v. Mellon*, which held that a county judge could preside in a county other than the one in which he was elected at the request of the county judge of that other county;[52] and *People v. Sassovich*, which upheld the power of

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49 Ibid., 55.

50 Ibid., 69.

51 Uridias v. Morrill (1863), 22 Cal. 473.

52 People v. Mellon (1871), 40 Cal. 648.

the Legislature to create additional judicial districts.[53] In the latter case the Court affirmed the rules of constitutional construction laid down in *Bourland v. Hildreth*, and added:

> It is well settled that every Act deliberately passed by the Legislature must be regarded by the Courts as valid unless it is clearly and manifestly repugnant to some provision of the Constitution. The people must not be deprived, by judicial construction, of their prerogative right to declare, through the Legislature, what shall be the rule in a given case upon the mere conjecture or suspicion that they have already declared their will upon that subject in the Constitution.[54]

Under no rule of construction, however, could the Legislature make a board of supervisors a purely judicial body as it tried to do in Section 74 of the election law, by making contests in county courts dealing with elections appealable to the board of supervisors.[55] Under the Constitution the board did not have such powers and any judgment so rendered was a nullity. Boards of supervisors did have certain duties that in some respect had a judicial character, but this case was not one of them.[56]

One class of statutes that received changing interpretations through the years involved giving nonjudicial duties to courts and judges. The leading early case on the subject was *Burgoyne v. Supervisors*, decided in 1855,[57] which declared unconstitutional an 1850 statute that gave the court of sessions of each county the management of the financial matters of its county.[58] About June 20, 1850, the court of sessions of San Francisco County had entered into a contract for the purchase of land on which to erect county buildings, in compliance with the statute passed earlier that year.[59] William M. Burgoyne, assignee of the sellers, sued to collect for the land, bringing the question of nonjudicial powers of the judiciary into courts for review. The Legislature had acted under a provision of the Constitution

53 People v. Sassovich (1866), 29 Cal. 480.
54 Ibid., 482.
55 Cal. Stats. (1855), chap. 131, § 12.
56 Stone v. Elkins (1864), 24 Cal. 12.
57 Burgoyne v. Supervisors (1855), 5 Cal. 9.
58 Cal. Stats. (1850), chap. 86, § 6.
59 Cal. Stats. (1850), chap. 86, § 6.

which said that the county judge "shall perform such other duties as shall be required by law."[60] This act was declared unconstitutional in *Burgoyne v. Supervisors*,[61] according to the article of the Constitution dividing the powers of the state government into separate legislative, executive, and judicial departments: "[N]o person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases hereinafter expressly directed or permitted."[62]

An attempt was made to get around the *Burgoyne* decision in *Phelan v. San Francisco* where other sellers of land to the county tried to claim that the sales were not void, but voidable. Under this theory the sale could be later ratified by the Board of Supervisors, after its creation. This was rejected by the Court, which held that since the original sale was void, any subsequent ratification was equally void.[63] *Burgoyne v. Supervisors* was repeatedly affirmed in later cases, such as *People v. Town of Nevada*,[64] which declared unconstitutional a legislative enactment conferring on the county court the power of incorporating town governments.[65]

At its April 1866 term, the Supreme Court applied the principle of *Burgoyne v. Supervisors* and *People v. Town of Nevada* to a law making the chief justice of the California Supreme Court an ex officio member of the state library's board of trustees.[66] The Court held that the Legislature, under the third article of the Constitution, could not give the chief justice a nonjudicial duty. In commenting about this constitutional article, Justice John Currey said the provision,

> so far as it relates to the judicial department of the State, is, in our judgment, eminently wise. One of its objects seems to have been to confine Judges to the performance of judicial duties; and another to secure them from entangling alliances with matters concerning which they may be called upon to sit in judgment; and another still

60 Cal. Const. (1849), art. VI, § 8.
61 Burgoyne v. Supervisors (1855), 5 Cal. 9.
62 Cal. Const. (1849), art. III.
63 Phelan v. San Francisco (1856), 6 Cal. 531; Phelan v. San Francisco (1862), 20 Cal. 41.
64 People v. Town of Nevada (1856), 6 Cal. 143.
65 Cal. Stats. (1850), chap. 30, § 1.
66 Cal. Stats. (1861), chap. 57, § 1.

> to save them from the temptation to use their vantage ground of position and influence to gain for themselves positions and places from which judicial propriety should of itself induce them to refrain.[67]

The question of a judicial officer performing non-judicial acts came up again in *People v. Provines*, but with far different results.[68] The statute in this case, passed April 19, 1856, made the judge of San Francisco's police court a police commissioner.[69] Speaking for the majority of the Court, Justice Silas W. Sanderson, the chief justice whose place on the library board of trustees was challenged above, reviewed many of the cases in point from Burgoyne v. Supervisors through his own case, People v. Sanderson, and he ended by overruling any that were inconsistent with the views he now propounded. Sanderson now said that

> the Third Article of the Constitution means that the powers of the *State* Government, not the local governments thereafter to be created by the Legislature, shall be divided into three departments, and that the members of one department shall have no part or lot in the management of the affairs of either of the other departments.[70]

He concluded by saying:

> Our conclusion is that there is nothing in the Third Article of the Constitution which prohibits a judicial officer from exercising functions, not in their nature judicial, if they do not belong to either the Legislative or Executive Departments, as they are defined and limited in the Constitution itself, as interpreted by us.[71]

The *Provines* decision was used for the basis of upholding appointments to the board of supervisors of San Diego made by the county judge in *People v. Bush*.[72] The Supreme Court said that such an appointment was a ministerial, not a judicial act, and "A judicial officer may be required by law to discharge other than judicial duties."[73] Further, since the performance

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67 People v. Sanderson (1866), 30 Cal. 168.
68 People v. Provines (1868), 34 Cal. 520.
69 Cal. Stats. (1856), chap. 125.
70 People v. Provines, 534.
71 Ibid., 540.
72 People v. Bush (1870), 40 Cal. 344.
73 Ibid., 345.

of a nonjudicial act by a judicial officer did not make the act judicial, an important implication was that such an act could not be reviewed by a writ of certiorari, because that writ could only be issued to "an inferior officer or tribunal, exercising judicial functions, and the. proceeding to be brought up for review must be a judicial proceeding."[74]

The third article of the Constitution, dealing with the division of powers, was also used to decide cases in which the Legislature attempted to give itself judicial powers. In 1861 the Legislature passed an act changing the venue of a murder trial then pending in San Francisco's district court.[75] The district judge, defendant in *Smith v. Judge of the Twelfth District*, refused to transfer the case, saying that the statute was unconstitutional. The Supreme Court disagreed, saying first, that the Legislature had both the power and duty to prescribe the rules of procedure for the courts in general acts.

> It is not a virtue but a necessary defect of legislation, that general rules are enacted, which, while they apply to all cases, and generally with justice, yet apply harshly in exceptional instances. And as the Legislature possesses the general power to prescribe these rules, it has the same power, and it may be as much its duty to remedy the particular injurious operation of the law, as to enact the statute from which that effect comes.[76]

But, admitting that the Legislature could pass a special law to change a general law in a particular case, was the act an excess of legislative authority because it infringed on the powers of the judiciary? No. While the Legislature cannot decide cases,

> it can pass laws which furnish the bases of decision, and which laws the Judiciary are bound to obey. The Legislature cannot dictate to the Courts how they shall decide a particular case, but it can dictate the law to the Judges, and the Judges are bound to decide the given case in pursuance of the law thus dictated. It can, not only dictate a law for cases generally, but, in the absence of restrictive provisions, it can as well dictate a particular as a general law.

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74 Ibid.

75 Cal. Stats. (1861), chap. 58.

76 Smith v. Judge of the Twelfth District, 555–56.

> It is said that this act is objectionable, because it directs the Court to make a particular order. . . . But the whole error is in forgetting that the Court has the discretion only by virtue of the law giving it, and that the same law can take away that discretion as to all matters of remedy and leave to the Court a simple ministerial duty.[77]

The reasoning of the Court seems sound, but in at least this case, there was some evidence of the emotions involved in the case. The facts, according to Theodore Hittell, were that Horace Smith, a prominent San Franciscan, had shot and killed a man in the open, and had therefore been indicted and held for trial. Appearances were against Smith, and as there was a good deal of public feeling, he probably would have been convicted. When his application for a change of venue was denied, his friends introduced a bill in the Senate to move the trial to Placer County from San Francisco. The bill passed both houses, was vetoed by Governor Sheridan Downey, and was passed over the veto by the Legislature. With the Supreme Court declaring the act constitutional, the case was transferred to Placer County. "The result, as was expected, was an acquittal of Smith and a disappointment of the public."[78]

On the other hand, an act which placed the power of establishing ferries in counties upon the board of supervisors or on the county judge if there were no board, or if a supervisor had an interest in the ferry, was held to have exceeded its authority because it gave the power to two distinct branches of the government.[79] In his opinion, Chief Justice Murray said the Supreme Court had to decide in which department this power belonged, as it could not exist in both at once, for if it could, there would have been an anomalous situation where the supervisors could act without judicial review, or the court's act would have the consequences of a trial.[80]

The Court, in *Hardenburgh v. Kidd*,[81] declared void the provisions of the revenue acts of 1853 and 1854 which authorized the court of sessions to assess a county tax.[82] The Court did uphold the section of the act creating

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77 Ibid., 559.

78 Theodore H. Hittell, *History of California*, vol. IV (San Francisco: N. J. Stone & Company, 1885–97), 281.

79 Cal. Stats. (1855), chap. 147, §§ 2, 17, 25.

80 Chard v. Harrison (1857), 7 Cal. 113.

81 Hardenburgh v. Kidd (1858), 10 Cal. 402.

82 Cal. Stats. (1853), chap. 167, art. I, § 1; Cal. Stats. (1854), chap. 63, art. I, § 1.

the County of Stanislaus out of Tuolumne County, and which authorized the county judges of both counties to appoint commissioners to settle the amount of county indebtedness Stanislaus County was to assume,[83] since here the duty was to settle and adjust rights between parties, and so it partook of a judicial character.[84]

The Supreme Court also recognized that the Legislature could pass an act authorizing a minor's guardian to sell property belonging to the minor, and noted in passing that the appointment of guardians and the disposition of estates of minors could be regulated directly by the Legislature or be referred to a court of appropriate jurisdiction.[85] In approving a somewhat different type of sale the next year, the Court said that the laws then in force did not empower any court to authorize that particular type of sale.[86] Justice Crockett stated that a wiser policy would have been to refer such cases to the courts under general laws, which several states had done through constitutional provisions. "But in this and many other States, a contrary practice has prevailed, and estates of great value have been acquired and are now held under special statutes of this character."[87] But in *Lincoln v. Alexander*,[88] the Court refused to countenance a statute allowing the mother of the minor children to sell property belonging to the minors, when she was not their legal guardian.[89] Although the Legislature may have been ignorant of the fact there was an appointed guardian, the act was judicial, not legislative, in its character, and could not stand.

Another law declared unconstitutional was a general act ratifying real estate sales ordered by probate courts even if there were a defect of form, omissions, or errors.[90] This law was an attempted exercise of judicial power by the Legislature, and was itself void because it tried to validate judgments which were otherwise void, and sales made under these void judgments.[91]

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83 Cal. Stats. (1854), chap. 81, § 18.
84 Tuolumne v. Stanislaus (1856), 6 Cal. 440.
85 Paty v. Smith (1875), 50 Cal. 153.
86 Brenham v. Davidson (1876), 51 Cal. 352.
87 Ibid., 360.
88 Lincoln v. Alexander (1877), 52 Cal. 482.
89 Cal. Stats. (1857), chap 259.
90 Cal. Stats. (1865–66), chap. 596.
91 Pryor v. Downey (1875), 50 Cal. 388.

On February 17, 1866, an article appeared in the San Francisco *Daily American Flag*, charging in effect, that seven unnamed state senators had received $12,000 to vote against the repeal of the specific contract law, and that $24,000 had been divided among certain lobbyists for making the arrangement.[92] The Senate appointed a committee to investigate the charges, and D. O. McCarthy, editor and proprietor of the newspaper, was summoned to the bar of the Senate, where he admitted that the article was written at his direction and with his approval, although he did not write the article himself. McCarthy refused to say more, was held guilty of contempt, and committed to the Sacramento jail until he would answer the questions posed by the upper house. The jailing of McCarthy was made under an act passed in 1857 authorizing the commitment of anyone refusing to testify.[93] McCarthy applied to the Supreme Court for a writ of habeas corpus, claiming he had been imprisoned illegally.

The case was argued before Chief Justice John Currey and Justices Lorenzo Sawyer and Silas W. Sanderson, with the latter writing the opinion. Although the technical point to be decided was the constitutionality of the 1857 act, the opinion of the Court said much about the Legislature, its powers, and its relationship to the state constitution.

> A legislative assembly, when established, becomes vested with all the powers and privileges which are necessary and incidental to a free and unobstructed exercise of its appropriate functions. These powers and privileges are derived not from the Constitution; on the contrary, they arise from the very creation of a legislative body, and are founded upon the principle of self preservation. The Constitution is not a grant, but a restriction upon the power of the Legislature, and hence an express enumeration of legislative powers and privileges in the Constitution cannot be considered as the exclusion of others not named unless accompanied by negative terms. A legislative assembly has, therefore, all powers and privileges which are necessary to enable it to exercise in all respects, in a free, intelligent and impartial manner, its appropriate functions, except so far as it may be restrained by the express provisions of

92 *American Daily Flag*, February 17, 1866.

93 Cal. Stats. (1857), chap, 95, § 5.

> the Constitution, or by some express law made unto itself, regulating and limiting the same.[94]

The powers and privileges accruing to a legislative assembly by its creation could be ascertained by reference to the common parliamentary law.

> Thus by the common parliamentary law the Senate has the power, among other things, to judge of the qualifications of its own members, to preserve its own honor, dignity, purity and efficiency, by the expulsion of an unworthy or the discharge of an incompetent member; to protect itself and its members from corruption; and as necessary to the intelligent exercise of those powers they may summon and examine witnesses and compel them to testify by process of contempt, when without good cause they refuse to do so.[95]

In the case under discussion the charge made by the article was a charge affecting the honor, etc., of the Senate, and that body had the power to investigate the charge in order to expel any guilty members, and with that aim in view, to summon McCarthy to testify, and to commit him for contempt when he refused to testify without cause. Thus, the 1857 act was constitutional.

ELECTIONS AND OFFICES

The second article of the 1849 Constitution granted the right of suffrage, with certain enumerated limitations,[96] but other sections dealing with elections and offices were scattered throughout the articles.[97] On numerous occasions the Supreme Court decided cases involving the constitutionality of statutes, or their interpretation in light of the various constitutional provisions. Among the cases decided were those dealing with the eligibility and right to vote, eligibility to hold office, and what constituted a term of office.

The first case of this nature was *People v. Fitch*, which presented the following facts: James Winchester, the legally appointed state printer resigned

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94 Ex parte D. O. McCarthy (1866), 29 Cal. 403.

95 Ibid., 405.

96 Cal. Const. (1849), art. II.

97 Cal. Const. (1849), art. IV, §§ 4, 5, 6, 8, 13, 20, 21, 22; art. V, §§ 2, 3, 4, 8, 12, 16, 18; art. VI, §§ 3, 5, 7, 8, 16; art. IX, § 1; Art XI, §§ 5, 6, 7, 17, 18, 20.

March 28, 1851; on the 31st, Governor John McDougal appointed James B. Devoe while the Legislature was in session, but he resigned April 30, 1851; May 2, McDougal appointed G. K. Fitch; May 1, the Legislature appointed Eugene Casserly, having the day before passed a bill to that effect, but the bill was not signed by the governor. The Supreme Court held that when Winchester resigned, the power of filling the vacancy fell to the Legislature, and the appointments of both Devoe and Fitch were void.[98] The reasoning of the Court was that since the Legislature created the office and retained the power of electing and controlling the same, the governor could only appoint when the Legislature was not in session, and such appointment could only last until the end of the next session, by which time the Legislature would have acted. If the office in question were an office elected by the people, an appointment by the governor would last until the next election. The Court cited another case decided at the same term, but not reported until it was included in the index of volume 3 of the *Supreme Court Reports*. That case, *People v. Mott*,[99] held that when the governor appointed a judge to fill a district judgeship which the Legislature had created but failed to fill, such appointment was not for the remainder of the term, but only until the next election, as the position was one which was regularly filled by a general election.[100]

Another 1851 case not reported until 1853 was *People v. Brenham*,[101] which interpreted the election provisions of the act that reincorporated the City of San Francisco.[102] Under this law the first election of city officers was to be held yearly on the first Monday of September. Charles D. Brenham was elected mayor at the April 1851 election, and at the September 1851 election Stephen R. Harris was elected; Brenham refused to give up the office. Chief Justice Hastings said the term of one year was not absolute; it could be limited by a future election, here, the September election. This result, which would make Harris the mayor, was what the Legislature intended. Justice Murray concurred using different reasoning, part of which was to the effect that if there was doubt about a construction, the intention of the law had to

98 People v. Fitch (1851), 1 Cal. 519.
99 People v. Mott (1851), 3 Cal. 502.
100 Cal. Stats. (1851), chap. 84.
101 People v. Brenham (1851), 3 Cal. 477.
102 Cal. Stats. (1851), chap. 1, §§ 18, 19.

be toward popular right, that is, more frequent elections. Justice Lyons dissented, saying Brenham should have been allowed to serve as mayor until the September 1852 election, so as to be able to finish at least a year term, and no harm would have occurred if he actually served more than one year.

The Court adhered more closely to Lyons' dissent at its January 1856 term in *People v. Church*, where the county clerk of Alameda County was allowed to serve several months more than his two-year term.[103] He had been elected at an April 1853 special election, and held office until after the general election of September 1855. The act organizing Alameda County only said the clerk should serve two years until a successor was elected and qualified, and no provision was made for a second election.[104] The intention of the Legislature was that all future elections should be governed by the general election law, and it was also the intention to extend the term of the office past two years.

In 1855 the City of San Francisco amended its charter so as to hold municipal elections in May, the officers elected to enter into office in July.[105] The clerk of the San Francisco Superior Court, a state office, was elected at these municipal elections, and the Supreme Court decided that he would not enter into office until after the September election, so that the incumbent would be able to serve his statutory two-year term.[106]

Whether a resignation became effective when it was accepted by the governor or at the time set by the person resigning was raised in *People v. Porter*.[107] The Court held, "The tenure of the office does not depend upon the will of the Executive but of the incumbent."[108] In *People v. Reed*, the Court said that once the term in office expired, the office was technically vacant, although the incumbent could fulfill the duties until his successor started to perform them.[109] This would prevent a hiatus between the two terms. In this case the Legislature, which was the electing power, did not choose a successor, and the governor could then appoint someone. The governor could

103 People v. Church (1856), 6 Cal. 76.
104 Cal. Stats. (1853), chap. 41, § 9.
105 Cal. Stats. (1855), chap. 197, § 4.
106 People v. Haskell (1855), 5 Cal. 357.
107 People v. Porter (1856), 6 Cal. 26.
108 Ibid., 28.
109 People v. Reed (1856), 6 Cal. 288.

not, however, remove someone from office before the term ended if the office was one whose term was fixed by law even if the office were one which was appointive by the governor himself.[110] In the case of an office which could be filled by the governor *with the advice of the Senate*, in the absence of the Legislature, an appointment by the governor to a vacancy was for the whole term, although subject to later rejection by the state Senate.[111]

In *Conger v. Gilmer*, the Court had to decide which of two men was entitled to succeed the deceased James Coggins as justice of the peace of Sacramento. April 4, 1866, the board of supervisors appointed the plaintiff, but the next day the board reconsidered its action, withheld his certificate, and named the defendant, who received a certificate of appointment.[112] The point was whether the board could reconsider its action and change its mind. The Court said the board could so act, and was able to prevent the plaintiff from assuming the office by withholding the certificate of appointment, since the appointment was not complete without it. An elected official, however, could assume his office without a certificate because

> [w]hen a person is elected to an office his right is established by the result of the election, and does not depend upon his getting a commission, for in such a case the choice comes from the people, and when they have voted the last act required of them has been performed. In such a case the issuing of the commission is merely a ministerial act, to be performed by the officers, and not, as in the case of a taking by appointment, a part of the act to be done.[113]

The board of supervisors had voted in making the appointment and could not change an appointment by government functionaries into an election. That was clear. If the issuing of the certificate of election was a mere ministerial act, then such evidence could be no more than prima facie evidence of someone's right to the office in question, for "the real right or title to the office comes from the will of the voters, as expressed at the election."[114] In much the same vein the board of supervisors of Sacramento

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110 People v. Jewett (1856), 6 Cal. 291.
111 People v. Mizner (1857), 7 Cal. 519.
112 Conger v. Gilmer (1867), 32 Cal. 75.
113 Ibid., 80.
114 People v. Jones (1862), 20 Cal. 53.

erred in not allowing an elected official to withdraw a resignation made after he was elected, but before he was sworn in and had posted his bond of office. Until the latter two acts were performed, he was not entitled to the office, and he had no office from which to resign.[115]

The "will of the voters" presented several problems to the Court, starting with who was eligible to vote. Suffrage was granted to white male citizens of the United States and white male citizens of Mexico who decided to become United States citizens under provisions of the treaty ending the war between the two countries. Each white male had to be at least twenty-one years of age and a resident of the state six months prior to the election, and thirty days in the county or district in which "he claims his vote."[116] The term "month" as used in the Constitution referred to a calendar month and not a lunar month,[117] and an attempt by a woman, Ellen R. Van Valdenburg, to vote, was struck down in 1872, even though she claimed that she was entitled to do so under provisions of the Fourteenth Amendment to the United States Constitution.[118]

One of the provisions of the article granting suffrage in the state said, "For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States."[119] The coming of the Civil War period gave the Supreme Court the opportunity to interpret this provision with a number of soldiers stationed in California. Of course, soldiers who were also residents could vote.

> The *mere fact* that the men voting were soldiers of the United States army, did not disqualify them from voting. But they were not entitled to vote unless citizens of this State and of the county for the required period before the election; and a mere residence, or sojourn in the county in this capacity, does not make them citizens, or prove them to be such. The rule, as fixed by the Constitution is, that the fact of such sojourn or residence as soldiers, neither

115 Miller v. Board of Supervisors of Sacramento County (1864), 25 Cal. 93.
116 Cal. Const. (1849), art. II, § 1.
117 Sprague v. Norway (1866), 31 Cal. 173.
118 Van Valkenburg v. Brown (1872), 43 Cal. 43.
119 Cal. Const. (1849), art. II, § 4.

> creates nor destroys citizenship — leaving the political *status* of the soldier where it was before.[120]

A member of the military could change his legal residence, but the change could not be due to his service.[121]

In 1863 the Legislature enacted a statute providing that California voters in military service outside their counties could vote, and have their votes returned to the secretary of state to be counted in the appropriate counties.[122] In *Bourland v. Hildreth*, the votes cast by these soldiers were not allowed, the Court saying that the phrase "in which he claims his vote" in the second section of the second article of the state constitution meant that the votes had to have been physically cast in the district of residence. In dissent Chief Justice Sanderson doubted that the Constitution did set the site for voting, but in any event there was enough doubt as to this point so that there was not the clear repugnancy between the statute and the Constitution needed to declare the act unconstitutional.[123]

Undaunted by this decision, the Legislature passed the same act again in 1864.[124] In the words of Bancroft, "The legislature asserted its superiority to the courts by renewing the act in 1864, and volunteer votes were not again questioned."[125] Theodore Hittell stated things differently, saying, "several new acts were passed for the 'soldier's vote' during the continuance of the war, which would probably have been declared valid. As, however, the war closed in 1865, before an election under them was to be held, they became inoperative."[126]

Evidently neither historian was acquainted with the 1866 case of *Day v. Jones*, which, in reviewing the September 1865 election in Butte County, voided soldiers' votes in circumstances much the same as in *Bourland v. Hildreth* and did so on the authority of that case.[127] The only case to reach the Supreme Court dealing with a soldier trying to gain the residence

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120 Orman v. Riley (1860), 15 Cal. 49.

121 People v. Holden (1865), 28 Cal. 123.

122 Cal. Stats. (1863), chap. 355.

123 Bourland v. Hildreth, supra.

124 Cal. Stats. (1863–64), chap. 383.

125 Hubert Howe Bancroft, *History of California*, vol. VII (San Francisco: The History Company, 1890), 295.

126 Hittell, History of California, vol. IV, 340.

127 Day v. Jones (1866), 31 Cal. 26.

requirement through military service was heard in 1869, and his claim to residence was not allowed.[128]

The elective process created other problems that needed solutions by the Court. In *Minor v. Kidder*, the Court upheld an 1850 statute providing for contesting county elections,[129] saying that in order to contest an election the contestant need only allege that he was a qualified elector of the county.[130] The Court commented:

> It is the wholesome purpose of the statute to invite inquiry into the conduct of popular elections. Its aim is to secure that fair expression of the popular will in the selection of public officers, without which we can scarcely hope to maintain the integrity of the political system under which we live. With this view it has provided the means of contesting the claims of persons asserting themselves to have been chosen to office by the people. It has not authorized every citizen or member of the body politic at large to institute proceedings for that purpose, but has limited the authority in that respect to those who are themselves electors.[131]

In *People v. Holden* the suit to contest the election was not brought by an elector, but by the state's attorney general, in the name of the people. The Court upheld the action, saying that an elector's right to contest an election could not

> impair the right of the people, in their sovereign capacity, to inquire into the authority by which any person assumes to exercise the functions of a public office or franchise, and to remove them therefrom. . . . The two remedies are distinct, the one belonging to the elector in his individual capacity of a power granted, and the other to the people in the right of their sovereignty. Title to office comes from the will of the people as expressed through the ballot-box, and they have a prerogative to enforce their will when it has been so expressed."[132]

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128 Devlin v. Anderson (1869), 38 Cal. 92.
129 Cal. Stats. (1850), chap. 38, § 56.
130 Minor v. Kidder (1872), 43 Cal. 229.
131 Ibid., 236–37.
132 People v. Holden, 129.

For an election to be considered valid the necessary steps prescribed by law had to be taken, and an irregularity in the election procedure could invalidate an election. The Supreme Court discussed irregularities in the election procedure in *Knowles v. Yeates*, the same case that upheld the appeal of a contested election to the Supreme Court. The inspector and judges of the election held the election at a point distant from the one specified by the board of supervisors, and this was enough, in the Courts' view, to invalidate the election. Chief Justice John Currey said the Court was aware that

> [c]ourts have been very indulgent respecting the omissions, inadvertencies and mistakes of officers of elections, lest by exacting of them a technical compliance with the requirements of the law the citizen might be deprived of a sacred right. We are not disposed to be less indulgent . . . but we deem it of the highest importance to the protection of the elective franchise that the law should be complied with in substance, and that those interested with the discharge of the duties pertaining to elections should be required so to perform them as to preserve the ballot box pure. Others besides those who may lose their votes by the malconduct of officers of elections are concerned; and while seeking upon just principles to save to the elector his vote offered and given in good faith, we are not to forget that he himself, as well as all honest people, are vitally interested in the protection of the right of suffrage against the fraudulent machinations and devices of men whose partisan moral code bears upon its title page the infamous maxim, "All is fair in politics."[133]

At its July 1867 term, the Supreme Court voided a Petaluma municipal election because the board of supervisors of the county failed to create election districts as required under the Registry Act.[134] Justice Lorenzo Sawyer rebuked the Sonoma Board of Supervisors by saying that, "To sustain this election in the face of the prohibitory provisions of the statute would be to hold that a Board of Supervisors, by neglect or willful and contumacious refusal to discharge the duties imposed by law on that body, may wholly nullify an Act of the Legislature.[135] Under provisions of the

133 Knowles v. Yeates, 93.

134 Cal. Stats. (1865–66), chap. 265, § 13.

135 People v. Laine (1867), 33 Cal. 60.

same act the Court also voided certain votes in Tuolumne County because the voters' names were not on the poll list of the election precinct.[136] In 1877 the Court voided part of a county election in Tuolumne because the board of supervisors did not publish an ordinance it passed consolidating two county offices,[137] and invalidated a special election to fill the office of state controller after the incumbent died in office because the governor failed to issue a proclamation that the election was to be held.[138]

As the proper forms and procedures had to be followed lest an election be declared void, so, too, those seeking elective office had to meet constitutional and statutory requirements. In *Walther v. Rabolt* the Court held that an alien could not hold an office in the state; this was the rule in the common law and it had not been modified in California.[139]

Another bar to eligibility to hold public office occurred when such election meant the winner would hold two lucrative offices. The constitutional provisions provided that no member of either house of the legislature "shall, during the term for which he shall have been elected, be appointed to any civil office of profit, under this State, which shall have been created, or the emoluments of which shall have been increased, during such term, except such office as may be filled by elections by the people."[140]

The next section made anyone holding a lucrative office under the United States or any other power, except unpaid militia officers or local officers and postmasters earning less than $500 annually, ineligible to hold any civil office of profit under the state.[141] In accordance with these constitutional provisions the Supreme Court held that a postmaster with a salary of $1,400 per annum could not be elected sheriff of Siskiyou County even though he claimed that only $400 was salary, the rest being for expenses.[142] The Court said that he was paid a certain sum and he could dispose of it as he wished. The Court said, too, that the constitutional provisions meant that the defendant was not eligible to run, and not that he could be elected

136 Webster v. Byrnes (1867), 34 Cal. 273.
137 People v. Bailhache (1877), 52 Cal. 310.
138 Kenfield v. Irwin (1877), 52 Cal. 164.
139 Walther v. Rabolt (1866), 30 Cal. 185.
140 Cal. Const. (1849), art. IV, § 20.
141 Ibid., § 21.
142 Searcy v. Grow (1860), 15 Cal. 117.

and then resign his federal post. In *People v. Turner*, the defendant was elected as a district judge while allegedly a United States customs inspector, but the Court said that since the appointment had not yet been approved by the Secretary of the Treasury, he did not hold a lucrative position within the meaning of the provision in the Constitution.[143]

Another method of filling a vacancy in an office was by appointment by the governor; generally, such a situation arose when an incumbent resigned or passed away. But the governor, too, had to follow the proper steps in making appointments, which steps included approval by the Senate if so required by the laws of the state,[144] and once the governor made an appointment, and the commission of office was delivered, the governor could not withdraw the appointment.[145]

The question of what constituted a term in office and consequently when there was a vacancy that could be filled either by appointment or election was also brought before the Court.

Both an election and an appointment were involved in *Brooks v. Melony*, decided at the January 1860 term.[146] After the 1857 general election James W. Mandeville, controller-elect, refused his office, causing the new governor, John B. Weller, to declare the office vacant the following April, and appoint the defendant to fill the vacancy. That September the defendant was elected to the office in an election at which no other state officer was elected. The term of office was normally two years, and he refused to surrender his office to S. H. Brooks after the latter's election at the 1859 general election.

The Court held that Brooks was entitled to the office because the defendant was only to serve until the next general election when a complete set of state officers would be elected under a constitutional provision that state officers were to be elected at the same time and place as the governor.[147] Presumably, if there had not been such a constitutional provision, Melony would have served two full years from his own election, without his term coinciding with those of the other state officers, and without reference to

143 People v. Turner (1862), 20 Cal. 142.
144 People v. Bissell (1874), 49 Cal. 407.
145 Wetherbee v. Cazneau (1862), 20 Cal. 503.
146 Brooks v. Melony. (1860), 15 Cal. 58.
147 Cal. Const. (1849), art. V, § 20.

when Mandeville's term would have ended. Edward Norton, when a district judge, was in a situation similar to Melony's, but without a limiting constitutional provision. He was appointed to fill a vacancy until the next general election, at which time he was elected to the court. The Supreme Court said he had been elected for a full term of six years irrespective of when his predecessor's term would have ended.[148] Being elected to a full term did not necessarily mean serving it because the Legislature could shorten the term under certain circumstances,[149] as it did in 1863 by enacting a statute regularizing the elections and term of all officers of every county.[150] But the Legislature could also extend a term for the incumbent so long as the term did not last more than four years.[151]

Most positions were to be held until a successor qualified, which generally was at the end of the term, but the incumbent was sometimes faced with the situation of not having a successor qualify. In *Jacobs v. Murray*, the successor was not selected until two months after the expiration of the incumbent's term, and the latter claimed the appointment was void. He was wrong; after his term expired, he was a mere *locum tenens*, serving until his successor was selected, even though such selection was late in this case.[152] That an incumbent could hold over past his term even applied to the constitutional provision that never should "the duration of any office not fixed by this Constitution ever exceed four years."[153] The holdover period was not to be considered an extension of his term, but an instance where the public necessities required that the office not be vacant.[154]

INTERPRETING OTHER LAWS

At its first session, the Legislature passed a law requiring the captain of each ship arriving in San Francisco to give the local board of health a list of all the passengers and crew, and the owners or consignees to give a bond

148 Brodie v. Campbell (1860), 17 Cal. 11.
149 People v. Banvard (1865), 27 Cal. 470.
150 Cal. Stats. (1863), chap. 292, § 11.
151 Jacobs v. Murray (1860), 15 Cal. 221.
152 Christy v. B. S. Sacramento County. (1870), 39 Cal. 3
153 Cal. Const. (1849), art. XI, § 7.
154 People v. Stratton (1865), 28 Cal. 382.

for each person in the report.[155] In *Board of Health v. Pacific Mail Steamship Co.*, the defendants were sued to collect on a penalty for not posting the bond. However, the statute listed no penalty for noncompliance. As a result, the Court ruled that it was "a law without a sanction and, consequently, wholly inoperative."[156] This case was the first in a series that together provided a framework within which future legislatures could enact laws and the state could operate.

The Court was also called upon to decide where the Legislature would meet. The Constitution provided that the first session of the Legislature would meet at San Jose, which would become the capital until changed by a two-thirds vote of both houses.[157] In *People v. Bigler*, the Court interpreted this clause to mean that only the first removal (to Vallejo) needed a two-thirds vote; any subsequent move needed a majority vote,[158] thus upholding the 1854 act of the Legislature making Sacramento the capital.[159]

In *People v. Coleman*,[160] the Court was called upon to determine the constitutionality of sections of the Revenue Act of 1853, placing a tax on certain occupations.[161] The defendants, all San Francisco businessmen, claimed that these sections were repugnant to the Constitution of California, one provision of which said, "Taxation shall be equal and uniform throughout the State."[162] The Court held that this section of the Constitution did not apply to all types of taxes, but only to direct taxation on property; it did not require that everyone should be taxed alike.

In 1856 the Court again held for the power of the Legislature in *Boss v. Whitman*, saying, "the power of the Legislature is supreme, except where it is expressly restricted."[163] In this case the Legislature appointed a board of examiners to audit certain accounts, an act formerly performed by the comptroller, but not prescribed by the Constitution. There was no restriction on the Legislature here, since, "[w]here any of the duties or powers of

155 Cal. Stats. (1850), chap. 65, §§ 10, 11, 12.
156 Board of Health v. Pacific Mail Steamship Co. (1850), 1 Cal. 197.
157 Cal. Const. (1849), art. XI, § 1.
158 People v. Bigler (1855), 5 Cal. 23.
159 Cal. Stats. (1854), chap. 9, § 1.
160 People v. Coleman (1854), 4 Cal. 46.
161 Cal. Stats. (1853), chap. 167, arts. II, III, IV, VI.
162 Cal. Const. (1849), art. XI, § 13.
163 Boss v. Whitman (1856), 6 Cal. 365

one of the departments of the State Government are not disposed of, or distributed to particular officers of that department, such powers or duties are left to the disposal of the Legislature."[164]

One express restriction on the Legislature was the constitutional provision that state indebtedness could not exceed $300,000, with certain exceptions.[165] This caused an 1855 law for building a wagon road to the Sierra Nevada Mountains[166] to be declared unconstitutional in *People v. Johnson* as the state's debt already exceeded the constitutional limit.[167] This case was affirmed after a lengthy review in *Nougues v. Douglass*,[168] which voided an act of the Legislature providing for the erection of a state capitol.[169] The Legislature had passed an act in 1856 to erect a state capitol at a cost not to exceed $300,000, and also authorizing that the cost be borne through the sale of state bonds redeemable in thirty years,[170] but the Court declared that the state was already indebted to its constitutional limit. In 1860 the Legislature tried again, but this time provided that the debt be incurred in stages. Although the entire cost was not to exceed $500,000, only $100,000 could be contracted for at that time.[171] This law was declared constitutional because it did not authorize a debt for the entire $500,000. The balance over $100,000 would not become part of the state's debt until contracted for.[172] The reasoning of the Court was similar to that which it had already used in *State v. McCauley*, one of several cases dealing with the operation of the state prison by private individuals.[173] At issue there was an 1856 act to pay for the operation of the prison.[174] Although the total sum involved was $600,000, the act was upheld because no debt on the part of the state was actually incurred until the services were performed.

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164 Ibid., 364.
165 Cal. Const. (1849), art. VIII.
166 Cal. Stats. (1855), chap. 145.
167 People v. Johnson (1856), 6 Cal. 499.
168 Nougues v. Douglass (1857), 7 Cal. 65.
169 Cal. Stats. (1856), chap. 95.
170 Cal. Stats. (1856), chap. 95.
171 Cal. Stats. (1860), chap. 161.
172 Koppikus v. State Capitol Commissioners (1860), 16 Cal. 248.
173 State v. McCauley (1860), 15 Cal. 429.
174 Cal. Stats. (1856), chap. 39.

Another express limitation was found in the first section of the first article of the Constitution, which stated that among the rights of men were those of "acquiring, possessing, and protecting property."[175] This provision controlled laws of the Legislature that tended to impair a contract, and arose in still another case dealing with the state prison, *McCauley v. Brooks*.[176] Under the statute declared constitutional by *State v. McCauley*, above, the state entered into a five-year contract with James M. Estill for the operation of the state prison. In 1856 and 1858 the Legislature passed acts creating a board of examiners to examine demands before payments could be made to Estill or his assignee,[177] and the next year passed another act condemning and appropriating the interest of "certain persons" in the prison grounds and repealing the act under which the contract was made.[178] The Court declared that the 1856 and 1858 acts creating the board of examiners attempted to impair the contract with Estill and were thus invalid. "The imposition of any conditions not provided by the terms of the original contract," the Court declared, "is not within the constitutional power of the Legislature. Any law attempting to make such imposition is invalid, as impairing the oblivation of the contract."[179] The 1859 act did repeal the original statute, but could not affect any contracts made on the basis of the repealed law.

> The contract was a thing consummated — and after its execution did not depend for its further existence upon the continuation of the act which originally gave it life. The contract remained, after the extinction by repeal of its parent act, possessed of the same operative and binding force as previously. The rights of the parties and their respective obligations became fixed by that instrument beyond the reach of legislative power.[180]

Basic rights in respect to property and contracts were also protected by the Supreme Court. In 1856 a law was passed to allow a defendant in

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175 Cal. Const. (1849), art. I, § 1.

176 McCauley v. Brooks (1860), 16 Cal. 11.

177 Cal. Stats. (1856), chap. 85; Cal. Stats. (1858) chap. 257.

178 Cal. Stats. (1859), chap. 330.

179 McCauley v. Brooks, 29–30.

180 Ibid, 33.

an action for ejectment to set up the value of any improvements made by him.[181] The effect of this law was to discourage lawful owners of land from ejecting trespassers for fear of having to pay more for the improvements than the property was worth. One historian (and lawyer) felt the law was a bid for the support of squatters in the state.[182] In *Billings v. Hall*,[183] the Court declared the law unconstitutional as being at variance with the constitutional provision guaranteeing the right of "acquiring, possessing, and protecting property."[184] In reaching this decision, Chief Justice Murray said that the law had the effect of divesting vested rights, and if such a law were upheld, then a law divesting the right entirely might be maintained. This was a danger "upon the shallow pretext of policy, and under the false assumption of legislative omnipotence."[185]

Contract rights were upheld in *Robinson v. Magee*,[186] where an act designed to arrange the settlement of outstanding county warrants as a result of the organization of Amador County from Calaveras County,[187] was declared unconstitutional because it refused to honor warrants not registered with the county auditor before a certain date. This would have been an impairment of the obligation of contracts which was prohibited by the protection of property clause, above, although the state constitution did not make as clear a statement on this subject as did the federal constitution.[188]

Before a law could ever reach the Court for review, it had to go into effect; this required the signature of the governor. The Court, in 1851, had to determine at which point an act became law; the law in question had been passed to repeal an election for judge of San Francisco County on the day the election was held, and to allow the governor to appoint the judge.[189]

The governor signed the bill that day and appointed Alexander Campbell. Both he and the elected judge, the defendant here, claimed the office,

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181 Cal. Stats. (1856), chap. 47, § 4.

182 Theodore H. Hittell, *History of California*, vol. III (4 vols., N. J. Stone & Company, 1885–97), 685.

183 Billings v. Hall (1857), 7 Cal. 1.

184 Cal. Const. (1849), art. I, § 1.

185 Billings v. Hall, 16.

186 Robinson v. Magee (1858), 9 Cal. 81.

187 Cal. Stats. (1855), chap. 138, § 2.

188 U.S. Const., art. I, § 10.

189 This law is not found in the volume of statutes, Cal. Stats. (1850).

and the decision fell to the Supreme Court in the case of *People v. Clark*.[190] The Court held that the bill became law the very moment it was signed by the governor. In this case, if the signing took place before the election, then the election was void. If after, then the repeal by the Legislature could not deprive the defendant of his office. Until the time question could be solved, the presumption was to be in favor of the right of the people to elect.

In most instances the validity of a law was determined by its provisions and whether they were in conflict with the Constitution, but a law could be deemed invalid because its passage could have been irregular in some way, such as some problem with the governor's approval, which was the point in question in *Harpending v. Haight*.[191] Governor Henry H. Haight returned a bill with a veto message via his secretary to the Senate, but the secretary arrived one-half hour after adjournment, and this was the last day that the bill could be vetoed. The next day Haight attempted to return the bill, saying he had been prevented from doing so only by the Senate's adjournment. The Court said that there had not been a legal return to the Senate, the house in which the bill originated, because by not returning the bill within the constitutional period the Senate was unable to reconsider the bill or examine the objections of the governor. There was some testimony to the effect that the Senate adjourned early so as to prevent the return, but the motives of the Legislature were not in question.

The bill itself proposed to extend Montgomery Street and was backed most strongly by the speculator Asbury Harpending. Harpending later wrote that his attorney, Creed Haymond, suggested that if the bill was not returned in time it would become law, and Harpending arranged for the Senate to adjourn early and prepared several people to intercept Governor Haight's secretary on the way to the Senate chamber and engage him in conversation so as to detain him.[192]

In another case involving an attempted veto of a statute, Governor Haight's veto was upheld on the point that the day a bill is presented to

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190 People v. Clark (1851), 1 Cal. 406.

191 Harpending v. Haight (1870), 39 Cal. 189.

192 Asbury Harpending, *The Great Diamond Hoax . . .* , edited by James H. Wilkins (San Francisco: The James H. Barry Co., 1913), 154–56.

the governor was not to be counted as one of the ten days allotted to the governor to sign or reject a bill.[193]

Taken on balance, the Supreme Court tended to interpret the Constitution rather strictly, particularly when the powers of the various courts were under consideration. By so doing, the Court was attempting to assert the independence of the judiciary, and perhaps thereby remove some of the political stigma attached to that branch. By rendering a strict judicial interpretation to its own constitutional position, the Court was also setting a precedent for the strict interpretation of the functions of the executive and legislative branches as well.

This latter was particularly important because of the broad powers given to the Legislature by the framers of the Constitution. The Court, although acknowledging these broad powers, by holding its own branch to constitutional limits, it could insist that legislative powers were not unlimited, even if the limitations were only implied. In *Love v. Baehr*, the Court, in discussing the duties of state officers, said that while the Constitution was both silent in respect to the duties and contained no express limitation on the Legislature in imposing duties, "yet a limitation on this power is necessarily implied, from the nature of these offices."[194]

The relationship of the legislative and judicial branches was discussed at length by Chief Justice Stephen J. Field in *McCauley v. Brooks*. He said that the branches of government are independent of each other only in a restricted sense.

> There is no such thing as absolute independence. Where discretion is vested in terms, or necessarily implied from the nature of the duties to be performed, they are independent of each other, but in no other case. Where discretion exists, the power of each is absolute, but there is no discretion where rights have vested under the Constitution, or by existing laws. The Legislature can pass such laws as it may judge expedient, subject, only to the prohibitions of the Constitution. If it oversteps those limits . . . the judiciary will set aside its legislation and protect the rights it has assailed. Within

193 Iron Mountain Co., v. Haight (1870), 39 Cal. 540.

194 Love v. Baehr (1864), 47 Cal. 364.

> certain limits it is independent; when it passes over those limits, its power for good or evil is gone.
>
> The duty of the judiciary is to pronounce upon the validity of the laws passed by the Legislature, to construe their language and enforce the rights acquired hereunder. Its judgment in those matters can only be controlled by its intelligence and conscience. From the nature of its duties, its action must be free from coercion.[195]

But the judiciary was not itself free of the Legislature's control since the latter branch controlled such things as where the Legislature should meet and the procedure to be used in criminal and civil cases. The Constitution, then, did not make any department of the government above the others or independent of them. It simply provided that the departments be separate, and as the prime interpreter of the Constitution, the Supreme Court was the determiner of the relative position of each branch.

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[195] McCauley v. Brooks, 39.

Chapter 7

STATE AND LOCAL AUTHORITY

The constitutional article entitled "Miscellaneous Provisions" included the provision, "The Legislature shall establish a system of county and town governments, which shall be as nearly uniform as practicable, throughout the State."[1] The power thus granted the Legislature over the various levels of local government coupled with the power the Legislature also had over the affairs of the state saw a veritable multitude of statutory enactments dealing with the authority and powers apportioned to each level of government.

Many enactments came before the courts of the state, and the Supreme Court, in deciding a goodly number of them, made determinations about the powers and limitations of governments in general, of each level of government alone, and the relationship between the state and the various local governments. These decisions provided guidelines by which the state and each of the subdivisions were able to exercise their governmental functions.

THE STATE

One attribute of power of all governments in the United States is the right to take property for its own use when necessary. This right of eminent

[1] Cal. Const. (1849), art. XI, § 4.

domain, of course, is not unconditional, as seen in that provision of the United States Constitution that states, "nor shall private property be taken for public use, without just compensation."[2] The wording of the California Constitution duplicated that of the federal,[3] and the Supreme Court uniformly held that statutes providing for the condemnation of land had to be strictly followed. This power "must be exercised precisely as directed, and there can be no departure from the mode prescribed without vitiating the entire proceedings."[4] The fact that the United States was the party to receive the land made no difference in this regard, either.[5]

A principal requirement was that compensation must be paid *before* property could be taken for public use, as determined by the Court in *Sacramento Valley Railroad v. Moffatt*.[6] This view was amplified in *McCauley v. Weller*,[7] where a seizure of San Quentin Prison by the governor from the prison operator was voided even though a law was later passed allowing compensation.[8] So accepted was the practice of allowing private concerns to be condemned for public uses that one district judge allowed the San Mateo Waterworks to take possession of and use the land while the proceedings were still pending. Nevertheless, the Court ruled that this went too far because it amounted to the taking of private property without just compensation.[9]

While the statutes had to be adhered to, the Court allowed a broad interpretation to the term "public use," upholding statutes that provided for the condemnation of land for purposes of private roads going from a main road to the residence or farm of an individual,[10] and for water companies to use in bringing water to populous areas.[11] Such condemnations were considered to be for public uses, but in *Consolidated Channel Co. v.*

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2 U.S. Const., Amend. V.

3 Cal. Const. (1849), art. I, § 8.

4 Stanford v. Worn (1865), 27 Cal. 171.

5 Gilmer v. Lime Point (1861), 19 Cal. 47.

6 Sacramento Valley Railroad v. Moffatt (1857), 7 Cal. 577.

7 McCauley v. Weller (1859), 12 Cal. 500.

8 Cal. Stats. (1858), chap. 43, § 1.

9 San Mateo Waterworks v. Sharpstein (1875), 50 Cal. 284.

10 Sherman v. Buick (1867), 32 Cal. 241.

11 S. F. & A. W. Co. v. A. W. Co. (1869), 36 Cal. 639.

Central Pacific R. R.,[12] the Court refused to allow the condemnation of a portion of the defendant's land for the construction of a flume to carry off the plaintiff's tailings, holding that the flume was only for the plaintiff's benefit, and was not a public use within the meaning of the Constitution, even though the Code of Civil Procedure listed flumes as public uses.[13] The Court used similar reasoning in *People v. Pittsburgh R. R. Co.*, where the defendant, claiming that it would carry both freight and passengers, was given the right to condemn private land for its railroad. Since its construction, though, the railroad had been used exclusively to carry coal from the Pittsburgh Coal Company's mines to the Sacramento River, and the state brought suit to annul the defendant's franchise.[14] The Court said that the company's claim to carry both freight and passengers was

> a mere false pretense; that the use for which these lands were taken was, in fact, a mere private use, and one to which the eminent domain is of course inapplicable. The proceedings in condemnation amounted to an imposition upon the Court before which they were had.
>
> It is certainly competent for the State, upon discovering the misuse of its authority, whereby the private property of one of its citizens has been wrongfully taken for the private use of another, to interpose by its Attorney-General to correct the abuse.[15]

Not only were statutes dealing with eminent domain to be strictly construed, but any statute divesting a person of his property had to be so treated, even a statute dealing with animals found to be estrays.[16] Said the Court: "a party claiming to have acquired a right and title to property by virtue of its provisions as against the original owner, must affirmatively allege and prove that the mode prescribed by the statute for the acquisition of such title has, in every particular, been strictly followed."[17]

The state's taxing power was in part limited by the revenue act which said that mining claims could not be taxed,[18] although the Court held in

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12 Consolidated Channel Co. v. Central Pacific R. R. (1876), 51 Cal. 269.
13 Cal. Code Civ. Proc. (1872), § 1238, subdiv. 4, 5.
14 People v. Pittsburgh R. R. Co. (1879), 53 Cal. 694.
15 Ibid., 697.
16 Cal. Stats. (1863), chap. 425.
17 Trumpler v. Bemerly (1870), 39 Cal. 490–91.
18 Cal. Stats. (1857), chap. 261, § 2.

State of California v. Moore that any improvements made on a claim could be taxed.[19] At the same time, the Court said that when a claim was sold, the purchase price could not be taxed, because such taxation would really be an indirect tax on the claim itself.

Since California was blessed with numerous harbors and many miles of inland waterways, the Legislature attempted to regulate the use of the harbors and waters of the state. At its first session the Legislature passed an act providing for attachments against ships navigating the waters of the state.[20]

An attachment was attempted against the *Sea Witch*, a ship in San Francisco harbor normally engaged in trade between China and New York. The Court in *Souter v. Sea Witch* said that since the only time this ship navigated in state waters was in entering San Francisco harbor, she was not within the class of ships encompassed by the act.[21] But a ship used to carry freight between San Francisco and Sacramento, even though it was built in New York, and its owners resided in New York, was liable to taxation by the State of California. If not liable, the effect would be that nonresident foreigners shall receive the protection of the state in the enjoyment of property, and in the profitable pursuits of commerce and traffic, free from any of the burdens of government; and that these shall be borne exclusively by the resident citizens of the state, who enjoy no greater benefits, and receive no higher protection.[22] Such a ship was also considered to be "plying coastwise," and thus liable to harbor dues in San Francisco.[23]

Control over the waters extended to the erection of improvements in the water as well as to ships. In *Gunter v. Geary*, the plaintiffs had built a wharf which extended into the water even at low tide. The wharf could be considered a public nuisance if it obstructed anyone's use of the harbor, since "all that part of a bay or river below low water at low tide, is a public highway, common to all citizens."[24] The city of San Francisco had the power to abate such a nuisance under authority of the Legislature because "[t]he absolute right of a state to control, regulate, and improve the navigable

19 State of California v. Moore (1859), 12 Cal. 56.

20 Cal. Stats. (1850), chap. 75, § 5.

21 Souter v. The Sea Witch (1850), 1 Cal. 162.

22 Minturn v. Hays (1852), 2 Cal. 592.

23 San Francisco v. Steam Navigation Company (1858), 10 Cal. 504.

24 Gunter v. Geary (1851), 1 Cal. 468.

waters within its jurisdiction, as an attribute of sovereignty, cannot be in any matter disputed."[25]

In 1862 the Legislature passed an act to provide for the straightening of the channel of the American River wherever necessary to protect the city of Sacramento from being flooded.[26] As a result of this act, the American River was made to run into the Sacramento River at a point farther north, leaving the land belonging to the plaintiffs in *Green v. Swift* liable to be damaged when spring torrents were heavy.[27] They sued for damages done to their improvements, but were unable to collect from either the contractors or the contracting agency. The Court said first, "The work which was directed by the statute was, in itself, distinctively a work of public character and within the general police power of the State to perform."[28] The contractors used proper care and skill in their work, and could not be held liable for an error of judgment, and the Court also denied a claim by the plaintiffs that the damage could also be considered a taking of that property for public use.

The general "police power" referred to by the Court in *Green v. Swift* has been defined as "The power vested in the legislature to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same."[29] From this passage it seems clear that the key to the acceptability of various acts dealing with the state's police powers was the constitutionality of such acts in light of both the state and federal constitutions. The federal constitution was invoked against the state in *State v. S. S. Constitution*,[30] but the Sunday blue law was held to be a legitimate function of the state's police powers in *Ex parte Andrews*.[31]

The 1868 Legislature passed a law making an eight-hour work day the maximum on any public project whether on the state or local level,[32] and

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25 Ibid., 469.

26 Cal. Stats. (1862), chap. 158.

27 Green v. Swift (1874), 47 Cal. 536.

28 Ibid., 539.

29 Henry C. Black, *Black's Law Dictionary*, edited by the Publisher's Editorial Staff (4th ed.; St. Paul: West Publishing Company, 1951), 1317.

30 Supra, 95–96.

31 Supra, 85–86.

32 Cal. Stats. (1867–68), chap. 70.

the Court did not question its constitutionality in *Drew v. Smith*.[33] In *Ex parte Shrader*, the petitioner questioned an order of the San Francisco Board of Supervisors prohibiting the keeping of a slaughter house within certain limits, in violation of which he was convicted.[34] Oscar L. Shafter, speaking for the Court, said the real question was the constitutional authority of the Legislature to pass the act under which the Board of Supervisors acted. That act, passed April 25, 1863, authorized the San Francisco officials to make all necessary health regulations,[35] and was upheld as being part of the Legislature's power to repress what is harmful to the public good, with *Ex parte Andrews* cited as authority.

Another important aspect of this case was that it recognized the power of the state to authorize local governments to pass acts that it could pass and enforce itself, including "police power" ordinances, such as a Sacramento ordinance "to prohibit noisy amusements and to prevent immorality" which was challenged in *Ex parte Smith and Keating*."[36] The petitioners, who were convicted under this ordinance, claimed it violated their rights under both the state and federal constitutions. The Court denied this allegation, saying that laws intended to regulate the enjoyment of natural rights of persons did not impair, but fostered and promoted those rights; to provide such laws was the essential purpose and object of government. The Court concluded by giving a succinct summary of the powers of the state: "In ascertaining what is right and providing for its protection, and what is wrong and providing for its prevention, lies the whole duty of the legislature."[37]

Continuing in a like manner, the Court upheld San Francisco ordinances prohibiting the feeding of "still slops" to milk cows,[38] and barring the utterance of profane language.[39] Both ordinances were enacted under authority of the act passed upon in *Ex parte Shrader*, and in both instances the Court held that if the local legislative authority felt that the prohibited

33 Drew v. Smith (1869), 38 Cal. 325.
34 Ex parte Shrader (1867), 33 Cal. 279.
35 Cal. Stats. (1863), chap. 352, 21.
36 Ex parte Smith and Keating (1869), 38 Cal. 702.
37 Ibid., 712.
38 Johnson v. Simonton (1872), 43 Cal. 242.
39 Ex Barte Delaney (1872), 43 Cal. 478.

practices were harmful to the health and morals of the citizenry, then such decision would be accepted without question by the Court.

A more complicated situation arose in *Ex parte Wall*,[40] when the Court dealt with a local liquor option law passed in 1874 to permit voters of townships to vote on the granting of licenses for retail liquor sales.[41] The Court held the law to be unconstitutional because "[t]he power to make laws conferred by the Constitution on the Legislature cannot be delegated by the Legislature to the people."[42] This statute differed from the act of 1863 discussed above because in that instance the Legislature was giving or delegating the authority to another legislative body, not the people. "Our government is a representative republic, not a simple democracy."[43] The Court also said the law was void because it did not specifically name the condition or subsequent event which would allow the law to take effect. While a statute could be conditional, the condition had to be stated.

> The Legislature cannot transfer to others the responsibility of deciding what legislation is expedient and proper, with reference either to present conditions or future contingencies. To say that the legislators may deem a law to be expedient, is to suggest an abandonment of the legislative function by those to whose wisdom and patriotism the Constitution has intrusted the prerogative of determining whether a law is or is not expedient.[44]

The statute authorized the suspension of a general law, which differed from a statute treating a purely local concern that needed local approval. In such an instance, said the Court in *People v. Nally*, "it is competent for the Legislature to enact that a statute affecting only a particular locality shall take effect on condition that it is approved by a vote of a majority of the people whom the Legislature shall decide are those who are interested in the question."[45]

As was true with governmental bodies generally, the state could enter into contracts, and could not escape a contract entered into by having the

40 Ex parte Wall (1874), 48 Cal. 279.
41 Cal. Stats. (1873–74), chap. 300.
42 Ex parte Wall, 313.
43 Ibid., 314.
44 Ibid., 315.
45 People v. Nally (1875), 49 Cal. 480.

Legislature cancel or change the terms of the contract, as was tried in the case of *McCauley v. Brook*s.[46] Of course a binding contract could be entered into by a state agency as well as by the state itself, but for such a contract to be binding, the state agency in question had to follow all necessary statutory provisions.[47]

One of the attributes of power given to the state by the Constitution was the control of business corporations. Most often a corporation was formed by receiving a franchise from the state. As the Supreme Court stated in *People v. Selfridge*, "The right to be a corporation is in itself a franchise; and to acquire a franchise under a general law, the prescribed statutory conditions must be complied with."[48] Failure to comply with the required conditions would result in a forfeiture, and the state would not have to sue for a court order declaring the forfeiture. The franchise reverted to the state, which could grant it again at its pleasure.[49]

Once a corporation was formed by a general law, as required by the Constitution,[50] the Court, in *California State Telegraph Co. v. Alta Telegraph Co.*, said that such corporation could later be given an exclusive franchise. [51] There was no constitutional language prohibiting the Legislature "from directly granting to a corporation, already in existence and created under the general laws, special privileges in the nature of a franchise, by a special act, or prohibiting a corporation from purchasing or holding such franchises, which may have been granted to others."[52]

This decision was overturned some eleven years later in *San Francisco v. S. V. W. W.*, when the Court held that a law affecting the rights of one corporation alone was to be considered a special law, and thus contrary to the state constitution.[53] As to the effects of the earlier decision, the Court said that even if property rights had grown up under the decision in that case, it was better that some inconvenience should have been submitted to, rather than such a decision should stand and a valuable provision of the Constitution be obliterated.

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46 See, in chapter 6 *supra*, "Interpreting Other Laws."

47 Cowell v. Martin (1872), 43 Cal. 605.

48 People v. Selfridge (1877), 52 Cal. 333.

49 O. R. R. Co. v. O. B. & F. V. R. R. Co. (1873), 45 Cal. 365

50 Cal. Const. (1849), art. IV, § 31.

51 California State Telegraph Co. v. Alta Telegraph Co. (1863), 22 Cal. 398.

52 Ibid., 425.

53 San Francisco v. Spring Valley Water Works (1874), 48 Cal. 493.

The state also granted franchises for toll roads, bridges, and the like, but such "public grants are to be strictly construed, that nothing passes to the grantee by implication, and that the grant of a franchise is not exclusive, unless it is expressly made such by the grant itself."[54]

In *Wood v. Truckee Turnpike Co.*, the Court would not allow the defendant's franchise to collect tolls on a road through public lands pass to the plaintiffs through an execution by the sheriff. The defendant had neither a possessory interest nor a title in the land through which the road passed. Further, being a corporation, the defendant lacked the capacity to hold lands by title unless needed by the purpose of the corporation. That the road ran over public lands made no difference since a corporation was not considered a natural person; settlers, as natural persons, had the unlimited capacity to acquire estates in land and hold them indefinitely thereafter.[55]

The general trend of the Supreme Court's decisions was to allow the state government a large amount of latitude in its activities, feeling that such had been the intent of the framers of the Constitution. The result of this trend was to consider a state law constitutional unless it was clearly (in the eyes of the justices) repugnant to the Constitution. Thus, what generally would be considered "borderline" cases were allowed to stand, and this probably went a long way toward keeping the state government strong and the cities and counties relatively weak.

THE COUNTIES

When California was first organized as a state, it was not yet divided into counties, but a provision of the Constitution directed the Legislature to do so. A uniform system of county and municipal governments was to be established, and the Legislature was also to provide for the election of boards of supervisors and prescribe their duties as well.[56] By a series of acts the Legislature implemented the constitutional directive and continued to create new counties as time went on.[57]

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54 Bartram v. Central Turnpike Co. and Bartram v. Ogilby (1864), 25 Cal. 283.

55 Wood v. Truckee Turnpike Co. (1864), 24 Cal. 474.

56 Cal. Const. (1849), art. XI, §§ 4, 5.

57 Cal. Stats. (1850), chap. 15.

The right of a county to build a bridge across a county line was upheld as a right of sovereignty in *Gilman v. County of Contra Costa*.[58] In 1852 Contra Costa County entered into a contract with one T. C. Gilman for the construction of a bridge across San Antonio Creek. The lower court held that the bridge, which crossed San Antonio Creek to the city of Oakland, was in Oakland, and that the city had jurisdiction over the bridge. The Supreme Court reversed the lower court, with Justice Heydenfeldt saying, "In such a case, I think the rule for public convenience would admit the power of either jurisdiction to have a bridge constructed, to enable the citizens of its own territory to pass beyond it."[59]

However, Gilman never actually received recompense because there was no money in the county treasury. He was given a warrant, but had no recourse at that time because the law of private contracts was not applicable where the state or county government was a party, in regard to either the mode or measure of enforcement. In 1854, however, the Legislature gave counties the right to sue and be sued in general terms,[60] and also enacted legislation the following year to fund the debts of the county.[61] Gilman, choosing not to avail himself of the funding act, sued, and was awarded a judgment, the Court holding that the 1854 act applied to claims that arose prior to its passage as well as afterward.[62] Gilman was unable to execute his judgment, even trying to execute and levy funds in the hands of the county treasurer and public buildings belonging to the county.[63] Having failed here, Gilman sued out an alias execution against property owned by a county resident, and an attempt was made to prevent the execution in *Emeric v. Gilman*.[64] The Court held against Gilman, with Justice Field saying:

> Whoever becomes a creditor of a county, must look to its revenues alone for payment. The statute has authorized a suit against the county by which his demand may pass into judgment, but it has

58 Gilman v. County of Contra Costa (1855), 5 Cal. 426.
59 Ibid., 428.
60 Cal. Stats. (1854), chap. 122.
61 Cal. Stats. (1855), chap. 16.
62 Gilman v. County of Contra Costa (1856), 6 Cal. 676
63 Gilman v. County of Contra Costa (1857), 8 Cal. 52.
64 Emeric v. Gilman (1858), 10 Cal. 404.

> given no remedy by execution. When the judgment is rendered, it becomes the duty of the supervisors to apply such funds in the treasury of the county as are not otherwise appropriated, to its payment, or if there are no funds, and they possess the requisite power to levy a tax for that purpose, and if they fail or refuse to apply the funds, or to exercise the power, he can resort to a *mandamus*. But if they have no funds, and the power to levy the tax has not been delegated to them, the Legislature must be invoked for additional Authority.[65]

Gilman assigned his judgment to George F. Sharp, who could not get satisfaction either, but on March 14, 1860, the Legislature passed an act to settle the judgment at a lesser rate of interest,[66] which Sharp accepted, but then sued to recover the original amount. In *Sharp v. Contra Costa County*, decided at the Supreme Court's October 1867 term, the Court held for the county, saying that Sharp had no recourse except to take what had been offered, for

> the State had the power to pay or not as she pleased, and of course to determine the time, mode and measure of payment. This she did by passing the Funding Act, and in passing it she fully vindicated her good faith, and left all claimants for whom provision was made in that Act without further claims upon her.[67]

The 1860 act was *ex gratia*; neither Gilman nor Sharp could ask for anything more. As the Court said in the *Sharp* case, regarding the relationship between the state and the counties:

> In this case a sovereign is one of the contracting parties; for the government of the County of Contra Costa is a portion of the State Government, and as against a sovereign there are no remedies except such as the sovereign, in the exercise of that good faith by which all Governments are presumed to be actuated, may accord. The State Government, neither in its general nor its local capacity, can be sued by her creditors or made amenable to judicial process

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65 Ibid., 410.

66 Cal. Stats. (1860), chap. 124.

67 Sharp v. Contra Costa County, 291–92.

> except by her own consent. Her creditors must rely solely upon her good faith as to the time, mode, and measure of payment.[68]

Another case arising from Gilman's bridge was *People v. Alameda County* in which the Court said that a county could take part in a suit as a plaintiff, in this case a petition for a writ of mandamus to compel Alameda County to pay its statutory share of the cost of the bridge.[69] Here the county was a relator, but under the 1854 act mentioned above, a county could sue in its own name.[70]

The legal nature of a county was ruled upon in 1856 in *Price v. Sacramento*, where the plaintiffs sued Sacramento County to collect on a contract entered into with the county; the Board of Supervisors had previously refused to pay the plaintiffs for the performed services.[71] With the 1854 act having granted the power to sue and be sued in general terms,[72] the Court now said, "The right to sue is not limited to cases of torts, malfeasance, etc., but is given in every case of account."[73] The Court referred to the county as a quasi-corporation — while remaining a subdivision of the state for purposes of government, the county was given powers similar to those of a municipal corporation. In such a corporation the people of the county were represented by the board of supervisors.[74] As the Court stated in *El Dorado County v. Davison*, "The Board of Supervisors are a municipal body, having no powers except those expressly granted by the sovereign authority, or which are necessary to the powers granted in terms."[75] The practical effect was to allow a county to be sued directly in most instances, whereas the state could be sued only in certain types of cases.

Each county, like the state, possessed the right of eminent domain; for the most part the counties used this power to create new roads. The Court ruled in 1857 that when a county was forced to condemn land for a road, the title did not vest in the county until just compensation was tendered.[76]

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68 Ibid., 290.
69 People v. Alameda County (1864), 26 Cal. 641.
70 Solano County v. Neville (1865), 27 Cal. 465.
71 Price v. Sacramento (1856), 6 Cal. 254.
72 Cal. Stats. (1854), chap. 41, § 1.
73 Price v. Sacramento, 256.
74 Calaveras County v. Brockway (1866), 30 Cal. 325.
75 El Dorado County v. Davison (1866), 30 Cal. 520.
76 McCann v. Sierra County (1857), 7 Cal. 121.

In 1859 the Court went further, allowing damages when Alameda County appropriated land without paying compensation, saying further that the opening of a highway on plaintiff's land was illegal and void, and that the county was guilty of a trespass.[77] Because the taking of private property was involved in these cases, the Court, in *Curran v. Shattuck*, said that boards of supervisors "must strictly pursue the statute or the proceedings will be void."[78] Under review in that case was an instance in which the plaintiff had no notice of the action of the Board of Supervisors, "And in such proceeding the person whose rights are to be affected against his will must have notice."[79] In *Grigsby v. Burtnett*, the Court said that "just compensation" was not what the county wanted to pay; if the landowner objected, the amount of the compensation would have to be adjudicated before title passed to the county, and before the county could enter and use the land.[80] The Court upheld a statute in 1870, dealing with roads in Santa Clara County,[81] that said that money had to be actually set apart in the treasury before the land could be taken.[82] Control over roads did not mean or even remotely imply that a county could convert a public highway into a toll road and grant a franchise to collect the tolls thereon.[83] The Legislature did pass an act for the establishment of toll roads,[84] but as with other laws dealing with franchises, no corporation could be given privileges not enjoyed by other similar corporations.[85]

That all statutory provisions had to be followed in land condemnation proceedings applied to the owner of the land to be taken as well. The Court said, "Strict compliance with the requirements of the Act is necessary to accomplish a condemnation on the part of the public, and a like compliance with all the provisions relating to the assessment of damages and their recovery is essential also on the part of the landowner."[86]

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77 Johnson v. Alameda County (1859), 14 Cal. 106.
78 Curran v. Shattuck (1864), 24 Cal. 427.
79 Ibid., 433.
80 Grisby v. Burtnett (1866), 31 Cal. 406.
81 Murphy v. De Groot (1870), 44 Cal. 51.
82 Cal. Stats. (1865), chap. 440.
83 El Dorado County v. Davison, *supra*.
84 Cal. Stats. (1867–68), chap. 181.
85 Waterloo Turnpike Road Co. v. Cole (1876), 51 Cal. 381.
86 Lincoln v. Colusa (1865), 28 Cal. 662.

Thus, in *Harper v. Richardson*, the plaintiff's action for damages over the opening of a road was barred because the action was not brought within the statutory period.[87] However, the steps prescribed for the landowner to use in pursuing compensation "must not destroy or substantially impair the right itself."[88]

Counties also had jurisdiction over bridges and could arrange for ferry lines, as well as roads. As noted above, the original *Gilman* case decided that a county could even build a bridge across a county line.[89] The repair and maintenance of roads, bridges, and the like also fell to the county, and again strict compliance with statutory provisions was a prerequisite. In *Murphy v. Napa County*, the Court upheld the refusal of the board of supervisors to pay for repairs on a bridge in the absence of a written contract.[90] If repairs were faulty, or if the county neglected to have a bridge or highway repaired, the county itself was not liable for injuries occurring due to the lack of proper repairs; any remedy that existed had to be sought against the supervisors or road overseers individually.[91] This view was upheld in *Crowell v. Sonoma County*, with the Court denying any master–servant relationship between a road overseer and the county.[92]

The government of each county was made up of several county officers, generally a treasurer, auditor, sheriff, and tax collector, and a board of supervisors, with the latter body being the most important. The Supreme Court found the board of supervisors to be a special body, with mixed powers, legislative, executive, and judicial. Its discretion in certain matters had to be trusted, and its judgment conclusive.[93] A county was considered to be both a geographical and a political subdivision of the state and subject to the latter's dominion. Thus, an act of the Legislature ordering the board of supervisors to submit to the voters the question of subscribing to $200,000 worth of stock in the San Francisco and Marysville Railroad Company was considered within the former's powers.[94] The Court held

87 Harper v. Richardson (1863), 22 Cal. 251.
88 Potter v. Ames (1872), 43 Cal. 75.
89 Gilman v. County of Contra Costa (1855), 5 Cal. 426.
90 Murphy v. Napa County (1862), 20 Cal. 497.
91 Huffman v. San Joaquin County (1863), 21 Cal. 426.
92 Crowell v. Sonoma County (1864), 25 Cal. 313.
93 Waugh v. Chauncey (1859), 13 Cal. 11.
94 Cal. Stats. (1857), chap. 243, § 1.

that the submitting of such a question to the voters was considered to be a mere ministerial function with which an individual could not interfere.[95] So broad was this power of the Legislature over the counties, that it could even confer extraterritorial jurisdiction. For example, in 1867, the Court upheld the power of the Legislature to grant Sonoma and Lake Counties the authority to "lay out, open, and maintain a road" in Napa County.[96]

An instance of a board of supervisors using its discretionary powers occurred in *El Dorado County v. Elstner*, which involved the examination and settlement of a claim against a county.[97] Justice Joseph G. Baldwin wrote that in such an instance the board was a quasi-judicial body, in that the allowance and settlement of the claim against the county were an adjudication of the claim and thus conclusive. In *Babcock v. Goodrich*, the Court added that courts would not review a board's action, unless there were some gross irregularity, such as fraud.[98] Whether a board, when acting in its judicial capacity, exceeded its jurisdiction could be examined by a writ of certiorari, and a board could be forced to perform a ministerial function by the use of a mandamus.

Where a board had no discretion, it had to follow legislative enactments exactly.[99] "It is settled in this state that no order made by a Board of Supervisors is valid or binding, unless it is authorized by law."[100] In *People v. Bailhache*, the Contra Costa Board of Supervisors was authorized to consolidate certain county offices, but such consolidation was voided due to the board's failure to publish the ordinance of consolidation.[101] Two years later the Court voided a contract because the Stanislaus Board of Supervisors did not first advertise for bids as was required by the political code.[102] Even a power left to a board's discretion was not exempt from legislative control. Boards of supervisors could grant franchises for toll roads, ferries, and bridges. To use the franchising of ferries as an example, the Court said, "The Supervisors have the *general* power to grant a ferry franchise, and to

95 Pattison v. Board of Supervisors of Yuba County (1859), 13 Cal. 175.
96 People v. Lake County (1867), 33 Cal. 487.
97 El Dorado County v. Elstner (1861), 18 Cal. 144.
98 Babcock v. Goodrich (1874), 47 Cal. 488.
99 People v. Sacramento County (1873), 45 Cal. 692.
100 Linden v. Case (1873), 46 Cal. 174.
101 People v. Bailhache (1877), 52 Cal. 310.
102 Maxwell v. Supervisors of Stanislaus (1879), 53 Cal. 389.

determine when, and under what circumstances, and to whom, it shall be granted."[103] But the Legislature, in allowing boards of supervisors to grant such franchises, did not divest itself of the right to make further grants:

> These franchises, being sovereign prerogatives, belong to the political power of the State, and are primarily represented and granted to the Legislature as the head of the political power; and the subordinate bodies or tribunals making the grants are only agents of the Legislature in this respect. But the delegation of these powers to these subordinates in no way impairs the power of the legislature to make the grant.[104]

The various boards of supervisors were given numerous other statutory powers and duties. They could create offices and raise salaries, if a statute provided for such an office, but they could not pay a salary higher than the statutory limit.[105] Boards of supervisors were the guardians of the property interests in each county, and in that capacity occupied a position of trust and were bound to the same measure of good faith toward the county as was required of an ordinary trustee toward his *cestui que trust*, or an agent toward his principal. In taking care of this property no supervisor was entitled to extra pay for services rendered,[106] but if in the discretion of a board additional aid were needed, such as private counsel, such expense became a legal charge against the county.[107] Of course the hiring of or granting a contract to a supervisor by the board of the same county was a conflict of interest and barred by statute.[108]

Of the various county officers the ones who seemed to appear most often in Supreme Court litigation were the tax collector, auditor, and treasurer. It is no coincidence that all three were involved in county financial matters. Tax collectors will be treated in the chapter dealing with taxation, but auditors and treasurers will be discussed here.

The county auditor was charged with drawing warrants for all claims legally chargeable to the county that were allowed by the board of

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103 Henshaw v. Supervisors of Butte County (1861), 19 Cal. 150.

104 Fall v. County of Sutter (1862), 21 Cal. 252.

105 Robinson v. Board of Supervisors of Sacramento (1860), 16 Cal. 208.

106 Andrews v. Pratt (1872), 44 Cal. 309.

107 Hornblower v. Duden (1868), 35 Cal. 664.

108 Domingos v. Supervisors of Sacramento (1877), 51 Cal. 608.

supervisors. If a claim were not "legally chargeable" the county treasurer did not have to pay the warrant, and could not be compelled to do so.[109] Most of the cases involving these two officers were attempts to compel a warrant to be drawn and/or paid. The auditor could not have an order drawn without an order from the board of supervisors, for whom the auditor was a clerk in this respect.[110] If the auditor refused to accede to the board's order, he could be compelled to do so by a writ of mandate.[111]

One problem faced by many county officers had to do with receiving salaries. Pay was relatively poor, and oftentimes salary warrants were not paid due to a lack of funds in the treasury. Henry Eno, as county judge, faced this problem. He acidly noted: "Salary $1800 payable monthly. Should be glad if I could get it at the expiration of a year. On the first of May $600 will be due me. Have not received a dime yet — and have so far lived on borrowed money paying 2½ per cent per month."[112]

In the same 1866 letter, he stated that Alpine County was $22,000 in debt at that time. The reason was all too clear. As the county's debt rose, the treasurer refused to pay on the salary warrants. Warrant holders either had to wait until the county became solvent or collect as little as fifty cents on each dollar by selling the warrant to a speculator at a discount. Eno decided to force the issue, suing out a writ of mandamus to force the treasurer to pay, and the case eventually reached the Supreme Court in 1867 as *Eno v. Carlson*.[113] The Court upheld the treasurer, who was registering warrants in order of presentation, and paying them accordingly. The Court said there was no redress available, "except by refusal to accept judicial appointments, or resigning them when they may have been accepted, or by appeal to the people."[114]

In *Foster v. Coleman*, the Board of Supervisors of Los Angeles County was prevented from creating a debt or liability not provided for by law.[115] This case was a taxpayer's suit brought to prevent payment to a deputy

109 Keller v. Hyde (1862), 20 Cal. 593

110 Connor v. Norris (1863), 23 Cal. 447.

111 Babcock v. Goodrich, *supra*.

112 Henry Eno, *Twenty Years on the Pacific Slope; Letters of Henry Eno* . . . (Yale Americana Series, no. 8; New Haven: Yale University Press, 1965), 144.

113 Eno v. Carlson (1867), 1 Cal. Unrep. 354.

114 Ibid., 355.

115 Foster v. Coleman (1858), 10 Cal. 278.

assessor whom the supervisors had been trying to compensate because his earlier fees had been paid by a warrant which was worth only 40 percent of its face value. Although an attempt at equalization, it was not authorized by law and was thus illegal. Further, a board of supervisors could not put aside part of the county's revenue as a fund for current expenses,[116] as it was not authorized to do by law,[117] or pay warrants in any order other than that specified by the Legislature.[118] The county treasurer could not pay any warrants or the interest thereon unless first audited by the board of supervisors, as the treasurer was not an independent agent with regard to the county's funds.[119]

The cases discussed indicate the almost second-class status of the counties. Although forced to create counties by the Constitution, the Legislature retained an inordinate amount of power over them, being able to enact a law dealing with almost any aspect of county government, including creating and eliminating counties. One result was that the state often would step in, as with Gilman's bridge, but too often counties had to settle their problems with their very limited powers.

With the state's broad control over the counties clearly constitutional, the Court's role was virtually limited to cases involving individual contests and to seeing that counties did not go beyond the powers granted by the state; this was the situation with municipalities as well.

THE MUNICIPALITIES

As previously noted, that section of the Constitution providing for the division of the state into counties also authorized the Legislature to provide for the establishment of towns;[120] the Legislature again complied. Like a county, a municipal government was a political subdivision of the state, having as its primary object the administration of governmental functions. But the town, as a municipal corporation incorporated by its inhabitants, could also administer local affairs and business outside the sphere

116 Laforge v. Magee (1856), 6 Cal. 285.
117 Cal. Stats. (1850), chap. 42, § 13.
118 McDonald v. Maddux (1858), 11 Cal. 187.
119 People v. Fogg (1858), 11 Cal. 351.
120 Cal. Const. (1849), art. XI, § 4.

of government; a town or city could engage in proprietary activities such as supplying water or other utilities, or operate public transportation lines.

But whatever a municipal corporation did, it was forever subject to legislative control. The Supreme Court summarized the state–municipality relationship when it said: "Municipal corporations possess and can exercise only such powers as are expressly or by necessary implication conferred or delegated by the legislative act of incorporation; and when the legislative charter prescribes the mode of exercising such delegated powers, it must be strictly construed."[121]

Discussing the manifold problems of Los Angeles in the first two decades of statehood, one historian wrote in much the same vein, adding that the city's legal status hampered the municipal government somewhat: "Los Angeles, which was entitled to the rights of a private corporation, was subject to the authority of the California Legislature which had created and could abolish it and could expand, contract, or otherwise modify its powers. In practice, however, the state seldom interfered — except to limit the town's tax rate and bonded debt."[122]

Some typical problems faced by a city included assessing property for municipal improvements, street maintenance, and the abatement of public nuisances. In *Weber v. The City of San Francisco*, the Supreme Court held that a city, in this case San Francisco, could assess property for improvements in the city, but could not impose a penalty of 1 percent per day for the nonpayment of the assessment.[123] The right to abate a nuisance was brought up in *Gunter v. Geary*, as mentioned before, and while the justices themselves disagreed whether the wharf actually constituted a nuisance, they agreed that if it was a nuisance, the city could remove it.[124]

On occasion, a city had need to acquire property either by purchase or by the use of its right of eminent domain. In *DeWitt v. San Francisco*,[125] the Supreme Court stated that the laws authorizing the San Francisco Board of Supervisors to build a courthouse and jail necessarily implied the purchase

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121 City of Placerville v. Wilcox (1868), 35 Cal. 23.

122 Robert M. Fogelson, *The Fragmented Metropolis: Los Angeles, 1850–1930* (Cambridge: Harvard University Press, 1967), 27–28.

123 Weber v. The City of San Francisco (1851), 1 Cal. 455.

124 Gunter v. Geary, 462.

125 Dewitt v. San Francisco (1852), 2 Cal. 289.

of all required real and personal property as well.[126] In *People v. Harris*, the Court upheld a contract to fix up a building bought jointly by the city and county of San Francisco for their mutual use.[127] Chief Justice Murray stated: "The right to fit up a building for city or public purposes, and provide suitable accommodations for the transaction of the business of the City, is a necessary incident to the administration of every municipal government, without which it would be impossible to carry out the objects and purposes of the incorporation."[128] A city, too, had to pay a just compensation for exercising its right of eminent domain; here also the compensation had to be paid before the owner lost his title.[129] In a case where the city made part payment, the Court held that this was not sufficient either, and that the property could be reclaimed by the owner.[130]

Whenever the Legislature chose to pass laws dealing with municipal affairs, such enactments had to be followed with great exactitude. This was made explicit in *People v. McClintock*, when the Court said that Sacramento could not purchase a site upon which to erect a waterworks,[131] because the statute authorizing the city to contract for a water supply did not mention a site or a building.[132]

The powers of municipalities were laid out in their charters. Each charter was in the form of a separate legislative enactment. The only method by which a charter could be changed in any way was by a new law by the Legislature. The charters were considered to be "special grants of power from the sovereign authority, and they are to be strictly construed. Whatever is not given expressly, or as a necessary means to the execution of expressly given powers, is withheld."[133]

Under discussion in the case from which this statement was quoted was an attempt by Placerville to pay for a railroad survey from that city to Folsom. The Court did not allow the survey because there was no direct

126 Cal. Stats. (1851), chap. 70, § 7; Cal. Stats. (1852), chap. 38, § 7.
127 People v. Harris (1853), 4 Cal. 9.
128 Ibid., 10.
129 San Francisco v. Scott (1854), 4 Cal. 114.
130 Colton v. Rossi (1858), 9 Cal. 595.
131 People v. McClintock (1872), 45 Cal. 11.
132 Cal. Stats. (1871–72), chap. 491.
133 Douglass v. Mayor of Placerville (1861), 18 Cal. 647.

authority for it in the charter.[134] To allow the survey would have meant considering it to be a municipal benefit like a city street, but the Court refused to go that far.

Varied provisions of state statutes came to the Court for interpretation. An act amending the original act incorporating Marysville said that the city could not take stock in any public improvement without first submitting the question to the voters.[135] The Court, in *Low v. City*, said the words "public improvement" had to be considered in a limited sense, applying to those improvements normally included in police and municipal regulation. They could not be extended to objects foreign to the purposes of the incorporation of the town; buying stock in a private navigation company was not what the Legislature had in mind.[136] When the city of Oakland was given full powers over docks, wharves, etc., in its charter,[137] the city could not grant the exclusive privilege of controlling these and the right to collect fees therefrom, because such an unconditional grant left no power of regulation to the city itself.[138] The Court went on, in *City of Oakland v. Carpentier*, to say, "These police regulations are essential to the interest of the city, to commerce, its health, possibly, certainly its convenience and general prosperity."[139]

The cases of *Holland v. The City of San Francisco*[140] and *Gas Co. v. San Francisco*,[141] taken together, had much to say about municipal corporations. In the first case, the plaintiff had purchased some land from San Francisco under authorization of an ordinance which proved to be void. Before the sale of the land, the common council passed another ordinance appropriating the proceeds from the sale, and the money paid by the plaintiff was appropriated and used by the city. The second ordinance was held to be a sufficient recognition of the first ordinance, thereby making the sale valid. In its ability to own and dispose of property, the municipality acted like a private corporation, and in such case its discretion could be controlled by

134 Cal. Stats. (1859), chap. 93.
135 Cal. Stats. (1854), chap. 10, § 1 (special law).
136 Low v. City (1855), 5 Cal. 214.
137 Cal. Stats. (1852), chap. 107, § 3.
138 City of Oakland v. Carpentier (1859), 13 Cal. 540.
139 Ibid., 547.
140 Holland v. The City of San Francisco (1857), 7 Cal. 361.
141 Gas Co. v. San Francisco (1858), 9 Cal. 453.

the judicial department. In the second case, the city denied any knowledge of the gas furnished by the plaintiff for lighting the city hall and city fire engine houses. Justice Field said such an answer was unsatisfactory; while the city was not a natural person, its officers and agents could gain the knowledge. In its private character a municipal corporation exercised the powers of a private individual or private corporation. Here, the city used the gas and even put up the meters and gas fixtures, so it could not claim a lack of knowledge.

One case that arose had to do with the power of a municipal corporation to require a license tax from a transport company, even though the latter did only a part of its business in the city. The decision in *Sacramento v. The California Stage Company* stated that Sacramento had this power, as the company had its office and place of business in the city. Even though the larger part of the transportation was out of the city, much of its business was done in the city. Since it received the protection of the local government, it ought to contribute to the support of that government.[142]

A municipal corporation could enter into contracts, but only if the act of incorporation delegated the power to make them. Further, anyone contracting with a municipality was bound to know the extent of the powers of its officers.[143] In *People v. Swift*, the Court said a city could validate a contract for certain repairs by a subsequent ratification since the charter gave the city both the right to enter into that type of contract in the first place, with the right to validate it by subsequent ratification.[144] A municipality could sue,[145] but any suit had to be in the name of the city or town, and not in that of a municipal official.[146]

The idea of "municipal benefit" mentioned above included control over city streets, their repair, and the authority to build bridges. Repairs "to the streets, though, required scrupulous compliance with the charter, as assessments were levied on the affected property owners.[147] The responsibility for the repairs fell on the city's council, not on the city, and as with

142 Sacramento v. The California Stage Company (1859), 12 Cal. 134.
143 Wallace v. Mayor of San Jose (1865), 29 Cal. 180.
144 People v. Swift (1866), 31 Cal. 26.
145 San Francisco v. Sullivan (1875), 50 Cal. 603.
146 Leet v. Rider (1874), 48 Cal. 623.
147 City of Stockton v. Whitmore (1875), 50 Cal. 554.

counties, the individual officers could be sued for an injury, but not the local corporation itself.[148] Control over bridges included the right to grant a franchise for their construction and use,[149] and a business established under a state act was still subject to local taxation.[150]

As was the case with the counties, the Supreme Court could do nothing but acquiesce to the state's control over municipalities. The Court's decisions created no landmarks in constitutional law, but were important nonetheless in helping determine the powers of local governments. More often than not the Court was dealing with everyday problems such as interpreting a contract entered into by a city, or an act of the Legislature empowering a municipality to perform some service. As an example of the type of cases faced by the Court, an examination of a series of cases involving San Francisco follows.

SAN FRANCISCO: A CASE STUDY

San Francisco, as the largest and most important city in the state, had a consequently larger share of litigation reach the Supreme Court. Many of the most important of these cases were the result of San Francisco's continuing financial problems, but many also arose from the normal development of a large, metropolitan area, while others dealt with the powers of any ordinary city or town.

The earliest cases could be placed in two groups, each based on a different act of the Legislature. The first group arose from the sale of beach and water lots; the second was from the creation of the sinking fund.

Even before the advent of statehood the city of San Francisco was getting all its revenue from the sale of beach and water lots.[151] These sales were void at the time, but were later validated by the Legislature in March 1851.[152] The first case involving this law was *Eldridge v. Cowell* in which the Court held that since the plan of the city extended streets into the tide

148 Winbigler v. City of Los Angeles (1872), 45 Cal. 36.

149 Fall v. Mayor of Marysville (1861), 19 Cal. 391.

150 San Jose v. San Jose & Santa Clara Railroad (1879), 53 Cal. 475.

151 Theodore H. Hittell, *History of California*, vol. III (4 vols., N. J. Stone & Company, 1885–97), 379.

152 Cal. Stats. (1851), chap. 41, § 2.

waters, it was necessarily anticipated that purchasers would fill the lots until the level depth of water suitable for handling ships was reached.[153] The defendant's lot had been reclaimed from the water before he purchased it; when the plaintiff later bought the next lot *away* from the water, he bought without *any* riparian rights. By passing the March 1851 law the state recognized the city's plan and constituted an act consistent with her complete sovereignty over her navigable buoys and rivers.

A landmark case in the group of cases dealing with the sale of beach and water lots was *Wood v. San Francisco*.[154] In this case the defendant bought the Broadway Wharf, which had already been laid down as a public street. The sale by the city was void as it could not convert a public easement to a private use. Further, when the city laid out the streets, they were here held to continue on to high water if the front were filled in. This was affirmed in *Minor v. City of San Francisco*.[155] In *Hyman v. Read*, the plaintiff questioned the boundaries covered by the 1851 law. The Court denied any ambiguity, but even if there were, it would construe the law favorably to the city.[156] Thus, all the land within the designated boundaries, whether divided into lots or not, was included.

In spite of the income from land sales, the financial situation of San Francisco was quite bleak. At the 1851 session of the Legislature a series of acts was passed to help alleviate San Francisco's financial crisis by passing on May 1 an act to fund the floating debt of the city and for its payment.[157] The debt at this time was over $1,500,000; in order to help the situation, the city created Sinking Fund Commissioners to whom it transferred all the city's real property. On the same day the Sinking Fund Commissioners transferred the real property to the commissioners of the funded debt. These moves by the city were tested early in the important case of *Smith v. Morse*, which upheld the sale of much of San Francisco's unsold land to satisfy various creditors of the city.[158] Dr. Peter Smith, one of the principal creditors of San Francisco, won several judgments against the city,

153 Eldridge v. Cowell (1854), 4 Cal. 80.
154 Wood v. San Francisco (1854), 4 Cal. 190.
155 Minor v. City of San Francisco (1858), 9 Cal. 39.
156 Hyman v. Read (1859), 13 Cal. 444.
157 Cal. Stats. (1851), chap. 88.
158 Smith v. Morse (1852), 2 Cal. 254.

but being unable to collect, got writs of execution against some of the real property of the city, which he himself purchased. The Court held that the transfers of the land to the funded debt commissioners were void, since they would have been void as being fraudulent if done by an individual and were also void when done by a corporation. The city could sell land, but not to create a new department, and take revenues and place them in the hands of the city's own creation. Nor could the sale be blocked by the city claiming the state had an interest in the land; the state could make its own claims if it so wished. Further, since the plaintiff's claims preceded the enactment of the funding law, the latter's provisions were void as to him.

Thorne v. San Francisco[159] decided the question as to whether the city could redeem land sold in the executions against it, under the Redemption Act of 1851.[160] The Court said that the land could not be redeemed, as that would make the law retrospective, when laws are to be construed as prospective. If retrospective, it would be an ex post facto law, and in contravention of the United States Constitution.[161] The Court further held that the provision in the 1855 San Francisco charter, which limited the amount of indebtedness that the city could incur to $25,000, did not include the previous funded debt.[162] The new charter attempted to provide protection for the new government, and not to interfere with the old debt. If the old debt had been included, being far more than $25,000, the municipal government in San Francisco would have become a nullity as it would not have been able to contract for necessary expenses.[163]

At the April 1857 term, the Supreme Court had more to say about the 1851 law creating the sinking fund. In *People v. Woods*,[164] the Court said that the 1851 law created a contract between San Francisco and its creditors which could not be changed by subsequent acts. Thus, provisions of the Consolidation Act of 1856, which changed the terms of the earlier law were void.[165] In *People v. Bond*, the Court amplified its views by saying that

159 Thorne v. San Francisco (1854), 4 Cal. 127.
160 Cal. Stats. (1851), chap. 5, § 229.
161 U.S. Const., art. I, § 9.
162 Cal. Stats. (1855), chap. 197, § 32.
163 Soule v. McKibben (1856), 6 Cal. 142.
164 People v. Woods (1857), 7 Cal. 579.
165 Cal. Stats. (1856), chap. 125, § 95.

the contract created was substantially a trust deed under which the city gave to trustees much of its revenue and property, the trustees to apply these to redeem the city's obligations.[166] In this case, the assessor added the interest to pay the debt to the tax roll, according to the provisions of the Consolidation Act. The Court voided the assessor's action, again saying that the Legislature could not change the terms of the contract, unless, now, the creditors sanctioned such a change. In a suit brought by the city and county of San Francisco to prevent the commissioners of the funded debt from receiving certain moneys, the Court defined the position of the commissioners. In reversing the plaintiffs' injunction, the Court said that the commissioners were not private agents but public officers, and could not be interfered with unless it were shown that they were acting in some way to harm the fund.[167]

In 1858 the Legislature passed an act amending the 1851 funding act so that the commissioners could redeem the earlier issued stock in exchange for 6 percent bonds, although the 1851 law had said that the stock had to be redeemed at a price no higher than par.[168] The Court in *Blanding v. Burr* held that this provision was legal since the vested rights were not affected and therefore the creditors under the 1851 law were not being injured.[169] *Thornton v. Hooper* added that while the Legislature could not impair the obligation of contracts, it could enact laws respecting them, here revising the way of giving effect to the purposes of the 1851 law, to reduce San Francisco's debt.[170]

Like other municipalities, San Francisco was under a great deal of legislative control. Such was the California experience. The Legislature could provide for the erection of a city hall on a certain site,[171] grant the right to lay down and construct a railroad on public streets,[172] and could force the city to pay from its treasury for the extension of certain city streets.[173] In the latter case the Court restated the constitutional power of the Legislature to

166 People v. Bond (1858), 10 Cal. 563.
167 County of San Francisco v. Fund Commissioners (1858), 10 Cal. 585.
168 Cal. Stats. (1858), chap. 225, § 3.
169 Blanding v. Burr (1859), 13 Cal. 343.
170 Thornton v. Hooper (1859), 14 Cal. 9.
171 San Francisco v. Canavan (1872), 42 Cal. 541.
172 Carson v. Central R. R. Co. (1868), 35 Cal. 325.
173 Sinton v. Ashbury (1871), 41 Cal. 525.

direct and control the affairs and property of a municipal corporation for municipal purposes.

Under various consolidation acts the City and County of San Francisco were combined, with the Board of Supervisors also functioning much the same as a city council. The board was given certain areas in which it could use its discretion without interference from either the Legislature or the courts,[174] but when it was mandated by the Legislature to perform an act, it had to do so.

The increase in San Francisco's population brought about the introduction of various utilities, such as street railroads, gas for lighting, and especially waterworks. Each of these utilities was amply represented by cases taken to the Supreme Court, but those cases dealing with water companies were both quite complex and quite informative. They shed light on the powers of the municipality, particularly that of entering into contracts; indicate the relationship between the city and the state, primarily the control of the latter over the former; and graphically illustrate the type of problems brought before the Court.

In respect to waterworks, the first two companies making an appearance in the Court were the San Francisco Water Works and the Spring Valley Water Works. The San Francisco Water Works was organized in 1857 under the 1853 act providing for the formation of corporations generally,[175] as amended in 1855,[176] and the 1858 act for the incorporation of water companies.[177] In order to lay its pipes, the company needed some land belonging to Leonard D. Heyneman, and sought to appropriate it by condemnation proceedings. In *Heyneman v. Blake*,[178] the Supreme Court upheld the waterworks' incorporation under the 1853 and 1855 acts as being within the general description of a business organized "for the purpose of engaging in any species of trade or commerce, foreign or domestic."[179] The Court also upheld the corporation's power to appropriate private land

174 Hall v. Supervisors of San Francisco (1862), 20 Cal. 596.

175 Cal. Stats. (1853), chap. 65.

176 Cal. Stats. (1855), chap. 162.

177 Cal. Stats. (1858), chap. 262.

178 Heyneman v. Blake (1862), 19 Cal. 579.

179 Cal. Stats. (1853), chap. 65, § 1; Cal. Stats. (1855), chap. 162, § 1.

under the 1858 act. The 1858 law was amended in 1861,[180] and in *Spring Valley Water Works v. San Francisco* the Court upheld the right of this company, too, to appropriate land necessary for the use of the company.[181]

The 1858 act concerning water companies said that if one company brought water to San Francisco, the city was entitled to use whatever water it needed to put out fires, and if more than one company became involved in bringing water to the city, each was to give its proportionate share of water to fight fires, "and for other municipal uses," a phrase not used in reference to only one company. The Spring Valley Water Works took over the San Francisco Water Works in 1865, thus attaining a monopoly as the only company to bring fresh water into the city. It continued to supply the city with water for all its municipal uses for several years, and then limited the city only to water for fighting fires. The city brought suit to restrain the Spring Valley company, but the Court upheld the water company, saying that while the intent of the Legislature was to have the company supply all the city's water, it could not override the plain language of the statute.[182] The city then brought suit again, this time alleging that an act of the Legislature granting the company's owners special privileges was unconstitutional because it was a special act.[183] The Court agreed that the act was unconstitutional, but even under the general law dealing with water companies the company need only supply water for fighting fires or for some other great necessity.[184] In 1877 the Spring Valley company applied to the Supreme Court directly for a writ of prohibition to prevent the San Francisco Board of Supervisors from passing an ordinance ordering the mayor to connect the city's pipes to those of the company.[185] Speaking for the Court, Justice Elisha McKinstry said:

> In my opinion, the writ ought not to issue to arrest any legislation pending before a body authorized by the Constitution and laws to legislate with matters of public interest. Error committed by such

180 Cal. Stats. (1861), chap. 227.

181 Spring Valley Water Works v. San Francisco (1863), 22 Cal. 434.

182 San Francisco v. Spring Valley Water Works (1870), 39 Cal. 473.

183 Cal. Stats. (1858), chap. 288.

184 San Francisco v. Spring Valley Water Works, supra.

185 Spring Valley Water Works v. San Francisco (1877), 52 Cal. 111.

> bodies cannot usually be corrected by resort to this extraordinary writ without great public inconvenience . . . .
>
> I know of no way in which it can be shown that the members of the Board of Supervisors threaten (in their official capacity) to pass an ordinance, and it must be presumed that the members of that legislative assembly will fully consider the question of the *power to pass* the order, as well as the merits of the order itself.[186]

Justice McKinstry then turned his attention to the last case between the two parties, saying that the unconstitutionality of the 1858 act was the only point really decided there. He went on to say that the water company had as its duty to "furnish water free (to the extent of its means) for the extinguishment of fires, and to the Fire Department, and for all other purposes for which it may be demanded by the authorities of the city and county in discharge of their direct duties as governmental agents."[187]

The company could charge ordinary rates for other city government uses such as schools, hospitals, and the like.

At the same April 1877 term, the Supreme Court heard *Spring Valley Water Works v. Ashbury*[188] and *Spring Valley Water Works v. Bryant*,[189] both cases involving more controversy between the city and the company. In the first of these two cases the company brought suit to compel Monroe Ashbury, the city and county auditor, to endorse a $92,000 demand allegedly due the company for water furnished for municipal purposes in the forty-six-month period prior to December 1872. The claim was approved by both the mayor and the Board of Supervisors, but Ashbury claimed the approval by the board was irregular on two counts. First, the board did not publish the resolution of approval, and also because the amount approved was indefinite, being a larger sum than was needed, with the company's demand to be paid from it. The Court agreed with Ashbury that under the act consolidating the city and county governments, the Board of Supervisors erred in both respects. The second case involved an attempt to have the courts review a resolution of the city's board of supervisors dealing

186 Ibid., 117.

187 Ibid., 122.

188 Spring Valley Water Works v. Ashbury (1877), 52 Cal. 126.

189 Spring Valley Water Works v. Bryant (1877), 52 Cal. 132.

with the delivery of water. The Supreme Court said it could only review acts involving the exercise of judicial functions.

In an effort to finally settle the controversy between these parties, Justice McKinstry again referred back to the decision declaring the special law unconstitutional, and stated that that case determined

> that corporations in this State, except for municipal purposes, must be formed under general laws, and can exercise no powers except such as are conferred by such general laws. The power to charge tolls or rates for water is a *franchise* conferred on corporations formed under the general laws for the formation of water companies, and can be exercised only in the manner provided for in those laws.[190]

The general law dealing with water companies set the method by which rates were to be set. If the mode provided by the statute proved unsatisfactory, the Legislature should be asked to change the general law. This decision was affirmed in yet another case two years later.[191]

The Legislature did step in by authorizing the city to provide and maintain its own waterworks, and granting the power to condemn and purchase private property for that purpose.[192] The last San Francisco water case in the period under discussion, *Mahoney v. Supervisors of S. F.*, laid down the statutory rules for condemning land, again holding that the city was bound to follow the statute in all particulars.[193]

The *Water Works* cases indicate the extent of legislative control over matters that were purely local in nature but which, because of the power granted the Legislature, became the subject of a state law.

Another group of cases, more than seventy in the thirty-year period from 1850 to 1879, involved nothing more than street repairs in San Francisco. An early example was *Hart v. Gaven*,[194] in which the Court ruled that where an ordinance said owners of lots were responsible for keeping up the streets in front of their lots, the city of San Francisco could perform

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190 Ibid., 140.

191 San Francisco v. Spring Valley Water Works (1879), 53 Cal. 608.

192 Cal. Stats. (1875–76), chap. 234.

193 Mahoney v. Supervisors of San Francisco (1879), 53 Cal. 383.

194 Hart v. Gaven (1859), 12 Cal. 476.

reasonable repairs, and the lot owner would have to bear the cost, as long as the cost was reasonable under the city's taxing power as established by the Consolidation Act of 1858.[195] These street repair cases, too, indicate the extent of the authority of the state in general and the control of local government by the state. A statement by Justice Augustus L. Rhodes from a street repair case in 1865 will serve to conclude this chapter because the case was typical of cases involving municipalities adjudicated by the court, and also because it spelled out the relationship between state and local government. Justice Rhodes wrote:

> The municipal governments, in causing street improvements to be made, act under the authority conferred upon them by the Legislature, the authority being a portion of the sovereignty delegated to them for the purposes of municipal government.
>
> The municipal government, in the exercise of the authority thus conferred, is subject to all the constitutional restraints and limitations imposed on the Legislature, and has no other or greater power than is and lawfully may be conferred on it by the legislative act.[196]

* * *

[195] Cal. Stats. (1856), chap. 125, §§ 56, 57.

[196] Creighton v. Manson (1865), 27 Cal. 613.

Chapter 8

ECONOMIC ASPECTS OF A DEVELOPING STATE

In the years after 1860, tremendous economic growth took place in the state. The gold mining industry was joined by farming, cattle-raising, manufacturing, and banking, among others, in developing the state's economy. The building of the transcontinental railroad was another important factor, but in a different way. The railroad was expected to bring a new wave of prosperity to the Golden State, but this did not happen. Instead, "[o]ne of the many unexpected and unfavorable effects that the completion of the Pacific railroad had on the economy of California was that it suddenly exposed her merchants and manufacturers to intense competition from those of the Eastern cities."[1] Regardless of its effect on the state, the railroad, even from before its actual construction, caused a good deal of controversy, legal and otherwise.

One specter facing all businesses was that of taxation. Like other attributes of sovereignty, the taxing power had certain limitations placed on it, and questions arose that only the Supreme Court could answer. Whatever the decisions of the Court, they served to provide a legal framework for the state's business interests to use.

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[1] Walton Bean, *California; An Interpretive History* (New York: McGraw-Hill Book Company, 1968), 219.

The Civil War brought another challenge to the state's economy, the legal tender notes, or "greenbacks." This paper money, though, affected more than just the state's economy. It brought into focus the question of Union loyalty, challenged the role of California as a hard-money state, and as with other major legal controversies, presented a long string of cases for the Supreme Court to adjudicate.

TAXATION

The 1849 Constitution mentioned the subject of taxation in only one section of one article. The section read:

> Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law; but assessors and collectors of town, county, and State taxes, shall be elected by the qualified electors of the district, county, or town, in which the property taxed for State, county, or town purposes is situated.[2]

With only one section in the Constitution as a frame of reference, the Court was given many opportunities to explain that section and in so doing help to establish an orderly system of taxation in the state.

The ultimate power over taxation was not stated directly in the Constitution, but the Court, in *People v. Seymour*, clearly placed it in the state, with Justice Joseph G. Baldwin writing that the power to lay and collect taxes

> is a sovereign attribute. The mode of ascertainment and collection of the tax is a matter of legislative discretion. What the Legislature may do, as a general thing, it may do in its own way, and at its own time. There is a general power to tax; there is no restriction of mode, nor is there any limitation of time by the organic law. Unless restrained by the Constitution, the Legislature have plenary power over the subject.[3]

The case itself involved the constitutionality of an 1860 act to enforce the collection of delinquent taxes in Sacramento for the years 1858 and 1859.[4] The

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[2] Cal. Const. (1849), art. XI, § 13.

[3] People v. Seymour (1860), 16 Cal. 343.

[4] Cal. Stats. (1860), chap. 172.

state's power over taxation included the authority to provide such a remedy. This taxing power even extended to fixing the fees allowed to tax collectors.[5]

The question of whether or not a tax was "equal and uniform" was brought up on numerous occasions. In *Sacramento v. Charles Crocker*, the defendant paid both taxes on his merchandise and a business license tax as well.[6] He objected to the license tax, but the Court said the tax was not unequal, because it was a tax on the amount of business transacted, and all businesses paid at the same graduated rate. What violated the "equal and uniform" rule were attempts to exempt the taxable property of a railroad company in a county from paying a school tax lawfully levied on all taxable property in such county,[7] or to remit part of a tax within a district.[8] The leading case of *People v. Whyler*, which involved the levying of a tax for the construction of levees in Sutter County, laid down several points as to what constituted uniform taxation.[9] The levees, the Court admitted, would injure some of the land, and the fact that all the land was taxed at its former value did not make the tax unequal. The tax, being on all property, real as well as personal, was a tax and not an assessment, even though for a local improvement. A tax on real estate alone was considered to be an assessment, and could be levied against only those actually to be benefited by the proposed improvement.[10] But the laying of the assessment had to be equal, which meant in proportion to the benefits accruing from the improvement.[11]

When the Constitution said that all property was to be taxed uniformly, what was meant to be taxed was private property, and not property belonging to the United States or to California.[12] Property belonging to the United States included land that was part of the public domain, and the fact that the land was being preempted and in actual occupation by a settler made no difference because, until the preemptor completed all the steps necessary to acquire title, the title remained with the United States.[13]

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5 Solano County v. Neville (1865), 27 Cal. 465.
6 Sacramento v. Charles Crocker (1860), 16 Cal. 119.
7 Crosby v. Lyon (1869), 37 Cal. 242.
8 Wilson v. Sup. of Sutter Co. (1873), 47 Cal. 91.
9 People v. Whyler (1871), 41 Cal. 351
10 Taylor v. Palmer (1866), 31 Cal. 240.
11 Doyle v. Austin (1874), 47 Cal. 353.
12 People v. McCreery (1868), 34 Cal. 432.
13 People v. Morrison (1863), 22 Cal. 73.

The Court later modified its view somewhat by saying that once a certificate of purchase had been issued, the land could be taxed even though the federal government had not yet issued a patent therefor.[14] The modification virtually involved the use of a "legal fiction" under the 1861 Revenue Act, which said that real estate meant and included "the ownership of or claim to, or possession of, or right of possession to any land."[15] Said the Court:

> The term "claim," as used in this provision, means something more than a mere assertion by the party assessed that he owns or is entitled to possess the lands described in the list. While the word carries with it the idea of such assertion, it involves also the idea of an actual possession of the land claimed.[16]

Later that same October 1866 term, the Court added, "The land itself is not taxed, but the defendant's claim and right of possession is taxed."[17] The public property of counties and towns, as subdivisions of the state, could not be taxed either,[18] and assessments, as differentiated from tax, could not be levied either on public property, even if the property would be benefited by the improvement.[19]

The state, in its sovereign authority, could, by appropriate legislation, authorize any political subdivision to levy a tax or assessment either for general revenue or for special purposes. Such special purposes included building a bridge in the city of Nevada,[20] or for a new county to pay its share of the debt of the county from which it was formed.[21] The grant of taxing power to a local government certainly did not mean that the power could be abused, as was pointed out in *People v. Kohl*. In that case the defendant paid his property taxes and then sold the land, after which Los Angeles County attempted to collect again from the new owner. The Court held that this amounted to an attempt at double taxation.[22] In *People v. Niles*, the Court disallowed

14 People v. Shearer (1866), 30 Cal. 645.
15 Cal. Stats. (1861), chap. 401, § 5.
16 People v. Frisbie (1866), 31 Cal. 148.
17 People v. Cohn (1866), 31 Cal. 211.
18 People v. Doe G. 1034 (1868), 36 Cal. 220.
19 Doyle v. Austin, *supra*.
20 Kelsey v. Trustees of Nevada (1861), 18 Cal. 629.
21 Beals v. Supervisors (1865), 28 Cal. 449.
22 People v. Kohl (1870), 40 Cal. 127.

an attempt by Mendocino County to assess a boat serving Mendocino, but whose home port was San Francisco.[23] The Court also voided a San Francisco ordinance taxing goods outside the city's corporate limits or *in transitu* under a bill of lading, as being in restraint of trade.[24]

The assessment and collection of property taxes was important to all counties, and disputes occasionally arose which had to be settled in the Supreme Court. A series of tax cases involved the land in Mariposa County granted to John Charles Frémont. In the first of these cases, *Palmer v. Boling*, the Court said that a tax assessment could not be made until after the title had vested in the owner, but once the title did vest, the assessment could be made immediately.[25] In *Fremont v. Early*, Frémont tried to restrain the collection of the 1856 taxes because the taxes of 1851 through 1854 were allegedly collected illegally.[26] He had paid $13,800 during those years and wanted this amount set off against his 1856 taxes. Frémont did not prove the illegality of the earlier taxes or the insolvency of the county. Without showing that the taxes had been illegal and that the only way the insolvent county could pay what it owed him was by setting off the current taxes, Frémont's case failed.

Frémont, who seemed to have a plethora of tax problems, also sought an injunction against the former sheriff of Mariposa County to prevent the sale of part of his grant to pay $8,000 in delinquent taxes. Although the defendant claimed that he was completing some unfinished business of his office by selling land in 1858 to pay 1855 taxes, the Court held for Frémont, noting that the defendant's term in office had ended in October 1855, and his right to finish the business of his term ended in March 1856, when he settled his accounts with the county auditor.[27] The delinquent taxes should have then gone on the tax roll of the next year, 1856, to be collected by the new sheriff.

Under the provisions of the 1857 revenue act, the board of supervisors was authorized to sit as a board of equalization to which tax appeals could be brought.[28] In spite of the general language used in the statute the Supreme Court limited arbitrary use of the act in *Patten v. Green* when it

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23 People v. Niles (1868), 35 Cal. 282.
24 Ex parte Frank (1878), 52 Cal. 606.
25 Palmer v. Boling (1857), 8 Cal. 384.
26 Fremont v. Early (1858), 11 Cal. 361.
27 Fremont v. Boling (1858), 11 Cal. 380.
28 Cal. Stats. (1857), chap. 251, § 8.

voided the act of the board of equalization of Sonoma County in raising the valuation of plaintiff's land by one-half without giving him notice.[29] Justice Baldwin, speaking for the unanimous Court, said,

> We think it would be a dangerous precedent to hold that an absolute power resides in the Supervisors to tax land as they may choose, without giving any notice to the owner. It is a power liable to a great abuse. The general principles of law applicable to such tribunals, oppose the exercise of any such power.[30]

As with other legislative acts, laws dealing with taxation had to be followed exactly, even to the extent of including dollar signs for each valuation.[31] Further, in order to bring suit to collect a tax, the suing governmental body had to aver in its complaint that the statute had been complied with in all its particulars.[32] One particular not followed on several occasions was that the assessor be elected from the taxed district. This meant that the assessor elected by the city and county of Sacramento could not assess a tax in the city for city purposes alone.[33] The various county and state boards of equalization were also limited to statutory provisions in their actions. In *People v. Reynolds*,[34] the Yuba County Board of Equalization added property to the assessment roll although the 1861 revenue act said only the assessor could do this.[35] This action of the board's was illegal and was not allowed to stand, nor could a cancellation of assessments be allowed.[36]

For a number of years, the Legislature had been arranging for the codification of the state's laws, and these codes were adopted at the Legislature's 1871–72 session, with most of the codes to take effect January 1, 1873. The Political Code provided for a three-member State Board of Equalization to equalize the assessments of taxes in the different counties

> so as to cause them to approximate as nearly as possible to the equality and uniformity enjoined by the Constitution. It had become

29 Patten v. Green (1859), 13 Cal. 325.
30 Ibid., 329.
31 Hurlbutt v. Butenop (1864), 27 Cal. 50.
32 People v. Castro (1870), 39 Cal. 65.
33 People v. Hastings (1866), 29 Cal. 449.
34 People v. Reynolds (l865), 28 Cal. 107.
35 Cal. Stats. (1861), chap. 401, § 22.
36 People v. Board of Supervisors (1872), 44 Cal. 613.

> apparent . . . that when the value of property for the purposes of taxation was to be ascertained and finally determined by the local Assessors, subject only to a limited control by the County Boards of Supervisors, the grossest inequality frequently existed in the valuations in different counties, whereby the requirement of the Constitution that "taxation shall be equal and uniform throughout the State" was practically abrogated.[37]

The power of the Legislature to create a board with these powers, upheld in the above-quoted case, *Savings and Loan Society v. Austin*,[38] was challenged again at the Court's next term in *Houghton v. Austin*, and with different results. In the latter case the Court held that the section giving the State Board of Equalization the right to fix the rate of taxation was unconstitutional because it was a delegation of legislative authority.[39]

> This section [3696] of the Code attempts to confer upon the State Board the power to add any sum to the amount of tax to be levied by law. We are of opinion that the Legislature cannot commit to the board this power to increase . . . the amount of tax to be paid by the people.[40]

Justice Elisha McKinstry commented that in California the power of taxing the people rested only in the Legislature, and the members of that body could not substitute the judgment of others for their own.

Houghton v. Austin was affirmed by the Court in 1878 in a case challenging the validity of tax sales of land made under the void statute. The Court said that since the tax levy was void, any sales made because of that void tax were also void, and any deeds issued to confirm such sales were nullities.[41]

The series of cases having the greatest importance to the banking community, the legal tender note controversy excepted, had to do with solvent debts. Generally stated, banks could be taxed on all money, gold dust, bullion on hand, and all solvent debts, which included all mortgages and other loans and debts due them; credits secured by mortgages were simply regarded as

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37 Savings and Loan Society v. Austin (1873), 46 Cal. 473–74.

38 Houghton v. Austin (1874), 47 Cal. 646.

39 Cal. Pol. Code (1872), §§ 3693, 3696.

40 Houghton v. Austin, 652.

41 Harper v. Rowe (1878), 53 Cal. 233.

property and taxed as such. At the same time the mortgagor paid taxes on the full value of his property regardless of the debt against it, at least nominally. "As a matter of fact, however, it was usually arranged in agreement between debtor and creditor that the debtor should pay the taxes on both the property and the loan."[42] The mortgage was not taxed *as such*, but the money secured thereby was.[43] A bond, though, could be taxed as personal property, although the Court limited its ruling to state bonds because the United States Supreme Court had already decided that federal bonds could not be taxed.[44]

The first real challenge to the system of taxing solvent debts occurred in 1868 when Andrew B. McCreery, holder of a $125,000 note on James Lick's "Lick House," claimed that taxing both the money loaned and the property on which the money was lent amounted to double taxation.[45] The Court said that the question of double taxation did not arise from the facts of the case.

> While the defendant held the money, which he afterwards loaned to Lick, he was taxable for that sum, and when he passed the money to Lick upon making the loan, and took Lick's obligation to pay the same, secured by a deed of trust or other adequate security, he certainly did not divest himself of so much property. He possessed the same amount of property that he held before the loan was made. Its form only was changed. And so in all cases of loans. The lender owns the debt, and the debt is property, its value depending on the sufficiency of the security, . . . and the ability of the borrower to pay the debt. The holder of the debt is taxable upon the value of the debt.[46]

The Court added that the borrower *might* claim double taxation if the debt were not subtracted from the taxable value of his property, but such was not the case here.

The Court sidestepped the question again the next year in *People v. Whartenby*, when the lender claimed double taxation.[47] As against the lender, the Court said, there was no double taxation:

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42 Carl B. Swisher, *Motivation and Political Technique in the California Constitutional Convention, 1878–79* (Claremont: Pomona College, 1930), 66.

43 Falkner v. Hunt (1860), 16 Cal. 167.

44 People v. Home Insurance Company (1866), 29 Cal. 533.

45 People v. McCreery, *supra*.

46 Ibid., 446–47.

47 People v. Whartenby (1869), 38 Cal. 461.

> The debt secured by the mortgage has been but once taxed, and if the owner of the mortgaged property shall claim that the amount of the mortgage should be deducted from the value of the property, and that he should be assessed only for the remainder, it will be our duty to decide that question when it comes before us; but it is not before us in this case.[48]

Possibly in response to protests by the San Francisco banking community, the Legislature enacted a law in 1870 exempting solvent debts from taxation,[49] but this law was declared unconstitutional by the Supreme Court in *People v. Eddy*.[50] The reasoning of the Court was that a solvent debt was property, and the Legislature could not exempt any private property because the state constitution said all property was to be taxed. Finally a property owner brought suit, claiming the amount of the mortgage should have been subtracted from the value of the property, but this argument was not allowed.[51]

The new codes that went into effect January 1, 1873, again provided for the taxation of solvent debts,[52] and set the stage for the key cases of *Savings and Loan Society v. Austin*[53] and P*eople v. Hibernia Bank*.[54] The first of these cases held the tax on solvent debts to be an instance of double taxation, although the case itself hinged on a procedural point. Justice Joseph Crockett said, "if a debt for money lent and secured by mortgage be taxed, and if the mortgaged property be also taxed, the same *value* and subject matter has been twice taxed, and it presents a case of double taxation."[55]

The *Hibernia Bank* case involved the solvent debt question directly, as San Francisco banking interests brought the suit. The Court said that credits were not "property" as that term was used in the Constitution, and hence, not taxable. Further, there had to be a basis of valuation, and a solvent debt, being a paper promise to pay money, was not money itself. Such

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48 Ibid., 464–65.

49 Cal. Stats. (1869–70), chap. 424.

50 People v. Eddy (1872), 43 Cal. 331.

51 Lick v. Austin (1872), 43 Cal. 590.

52 Cal. Pol. Code (1872), § 3607.

53 Savings and Loan Society v. Austin, *supra*.

54 People v. Hibernia Bank (1876), 51 Cal. 243.

55 Savings and Loan Society v. Austin, 491.

a credit or debt was only property in the general sense. If the debt had a value of its own, then the payment of the debt would affect the value of assets in the state, but, "When a debtor pays his debt he does not abstract or destroy any portion of the taxable property of the State; the aggregate of values remains the same."[56] This decision left considerable disaffection,

> especially by debtors and tax payers, for it was recognized that creditors were still escaping their share of the burden of taxes. Debtors did not now appear to be carrying a double load, as they had done when they had paid taxes on the full value of their property and again on the money loaned to them, but still they and their fellow holders of tangible property had to pay nearly the total tax bill of the state."[57]

THE LEGAL TENDER CASES IN CALIFORNIA

The question of the use of greenbacks in California was a most vexing problem for the state as a whole, not only financially, but because it raised the possibility of a conflict between the state and the federal government. Although California no longer questioned the judicial primacy of the United States Supreme Court, occasional disputes between the state and the national government still arose from time to time, and the use of legal tender notes, or "greenbacks," during the Civil War was one such dispute.

By 1862 the financial situation of the United States government was quite gloomy. The suspension of specie payments in late 1861 caused financiers to look elsewhere to solve financial problems. With taxes and loans insufficient to meet the cost of the war, the issuance of paper money became a most tempting and necessary recourse.

On February 25, 1862, Congress passed a legal tender act authorizing the issuance of $150,000,000 in non–interest-bearing United States notes, which were to be "legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest."[58] To ensure negotiability and to prevent depreciation of these notes, the

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56 People v. Hibernia Bank, 248.

57 Swisher, *Motivation and Political Technique*, 69.

58 12 U.S. Stat. at L. (1862), 345–48.

government declared them to be legal tender, but they were in fact fiat money, lacking gold reserves and a redemption date. It was expected that the value of these notes would depend on the confidence of the people in the United States. The obvious necessity for the issuance of these notes stilled opposition in the eastern states, but opposition continued on the Pacific Coast, and in California in particular.

Following the discovery of gold, California became and remained for many years a "hard money" state. "This was undoubtedly due to the fact that it was able to produce more than enough gold and silver to satisfy "the needs of its people for a circulating medium."[59] There were no banks of issue in California, and the organic law of the state specifically prohibited the creation and circulation of bank notes as money.[60] The complete text of the act did not reach the state until March 27, 1862. On June 13 the fears of Californians over depreciated currency were realized when the legal tender notes were quoted at discounts of 1 to 2 percent. By June 30 the discount was up to 8 percent; by July 19 they had reached 15 percent, and from that time into the 1870s greenbacks were bought and sold on the street and in the stock exchanges of San Francisco.[61]

The first case dealing with legal tender notes to reach the California Supreme Court was *Perry v. Washburn*, decided at the July 1862 term.[62] At issue was an attempt by the plaintiff to pay taxes owed to the city and county of San Francisco in legal tender notes. The defendant, San Francisco's tax collector, said that under the California general revenue act of 1861 he could only accept taxes paid "in the legal coin of the United States, or in foreign coin at the value fixed for such coin by the laws of the United States."[63] The lower court held that the taxes could not be paid in greenbacks, and the plaintiff applied to the Supreme Court for a mandamus to compel the tax collector to accept the notes. The Court, in a unanimous decision, with Chief Justice Stephen J. Field writing the opinion, affirmed the district court's decision: "The Act does not, in our judgment, have any reference to taxes levied under the laws

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59 Ira B. Cross, *Financing an Empire; History of Banking in California*, vol. I (4 vols.; Chicago: The S. J. Clarke Publishing Co., 1927), 289.

60 Cal. Const. (1849), art. IV, § 34, 35,

61 Cross, *Financing an Empire*, vol. I, 310.

62 Perry v. Washburn (1862), 20 Cal. 319.

63 Cal. Stats. (1861), chap. 401, § 2.

of the State. It only speaks of taxes due to United States, and distinguishes between them and debts. . . . Taxes are not debts within the meaning of this provision."[64] Under this decision the notes could still be used to pay debts and other business obligations, and did not prevent the state's treasurer, Delos R. Ashley, from paying California's quota of the United States direct tax in greenbacks, which the federal government accepted.

In an attempt to void the chance of being paid with depreciated currency, merchants began the practice of inserting a clause in contracts that provided for payment in gold or its equivalent. "But in the absence of a specific law giving validity to such contracts, they could not be enforced; and many people disregarded their promises and paid their debts with greenbacks at par."[65]

To ensure the validity of such contracts, Silas W. Sanderson, then a member of the Legislature, authored a bill "providing that contracts in writing for the direct payment of money, made payable in a specific kind of money or currency, might be specifically enforced by the courts, and judgments on such contracts be made payable and collectable in the kind of money or currency specified."[66] This bill passed the Legislature in 1863 and was generally known as the "Specific Contract Act."[67]

At its July 1864 term, the California Supreme Court rendered several key opinions dealing with legal tender, and it passed on the constitutionality of the federal act and the legality of the state act. In *Lick v. Faulkner*, James Lick sued William Faulkner to collect money due as rent on a store in San Francisco. Lick refused to accept the legal tender notes that Faulkner proffered, claiming that the act under which the notes were issued was contrary to the United States Constitution because Congress was not given the power to make such notes legal tender. The Court, with Justice John Currey writing the decision, felt otherwise. Currey first pointed out, "Though the Government of the United States is one of enumerated and limited powers, it is supreme within its sphere of action."[68] These powers were for

64 Perry v. Washburn, 350.

65 Joseph Ellison, "The Currency Question on the Pacific Coast During the Civil War," *The Mississippi Valley Historical Review* XVI (June, 1929): 56.

66 Theodore H. Hittell, *History of California*, vol. IV (San Francisco: N. J. Stone & Company, 1885–97), 347.

67 Cal. Stats (1863), chap. 421.

68 Lick v. Faulkner (1864), 25 Cal. 418.

the purposes stated in the preamble, "But they could not be carried into execution without legislation; of this the framers of the Constitution were aware, and hence Congress was empowered to make all laws necessary and proper for carrying into execution the powers specified."[69]

The powers to declare war, to raise an army and navy, and to suppress insurrections were granted to Congress by the Constitution, and the power to pass laws to execute these other powers. This particular law was passed as a means of effecting these enumerated powers, and "the Act of Congress upon this particular point was an exercise of sovereign authority within the scope of the powers granted in the Constitution."[70]

The Court affirmed *Lick v. Faulkner* again that term in *Curiac v. Abadie*[71] and *Kierski v. Mathews*.[72] In the former case the lower court tried to circumvent the Supreme Court by treating the contest as one in equity, noting that paper money was worth but sixty cents on the dollar at that time. The Court found for the plaintiff, but the Supreme Court reversed the decision and directed a verdict for the defendant, on the basis of *Lick v. Faulkner*.

Had the decision in *Lick v. Faulkner* been different, and the Court declared the federal act unconstitutional, there would have been no need for a state specific contract law. But as things turned out, the federal law was constitutional, and the California Supreme Court had to deal with the state law as well in *Carpentier v. Atherton*.[73]

In a contract dated April 2, 1864, Faxon D. Atherton agreed to pay Horace W. Carpentier five hundred dollars in United States gold coin, on demand. Some time later Carpentier demanded payment and Atherton offered only legal tender notes for both principal and interest. Carpentier refused the paper money and brought suit on the contract. The lower court held for him, and Atherton appealed to the Supreme Court. Justice John Currey wrote the opinion, holding that the California statute was not in conflict with the federal statute. The latter was paramount in cases involving the payment of money generally,

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69 Ibid., 419.

70 Ibid., 433.

71 Curiac v. Abadie (1864), 25 Cal. 502.

72 Kierski v. Mathews (1864), 25 Cal. 591.

73 Carpentier v. Atherton (1864), 25 Cal. 564.

> but as to the contract, which is the foundation of the judgment in this case, it is more than a contract for the payment of money merely. It goes to the extent of defining by what specific act the contract shall be performed. By the admitted and settled rules of law, such a contract can be performed, according to the agreement of the parties, only by the payment of the kind of money specified.[74]

Justice Currey added that the act was merely remedial and created no new rights. Chief Justice Silas W. Sanderson, author of the state law, expressed no opinion.

Another important case decided at the July 1864 term dealing with legal tender notes, *Galland v. Lewis*, declared that the specific contract act was retroactive in its operation.[75] The case involved a contract executed September 1, 1862, and payable in United States coin on October 15, 1862. The defendant offered the amount due in United States notes February 1, 1863, also before the passage of the state act. In his opinion Justice Oscar L. Shafter wrote that when retroactive laws had been voided, such laws had been in conflict with some vested right. "But when an Act like the one now in question takes a contract as it finds it, and simply enforces a performance of it according to its terms, it is not liable to objection because it may have a retroactive operation by way of relation to past events."[76]

In the *Galland* case the execution of the contract, the due date, and the proffered payment all occurred in the period between the passage of the federal and state acts. At the January 1865 term the Court answered another challenge to the federal act, at least as to contracts executed prior to its passage.[77] At issue were bonds offered in 1858 and 1859 by a mining company, which attempted to redeem them in legal tender notes. The plaintiff admitted the validity of the federal acts as to the payment of debts,[78] but questioned whether debts created before February 25, 1862, were subject to satisfaction by the payment of legal tender notes.

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74 Ibid., 572–73.

75 Galland v. Lewis (1864), 26 Cal. 46.

76 Ibid., 48.

77 Higgins v. B. R. & A. W. & M. Co. (1865), 27 Cal. 153.

78 At issue as well was a second federal act passed March 3, 1863, providing for the issuance of additional legal tender notes. 12 U.S. Stat. at L. (1863), 709–13.

Justice Currey again spoke for the Court, holding the federal act did apply to debts created before its passage, and:

> The Acts of Congress under consideration making United States notes lawful money and a legal tender in the payment of debts are not laws, operating retrospectively but *in presenti* and prospectively. No new obligations are created nor new duties imposed by them; neither do they attach new disabilities in respect to transactions or considerations which had transpired before their passage. They simply provide that the notes issued by their authority shall be lawful money, and that such money shall be a legal tender in the payment of debts.[79]

With this decision the remainder of cases dealing with legal tender notes, and they continued until 1878, essentially involved explanations and amplifications of these earlier decisions. The decision in *Perry v. Washburn*, for example, that legal tender notes could not be used for the payment of taxes, was the basis for later holding that the greenbacks could not be used to pay wharfage fees to an agency of the state because such fees were in the nature of public revenue,[80] and that the notes could not be used to pay a fine, as a fine was not a debt within the meaning of the federal statute.[81]

Under California's specific contract law any contract or debt generally payable in money, without specifying a particular kind of money, could be satisfied by legal tender notes. This included a judgment,[82] the obligation of a judgment creditor,[83] and interest on a savings deposit, even though the deposit itself was in gold coin.[84] It was also necessary that a plaintiff aver in his complaint that a recovery in coin was being sought. The lack of such an averment prevented a judgment in default being paid in gold in *Lamping v. Hyatt*, where the Court ruled that in a default judgment "the Court was therefore not authorized to grant any greater relief than is demanded in the prayer of the complaint."[85] In another instance the Court said, "The right to the relief given is peculiar and exceptional, and if a party would recover

79 Higgins v. B. R. & A. W. & M. Co., 159–60.
80 People v. Steamer America (1868), 34 Cal. 676.
81 In re Whipple (1866), 1 Cal. Unrep. 274.
82 Reed v. Eldredge (1865), 27 Cal. 346.
83 People v. Mayhew (1864), 26 Cal. 655.
84 Howard v. Roeben (1867), 28 Cal. 281.
85 Lamping v. Hyatt (1864), 27 Cal. 102.

money in the form of gold or silver of one who received it for him in that form, the form or kind of money received should be specially averred."[86]

One method attempted to get around the lack of a specific kind of money was to show the difference between the value of gold and the value of greenbacks. But the Court refused to accept such proof, saying, "'Greenbacks' are lawful money — they are a legal tender for all debts — and are therefore necessarily a legal standard for the measurement of values — not of other lawful money, but of all commodities bought and sold, services rendered, etc."[87]

Another method was to specify gold coin or its equivalent. This was tried in *Lane v. Gluckauf*, where a contract dated August 4, 1863, included the proviso that if the debt were not paid in gold coin then damages were to be paid equal in value to the difference between gold and paper money in the San Francisco market. The complaint also specified alternative remedies of gold and paper, and was upheld by the Court because the intent of the contract was to insure payment in gold, and only if gold could not be obtained, was the payment to be made in notes.[88] A contract that merely said that gold or its equivalent in legal tender notes was to be paid in satisfaction of the debt was not enough to bring the contract within the provisions of the specific contract act because there was no standard of comparison.[89] The Court concluded, "In contemplation of law, a dollar in legal tender notes is equal to, and therefore the equivalent of, a dollar in gold coin. In comparing the two kinds of money the law knows no difference in value between them. It recognizes no other standard of equivalents."[90]

The introduction of the legal tender notes and their rapid depreciation presented questions that the federal government probably never anticipated, but state courts had to answer. One example that should suffice was whether the $50 line separating a felony from a misdemeanor was to be based on gold or paper currency at the latter's lesser value. The California Supreme Court settled this matter by saying that the federal act was not involved since that act only created a kind of money to be used in business, and as a tender in the payment of debts. But since no contract or tender was involved here, "The

86 McComb v. Reed (1865), 28 Cal. 288.
87 Spencer v. Prindle (1865), 28 Cal. 276.
88 Lane v. Gluckauf (1865), 28 Cal. 288.
89 Reese v. Stearns (1865), 29 Cal. 273.
90 Ibid., 276.

grade of the offense must be determined by the standard with reference to which it must be presumed to have been fixed by the legislature."[91]

Judicially, California was in line with the rest of the nation since "[p]ractically every State Court which had considered the question had upheld the constitutionality of the [federal] law."[92] No California legal tender cases were appealed to the United States Supreme Court, although that tribunal acted on similar cases. At its December 1868 term the United States Supreme Court ruled that paper money was not legal tender for state taxes,[93] and that the notes were not legal tender in the settlement of obligations calling specifically for payment in gold or silver coin.[94]

Although California was in line legally,

> [a]t the same time it seems plain that the policy of California nullified, to a certain extent, a federal law. To be sure the circulation of the federal notes throughout the state was not actually prohibited. Their use, however, was practically banned by the state laws. . . . As far as California was concerned, the law giving legal tender quality to treasury notes was of little effect.[95]

The legal tender notes may have been of little effect in general, yet California businessmen were able to make large profits by purchasing goods in eastern markets with depreciated greenbacks and selling those goods for gold on the Pacific Coast.

THE RAILROADS

Probably the best-known fact associated with the building of the transcontinental railroad was the financial aid, both in money and land, extended to the railroad companies. What is not as well known is the fact that a goodly amount of largesse was forthcoming from the states as well, and California was certainly not to be outdone, particularly with the "Big Four" being

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91 People v. Welch (1865), 1 Cal. Unrep. 221.

92 Charles Warren, *The Supreme Court in United States History*, vol. II (2 vols.; Boston: Little, Brown & Co., 1921), 499.

93 Lane County v. Oregon (1868), 7 Wall. 71.

94 Bronson v. Rodes (1868), 7 Wall. 229.

95 Joseph Ellison, *California and the Nation . . .* , University of California Publications in History, vol. XVI (Berkeley: University of California Press, 1927), 230.

California residents and active in Republican politics at a time when the G.O.P. was in political ascendency both nationally and in the state. Of the various states extending aid, California was the only far western state to be in a position to be interested in aiding railroads. In spite of constitutional prohibitions against financial aid to private corporations, California presented rights-of-way, land for terminals, and guaranteed Central Pacific bonds.

The one statute involving direct state aid to be tested in the California Supreme Court was passed in 1864. It authorized the Central Pacific Railroad to issue $1,500,000 in 7 percent bonds, with the state to pay the interest on the bonds for twenty years; the state was to create a special tax fund through a special 8 percent tax.[96] A suit was instituted in the name of the people for an injunction to restrain the railroad from issuing any bonds; the petitioner claimed the law violated the provisions of the Constitution limiting the amount of state indebtedness,[97] and prohibiting both the use of the state's credit to help a private person or institution, and the state becoming a stockholder either directly or indirectly.[98] The injunction was denied and the law declared constitutional in *People v. Pacheco*.[99] The Court quickly disposed of the debt limitation problem by citing the cases dealing with the state prison and state capitol, because no specific debt was being created immediately.[100] The principle involved was that of taxation, vested in the Legislature; that power was unlimited.

> The Legislature may not only determine the extent to which it will exercise the taxing power, but also for what objects of public interest it shall be exercised, and it may appropriate the moneys raised to such objects . . . .
>
> There is in the Constitution of California no limitation on the power of the Legislature to appropriate moneys, either as to the amounts to be appropriated or the objects for which they may be made.[101]

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96 Cal. Stats. (1863–64), chap. 320.

97 Cal. Const. (1849), art. VIII.

98 Ibid., art. XI, § 10.

99 People v. Pacheco (1865), 27 Cal. 175

100 See, in chapter 6 *supra*, "Interpreting Other Laws."

101 People v. Pacheco, 209.

The Court said there was no loan or gift of the state's credit contrary to the Constitution because in a case of war there could be no limit to the credit of the state.

> If the Legislature may authorize the building of a railroad for military purposes, it may certainly appropriate funds to aid a corporation in the construction of a similar work in consideration of its use for such purposes. The principal end being the advantage to be derived from the use of the road, it matters not that the appropriation incidentally aids an individual, association or corporation.[102]

The power of the Legislature over its political subdivisions, already noted in other instances, also came into play in regard to the railroads. In the early stages of the construction of the Central Pacific's share of the railroad was the problem of finances. The government delayed the issue of the first mortgage gold bonds and the company could not borrow money with only second mortgage security. In addition, California laws making stockholders personally liable for a company's debts made railroad stocks virtually unsalable, and outright borrowing was precluded by high interest rates. California expectations that financial problems would cause the demise of the railroad enterprise were modified however, when Leland Stanford, the state's governor, persuaded the Legislature to aid the company.

Encompassing a period little more than a year in length, the Legislature passed eight acts granting special concessions to the Central Pacific and Western Pacific railroads alone, and other railroads also received favorable legislation. In addition to the act involved in the *Pacheco* case, the Legislature authorized various cities and counties to subscribe to railroad stock. Not all the statutes were challenged in the courts, but enough were so as to keep many lawyers occupied.

One of these laws to be challenged was the bill authorizing the San Francisco Board of Supervisors to take and subscribe a million dollars to the capital stock of the Western Pacific and Central Pacific.[103] Even in the Legislature there was controversy over the bill, with only half of San Francisco's ten representatives voting for its passage. Controversy did not end with passage, however. One provision of the law was that the people of San

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[102] Ibid., 225.

[103] Cal. Stats. (1863), chap. 291.

Francisco approve the subscription to the railroad bonds. The necessary consent was secured at an election held in May, 1863, but several students of the subject feel that irregular means were used to carry the election.[104]

The ordinance passed by San Francisco's citizenry bound the city to purchase $600,000 worth of stock in the Central Pacific and $400,000 in the Western Pacific, but Wheeler N. French instituted a taxpayer's suit to prevent the city from purchasing the stock. A temporary injunction was granted by the district court, but on appeal, the Supreme Court upheld the constitutionality of the statute in *French v. Teschemaker.*[105] French's contention was that the enabling statute was void because it relieved the city of any liability beyond the amount subscribed, contrary to the constitutional provisions making stockholders personally and proportionately liable for all corporate debts.[106] The Court turned down this argument saying that the city could not subscribe to railroad stock without the permission of the Legislature, and the Legislature would also determine proportionate liability, since it was not defined in the Constitution.

Those opposing the subscription also turned to the Legislature, which passed an act[107] authorizing the city to compromise with each of the two railroads and thus settle all claims

> for cash or other security, in place of bonds claimed by the companies, provided the power to make such compromise should rest in the Board of Supervisors only after and in case said board should be compelled by final judgment of the Supreme Court to execute and deliver the bonds specified in the act.[108]

The city enacted a compromise under which it was to give the Central Pacific $400,000 in bonds instead of buying $600,000 in stock, and $200,000 in bonds to the Western Pacific instead of the $400,000 in stock. The required court order was issued, but the city's officers still refused to deliver the bonds, causing a new writ of mandate to be sought against these

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104 See for example, Stuart Daggett, *Chapters on the History of the Southern Pacific* (New York: The Ronald Press Company, 1922), 31.

105 French v. Teschemaker (1864), 24 Cal. 518.

106 Cal. Const. (1849) art. IV, §§ 32, 36.

107 Cal. Stats. (1863–64), chap. 344.

108 Daggett, *Southern Pacific*, 34.

officials individually; this became *People v. Coon*.[109] The Court granted the mandamus, saying that since the city was a creature of the Legislature, and in the exercise of its legitimate powers could only act by and through its agents. Here the city's agents, the defendants, had to act if all the conditions stated in the act authorizing the compromise were met, and they were. The last condition was an order from the Court, and that order consisted of the final judgment in *French v. Teschemaker*.

As a result of the issuance of the mandamus the city officers signed the bonds, but the city and county clerk, Wilhelm Loewy, either refused or merely failed to countersign them; the bonds ended up with the county treasurer, and the state, as in *People v. Coon*, acting on relation of the Central Pacific, brought suit, seeking a peremptory mandamus commanding Loewy or his successor to get the bonds, countersign them, and help deliver them to the railroad. The Board of Supervisors was to assist him and was made a co-defendant, as the case came up as *People v. Supervisors of San Francisco*.[110] Six of the supervisors tried to answer individually, but the Supreme Court said the Board could only answer in its aggregate capacity. The Board and Loewy now alleged fraud in the 1863 enabling election. Governor Leland Stanford had written an open letter at the time of the election to remind the city's inhabitants of the advantages the railroad would bring to the state generally, and San Francisco in particular.

Stanford did not limit his influence to letter writing, for at the trial in the lower court witnesses testified that Stanford's brother Philip, a large Central Pacific stockholder, purchased votes at the polls. This argument was rejected, the Court saying that since fraud had not been found by the lower (trial) court, the matter was now *res judicata*. Failing on this point, the defendants raised other technical matters, but the railroad won the day.

The victory was costly to the railroad, at least in part, as "Stanford and his associates afterward claimed that this action on the part of San Francisco seriously weakened the credit of the company not only in the West but in the financial centers of the East."[111] The bonds were delivered

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[109] People v. Coon (1864), 25 Cal. 635.

[110] People v. Supervisors of S. F. (1865), 27 Cal. 655.

[111] Harry J. Carman and Charles H. Mueller, "The Contract and Finance Company and the Central Pacific Railroad," *The Mississippi Valley Historical Review* XIV (December, 1927): 332.

to the company April 12, 1865, seven days after the decision in *People v. Supervisors of S. F.*, but also after two years of legal struggles. This two-year delay proved costly to the company; had the bonds been available in 1864 the company would have built its line more rapidly and gone beyond Salt Lake.

The city was the loser in the long run, too. The result was a flat payment by the city with no stock in return, "but since the road later made money and its stocks soared in value, this move cost the city millions in railroad securities."[112]

Due to San Francisco's prominence in the state, the controversy between it and the railroad probably received more notoriety than the problems of other cities and counties, but these problems were real enough to the local governments involved. As early as 1860, before the passage of the federal railroad act, Butte County appeared in the Supreme Court as a defendant in a taxpayer's suit to restrain the county from carrying out provisions of two 1860 acts of the Legislature authorizing the county to buy bonds of the California Northern Railroad Company.[113] In *Hobart v. Supervisors of Butte County*, the Court rejected the plaintiff's contention that the act was not a "law, for the reason that the matter prescribed is not the will of the Legislature, but a mere transfer to the people of Butte County of powers to legislate.[114]

The Court reiterated the extensive powers of the Legislature, which were limited only by the Constitution. The act provided for an election before the bonds were to be purchased:

> The Legislature frame the law, and fix its terms and provisions; but they declare that this law shall only take effect in a particular event, that event being the assent of the people interested. It is difficult to see upon what principle the Legislature, having the general powers before attributed to it, may not as well make a *local law* depend for effect upon the will of all the voters of a locality or a majority, as upon the assent of a few; and laws are passed everyday which depend for validity upon the acts of individuals.[115]

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112 Norman E. Tutorow, *Leland Stanford: Man of Many Careers* (Menlo Park: Pacific Coast Publishers, 1971), 77.

113 Cal. Stats. (1860), chap. 122, 164.

114 Hobart v. Supervisors of Butte County (1860), 17 Cal. 30.

115 Ibid., 33.

The exact monetary provision of the 1860 acts was that the county would issue bonds totaling one-third of the railroad's expenditures. The county claimed that even though the railroad spent some $97,000, the work was worth only $30,000, making the county liable for $10,000 in bonds. The Supreme Court disagreed, saying that the actual expenditure was the real basis of the county's liability. "Any other basis, besides being uncertain, and leading to embarrassing inquiries, is unwarranted by the express terms and evident spirit of the Act."[116] The county now followed the legislative and judicial dictates, but in 1863 the Legislature passed a new act, authorizing the county to issue county bonds to pay for the railroad bonds,[117] and in 1866 a further act for the levying and collection of a tax to provide for the payment of accruing interest on the county bonds, and eventual payment of the principal.[118] In 1872 the county was called upon to appear again in court, with the Supreme Court ordering the county to increase the tax levy for the payment of the interest and principal.[119]

Other local governments involved in railroad stocks and bonds to become involved in Supreme Court litigation because of such involvement, included Sacramento's consolidated city and county government, the counties of Napa, Plumas, Santa Clara, and Marin, and the cities of Stockton and San Diego. Although the facts may have differed from city to city or county to county, no new principles of law were involved, although a look at Stockton's involvement might shed further light on the problems faced by a local government in its relationship with a railroad. At its 1870 session, the Legislature empowered the city of Stockton to aid the Stockton and Visalia Railroad, directing the municipal authorities to donate $300,000 to the railroad, which was to have a permanent terminus in the city, at its waterfront.[120] Bonds were to be placed in the hands of trustees who were to deliver them piecemeal to the railroad as the work progressed. All went well until the city authorities refused to levy the tax to pay the accruing interest on the bonds, claiming the act was unconstitutional.

116 C. N. Railroad Company v. Butte County (1861), 18 Cal. 675.
117 Cal. Stats. (1863), chap. 178.
118 Cal. Stats. (1866), chap. 305.
119 Robinson v. Butte County (1872), 43 Cal. 353.
120 Cal. Stats. (1869–70), chap. 396.

In *S. & V. R. R. Co. v. City of Stockton*, the Court again stressed the power of the Legislature over local governments, taxation, and internal improvements, and upheld the law.[121] Meantime, the railroad, the Stockton and Visalia Railroad Company, to be exact, sold out its interests to Leland Stanford and friends, who were then in the process of assembling their railroad network. The agreement had been that the railroad was to go from Stockton to Visalia, by which time all the bonds were to be delivered to the railroad company, but the company tried to use a portion of another acquired road, not built by the Stockton Railroad, as part of the road it constructed.

David S. Terry, a former chief justice, acted as attorney for the railroad, but then changed over to the city, whose officials challenged Stanford's group. Terry's biographer has traced the proceedings:

> Starting in 1871 the Stockton and Visalia Railroad case wound its weary way through the courts for half a dozen years and then was settled out of court. By the summer of 1872 Terry had become one of the attorneys for the people. . . . The district court's decision favored the city and county, but in 1875 the supreme court reversed the decision and held that the bonds should be delivered to the railroad company. Terry and his associates in the case managed to delay matters until May, 1877, and finally effected a compromise. City and county bonds to the value of $200,000 were to go to the railroad's representative, and in return $300,000 worth of bonds and their coupons were to be canceled. The total cancellations amount to $530,000. Terry and those who had worked with him on the case had saved Stockton and San Joaquin County a very substantial sum of money.[122]

The county of San Joaquin was also a party to the subsidy for the railroad, but was not involved in the Supreme Court case with the city of Stockton, *Stockton Railroad Co. v. Stockton*.[123] In that case the Court said that by purchasing what it did, the railroad was still securing to the people of Stockton the benefits they sought, permanent communication by a railroad from the Stockton waterfront to Visalia.

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121 S. & V. R. R. Co. v. City of Stockton (1871), 41 Cal. 147.

122 A. Russell Buchanan, *David S. Terry of California; Dueling Judge* (San Marino: The Huntington Library, 1956), 164.

123 Stockton Railroad Co. v. Stockton (1876), 51 Cal. 328.

In *Hornblower v. Duden*, the Supreme Court upheld the right of El Dorado County to hire outside counsel to represent its interests in a contested election for directors of the Placerville and Sacramento Valley Railroad.[124] The county owned 2,000 shares having a nominal value of $200,000, and "was, therefore, a stockholder, and as such directly interested in the conduct and management of the affairs of the company, and therefore in the selection of its officers. She had precisely the same rights as any other stockholder."[125]

As a stockholder the county's interests had to be looked after with the same care as other property, and the Board of Supervisors had the power to use whatever means were necessary. If this case was not a landmark in legal history, it did indicate some of the problems raised by the entry of the railroads and the involvement of local governments in railroad financing.

Railroads were also considered to be "public uses" and were entitled to use the state's power of eminent domain under the California Railroad Law of 1861.[126] The Supreme Court held that numerous decisions had already decided that a railroad was a "public use" within the constitutional meaning. It refused to be put in the position of determining the point for each individual railroad, saying such a determination was within the discretion of the Legislature.[127]

Such a condemnation was, of course, a special proceeding, and "[i]t is a rule of universal recognition that in special proceedings, by which private property is taken for public use, the statute must be strictly construed."[128] Under the 1861 law, commissioners were to be appointed to appraise the value of the land when it was actually taken, which meant when the title passed to the railroad.[129] The Court also upheld statutory provisions allowing the commissioners to take into account any benefits accruing to the rest of the owner's land, or any injury thereto. Only in such a way could a "just compensation be reached."[130] In *Southern Pacific Railroad*

124 Hornblower v. Duden (1868), 35 Cal. 664.
125 Ibid., 670.
126 Cal. Stats. (1861), chap. 532.
127 Contra Costa Railroad Co. v. Moss (1863), 23 Cal. 323.
128 S. P. R. R. Co. v. Wilson (1874), 49 Cal. 396.
129 S. F. & S. J. R. R. Co. v. Mahoney (1865), 29 Cal. 112.
130 S. F. A. & S. R. R. Co. v. Caldwell (1866), 31 Cal. 367.

Co. v. Reed, the Court said that it was possible for two railroads laying tracks over the same land to each cause injury to property owners, and each become liable for such injury as it inflicts.[131] The Court also laid down the rule that the railroad could not enter and use the condemned land until title passed to it, while no title could pass until just compensation was given to the land owner.[132]

Taxation of the railroads also came within the purview of the Supreme Court, which upheld the state's right to tax the property of railroads within the limits of the state.[133] In the case of railroad land, also part of the public domain, such land became liable to taxation by the state when all the steps needed to receive a federal patent had been completed.[134]

Cases emanating from federal railroad laws did not reach the state courts of California with great frequency, but conflicts did arise, such as when a railroad line was made to cross a mineral claim. The 1862 Pacific Railroad Act specifically excepted mineral lands from grants by the federal government to the railroads,[135] but in *Doran v. Central Pacific Railroad Company* the railroad's actual line of road crossed public mineral lands claimed, improved, and mined by the plaintiff.[136] In such an instance the railroad had priority because title to the land was in the federal government, and as the holder of the paramount title, the government could dispose of the land as it wished. The plaintiff was, as compared to the government, a mere naked trespasser, and could not prevent the entry of the paramount authority or one who enters under that authority. The same reasoning, in essence, was used in *Western Pacific Railroad Co. v. Tevis*, when the Court said the railroad's right of way, as granted by Congress, prevailed against a preemptor who had not yet perfected his claim because until the claim was perfected, the title to such public lands remained in the federal government.[137] If the United States had already disposed of the land in any way, then a railroad could not enter. One such instance occurred in *Butterfield*

131 Southern Pacific Railroad Co. v. Reed (1871), 41 Cal. 256.
132 Fox v. W. P. Railroad Co. (1867), 31 Cal. 538.
133 People v. Central Pacific Railroad Co. (1872), 43 Cal. 398.
134 Central Pacific Rail road v. Howard (1877), 52 Cal. 227.
135 12 U.S. Stat. at L. (1863), 489–98.
136 Doran v. Central Pacific Railroad Company (1864), 24 Cal. 2.
137 Western Pacific Railroad Co. v. Tevis (1871), 41 Cal. 489.

v. C. P. R. R. Co. when the Central Pacific entered land the property of a holder under a federal military land warrant, and the railroad was liable for damages.[138]

The three sections comprising this chapter indicate, as noted earlier, some economic aspects faced by California as a developing state. The section dealing with taxation involves purely state and local problems, but the sections dealing with legal tender notes and the railroads, while developed from the view of the state, also show California reacting to national concerns.

Generally stated, the decisions were victories for, and beneficial to the business interests of the state, particularly financial groups, who no longer had to pay interest on their mortgages, did not have to accept depreciated paper money, and fully expected to profit from the railroad industry, both through the bonds and from the increased business that was expected to be generated by the railroads. Many of these decisions, seemingly probusiness, left the Court under fire, as claims were made that the decisions were arrived at on the basis of business and not law. Certainly the justices were generally men of property and may have had sympathies for the business community; some of the justices certainly had (Republican) political connections with the Big Four. Another consideration might have been political, as the justices may have been catering to businessmen, many of whom were also political leaders, to ensure their own careers, either continuing on the Court or in other political offices.

There are other more charitable explanations as well. The most obvious one is merely to say that the decisions represented the law as the justices saw it. Another possible explanation was that the justices were influenced by outside considerations, but not personal ones. They may have felt that their decisions would go far in helping California grow and develop financially.

The long-range trend of the opinions presents still another option, the one favored by this author. These decisions involved the continuing constitutional question of legislative authority. The Constitution gave the Legislature a tremendous amount of power, and the Court, unless there was a clearly unconstitutional enactment, was prone to support and even encourage legislative power. It has been noted earlier in this study that although the Court said there were limits on the power of the Legislature, it

138 Butterfield v. C. P. R. R. Co. (1866), 31 Cal.

still tended to give this power wide latitude. Thus, the Court accepted the judgment of the Legislature about the Specific Contract Act and the various railroad acts, and actually preferred direct Legislative control over tax matters to that by the State Board of Equalization. It may very well be true that members of the Court agreed with these decisions as private persons, but the constitutional question of legislative power was a real legal issue.

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Chapter 9

CALIFORNIA AND THE NATION

Conflicts between the various states and the federal courts can be traced back to the early days of the Republic. In 1794 the United States Supreme Court held that a citizen of one state could sue another state in the federal courts.[1] This conflict was settled by the Eleventh Amendment to the United States Constitution, but succeeding years produced new situations that again placed state and federal authority at odds with one another. The period after 1815, when the concept of states' rights gained prominence, saw several states defy the United States Supreme Court. In the 1850s three states in particular defied the federal courts: Ohio, Wisconsin, and California.

Defiance by the California Supreme Court consisted in the denial of the federal courts' jurisdiction in certain cases and in refusing to accept decisions of the United States courts and other federal bodies as binding on California's courts. Other problems involved the interpretation of the United States Constitution, laws, and treaties, and decisions in cases involving slavery.

[1] Chisholm v. Georgia (1793), 2 Dall. 419.

STATE AND FEDERAL AUTHORITY

The first case to reach the Supreme Court involving a possible conflict between California and federal authority was *People v. Naglee*,[2] which tested the California law taxing foreign miners. This law was passed by the Legislature in 1850 to collect license fees from foreigners who worked the mines in the state.[3] The case arose when Attorney General James A. McDougall questioned the defendant's right to collect the taxes, the latter being one of the fee collectors. Justice Bennett, speaking for the Court, said the law was not in violation of the United States Constitution, as a usurpation of defined congressional powers, since the state had the power of taxation over all persons within its territorial jurisdiction, and this held true even if the mining lands were public lands of the United States which the miners were working as mere trespassers or as claimers of a preemption right.

The promise of California attracted people from many countries of the world, and until such time as they became citizens of the United States many of their rights were to be determined by treaties between their native lands and the United States. In the 1850s the Supreme Court acknowledged the federal government's treaty-making powers and the authority of such treaties,[4] but the question of whether a specific law was indeed in conflict with a treaty still remained.

This conflict between state law and federal treaty was often the key to the legality of anti-Chinese legislation, but in California, in the twenty-five or so years after admission, the most important treaty was the Treaty of Guadalupe Hidalgo, signed May 30, 1848, ending the war with Mexico.[5]

Having decided that foreign miners could be taxed, the Court went on to discuss the provisions of the Treaty of Guadalupe Hidalgo dealing with the citizenship of the native Californians, and to examine the treaty-making power of the United States. By the eighth and ninth articles of the treaty, any Mexican citizen who did not either move to Mexico or declare his intention to retain his Mexican citizenship within one year of the exchange of ratifications, was to be considered as having elected to become a citizen of the

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2 People v. Naglee (1850), 1 Cal. 232.

3 Cal. Stats. (1850), chap. 97.

4 People v. Gerke (1855), 5 Cal. 381; Forbes v. Scannell (1859), 13 Cal. 242.

5 9 U.S. Stat. at L. (1848), 922–43.

United States.[6] The Court said that the statute was not in conflict with these treaty articles, and all Mexicans who had not declared their intentions to retain their Mexican citizenship were to be deemed American citizens and not subject to the tax. But if this or any state law were to clash with a treaty of the United States, it was not always necessary that the state law had to give way. In presenting a typical states' rights argument, the Court went on to state that the state law would give way only if the power to enact that law had been specifically relinquished by the state to the central government:

> If the state retains the power then the president and senate cannot take it away by a treaty. A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty making department . . . . When it transcends these limits . . . it cannot supersede a state law which enforces or exercises any power of the state not granted away by the constitution.[7]

In spite of the authority of the *Naglee* case, some twenty years later the citizenship of Pablo de la Guerra was challenged.[8] De la Guerra, a member of a prominent Santa Barbara Californio family, had been one of the men to draw up California's 1849 Constitution, and like other members of his family, held various offices. In this particular case he had been elected a district judge in 1869, and the relator questioned de la Guerra's citizenship under the 1848 treaty, saying that an act of Congress admitting California's Mexicans to citizenship was needed. Said the Court: "The question raised would be of very grave import to the people of this State, were it not for the fact that its solution is quite obvious."[9] Justice Jackson Temple opined that the Treaty of Guadalupe Hidalgo itself had the direct effect of fixing the status of the inhabitants of the territories ceded under the treaty, and under the ninth article the only way in which it was possible to admit the Mexicans into full citizenship was by incorporating the ceded territory into the United States as a state. After such admission into the union, no further act was needed to define the rights of the inhabitants of the ceded territory. Jackson defined the steps more finely by adding that citizenship

6 49 U.S. Stats. at L. (1848), 922–43.

7 People v. Naglee, 246.

8 People v. de la Guerra (1870), 40 Cal. 311.

9 Ibid., 339.

came with the cession to the United States, and statehood brought political power. "The possession of all political rights is not essential to citizenship. When Congress admitted California as a State, the constituent members of the State, in their aggregate capacity, became vested with the sovereign powers of government, "'according to the principles of the Constitution.'"[10]

The bulk of the cases involving an interpretation of the Treaty of Guadalupe Hidalgo, however, dealt with land grants emanating from the Mexican period, and the problem of these grants was largely assumed by the federal government.

Without mentioning the *Naglee* case the treaty-making power of the United States was upheld by the Court in *People v. Gerke*, where a Prussian citizen had died intestate, and the state claimed that the estate should have reverted to it because there was nobody competent to inherit.[11] In supporting the appointment of Henry Gerke as administrator and his sale of part of the estate on behalf of the absent heirs, the Court gave precedence to an 1828 treaty between Prussia and the United States, one of whose articles provided for such a contingency by allowing the heir to sell the property and take the proceeds.[12] In answering the claim of the state that the United States could not make such a provision by treaty, the Court said that before the federal constitution was written the individual states had the power to make such treaties, but by the federal compact "they expressly granted it to the Federal Government in general terms, and prohibited it to themselves."[13]

A similar treaty with the Hanseatic towns[14] was brought up in *Siemssen v. Bofer*, where the inheritors, again nonresident aliens, attempted to bring an action of ejectment.[15] Chief Justice Murray cast doubt on the *Gerke* case without actually overruling it, holding that the ejectment could not be maintained, but the interest in the property could be sold since the state authorized sales of real estate by parties not in possession.[16] In 1859 *People v. Gerke* was expressly upheld in *Forbes v. Scannell*, where an assignment to a creditor was held valid,

10 Ibid., 343–44.
11 People v. Gerke (1855), 5 Cal. 381.
12 8 U.S. Stat. at L. (1828), 378–86.
13 People v. Gerke, 383.
14 8 U.S. Stat. at L. (1827), 366–73.
15 Siemssen v. Bofer (1856), 6 Cal. 250.
16 Cal. Stats. (1850), chap. 101, § 34.

although it was made in Canton, China, before the United States consul, Oliver H. Perry, under an 1844 treaty between China and the United States.[17]

In 1855 one Frank Knowles petitioned the California Supreme Court to become a naturalized United States citizen. The Court denied his petition, which was based on an 1802 act of Congress giving any state court the power to naturalize.[18] In *Ex parte Knowles*, the Court denied its own jurisdiction, saying that it had only appellate powers, and the power to naturalize was one of original jurisdiction.[19] In any event, the California Legislature gave the district courts of the state the power to grant naturalization,[20] and the district court was the only state court with this power, as Congress could not confer any judicial power on a state court. But a state court could take the case where a seaman sued his master for past wages, where seaman, master, and ship were all British. Justice Bennett, speaking for the Court, said it was the duty of the courts to foreign nations to protect foreign subjects, especially as the seaman would have had a good case in an English court as well.[21]

It was also possible on occasion for both state and federal courts to have jurisdiction over a matter, and suit could be brought in both courts. In an action for money due on freight it was not enough of an answer to say that there was a suit on the same matter in the District Court of the United States. Chief Justice Murray said, "both actions may proceed at the same time without the fear of any danger of any collision or clashing of jurisdiction."[22]

A direct challenge to federal authority arose when the California Supreme Court denied the jurisdiction of the United States Supreme Court under the twenty-fifth section of the Federal Judiciary Act of 1789,[23] which gave the federal courts jurisdiction over certain classes of cases, as occurred in the 1850s in the cases of *Gordon v. Johnson*[24] and *Taylor v. The Steamer Columbia*.[25] In the former case the California Supreme Court

17 Forbes v. Scannell (1859), 13 Cal. 242.
18 2 U.S. Stat. at L. (1802), 153–55.
19 Ex parte Knowles (1855), 5 Cal. 300.
20 Cal. Stats. (1853), chap. 168.
21 Pugh v. Gilliam (1851), Cal. 485.
22 Russell v. Alvarez (1855), 5 Cal. 48.
23 1 U.S. Stat. at L. (1789), 73–92.
24 Gordon v. Johnson (1854), 4 Cal. 368.
25 Taylor v. The Steamer Columbia (1855), 5 Cal. 268.

denied a writ of error to enable an appeal to the United States District Court. Justice Solomon Heydenfeldt, speaking for a unanimous court, followed a line of reasoning already enunciated by the Virginia State Supreme Court and John C. Calhoun: the twenty-fifth section of the Federal Judiciary Act was unconstitutional and void since it was a patent usurpation of state powers. As there was no provision in the United States Constitution for this section, the Court held that state and federal courts were coordinate tribunals, with jurisdiction attaching to the court first receiving the matter for adjudication. The rule, then, became:

> 1st, that no cause can be transferred from a State Court to any Court of the United States.
>
> 2d, that neither a writ of error nor appeal lies to take a case from a State Court to the Supreme Court of the United States.[26]

State and federal courts were thus held to be coordinate, and by implication, completely independent of one another. Justice Heydenfeldt expanded his view the next year in the *Taylor* case, which involved the question of admiralty jurisdiction. The Court decided that judicial power over admiralty cases was not exclusive in United States courts, even though they had received jurisdiction to all admiralty and maritime cases from the federal constitution.[27] In so holding, the Court sustained statutory provisions giving the state's district courts equal jurisdiction with federal courts in admiralty cases;[28] jurisdiction attached to the court first receiving the matter for adjudication because the federal constitution nowhere gave exclusive jurisdiction to federal courts. One historian of the Supreme Court concluded that the reason for the state Court's hostile view was the physical isolation of California in the years prior to the building of the transcontinental railroad.[29]

The Legislature attempted to counter these decisions by passing an act compelling the state judiciary to comply with the Federal Judiciary Act.[30]

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26 Gordon v. Johnson, 374.

27 U.S. Const., art. III, § 2.

28 Cal. Stats. (1851), chap. 5, §§ 317–32.

29 Charles Warren, The Supreme Court in United States History, vol. II (2 vols.; rev. ed., Boston: Little, Brown, and Company, 1922, 1926), 257.

30 Cal. Stats. (1855), chap. 73, §§ 2, 3.

However, the Court changed its position before the decade ended. In *Warner v. Uncle Sam*, Justice Peter H. Burnett said the decisions in the *Johnson* and *Taylor* cases were wrong, but he did not overrule them in express terms.[31] In his view concurrent admiralty jurisdiction could be sustained only if the appellate power of the federal courts extended to the state courts: "The exercise of this original jurisdiction by the state courts, subject to the supervisory powers of the Supreme Court of the United States, would seem to be compatible with the harmony and efficiency of the system and beneficial in its practical effects."[32]

The Supreme Court of California gave formal judicial recognition to the disputed section of the Judiciary Act in *Ferris v. Coover*, although holding that the appellate power of the Supreme Court of the United States was limited to those instances actually mentioned in the section in controversy.[33] Although Chief Justice David S. Terry dissented, Justice Joseph Baldwin, with the concurrence of Justice Stephen J. Field, said that the arguments were all exhausted, and that the doctrine of federal judicial supremacy had long been established. Baldwin went on to say that "there should be a central tribunal having power to give authoritative exposition to the Constitution, and laws, and treaties of the United States, and which should also possess the power to secure to every citizen the rights to which he is entitled under them, seems to us highly expedient."[34] In spite of a vigorous dissent by Chief Justice Terry, California judicially "joined the Union."

Still other cases arose which involved relations between the state and the federal government, such as whether a state court could enjoin proceedings in a federal court. *Phelan v. Smith*[35] said that no such power existed, and in *Ex parte Lewis Crandall*[36] the Court enforced the federal act of 1790, which made desertion a crime.[37] The Court, in 1857, declared unconstitutional a state law which placed a passenger tax of $50 on each Chinese brought into California.[38] This decision was based on similar cases

31 Warner v. Uncle Sam (1858), 9 Cal. 697.
32 Ibid., 728.
33 Ferris v. Coover (1858), 11 Cal. 175.
34 Ibid., 179.
35 Phelan v. Smith (1857), 8 Cal. 520.
36 Ex parte Lewis Crandall (1852), 2 Cal. 144.
37 1 U.S. Stat. at L. (1790), 131–35.
38 Cal. Stats. (1855), chap. 153.

previously adjudicated by the United States Supreme Court,[39] and in *Mitchell v. Steelman*,[40] the California Statute of Frauds[41] was made to yield to the federal statute with which it was in conflict.[42]

It seems appropriate here to discuss, briefly, some cases arising from land considerations. In 1852 the Legislature enacted a law providing for the disposal of 500,000 acres of land granted to California under an 1841 act of Congress.[43] In *Nims v. Palmer*,[44] the Court held that the two laws were not in conflict, even though the latter act provided for the location of the land after survey.[45] "The State had the most perfect right to determine what shall constitute evidences of title as between her own citizens, to all lands within her boundaries."[46] In *Gunn v. Bates*, the Court said that since the United States Supreme Court had decided that a conditional grant from the Mexican government conveyed a good title even without performance of the conditions, the California court would not question the rule, although in a partial dissent Justice Terry said he did not agree on all points.[47] In 1859 the Court went on to say that decisions of the United States Land Commission and United States district courts could be used as evidence in disputes involving land,[48] and the state courts could not interfere with decisions of the United States Board of Land Commissioners.[49]

With these important questions of federal authority settled, later cases coming before the California Supreme Court involving federal relations still raised points that needed to be settled, not only those dealing with judicial relationships, but the interpretation by the state courts of the United States Constitution, federal laws, and treaties. Corollary to such a study is an examination of the relationship between California and other states of the federal union.

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39 People v. Downer (1857), 7 Cal. 169.
40 Mitchell v. Steelman (1857), 8 Cal. 363.
41 Cal. Stats. (1850), chap. 114, § 17.
42 9 U.S. Stat. at L. (1850), 440–41.
43 Cal. Stats. (1852), chap. 4.
44 Nims v. Palmer (1856), 6 Cal. 8.
45 5 U.S. Stat. at L. (1841), 453–58.
46 Nims v. Palmer, 13.
47 Gunn v. Bates (1856), 6 Cal. 263.
48 Gregory v. McPherson (1859), 13 Cal. 562.
49 Waterman v. Smith (1859), 13 Cal. 373; Moore v. Wilkinson (1859), 13 Cal. 478.

CALIFORNIA AND SLAVERY

Probably nothing in the period under discussion caused more excitement than the issue of slavery. Even before statehood slaves had been brought into California, many coming with their masters to work in the mines. Many people felt, or at least hoped, that California would become a slave state, but slavery was not permitted in the state constitution,[50] and the Legislature passed an act requiring all slaves to leave the state,[51] which was broader than the federal Fugitive Slave Act,[52] as it required slaves brought here voluntarily as well as fugitive slaves to leave the state. Two slave cases reached the Supreme Court in the 1850s, *In the Matter of Perkins*[53] and *Ex parte Archy*,[54] both by use of writs of habeas corpus. In the *Perkins* case, three slaves were brought into California voluntarily before statehood, and once there, the slaves freed themselves, and went into business on their own account. A provision of the 1852 act said that slaves brought here voluntarily before statehood who refused to return to their home state upon demand of their owner, should be deemed fugitives from labor and apprehended and returned to their owners. The Court said that the state law did not limit the federal act, but allowed such cases to be brought to state courts. The state, in so allowing, was also relieving itself of an obnoxious class of persons and was in no way considering the freedom of the slaves.

The *Archy* case, which was not decided until 1857, caused a great deal of discussion and excitement throughout the state. Archy was brought into the state by his master, Charles A. Stovall, who travelled to California for his health and who remained here a short time and then returned to Mississippi. Stovall worked for some time as a teacher, and then decided to send Archy back to Mississippi. He placed him on a steamer, from which the slave escaped. Legal proceedings were then begun.

Justice Burnett wrote the opinion in which he said that the right of property (a slave) went with its owner, and thus Stovall had a right to a slave while travelling, but Stovall changed his status by taking a position as a teacher. By this statement Burnett seemingly laid the way for Archy's

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50 Cal. Const. (1849), art. I, § 18

51 Cal. Stats. (1852), chap. 33, § 1.

52 9 U.S. Stat. at L. (1850), 462–65.

53 In the Matter of Perkins (1852), 2 Cal. 424.

54 Ex parte Archy (1857), 9 Cal. 147.

freedom, but gave Archy to Stovall's custody anyway, saying there were circumstances which would exempt Stovall from these rules, and that in the future the rules would be strictly enforced. For whatever reasons Burnett had for this action, Archy eventually gained his freedom as the matter came up before a United States commissioner, who freed Archy, as Stovall changed his story, claiming Archy had escaped in Mississippi.[55]

Justice Burnett's opinion brought about a great deal of adverse comment that was directed toward the Court in general and Burnett in particular. Joseph G. Baldwin is supposed to have stated that the Court "gave the law to the North and the Negro to the South."[56] The concurrence in the decision by Chief Justice Terry, an ardent pro-Southerner, was not surprising, but Burnett never explained the reason for his decision. One student of Burnett's career claims that Burnett had a record of dislike of African Americans, forever trying to bar them from whatever area in which he resided.[57]

The judicial relations between California and the United States were not atypical of the turbulent decade before the United States. California was not the first state to question federal judicial supremacy, nor was it to be the last. What tended to stimulate such a self-asserting point of view in California was the physical distance from the rest of the nation. California's geographical situation provided not only physical isolation but also a sense of aloneness that created a feeling of independence from the national government. As the decade went on, the slavery controversy tended to involve the state more in national questions, and the Court reversed its earlier stand on the Federal Judiciary Act.

JUDICIAL RELATIONSHIPS

The judicial recognition of the Federal Judiciary Act in *Ferris v. Coover* did not serve to extend a jurisdictional carte blanche to the federal judiciary over actions in California's courts. What the case did decide was, first, that in

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55 Theodore H. Hittell, *History of California*, vol. IV (4 vols., N. J. Stone & Company, 1885–97), 246.

56 J. Edward Johnson, *History of the Supreme Court Justices of California*, vol. 1 (2 vols., vol. 1 San Francisco: Bender-Moss Company, 1963; vol. 2 San Francisco: Bancroft-Whitney Company, 1966), 63.

57 William E. Franklin, "The Archy Case: The California Supreme Court Refuses to Free a Slave," *Pacific Historical Review* XX–XII (May, 1963): 153.

certain instances, such as maritime cases, causes could be transferred from state to federal courts, and second, that certain classes of cases could be appealed to the United States Supreme Court. In each such instance, however, the provisions of the Judiciary Act of 1789 and later federal laws dealing with the judiciary had to be followed with exactitude. In discussing an attempt to sue out a writ of error in order to have the United States Supreme Court review the key case of *Hart v. Burnett*, the decision that determined rights to San Francisco's pueblo lands,[58] Chief Justice Stephen J. Field wrote: "The Supreme Court of this State, whilst admitting the constitutionality of this [25th] section" does not recognize an unlimited right of appeal from its decisions to the Supreme Court of the United States."[59] Field added that appeals under the section in question were limited to the instances enumerated therein. Thus, he said, "In accordance with the views here expressed, I must, when applied to for a citation, judge, in the first instance, whether the case is covered by the Act of Congress."[60] In this particular instance Field refused the writ of error, holding that the federal act referred to final judgments, and the case sought to be reviewed was not a final judgment in that sense, but a determination of law to be used by the lower court in the rehearing of that case. In *Tompkins v. Mahoney*, the Supreme Court added that appeals from it to federal courts were limited to the United States Supreme Court and not to a United States Circuit Court even if such court were presided over by a United States Supreme Court justice.[61]

Problems of jurisdiction at the trial level might best be seen by examining cases that involved maritime questions. The acceptance of the 1789 Judiciary Act involved the determination that federal courts had exclusive jurisdiction over maritime cases, but this did not prevent such suits from appearing in state courts, but with a different form of action. In *Bohannan v. Hammond* a suit was brought for damages incurred by goods shipped by the plaintiff, and damaged by the defendant, a common carrier.[62] The defendant contended that state courts lacked jurisdiction because the action was brought on a maritime contract and could only be brought in

58 Hart v. Burnett (1860), 15 Cal. 530.
59 Hart v. Burnett (1862), 20 Cal. 171.
60 Ibid.
61 Tompkins v. Mahoney (1867), 32 Cal. 231.
62 Bohannan v. Hammond (1871), 42 Cal. 227.

admiralty. The Supreme Court rejected this argument, saying that the Judiciary Act defining jurisdiction of federal courts allowed a common law remedy if the common law could be applied, and a suit like this, seeking damages, was one such instance; state courts "have concurrent jurisdiction of causes of action, cognizable in admiralty, where only a common law remedy is sought."[63] The Court amplified its view the same year in *Crawford v. Bark Caroline Reed*,[64] where the plaintiff sued to enforce a materials lien under a California statute.[65] The Court held that the contract breached was a maritime contract, and the courts of the United States had exclusive jurisdiction of proceedings in rem to enforce a lien against the ship. The California statute was unconstitutional insofar as it tried to authorize proceedings in rem for causes cognizable in admiralty. This contract was enforceable in admiralty courts.

> The language of the Judiciary Act is not that the [federal] District Courts shall have exclusive, original cognizance of actions to enforce maritime liens, but of all civil causes of admiralty and maritime jurisdiction. The cause of action is the breach of the contract. For this an action lies in admiralty. It is the fact that it is a maritime contract which gives that Court jurisdiction, and not the fact that a maritime lien is to be enforced.[66]

If the case was one belonging to admiralty courts, their jurisdiction was exclusive unless the case fell within the saving clause of the Judiciary Act, which allowed a suit in state courts if there were a common law remedy. "It must follow from this that whenever Courts of admiralty have jurisdiction of a cause of action, whether it afford a remedy *in rem*, or *in personam* merely, that jurisdiction is exclusive, except as to the common law remedy reserved by that Act."[67] In determining whether a case was maritime or not, regardless of the pleading, the cause "must relate to the business of commerce and navigation."[68] Wharfage fees were not so related.

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63 Ibid., 229.

64 Crawford v. Bark Caroline Reed (1871), 42 Cal. 469.

65 Cal. Stats. (1851), chap. 5, § 317.

66 Crawford v. Bark Caroline Reed, 474.

67 Ibid.

68 People v. Steamer America (1868), 34 Cal. 676.

Whether a federal or state court had jurisdiction could also depend on the citizenship of the litigants, as well as the type of action involved. In *Calderwood v. Hagar*, an application for a mandamus to compel removal to the United States Circuit Court for trial, the relator, one of eleven defendants, claimed to be an alien, and the other defendants were not.[69] The twelfth section of the 1789 Judiciary Act said an alien defendant could ask for such a removal, but the California Supreme Court held that where there was a group of defendants, all had to be aliens, and all had to join in the application for removal. Further, the plaintiff had to be a United States citizen: "It is well settled that the United States Courts have no jurisdiction over suits between alien and alien, but they are confined to actions between citizens and foreigners where their jurisdiction is founded upon citizenship."[70]

Admitting the jurisdiction of the courts of the United States necessarily implied the acceptance of the decisions of those courts. In *Brumagin v. Tillinghast*, an 1861 case, the California Supreme Court said that a decision of the United States Supreme Court declaring a California statute unconstitutional was conclusive on it.[71] In 1879 the Court went somewhat further, saying, "When our judgment must depend upon a question which may be reexamined by the Supreme Court of the United States on writ of error, we will follow the rule of law laid down by that Court."[72]

Relations between California courts and courts of other states and nations also came up for review. In *Taylor v. Shew*, the Court said that an action on a judgment of a court of competent jurisdiction could be maintained in California, even though an appeal was pending in that case.[73] The presumption was that the decision of the other court was legal and correct.

CONFLICT OF LAWS

The acceptance of the authority of the United States Supreme Court effectively settled judicial relationships, but still left open the problem of interpreting laws. The most obvious type of situation was one in which a

69 Calderwood v. Hager (1862), 20 Cal. 167.
70 Orosco v. Gagliardo (1863), 22 Cal. 83.
71 Brumagim v. Tillinghast (1861), 18 Cal. 265.
72 Belcher v. Chambers (1879), 53 Cal. 643.
73 Taylor v. Shew (1870), 39 Cal. 536.

state law conflicted with a federal law or treaty or with the United States Constitution, but other problems did arise in interpreting laws.

One such instance had to do with federal laws that dealt with the state's courts in some way. In 1855 the Supreme Court of the state denied Frank Knowles' petition for citizenship as being outside of its exclusively appellate jurisdiction, as noted above. The 1862 amendments assigned naturalization powers to the county courts,[74] and in 1869 the Supreme Court held that such an assignment was compatible with the federal statute.[75] If the federal government could not confer powers on the state courts, the question then arose whether such courts could nonetheless enforce federal statutes. In *People v. Kelly*, the Court said that for an act to be punishable in a state court the act had to have been contrary to a state law, and such was not the situation in that case.[76]

The conflict between a state law and the United States Constitution, federal treaties, and laws, has been discussed previously in several instances. Many of these, such as the cases dealing with attempts at Chinese exclusion, were examples of the conflict between the state's police powers and federal authority, and were essentially decided on the premise that when the federal government had preempted a sphere of legislation, the state could not enact laws in the same area. This same premise was used to decide cases not involving state police powers, such as state bankruptcy laws. In 1867 the United States Congress enacted a bankruptcy law,[77] pursuant to the constitutional provision conferring upon Congress the power to establish uniform bankruptcy laws.[78] The power so conferred, said the California Supreme Court, did not become exclusive until Congress did act. Until such time states could pass laws on that subject, but when Congress did so act, such law was to be considered supreme, and while in force, all state laws on the same subject and in conflict with it were suspended.[79] However, if the federal law did not prohibit a state from also acting, or expressly withheld federal exclusivity, then state and federal governments

74 Cal. Const. (1849), art. VI, § 8 (amended 1862).
75 In the Matter of Martin Conner (1870), 39 Cal. 98.
76 People v. Kelly (1869), 38 Cal. 145.
77 14 U.S. Stat. at L. (1867), 517–41.
78 U.S. Const., art. I, § 8.
79 Martin v. Berry (1869), 37 Cal. 208.

could enact laws on the same subject.[80] With this rule established, seemingly there could be no more conflicts, but such was not the case. In 1874 the Legislature passed a law authorizing the San Francisco Board of Supervisors to obtain a ship to be used to instruct boys in seamanship.[81] Later the same year Congress passed a similar act, but with certain conditions attached.[82] The Court held that the board could not accept the ship applied for from the United States because the act of Congress was inconsistent with the state act.[83]

State laws not only had to yield to conflicting federal laws, but they also had to conform to the federal constitution and to treaties entered into by the central government. As with many state–federal legal controversies a key problem was to find, or pinpoint, the line separating state and federal powers. In particular, California found legislative enactments based on its so-called police powers struck down as being in conflict with the United States Constitution and various treaties. Such was the case with California's attempt to keep Chinese out of the state. Laws attempting to exclude Chinese immigrants were found to be in contravention of the commerce clause of the United States Constitution. This clause was used to void other state acts as well. One such enactment was an 1858 law that placed a stamp tax on all gold and silver transported from the state,[84] but the Court said that such a requirement amounted to a tax on exports and was unconstitutional[85] under authority of the United States Supreme Court.[86] A similar tax on tickets of persons leaving the state,[87] was declared unconstitutional on the same grounds in 1868.[88] Another statute determined to be a usurpation of federal authority was one passed in 1866 authorizing Alpine County to collect a toll on logs floating down the Carson River toward Nevada.[89] The Court said that the act was an attempt to

80 People v. White (1867), 34 Cal. 183.
81 Cal. Stats. (1873–74), chap. 288.
82 18 U.S. Stat. at L. (1874), 121.
83 Glass v. Ashbury (1875), 49 Cal. 571.
84 Cal. Stats, (1858), chap. 319.
85 Brumagim v. Tillinghast, *supra*.
86 Almy v. State of California (1860), 24 How. 169.
87 Cal. Stats. (1862), chap. 230, § 416.
88 People v. Raymond (1868), 34 Cal. 492.
89 Cal. Stats. (1865–66), chap. 311.

regulate commerce between the states of California and Nevada, and such power was vested in the United States.[90]

Certain taxes on imports could be deemed constitutional, however. In *Addison v. Saulnier* the Court held that the fee charged by the state gauger for examining certain imported wines was not a tax within the meaning of the state constitution,[91] and that the act authorizing the gauger's examination did not impose a duty on imports, but was merely an inspection law.[92] It was also possible to tax imported goods for general state and county taxes, if they were taxed like other goods. In the words of the Court: "It is admitted that the state may tax imported goods after they have become incorporated with the mass of the wealth of the state."[93]

CALIFORNIA AND THE STATES

The first two sections of the Fourth Article of the United States Constitution outline the relative position of one state to another.[94] Essentially these sections say that each state is to recognize the laws and judicial proceedings of the other states, and citizens of one state are to enjoy the same rights of citizenship in all the other states. Judicial proceedings were discussed in connection with *Taylor v. Shew*, and the same case also used the judicial rule that unless proof was given to the contrary about the law of another state, the presumption was that the law in that state was the same as in California.[95] Similarly, if a common law rule were brought up, the presumption was that the common law was the basis of that state's laws, and this was applied to all states formed from the original colonies, and states formed from later acquired land, whose populace was formed from the original states.

> But no such presumption can apply to States in which a government already existed at the time of their accession to the country, as Florida, Louisiana, and Texas. They had already laws of their own, which remained in force until by the proper authority they

90 C. R. L. Co. v. Patterson (1867), 33 Cal. 334.
91 Addison v. Saulnier (1861), 19 Cal. 82.
92 Cal. Stats. (1852), chap. 58.
93 Low v. Austin (1870), 1 Cal. Unrep. 642.
94 U.S. Const., art. IV.
95 Taylor v. Shew, *supra*.

> were abrogated and new laws were promulgated. With them there is no more presumption of the existence of the common law than of any other law. [96]

In such an instance, and the case involved Texas law, the Court went on the presumption that the Texas law was the same as that in California, and decided the issue on that basis. As Chief Justice Stephen J. Field explained the situation:

> We are called upon to determine the matter in controversy, and are not at liberty to follow our own arbitrary notions of justice. We cannot take judicial notice of the laws of Texas and we must, therefore, as a matter of necessity, look to our own laws as furnishing the only rule of decision upon which we can act; and to meet the requirements that the case is to be disposed of according to the laws of Texas, the presumption is indulged that the laws of the two States are in accordance with each other.[97]

In 1862 the Court was able to summarize this position by saying that the presumption applied to statute law as well as the common law.[98] The acceptance of laws from another state included territories,[99] and even mining customs of a territory would be enforced in a California court.[100] Presumably California law would have been used in the absence of proof about territorial laws or mining customs as well.

One thorny problem to be handled in dealing with the relations between states was the matter of fugitives from justice. The United States Constitution states: "A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."[101]

Cases involving extradition came before the Court as habeas corpus proceedings in which the alleged fugitives challenged their imprisonment

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96 Norris v. Harris (1860), 15 Cal. 253.

97 Ibid.

98 Hickman v. Alpaugh (1862), 21 Cal. 225.

99 Pearson v. Pearson (1875), 21 Cal. 120.

100 Blodgett v. Potosi G. & S. M. Co. (1867), 34 Cal. 227.

101 U.S. Const., art. IV, § 2.

in California. One such case was *In the Matter of Romaine*, in which the California Supreme Court indicated, without saying so directly, that Congress could not pass a law dealing with fugitives from justice, because this was a matter between the various states themselves.[102] California passed a law extending extradition privileges to territories as well as states, sending the petitioners back to Idaho, then still a territory.[103] In 1875 the Court upheld a section of the Penal Code[104] that the alleged fugitive had to have a prosecution pending against him in the state from which he fled.[105]

One phenomenon of the period after 1860 was the termination, physical and otherwise, of California's isolation from the rest of the nation. The building of the national railroad network essentially ended the physical isolation, and the Civil War did much to end the sense of mental isolation by helping California identify with national problems.

Compared to the decade of the 1850s the judicial relationship between California and the rest of the nation after 1860 was relatively serene. No longer would courts defy the central government, and in a sense, California "came of age" judicially.

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[102] In the Matter of Romaine (1863), 23 Cal. 585.

[103] Cal. Stats. (1851), chap. 29, § 665.

[104] Cal. Penal Code (1872), § 1548.

[105] Ex parte White (1875), 49 Cal. 433.

Chapter 10

MINERALS AND WATERS

Gold was discovered on January 24, 1848, and was followed by California's famous rush for gold. This momentous discovery and the beginnings of the great influx of people both took place before statehood and the establishment of a legal system. The result was that the miners had to create their own law, which they did as best they could, but such a procedure was still haphazard and left many important but unresolved legal problems, particularly as the number of miners increased.

In 1849 Henry Gunter paid for some lumber with gold dust, each ounce valued as $15.50 in payment, even though worth $16.00 at the time. He later sued for the difference and in *Gunter v. Sanchez* the Court did not allow this claim, as both parties had agreed to the $15.50 value.[1] "Gold dust is constantly fluctuating in its market value — it is an article of traffic like merchandise, and a payment in it is a payment for just so much as the parties agree, and for no more."[2] This was the first case arising from the discovery of gold, and possibly the easiest one decided.

[1] Gunter v. Sanchez (1850), 1 Cal. 45.

[2] Ibid., 49.

The state legislature gave official sanction to miners' rules and regulations adopted by the various mining districts,[3] and the state's courts admitted their validity,[4] but still to come before the Supreme Court were questions dealing with the appropriation of mineral lands and water, the paramount title to the mineral lands, and the conflict between farmers and miners when minerals were found on a piece of land also used for agricultural purposes.

OWNERSHIP OF MINERAL LANDS

For the two-year period between the discovery of gold and California's admission as a state, and the eleven additional years between statehood and 1861, the question as to the ownership of the minerals in ground remained unresolved. Neither federal nor state legislation was enacted to settle this question. It was finally brought before the California Supreme Court, where the justices had to work out a solution. The importance of a solution was stated by Stephen J. Field:

> The position of the people of California with respect to the public mineral lands was unprecedented. The discovery of gold brought . . . an immense immigration to the country. The slopes of the Sierra Nevada were traversed by many of the immigrants in search of the precious metals, and by others the tillable land was occupied for agricultural purposes. The title was in the United States, and there had been no legislation by which it could be acquired. Conflicting possessory claims naturally arose, and the question was presented as to the law applicable to them.[5]

The first statement on the matter of the title to the mineral lands by the California Supreme Court appeared in 1853 in *Hicks v. Bell*. The Court said that all minerals found in the state, whether on public or private lands, belonged to the state by virtue of her sovereignty, a conclusion based on English cases recognizing the right of the crown to minerals. Under this ruling the state had

> solely the right to authorize them [the public lands] to be worked; to pass laws for their regulation; to license miners; and to affix such terms

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3 Cal. Stats. (1851), chap. 5, § 621.

4 Hicks v. Bell (1853), 3 Cal. 219.

5 Stephen J. Field, *California Alcalde* (Oakland: Biobooks, 1950), 103.

> and conditions as she may deem proper, to the freedom of their use. In her legislation upon this subject, she has established the policy of permitting all who desire it, to work her mines of gold and silver, with or without conditions; and she has wisely provided that their conflicting claims shall be adjudicated by the rules and customs which may be established by bodies of them working in the same vicinity.[6]

Justice Solomon Heydenfeldt based his opinion on the English common law rule that the gold and silver in the British realm belonged to the crown. Commenting in later years about *Hicks v. Bell*, Stephen J. Field, one of the losing counsel, wrote that the Court ignored the reasoning behind the rule, but adopted its conclusion, and held that "the United States have no municipal sovereignty within the limits of the State, that they must belong in this county to the State."[7] By relying exclusively on the common law, the Court did not have to take into account any Spanish or Mexican law that may have conflicted, nor did the counsel for either party mention any but English and United States precedents.

One implication of this decision was that private lands being used for other purposes could be worked by miners without the owners' permission, and the mineral-seekers were quick to grasp the opportunity.

The *Hicks* decision was upheld throughout the decade of the 1850s, albeit with some modifications as to the right of entry on private lands, until 1859, when *Hicks v. Bell* was seriously challenged in *Biddle Boggs v. Merced Mining Co.*[8] The case had originally come before the Court in 1857 as a contest between Merced Mining Company and John C. Frémont, with the company mining land on which Frémont was also conducting mining operations, and which he also claimed under a Mexican grant.[9] The plaintiff company was granted an injunction to prevent Frémont from trespassing on its mining premises, and from working these claims. In so deciding Justices Peter H. Burnett, who wrote the opinion, and David S. Terry refused to comment on whether the minerals belonged to the state or federal government, but said that the company's mining claim was property and

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6 Hicks v. Bell, 227.

7 Field, California Alcalde, 105.

8 Biddle Boggs v. Merced Mining Co. (1859), 14 Cal. 279.

9 Merced Mining Co. v. Fremont (1857), 7 Cal. 307

was entitled to protection under the law. The rule laid down in *Hicks v. Bell* was necessary to deal with the circumstances in California at that time.

Frémont had his grant verified, a patent was issued, and he leased his mineral rights to Biddle Boggs, who brought suit to eject the Merced Mining Company. Biddle Boggs won in the lower court, and that decision was brought on appeal to the Supreme Court. Among the attorneys representing Biddle Boggs were Joseph G. Baldwin, soon to take his place on the Court, and Solomon Heydenfeldt, who now argued against his earlier position in *Hicks v. Bell* in regard to the right of entry on private lands for mining purposes. At its January 1858 term the Court reversed the lower court, with justice Burnett again writing the opinion and agreeing with his views in the 1857 case. Terry, now the chief justice, concurred, saying that the title to the minerals did not pass to Frémont, but he refused to comment on *Hicks v. Bell*. Stephen J. Field, now a member of the Court, dissented without an opinion.

A rehearing was granted, and the case was reargued at the July 1858 term and again at the October 1859 term. Chief Justice Stephen J. Field and Justice Warner W. Cope now affirmed the lower court in support of Frémont's lessee, Biddle Boggs. Field wrote the opinion, but sidestepped the question of whether the mineral rights passed to the state or the United States, saying he wanted to wait for a full bench; the third member of the Court, Joseph G. Baldwin, had been one of Boggs' counsel, and did not sit for the case. Without deciding the paramount title to the minerals, Field still modified *Hicks v. Bell* extensively. He said that for the sake of argument the minerals belonged either to the state or to the federal government. If the ownership belonged to neither, then the defendant company had no case at all. Assuming the first premise, there had to have been a license for the defendant to enter. But forbearance was the extent of the federal license to mine on the public lands, and such a license could not apply to private lands where the government was ignorant of entries to work such lands. There was no license from the state either. If the United States owned the minerals, it could only do so as a private proprietor, and as such it could not authorize entries on private land for removal of minerals when such entries caused damage to private property.

In 1861 Field had the opportunity to decide the title to the minerals in the cases of *Moore v. Smaw* and *Fremont v. Flower*.[10] The two cases involved

[10] Moore v. Smaw and Fremont v. Flower (1861), 17 Cal. 199.

the same question of law and were decided as one. The technical question was "whether a patent of the United States for land in California, issued upon a confirmation of a claim held under a grant of the former Mexican government, invests the patentee with the ownership of the precious metals which the land may contain."[11]

Both plaintiffs had patents from the United States based on Mexican grants, while both defendants were mining the respective lands. Field, in rendering his opinion, first referred back to Mexican law to note that when the grants were made,

> it was the established doctrine of the Mexican law that all mines of gold and silver in the country, though found in the lands of private individuals, were the property of the nation. No interest in the minerals passed by a grant from the Government of the land in which they were contained, without express words designating them. By the ordinary grant of land, only an interest in the surface or soil, distinct from the property in the minerals, was transferred.[12]

This practice of Mexico was, further, but a continuation of Spanish law. An interest in minerals could be transferred under certain circumstances, but at the time of the cession from Mexico to the United State, no gold or silver had been found on either grant. The minerals, then, constituted "at that time the property of the Mexican nation, and by the cession passed, with all other property of Mexico within the limits of California, to the United States."[13]

The defendants, accepting that the minerals did pass to the United States, offered two defenses, inconsistent with each other, but either one of which, if accepted, would have defeated the plaintiffs. The first of these defenses presented the view that when the gold and silver passed with the cession, the United States held them in trust for the state; when California was admitted the minerals passed to the state. This argument was supported by *Hicks v. Bell*, but, as previously noted, had already been repudiated by the justice rendering that opinion, Solomon Heydenfeldt. The second argument presented was that even if the minerals did become the property of the United States and did not vest in the state, the minerals remained the property of

11 Ibid., 210.
12 Ibid., 212–13.
13 Ibid., 213.

the central government and did not pass with the patents. The reasoning behind this argument was that the act of March 3, 1851, provided for the recognition and confirmation of Mexican grants, and since no minerals passed with the grants,[14] "and if the patents amount only to an acknowledgment of the rights derived from the former Government that interest still remains in the United States."[15] This argument was also rejected. Field noted that there was no restriction on the operation of a patent from the United States. What passed with the patent was "all the interest of the United States, whatever it may have been in everything connected with the soil, in everything forming any portion of its bed or fixed to its surface, in everything which is embraced within the signification of the term land."[16]

This included the face of the earth and everything under it. The accepted rule was that in regard to its real property within a state, the United States was in the position of a private proprietor, except that it was not subject to state taxation, and a patent from the federal government was subject to the same rules of contraction as applied to a conveyance by an individual; a conveyance by an individual would not reserve the minerals without an express provision. Further, Field said, the United States had never yet reserved minerals from the operation of its patents. In a decision the next year again involving John C. Frémont, Field said that local mining customs, although recognized by statute and judiciary, could not prevail against the paramount proprietor, the United States, "and as a consequence cannot against parties who claim by conveyance from the United States."[17]

The legal effect of the decision in *Moore v. Smaw* was to bar mining on lands belonging to another, and was bitterly assailed. In later years Field wrote that "for holding what now seems so obvious, the judges were then grossly maligned as acting in the interest of monopolists and land owners, to the injury of the laboring class."[18] Field's biographer wrote that if the charges of corruption were disregarded, this decision "was determined by the ideas of the judges as to what rule would work best amid the unprecedented conditions of pioneer

14 9 U.S. Stat. at L. (1851), 631–34.

15 Moore v. Smaw and Fremont v. Flower, 223.

16 Ibid., 224.

17 Fremont v. Seals (1861), 18 Cal. 435.

18 Field, *California Alcalde*, 108.

mining and agricultural life."[19] If the decision barred entry on private lands for mining purposes, it did not prevent entries on the public lands, and in 1866 the United States acted to recognize such entries by providing a method for mining claims to be patented and the miners to receive title to their mines. [20]

MINING CLAIMS AND MINING CUSTOMS

The wealth of California's mining areas often times resulted in conflicting claims that came to the Supreme Court for final adjudication, but so complicated were some of the cases that they would reappear before the Supreme Court on several occasions. Each time the Court would decide a point of law and generally return the case to the district court for further action based on the high court's ruling. A new point of law would then be raised and the case brought back up to the Supreme Court.

One such case has been aptly described:

> Year after year, and term after term, the great case of Table Mountain Tunnel vs. New York Tunnel, used to be called in the court held at Sonora, Tuolumne County. The opposing claims were on opposite sides of the great mountain wall. . . . When these two claims were taken up, it was supposed the pay streak followed the Mountain's course; but it had here taken a freak to shoot across a flat. . . . Into this ground, at first deemed worthless, both parties were tunnelling. The farther they tunnelled, the richer grew the pay streak. . . . Both parties claimed it. The law was called upon to settle the difficulty. The law was glad, for it had then many children in the county who needed fees. Our lawyers ran their tunnels into both of these rich claims, nor did they stop boring until they had exhausted the cream of that pay streak. Year after year, Table Mountain vs. New York Tunnel Company was tried, judgment rendered first for one side and then for the other, then appealed to the Supreme Court, sent back, and tried over, until, at last, it had become so encumbered with legal barnacles, parasites, and cobwebs, that none other than the lawyers knew or pretended

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[19] Carl Brent Swisher, *Stephen J. Field; Craftsman of the Law* (Washington, D.C.: The Brookings Institution, 1930), 88.

[20] 16 U.S. Stat. at L. (1866), 251–52.

> to know aught of the rights of the matter. Meantime, the two rival companies kept hard at work, day and night.[21]

The author, a juror for one of the district court hearings, came away disillusioned with lawyers, courts, and juries.

The greatest difficulty lay in the fact that the bulk of the mines was on public lands; the title to these lands was in the United States, and no legislation had been passed under which the land could be acquired by mining interests under a perfect title. But in order to work a mining claim it was not necessary to have a perfect legal title to the claim. In the mid-1850s, the Court said that prior possession of public lands, and most of the mines were on the public lands, would entitle the. possessor to maintain an action against a trespasser, and that this possessory right could become part of one's estate and descend, or in event of the possessor's death, the possessory right could be sold to another by the executor of the estate.[22] In 1856 the Legislature enacted a statute holding that unless one using land entered by miners could show a legal title, the presumption would be that the land in question was public land.[23] This statute was upheld by the Court at its October 1859 term in *Burdge v. Smith*.[24] The decision was affirmed in *Smith v. Doe* at the Court's next term.[25]

Of course, the possessory right had to be proved by one seeking to eject a trespasser. To hold differently would have contravened the principle "that a plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary."[26] Since in most of these cases the strength of title consisted in the possessory right, prior possession was all that was needed to be shown. What actually constituted "possession" was often open to debate, but in 1851 the Legislature provided that local mining customs should prevail in suits for mining claims in justices' courts, and was soon extended by the Supreme Court to apply to actions for mining claims in all courts.[27] In *Attwood v. Fricot*, the Court said: "Mining claims are held by possession, but that possession

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[21] Prentice Mulford, *Prentice Mulford's Story; Life by Land and Sea* (New York: F. J. Needham, Publisher, 1889), 174–75.

[22] Glover v. Hawley (1855), 5 Cal. 85.

[23] Cal. Stats. (1856), chap. 47, 21.

[24] Burdge v. Smith (1859), 14 Cal. 380.

[25] Smith v. Doe (1860), 15 Cal. 100.

[26] Penn. Mining Co. v. Owens (1860), 15 Cal. 135.

[27] Irwin v. Phillips (1855), 5 Cal. 140.

is regulated and defined by usage and local, conventional rules."[28] The Court added that mining claims did not need the same degree of possession as did agricultural lands in order to maintain an action for trespass.

Attwood v. Fricot was decided at the Supreme Court's October 1860 term, and that same term the Court affirmed that decision when it decided the leading case of *English v. Johnson*, which was a controversy over a piece of mining ground in the county of Amador.[29] At the trial in the lower court the jury was instructed,

> in effect, that possession taken, without reference to mining rules, of a mining claim was sufficient, as against one entering by no better title, to maintain the action; and further, that this possession need not be evidenced by actual enclosures, but if the ground was included within a distinct, visible and notorious boundaries, and if the plaintiffs were working a portion of the ground within those boundaries, this was enough as against one entering without title.[30]

This instruction was correct; since neither entrant used the mining rules of the vicinage, "The actual prior possession of the first occupant would be better than the subsequent possession of the last."[31] The Court approved *Attwood v. Fricot* in that less was required to acquire possession of a mining claim than agricultural lands; for one thing, enclosure was not necessary as the physical marks on and around the claim were enough to establish the boundaries of the claim. Then the Court turned to deal with the instance of the prior possessor not following local rules, and the so-called intruder complying with the local customs, and came up with a compromise of sorts by saying the prior claimant could keep what the local customs decreed even if he had not followed them, or could keep the whole amount, as already indicated, if the second entrant did not follow the customs, either. But in any event, "this whole matter can be, and should be regulated by the miners, . . . who have full authority to prescribe the rules governing the acquisition and divestiture of titles to this class of claims, and their extent subject only to the general laws of the State."[32]

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28 Attwood v. Fricot (1860), 17 Cal. 43.

29 English v. Johnson (1860), 17 Cal. 107.

30 Ibid., 115.

31 Ibid.

32 Ibid., 118.

Subsequent cases affirmed and broadened *English v. Johnson*. In *Hess v. Winder*, the Court said, "Possession is presumptive evidence of title; but it must be actual. By actual possession is meant a subjection to the will and dominion of the claimant."[33] The Court did say, too, that the evidence of the right of possession had to be sufficient to give notice to anyone having the right to know this, that the claim was under the control and dominion of a claimant. The possessory right was also sufficient, under the Practice Act,[34] for the party in possession to bring suit to determine the adverse claim or title of one out of possession.[35] The Court noted in 1871 that in California the subject matter of an action for the recovery of mining ground was regarded as a question of title to real property in fee, even though the ultimate title was in the United States.[36]

The case of *Attwood v. Fricot* also said that when a mining claim's boundaries were defined, "and the party enters in pursuance of mining rules and customs, the possession of part is the possession of the entire claim."[37] Some years later the Court laid down the facts needed to establish constructive possession of a mining claim.[38] It was necessary to prove that there were local mining customs, rules and regulations in force in the district embracing the claims; that certain acts were required by such mining laws or customs to be performed at the location and working of claims as authorized by such laws; and that the claimant (plaintiff) had substantially complied with these requirements.

The importance of local mining customs in defining possession was also evident in determining when a claim had been abandoned. For an abandonment to be effected, there had to be, by the possessor, some act or other evidence indicating an intent to abandon his claim. In abandoning a claim, the possessor

> must leave it free to the occupation of the next comer, whoever he may be, without any intention to repossess or reclaim it for himself in any event, and regardless and indifferent as to what

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33 Hess v. Winder (1863), 30 Cal. 355.

34 Cal. Stats. (1851), chap. 5, § 254.

35 Pralus v. Pacific G. & S. M. Co. (1868), 35 Cal. 30.

36 Spencer v. Winselman (1871), 42 Cal. 479.

37 Attwood v. Fricot, 43.

38 Pralus v. Jefferson G. & S. M. Co. (1868), 34 Cal. 558.

> may become of it in the future. When this is done, a vacancy in the possession is created, and the land reverts to its former condition, . . . and not until then, an abandonment has taken place. There can be no abandonment except where the right abates, and ceases to exist. If it be continued in another, by any of the modes known to the law for the transfer of property, there has been no abandonment, for the right, first acquired by the occupancy still exists, although vested in another, and the continuity of possession remains unbroken.[39]

The claimant to a mine on the public lands could also lose his claim by forfeiture, which in California meant the loss of a right, previously acquired, to mine a particular piece of ground by neglect or failure to comply with the rules and regulations of the bar or diggings in which the mining ground was situated.[40] However, the Court added in 1868 that for the noncompliance to act as a forfeiture, the rule violated would itself have to so provide.[41] The line between forfeiture and abandonment was unfortunately not always clear, for in another case the Court held that the failure to perform the amount of work required by local mining laws amounted to an abandonment; the Court here did not mention the term "forfeiture."[42]

Miners' rules extended into areas other than possession and abandonment. In 1860 the Court recognized a local custom holding that loose quartz belonged to the claim on which the quartz ledge from which the loose material had been detached was located,[43] and the next year said that local mining rules could limit the quantity of ground claimed by location, although such rules could not limit the quantity of ground or the number of claims that could be purchased.[44] As prevalent as mining rules were, they were of no avail against the United States,[45] and they could not prevail against locations made before their adoption.[46]

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39 Richardsog v. McNully (1864), 24 Cal. 344.

40 St. John Kidd (1864), 26 Cal. 263.

41 Bell v. Bed Rock T. & M. Co. (1868), 36 Cal. 214.

42 Depuy v. Williams (1865), 26 Cal. 309.

43 Brown v. Quartz Mining Co. (1860), 15 Cal. 152.

44 Prosser v. Park (1861), 18 Cal. 47.

45 Fremont v. Seals, *supra*.

46 Inimitable Mining Co. v. Union Mining Co. (1870), 1 Cal. Unrep. 599.

At Court, miners' rules and regulations were allowed to be introduced into evidence whenever possible, even if, as in *Roach v. Gray*, only one of the parties claimed under local customs.[47] In 1866, in one of the several cases between the Table Mountain Tunnel Company and S. N. Stranahan, the Court held that the statute recognizing local mining customs did not extend to general customs or usages.[48] This particular case dealt with the size of mining claims, and the Court said that if there were no local custom at the time of location, general customs were admissible in evidence on the question of the reasonableness of the extent of a claim. Any general custom would have to be proved, "but evidence of local usages and regulations varying from each other, are not admissible for this purpose, for they tend to show that the usage is *not* general."[49]

On another occasion the Court noted that local mining rules acquired validity from their customary obedience and acquiescence by the miners following enactment, and not from the enactment itself.[50] It followed from this that a custom became void whenever it fell into disuse or was generally disregarded, and this was a question for the jury to decide. Further, a custom generally observed would prevail as against a written mining law fallen into disuse. The Court was careful at all times to limit the admissibility of local customs to actions respecting mining claims, and so remain within the provisions of the statute. In an action dealing with damage to a ditch the Court said:

> Proof of custom is not admissible to oppose or alter a rule of law, or to change the legal rights and liabilities of parties as fixed by law. A vested right is acquired by the location and construction of a ditch. It is an injury to mine it away, and so recognized by law. The trespass cannot be justified by custom.[51]

But within the sphere in which customs could be used, their admissibility as evidence was strongly supported by the Supreme Court.

Local miners' rules and regulations were upheld and interpreted in *Packer v. Heaton*,[52] where the Court said that a bona fide intent to work a

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47 Roach v. Gray (1860), 16 Cal. 383.

48 T. M. Tunnel Co. v. Stranahan (1866), 31 Cal. 387.

49 Ibid., 392.

50 Harvey v. Ryan (1872), 42 Cal. 626.

51 Hill v. Weisler (1872), 1 Cal. Unrep. 724.

52 Parker v. Heaton (1858), 9 Cal. 569.

claim could be considered as work done, in determining whether a claim had been abandoned, and the fact that one partner, or tenant in common, absented himself for a time did not indicate an abandonment.[53] In *McGarrity v. Byington*,[54] the Court said, "The right of a mining claim vests by the taking in accordance with local rules . . . . The failure to comply with *any one* of the mining rules and regulations of the camp is not a forfeiture of title."[55] In *Dutch Flat Water Co. v. Mooney*, the Court added that when a right of property attached by local custom, it did not necessarily follow that the right could also be divested by local custom when such local custom was different from the general law on the subject.[56]

In 1864 in *Morton v. Solambo C. M. Co.*, Chief Justice Silas W. Sanderson stressed the importance of miners' rules and regulations, and traced their growth and development.[57] These customs, he said,

> were few, plain and simple, and well understood by those with whom they originated. They were well adapted to secure the end designed to be accomplished, and were adequate to the judicial determination of all controversies touching mining rights. And it was a wise policy on the part of the Legislature . . . to give them the additional weight of a legislative sanction. These usages and customs were the fruit of the times, and demanded by the necessities of communities who, though living under the common law, could find therein no clear and well defined rules for their guidance applicable to the new conditions by which they were surrounded, . . . Having received the sanction of the Legislature, they have become as much a part of the law of the land as the common law itself which was not adopted in a more solemn form.[58]

With or without the use of miners' customs, rules, or regulations, the tenuous legal title of one claiming a mine still presented certain questions that would not have arisen had the claimant of a mine been able to acquire legal title. It has already been noted that the possessory right could

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53 Waring v. Crow (1858), 11 Cal. 366.

54 McGarrity v. Byington (1859), 12 Cal. 426.

55 Ibid., 431.

56 Dutch Flat Water Co. v. Mooney (1859), 12 Cal. 534.

57 Morton v. Solambo C. M. Co. (1864), 26 Cal. 527.

58 Ibid., 532–33.

descend, or be sold by the estate of a deceased owner of a possessory right, but other legal aspects of this right still came before the Court. The Court in 1858 held that the possessory right could be seized and sold[59] under an execution to satisfy a debt, and the next year the Court said that permanent improvements became part of the claim, as was normal with real estate.[60] In 1863 the Court further commented that a claim could be sold as could any piece of real estate and the proceeds divided among tenants in common.[61] The Court explained that

> Although the ultimate title in fee in our public mineral lands is vested in the United States, yet as between individuals, all transactions and all rights, interests and estates in the mines are treated as being an estate in fee, and as a distinct and vested right of property in the claimant or claimants thereof, founded upon their possession or appropriation of the land containing the mine.[62]

For purposes of this case a mining claim may have been considered to be an estate in fee, but not for all transactions. Drawing together the unsettled status of a mining claim as an estate and the use of mining custom was the problem of sale of claims. Under the statute of frauds as adopted in California and most other jurisdictions in the United States, all sales of real estate had to be in the form of a written contract in order to be enforced in a court of law,[63] but the California Supreme Court did not always consider a mining claim as real estate within the meaning of the statute of frauds. The case of *Gore v. McBrayer* brought this point to the fore, as the Court said the statute of frauds did not apply to a mining claim on the public lands:

> The title to the land is in the United States; the right to mine and to use and hold possession of the claim inures by a sort of passive concession of the Government to the discoverer or appropriator. No writing is necessary to give the miner a title; but whatever right he has originally comes from the mere parol fact of appropriation

59 McKeon v. Bisbee (1858), 9 Cal. 137.
60 Merritt v. Judd (1859), 14 Cal. 59.
61 Hughes v. Devlin (1863), 23 Cal. 501.
62 Ibid., 506.
63 Cal. Stats. (1850), chap. 101.

> unless indeed, the rules or the customs prevailing . . . make a written notice necessary.[64]

Responding to a petition for a rehearing the Court clarified the rule somewhat: "The title is in the Government; if a written contract is needed to divest it the Government would have to execute it. But, subsidiary to the Government's paramount title is the permissive claim of the locator. This comes from a mere parol fact."[65]

In another of the *Table Mountain Tunnel Co. v. Stranahan* cases the Court reiterated that the transfer of a mine need not be by a deed; the mere transfer of possession was enough, because

> a conveyance by deed would have passed no greater interest than the plaintiff acquired by a transfer of possession. Rights resting upon possession only, and not amounting to an interest in the land, are not within the statute of frauds, and no conveyance, other than a transfer of possession, is necessary to pass them.[66]

The Court went further in *Patterson v. Keystone Mining Co.*, where it held that a bona fide parol sale of a mining claim, accompanied by a delivery of possession was valid as against a later sale by the same seller, even though the second sale was accompanied by a duly acknowledged deed.[67] It was necessary, though, that the seller be in the actual possession of the claim and be able to deliver the claim to the vendee.[68]

The Legislature took the question of parol sales away from the courts in 1860 when it declared gold claims to be real estate and prohibited parol sales of such mining claims;[69] in 1863, the 1860 law was extended to include all types of mines,[70] recognizing the importance of silver and copper mines to the state's economy. The Court affirmed these acts in 1866, limiting itself to parol sales made prior to their passage, although it continued to enforce the earlier parol sales.[71] The succeeding years saw a virtual

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64 Gore v. McBrayer (1861), 18 Cal. 588.

65 Ibid., 589.

66 Table Mountain Tunnel Co. v. Stranahan (1862), 20 Cal. 208.

67 Patterson v. Keystone Mining Co. (1863), 23 Cal. 575.

68 Copper Hill Mining Company v. Spencer (1864), 25 Cal. 18.

69 Cal. Stats. (1860), chap. 212.

70 Cal. Stats. (1863), chap. 89.

71 Patterson v. Keystone Mining Co. (1866), 30 Cal. 360; Goller v. Fett (1866), 30 Cal. 481.

dearth of cases dealing with parol sales until 1876 and the case of *Milton v. Lambard*, which involved an alleged verbal sale that took place in June 1874.[72] The argument of the plaintiffs was that the act of 1860 was repealed by the codes as its provisions (as well as those of the 1863 act) were not incorporated in the Civil Code. The defendant argued that if a mining claim were considered real estate then a transfer had to be in writing under the provision of the Civil Code dealing with the sale of real estate,[73] and if the section did not include mining claims, then the 1860 act was still in force. The Court accepted the defendant's first argument, saying, "A mine is real estate, and an interest therein . . . can be transferred only by operation of law or by an instrument in writing subscribed by the party disposing of the same, or his agent thereunto authorized by writing."[74]

WATER RIGHTS

The need for a readily available supply of water is most normally associated with the needs of agriculturalists and stockmen, but in California water was essential for mining operations as well. In the early days of California mining, water was used to wash away the gravel, and what remained, hopefully, was gold. At some diggings miners even constructed ditches to bring water to arid but gold-bearing claims. In 1849 the miners also began to work the river bottoms by diverting the water to only part of its channel, and mine the exposed part of the channel. Later on, as the search for precious metals moved away from immediate sources of water, series of sluices and toms were used for gold washing, again necessitating large quantities of water. As the gold reserves close to the surface were taken up, deeper gold finds needed to be worked by hydraulic mining methods, and as the term implies, a good deal of additional water was required.[75] As was the case with the appropriation of mining claims, a system of water appropriation was developed prior to statehood, again based on local customs, and again putting forth the doctrine of prior appropriation.

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72 Melton v. Lambard (1876), 51 Cal. 258.

73 Cal. Civil Code (1872), § 1091.

74 Melton v. Lambard, 260.

75 For the various mining methods involving the use of water, see John Walton Caughey, *Gold is the Cornerstone* (Berkeley: University of California Press, 1948), 159–76.

The decade of the 1850s saw the doctrine of prior appropriation of water affirmed by the Supreme Court starting with the 1853 case of *Eddy v. Simpson*, a landmark case in this area.[76] The plaintiffs in this case had prior occupancy of the waters being contested by use of a dam and a ditch, were using the water for mining purposes, and brought the suit to collect damages for interference with their alleged rights. The Supreme Court upheld the plaintiffs, the Court holding that the first possessor had the right to the water, and that this right was usufructuary, consisting more in the advantage of using the water, and not necessarily in the water itself. "The owner of land through which a stream flows, merely transmits the water over its surface, having the right to its reasonable use during its passage."[77] Once the water left the user's possession, all right to the water left as well. Two years later, in *Irwin v. Phillips*, the Court tied priority in the possession of water to the right to work the mines;[78] in both situations prior possession had become the rule.

When a claim to water was not dependent on ownership of the land through which the water ran, that is, the water was on public land, prior appropriation would enable a miner to use the water, and this prior possession had to be real; constructive possession was not sufficient.[79] In 1857 the Court added still more, saying that the right to water flowing through the public lands did not include the right to divert the water and prevent it from running on someone else's adjoining land, when such land was occupied prior to the diversion.[80]

An important case dealing with water rights in the mining region was *Bear River Co. v. York Mining Co.*, a case between two companies using the waters of the Bear River.[81] The plaintiffs' dam and ditch were located seven miles below, and some time before, defendants' dam and ditch. After use by defendants, the water returned to its natural channel and flowed down for plaintiffs' use. The plaintiffs sued for damages, claiming that the defendants had materially lowered both the quality and the quantity of the water. The Court held for the plaintiffs, saying that they were entitled to an

76 Eddy v. Simpson (1853), 3 Cal. 249.
77 Ibid., 252.
78 Irwin v. Phillips (1855), 5 Cal. 140.
79 Kelly v. Natoma Water Co. (1856), 6 Cal. 105.
80 Crandall v. Woods (1857), 8 Cal. 136.
81 Bear River Co. v. York Mining Co. (1857), 8 Cal. 327.

undiminished quantity of water so as to fill their ditch to the same height as before defendants' appropriation above; otherwise, by diminishing the flow, plaintiffs' prior appropriation could become worthless.

In *Butte Canal and Ditch Co. v. Vaughan*, the Court said that turning water from a ditch into a natural water course so that it could move downstream to be used again did not constitute an abandonment of the water.[82] The water could be taken out and used again, so long as the natural waters of the stream were not lessened so as to injure those who had previously appropriated the natural waters. In claiming waters on public lands, notice by appropriate acts, and completion of the ditch were sufficient to all subsequent locators, the title to such water going back to the beginning of the work,[83] and in *Parke v. Kilham* the Court said that an action for the diversion of water should be treated as an action for the abatement of a nuisance.[84]

The use of the doctrine of prior appropriation of mines and water was a judicial acknowledgment of the actual procedure practiced by the miners. At the same time the courts were legally bound to follow the common law, and this they did in a manner of speaking. The common law included the doctrine of prior appropriation of minerals, but not of water. The Supreme Court of California was thus left in the position of having to deal with a system of water appropriation that was already in use and accepted by the mining industry.

The common law, as it pertained to water, was that a stream belonged equally to those who had title to its banks, "and that no individual could carry away the stream from that community, nor could any member of the community take unto himself more than a reasonable share of the supply, for use upon his own land only."[85]

This view was obviously contrary to the accepted practice in the gold fields, especially since the waters in question were on public lands, the title resting with the federal government. At first the courts did not know whether to follow the practice in effect or the express (common) law.

> The judges, being drawn from the people, inclined to support the public action in appropriating natural resources, while attorneys

82 Butte Canal and Ditch Co. v. Vaughan (1858), 11 Cal. 143.

83 Kimball v. Gearhart (1859), 12 Cal. 27.

84 Parke v. Kilham (1857), 8 Cal. 77.

85 Samuel C. Wiel, "Public Policy in Water Decisions," *California Law Review* I (November, 1912): 12.

> naturally, when suiting their cases, urged express law. The courts adopted the attitude, in deference to the legal points, that they would not change the law because of policy — they said they would uphold the law; but they supported the public policy nevertheless by finding a way to say it was the express law.[86]

The solution to this problem was to use common law rules other than those dealing with water, and in effect the appropriation of water became analogous to the appropriation of mining claims also on the public lands. The title to the public lands was, as stated, in the federal government, and anyone appropriating the water would be a trespasser. But among trespassers, the first such had a title sufficient as against all other subsequent trespassers. This doctrine, known in the common law as disseisin, provided that the title of the first appropriator was paramount against everyone but the true owner. This reasoning could be justified as being the common law and also fortuitously coincided with actual practices adopted by the miners. Justice Solomon Heydenfeldt, who had earlier rendered the decision in *Hicks v. Bell*, now rationalized this extension of the common law by saying:

> In the decisions we have heretofore made upon the subject of private rights to the public domain, we have applied simply the rules of the common law. We have found that its principles have abundantly sufficed for the determination of all disputes which have come before us; and we claim that we have neither modified its rules, nor have we attempted to legislate upon any pretended ground of their insufficiency.
>
> That new conditions and new facts may produce the novel application of a rule which has not been before applied in like manner, does not make it any less the common law; for the latter is a system of grand principles, founded upon the mature and perfected reason of centuries. It would have but little claim to the admiration to which it is entitled, if it failed to adapt itself to any condition, however new, which may arise; and it would be singularly lame if it is impotent to determine the right of any dispute whatsoever.[87]

This departure from the common law prevented the disruption of mining operations throughout the state, and remained the rule of decision,

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[86] Ibid.

[87] Conger v. Weaver (1856), 6 Cal. 555–56.

with the Supreme Court essentially affirming earlier decisions, albeit with an occasional modification or clarification. Thus, in *Burnett v. Whitesides*, the Court upheld the right of the first appropriator of water to an undiminished amount regardless of the acts of later takers,[88] but if the first appropriator were to take only a part, someone else could later appropriate the remainder, and such a later appropriation gave the appropriator a right as perfect and as entitled to the same protection as that of the first appropriator to the portion taken by him.[89]

In an 1869 case, the Court affirmed *Eddy v. Simpson* directly, saying, "The right to the water . . . is only acquired by an actual appropriation and use of the water. The property is not in the corpus of the water, but is only in the use."[90] As with a mining claim, a water right could be lost by nonuse or abandonment. Said the Court in *Davis v. Gale* of an appropriator's right:

> Appropriation, use and nonuse are the tests of his right; and place of use and character of use are not. When he has made his appropriation he becomes entitled to the use of the quantity which he has appropriated at any place where he may choose to convey it, and for any useful and beneficial purpose to which he may choose to apply it.[91]

The significance of this decision was that an appropriator of water for one purpose, such as mining, at one place, could send or convey the water to another place, and for another purpose. Whatever the purpose was, it had to be a beneficial use, that is, the water was going to be used directly by the appropriator. Holding water for purposes of speculation was not such a beneficial use, and would void the appropriation.[92] The Court in *Davis v. Gale* was interested in abandonment, but in *Union Water Company v. Crary* the Court said the "right of the first appropriator may be lost, in whole or in same limited portions, by the adverse possession of another."[93] Such possession had to be "adverse" in the legal sense; it must have been continuous for the entire length of the statutory period and asserted, with

88 Burnett v. Whitesides (1860), 15 Cal. 35.
89 Smith v. O'Hara (1872), 43 Cal. 371.
90 Nevada County and Sacramento Canal Co. v. Kidd (1869), 37 Cal. 310.
91 Davis v. Gale (1867), 32 Cal. 34.
92 Weaver v. Eureka Lake Co. (1860), 15 Cal. 271.
93 Crary v. Union Water Company (1864), 25 Cal. 509.

the knowledge and consent of the owner of land, under a claim of title. In addition, the burden of proving this was on the adverse claimant.[94]

These cases were all based on the doctrine of prior appropriation, which involved the use, not the ownership, of water. In the leading case of *Kidd v. Laird*, the Court reiterated

> that running water, so long as it continues to flow in its natural course, is not, and cannot be made the subject of private ownership. A right may be acquired to its use, which will be regarded and protected as property; but it has been distinctly declared . . . that this right carries with it no specific property in the water itself.[95]

The rights of the first appropriator, "like those of a riparian owner, are strictly *usufructuary*."[96] The mention of a "riparian owner" pointed out that the Court was familiar with, even if it did not use, the common law of waters. The riparian doctrine

> accords to the owner of land contiguous to a watercourse a right to the use of the water on such land. The use of the water is limited to riparian [adjoining the water] land. The water may be used for . . . beneficial purposes. . . . The riparian right is not based upon use, and in the absence of prescription it is not lost by disuse. No riparian owner acquires priority over other riparian owners by reason of the time of beginning use of the water.[97]

The doctrine of prior appropriation was included in a positive statutory provision in the 1872 code revision,[98] and remained the law in California until past the period of this study. The doctrine of prior appropriation was tested and found wanting in 1886 in the case of *Lux v. Haggin*,[99] which "has been accepted as establishing the doctrine that the common [law] rule of riparian rights prevails in California."[100] There were some earlier

94 American Co. v. Bradford (1865), 27 Cal. 360.

95 Kidd v. Laird (1860), 15 Cal. 179–80.

96 Ibid., 180.

97 Wells A. Hutchins, *The California Law of Water Rights* (Sacramento: State of California Printing Division, 1956), 40.

98 Cal. Civil Code (1873), § 1422.

99 Lux v. Haggin (1886), 69 Cal. 255.

100 Willoughby Rodman, *History of the Bench and Bar of Southern California* (Los Angeles: William J. Porter, 1909), 96.

instances of the use of the riparian doctrine to decide water cases starting in 1865 with the case of *Ferrea v. Knipe*, but this decision involved two riparian owners who were not engaged in mining.[101] The Court said each of the parties was entitled to use the water in question because each was a riparian owner; the question of prior appropriation did not arise.

In the twenty years between *Ferrea v. Knipe* and *Lux v. Haggin*, three other Supreme Court decisions also involved the riparian doctrine; all three were in the two-year period 1878–1879, presaging the decision in *Lux v. Haggin* the next decade.

The first, *Creighton v. Evans*, saw the Court uphold the rights of a riparian owner against one who was not a riparian owner,[102] and in *Los Angeles v. Baldwin* the Court proportioned water between two riparian owners.[103] The Court, in the third of these cases, *Pope v. Kinman*, reaffirmed that the riparian proprietor had a usufruct in the waters of the stream in question as it passed over his land.[104] In none of these three cases were public mineral lands involved, perhaps indicating that the Court was preparing or anticipating a dual system of water law involving both the riparian and appropriation doctrines that in fact came to pass. Although with *Lux v. Haggin* the Court brought California into what might be called the mainstream of water law, the continued use of the appropriation doctrine was to acknowledge rights already acquired in the early days of statehood. Or, as one scholar has put it, "The Courts of California have recognized the common law rule, but have found that certain extensions and modifications were necessary to render it applicable to novel conditions."[105]

The Court itself found it occasionally necessary to defend its use of the appropriation doctrine against the

> notion, which has become quite prevalent, that the rules of the common law touching water rights have been materially modified in this State upon the theory that they were inapplicable to the conditions found to exist here, and therefore inadequate to a just and fair determination of controversies touching such rights. This notion is

101 Ferrea v. Knipe (1865), 28 Cal. 340.
102 Creighton v. Evans (1878), 53 Cal. 55.
103 Los Angeles v. Baldwin (1879), 53 Cal. 469.
104 Pope v. Kinman (1879), 54 Cal. 3.
105 Rodman, *Bench and Bar*, 96.

> without any substantial foundation. The reasons which constitute the groundwork of the common law on this subject remain undisturbed. The conditions to which we are called upon to apply them are changed, and not the rules themselves . . . . When the law declares that a riparian proprietor is entitled to have the water of a stream flow in its natural channel . . . without diminution or alteration, it does so because its flow imparts fertility to his land. . . . But this rule is not applicable to miners and ditch owners, simply because the conditions upon which it is founded do not exist in their case. They seek the water for a particular purpose, which is not only compatible with its diversion from its natural channel.[106]

Chief Justice Silas W. Sanderson said that controversies between appropriators could be determined in a like manner as controversies between riparian proprietors, that is, by determining whether "the plaintiff's use and enjoyment of the water *for the purpose for which he claims its use* has been impaired by the acts of the defendant?"[107] Defenses such as Sanderson's did not convince all California lawyers, however. Gregory Yale, his inability to practice in courts during the Civil War notwithstanding, was a leading member of the legal profession. His conclusion was that there was indeed a departure from the common law, and:

> The only principle which can be asserted to justify the past action of the Courts is in the fact that they sustained the state of things found to be extensively existing upon the doctrine of necessity. . . . An attempt to vindicate the Courts, upon the ground that their action was but an application of the common law in modified forms to suit the new conditions of things, would prove a disastrous failure.[108]

MINER AND FARMER

Mention has already been made that one implication of *Hicks v. Bell* was to open legally private lands as well as public lands to the gold seekers, who responded

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106 Hill v. Smith (1865), 27 Cal. 482.

107 Ibid., 483.

108 Gregory Yale, *Legal Titles to Mining Claims and Water Rights in California* . . . (San Francisco: A. Roman & Company, 1867), 137–38.

with great alacrity. This decision went beyond the possessory act passed by the Legislature in 1852 authorizing a possessor of public land used for grazing or farming purposes to maintain an action for injury to his possession, but the possession was not to preclude any person from mining the land for precious metals.[109] Why did Heydenfeldt go as far as he did? Stephen J. Field stated,

> It was the policy of the State to encourage the development of the mines, and no greater latitude in exploration could be desired than was thus sanctioned by the highest tribunal of the State. It was not long, however, before a cry came up from private proprietors against the invasion of their possessions which the decision had permitted; and the court was compelled to put some limitation upon the enjoyment by the citizen of this right of the State.[110]

The Court limited the full effects of *Hicks v. Bell* in 1855 in the case of *Stoakes v. Barrett*, which nominally passed on the 1852 possessory act.[111] The Court affirmed the act, saying it only gave the right to mine public, not private, lands used for agricultural purposes. Justice Heydenfeldt, who again wrote the opinion, affirmed *Hicks v. Bell* as to the state owning the minerals, but also affirmed the limitation implicit in the statute by saying, "to authorize an invasion of private property in order to enjoy a public franchise, would require more specific legislation than any yet resorted to."[112]

At the same January 1855 term the Court affirmed an entry on a farm on public lands, but Justice Charles Bryan, in writing the Court's opinion, used a broader basis than the state's right to the minerals.[113] He said it had generally been the policy of governments to reserve mineral to themselves and keep them from private ownership. The state of California, by virtue of its police powers, could and did pass a law dealing with the public lands, and the law passed, the Possessory Act, did not protect mineral-bearing public lands from entry. No one, then, using public land for agricultural purposes should be allowed to fence off a large body of minerals for his use;

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109 Cal. Stats. (1852), chap. 82.

110 Field, *California Alcalde*, 106.

111 Stoakes v. Barrett (1855), 5 Cal. 36.

112 Ibid., 39

113 McClintock v. Bryden (1855), 5 Cal. 97.

but any miner to enter, was to extract the minerals in the most practicable manner possible, causing as little injury as possible to the agriculturalist.

In spite of these two decisions, the Court did whittle the miners' right of entry. In *Fitzgerald v. Urton*, the Court refused to allow a miner to enter property being used for a hotel.[114] The Court said that since the 1852 act had legalized what would have been a trespass under the common law, it was to be construed strictly, "and the Act cannot be extended by implication to a class of cases not specifically provided for."[115] Hence, since the act of 1852 only mentioned agricultural and grazing lands, the Court would not extend it to cover other uses.

Responding to complaints by farmers, the "more specific legislation" mentioned by Justice Heydenfeldt in *Stoakes v. Barrett* was passed by the Legislature in 1855.[116] This law provided for indemnification to those injured by the working of mining claims under the 1852 act. The next year the Court allowed damages to a farmer for an injury to his property in *Burdge v. Underwood*, but the 1855 law was not mentioned; the Court did affirm the previous series of cases, however.[117]

In *Martin v. Browner*, one party enclosed twelve acres of land in a mining town, claiming it to be a town lot.[118] Defendants' mining operations were not near, nor did they interfere with plaintiffs' buildings. The Court held for the defendants, saying that if a person were to claim such large pieces of land in a mining district, "the consequence would be that all of the mineral lands in a neighborhood might be appropriated by a few persons, by their making a village or hamlet on or near the land so appropriated."[119] At the same term as the previous case, the Court affirmed *Burdge v. Underwood* and allowed damages for a ditch dug across the plaintiff's garden and orchard without his permission.[120]

The decision in *Biddle Boggs v. Merced Mining Co.*, which settled once and for all that miners could not enter land to which the agriculturalist had

114 Fitzgerald v. Urton (1855), 5 Cal. 308.
115 Ibid., 309.
116 Cal. Stats. (1855), chap. 119.
117 Burdge v. Underwood (1856), 6 Cal. 45.
118 Martin v. Browner (1858), 11 Cal. 12.
119 Ibid., 14.
120 Weimar v. Lowery (1858), 11 Cal. 104.

gained a title in fee, still left public lands open to entry. When, in *Burdge v. Smith*, the Court affirmed the 1856 act declaring that unless the user of land being entered by miners could actually show legal title, the presumption would be that the land was public land, the Court provided grist for Charles Shinn's later statement that "the mining-interests were in those days held to be altogether predominant in importance to the agricultural interests, over the entire gold-bearing area."[121]

The 1860s seemingly opened with the Court continuing in much the same vein, as it affirmed *Burdge v. Smith* in *Smith v. Doe*.[122] The unanimous Court, with Justice Warner W. Cope, writing the opinion, said that if the right of entry on public lands for mining purposes were taken away, large tracts of mineral lands could be claimed, resulting in the concentration of mining interests in a few persons. Admitting that the miner had the right to enter, Cope added that protection was to be afforded permanent improvements and growing crops of all descriptions, since they constituted private property, thus in effect limiting entries. He said:

> It must not be understood, however, that within the limits of the mines all possessory rights and rights of property, not founded upon a valid legal title, are held at the mercy and discretion of the miner. Upon this subject, it is impossible to lay down any general rule, but every case must be determined upon its own particular facts. Valuable and permanent improvements, such as houses, orchards, vineyards, etc., should, undoubtedly, be protected; as also, growing crops of every description, for these are as useful and necessary as the gold produced by the working of the mines. Improvements of this character, and such products of the soil as are the fruits of toil and labor, must be regarded as private property, and upon every principle of legal justice are entitled to the protection of the Courts. But in all cases it must be borne in mind that, as a general rule, the public mineral lands of the State are open to the occupancy of every person who, in good faith, chooses to enter upon them for the purpose of mining, and the examples we have given

[121] Charles H. Shinn, *Mining Camps; A Study in American Frontier Government*, edited by Rodman W. Paul (New York: Harper & Row, 1965), 260.

[122] Smith v. Doe (1860), 15 Cal. 100.

> may serve, in some measure, to indicate the proper modifications of this rule, and the restrictions necessary to be placed upon the exercise of this right. It is the duty of the Courts to protect private rights of property, but it is no less their duty to secure, as far as possible, the entire freedom of the mines, and to carry out and enforce the obvious policy of the Government in this respect.[123]

That same judicial term the Court held enclosing the land would not prevent an entry either, and the Court, in *Clark v. Duval*, went on to say,

> In giving effect to the policy of the Legislature, we must hold that the miner is not confined to a mere right of entry and egress, and a right to dig the soil for gold. Whatever is indispensable to the exercise of the privilege must be allowed him; else it would be a barren right, subserving no useful end. But the substantial thing is a right to use the land upon which he goes, not merely to dig, but to mine and so to use the land and such elements of the freehold or inheritance, of which water is one, as to secure the benefits which were designed. This use must be reasonable, and with just respect to the agriculturalist.[124]

The Court awarded damages to the farmer for actual injury done, and an injunction against the further diversion of his water, but refused damages or injunction for ditches and reservoirs dug by miners that the jury felt to be necessary to their mining operation. Now that the Court said the use by the miners had to be reasonable, and that there were exceptions to the right to enter and use farmlands, the Court was able to state exceptions and limitations, judging each such exception or limitation by the facts of each particular case.

In *Gillan v. Hutchinson*, the Court said the 1855 act was invalid if it tried to give a right of entry if none existed before the act's passage because the Legislature could not take property from one person and give it to another.[125] Thus, the Court said, the miner's right of entry did not entitle him to dig up an orchard or, in *Rogers v. Soggs*, to cut growing timber.[126]

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123 Ibid., 105–6.

124 Clark v. Duval (1860), 15 Cal. 88.

125 Gillan v. Hutchinson (1860), 16 Cal. 153.

126 Rogers v. Soggs (1863), 22 Cal. 444.

One who did enter legitimately under the 1855 act would lose the right if the possessor of the land received a patent from the United States.[127] In 1863 the Court partially reversed *Gillan v. Hutchinson*, and this became the final word on the subject until the federal government took action in 1866, holding that the 1855 act was clearly constitutional and was merely a regulation of the right to enter under the 1852 possessory act.[128]

Whatever the rights of miners under the 1852 and 1855 acts, the Supreme Court needed to establish the technical requirements a miner needed to plead in court to justify an entry. One entering had to show

> at least, first, that the land is public land; second, that it contains mines or minerals; third, that the person entering upon or against a prior possession enters for the bona fide purpose of mining. But this being in the nature of a justification of the entry as against an apparent and prima facie right of the actual prior possessor, must be affirmatively pleaded . . . with all the requisite averments to show a right under the statute, or by law to enter.[129]

The farmer or grazer on his part needed to show his prior possession,[130] and as late as 1873 the Court was called upon to say what constituted mineral lands for purposes of entries for mining. The Court said,

> The mere fact that portions of the land contained particles of gold, or veins of gold-bearing quartz rock, would not necessarily impress it with the character of mineral land within the meaning of the Acts . . . . It must at least be shown that the land contains metals in quantities sufficient to render it available and valuable for mining purposes.[131]

Controversies between mining and farming interests also involved the appropriation and use of water, and damage to farm and grazing lands as a result of such use. Conflicts over running water were dealt with by the doctrine of prior appropriation, but two cases came before the Court dealing with diversions of water from a farmer's reservoir. In the first of these, *Clark v. Duval*, the 1860 case quoted above, the Court upheld the

127 Fremont v. Seals (1861), 18 Cal. 433.
128 Rupley v. Welch (1863), 23 Cal. 452.
129 Lentz v. Victor (1861), 17 Cal. 271.
130 Ensminger v. McIntire (1863), 23 Cal. 593.
131 Alford v. Barnum (1873), 45 Cal. 484.

diversion as being a necessary incident to the entry for mining, but in *Rupley v. Welch*, the new five-man Court was not so generous, saying, "The threatened diversion of water from plaintiff's reservoir is a clear violation of a vested right of property, acquired by the plaintiff, by virtue of his prior appropriation of the water, and of which he cannot be divested for any private purposes or for the benefit of a few private individuals."[132]

The actual use of water by miners was also a potential hazard to farming and grazing interests. In two cases dealing with the same parties, the plaintiff complained of his land being flooded by the defendant's mining. The Court said that the defendant was bound to use his ditch so as not to injure the plaintiff's land regardless of who had the older right or title.[133] The miner was liable for damages, a view affirmed by the Court when the case came up again two years later. Now the farmer was also complaining of sediment being deposited on his land, and the miner was again liable.[134] In *Wixon v. Bear River* and *Auburn Mining Co.*, the Court, assessing damages against the defendant company for mud and silt that had accumulated on the plaintiff's crops, said that the plaintiff, in enclosing a tract of public land in the mineral region, received a vested right to be protected against one entering for mining purposes, an opinion more attentive to agricultural interests, at least in tone, than *Clark v. Duval*.[135] The Court extended the liability of miners for damages in 1875 to farm lands to cover mining industries other than gold and silver mining, in this case coal.[136]

On the other side of the coin, a miner sued a farmer for damage done to his claim by the farmer's running water, but since this was not an instance of a miner and farmer on the same parcel of land, the common law applicable to cases between adjoining landholders was used. Since the defendant was irrigating his own crops on his own land, a right which was his,

> [a]n action cannot be maintained against him for the reasonable exercise of his right, although an annoyance or injury may thereby be occasioned to the plaintiffs. He is responsible to the plaintiffs only

132 Rupley v. Welch, 455.
133 Richardson v. Kier (1869), 34 Cal. 63.
134 Richardson v. Kier (1869), 37 Cal. 263.
135 Wixon v. Bear River and Auburn Mining Co. (1864), 24 Cal. 367.
136 Robinson v. Black Diamond Coal Co. (1875), 50 Cal. 460.

> for the injuries caused by his negligence or unskillfulness, or those willfully inflicted in the exercise of this right of irrigating his land.[137]

Reading the cases dealing with mines and waters gives the impression of a definite but extremely slow change from the viewpoint of allowing miners to do virtually as they pleased to one that realized that there were limitations on the actions of miners in their search for minerals. It would be easy for a critic to say that the Court finally came around to a sounder legal view, but there was more than that involved. The change more likely reflected a general societal change in regard to property rights in California as the rush for gold ebbed and the mining industry became controlled by large companies desiring stability. At the same time other industries developed, and agriculture was one of these, that also demanded stability in property rights. To be sure, all conflicts between miners and farmers did not end, such as the conflict over mining debris in the Sacramento Valley in the 1880s,[138] but stability was at hand.

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[137] Gibson v. Puchta (1867), 33 Cal. 310.

[138] Robert L. Kelley, *Gold v. Grain; The Hydraulic Mining Controversy in California's Sacramento Valley; A Chapter in the Decline of the Concept of Laissez-Faire* (Glendale: The Arthur H. Clarke Company, 1959), 327.

Chapter 11

CONCLUSION

The preceding chapters have presented several areas of interest involving decisions of the California Supreme Court in the period 1850–1879.

The largest group of cases not discussed dealt with land in the state.[1] Many of these cases were decisions involving various federal land laws and were dependent upon decisions of the United States Supreme Court. Another large group of cases treated land grants from the Spanish and Mexican periods, but again these cases involved more federal than state legal issues, although the state was both interested and involved in the outcome. The Federal Land Act of 1851, establishing a Land Commission to settle land-grant disputes in the state, effectively removed most land-grant cases from the state courts.[2] Even the key question of the title to pueblo lands, decided by the California Supreme Court in *Hart v. Burnett*,[3] needed further

[1] For a treatment of land problems in California, see W. W. Robinson, *Land in California; The Story of Mission Lands, Ranchos, Squatters, Mining Claims, Railroad Grants, Land Scrip, Homesteads* (Berkeley: University of California Press, 1948), 291. In addition, Professor Paul W. Gates has a full study in progress on the same subject.

[2] 9 U.S. Stat. at L. (1851), 631–34.

[3] Hart v. Burnett (1860), 15 Cal. 530.

affirmation by the federal courts[4] and Congress.[5] The cases actually used for the study, then, while admittedly a fraction of those actually decided, are nonetheless quite sufficient as a basis for comment about the California Supreme Court as a whole.

In his conclusion to *California and the Nation*, Joseph Ellison wrote of California:

> In many respects California was a typical frontier community; for the problem of the American frontier was essentially one of civilization and Americanization; establishment of government; removal of obstructing agencies; concerting policies for the disposition and appropriation of natural resources . . . . We find in California the characteristic needs and demands of the American frontier; and the tendency to emphasize strongly the rights of the people. In a word, we find the typical self-confident, self-assertive, "dissatisfied frontier."[6]

If California was a "typical frontier community," was its Supreme Court, then, a "typical frontier institution?" Frederick Jackson Turner, in his famous frontier hypothesis, wrote, "The peculiarity of American institutions is, the fact that they have been compelled to adapt themselves to the changes of an expanding people."[7] This expansion was, in Turner's view, westward, and this adaptation took place in successive frontiers. The principal effect of the frontier social environment was to weaken traditional values and controls. Pioneers found themselves in new, volatile societies where customary behavior did not bring customary results. It was thus necessary to find new means to deal with new situations.

It would seem that for the period of this study the California Supreme Court was a typical frontier institution fairly well cut off or removed from the Eastern experience, making innovations to meet new conditions, and rejecting old, established legal formulas. But this was not really the case.

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4 San Francisco v. United States (1864), 4 Sawyer 553.

5 14 U.S. Stat. at L. (1867), 4.

6 Joseph Waldo Ellison, *California and the Nation 1850–1869: A Study of the Relations of a Frontier Community with the Federal Government* (Berkeley: University of California Press, 1927), 231.

7 Frederick Jackson Turner, *The Frontier in American History* (New York: Henry Holt and Company, 1920), 2.

The Court was, for the most part, in the mainstream of American law. The United States, and California was no exception, followed a system of legal precedents founded on the maxim, *stare decisis et non quieta movere* (to adhere to precedent and not to unsettle things which are settled). This, of course, does not mean that the law is static, for it is not. Decisions were and are modified, reshaped, and at times overruled, where there is sufficient justification for change.

The California Supreme Court recognized that it was a part of a large, great legal system, and this was shown in its decisions. The use of the common law was a real example of this both in its general application and its specific application in mining claim and water cases. Although its somewhat different application in the water cases would, on the surface, seem to negate this idea, the very fact that Justice Solomon Heydenfeldt felt called upon in *Conger v. Weaver* to defend his unorthodox use of the common law in *Eddy v. Simpson* and subsequent cases, stands as proof of the importance of the common law to California jurisprudence.

The use of stare decisis was not limited to references to California cases; thus, in *Ward v. Flood*, the Court made reference to the Massachusetts school segregation cases, *Roberts v. City of Boston*; the use of non-California decisions is implicit in the use of the common law. The Court's personnel also showed this reliance on the earlier settled states. Mention has been made of the number of judges from New York and Vermont, but the judges as a whole reached California already learned in the law and steeped in the idea of legal precedent. This was also true of the 1850s period, when men such as Serranus C. Hastings, former chief justice of Iowa's Supreme Court, and Alexander Anderson, one-time United States senator from Tennessee, served on the Court. Hugh C. Murray, California's youngest chief justice, once even refused to use the law of Mexico, which use was required by law for cases having their origins prior to statehood, opting instead for the common law as he had learned it in Illinois.[8]

The question arises, nonetheless, as to how the denial of the jurisdiction of the United States Supreme Court under the twenty-fifth section of the Judiciary Act of 1789 and the questionable use of the common law in water cases, for example, may be equated with the use of precedent and the

[8] Fowler v. Smith (1852), 2 Cal. 39.

common law. These decisions, it must be remembered, took place in the 1850s, the first decade of statehood. Charles Warren attributed the decision in *Gordon v. Johnson* to the isolated state of California before the completion of the transcontinental railroad increased contact between California and the rest of the nation,[9] but this was but a partial explanation at most. A closer look at California's early days could provide a better explanation.

After saying that California was a typical frontier community, Ellison added that in many other aspects, however, California was unique because it sprang to full maturity immediately instead of developing gradually as was the case with most communities.[10]

The Court was cognizant of the burden it carried. One man who was uniquely aware of this was Peter H. Burnett, California's first governor, and twice appointed to the state's high court.

He wrote in *Bear River Co. v. York Mining Co.*:

> It may be said, with truth, that the judiciary of this State, has had thrown upon it, responsibilities not incurred by the Courts of any other State in the Union. In addition to those perplexing cases that must arise, in the nature of things, and especially in putting into practical operation, a new constitution and a new code of statutes, we have had a large class of cases, unknown in the jurisprudence of our sister states.[11]

Burnett was referring specifically to the water cases when he continued: "Left without any direct precedent, . . . we have been compelled to apply to this anomalous state of things the analogies of the common law, and the more expanded principles of equitable justice."[12] In this last statement Burnett has indicated the nature of the Court in the early days of statehood.

Burnett was not the only justice to make references such as "anomalous state of affairs," or "unprecedented events." The *Supreme Court Reports* are replete with such references, and indicated that the Court was faced with problems, due to the rapid development of the state, with which

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9 Charles Warren, *The Supreme Court in United States History*, vol. II (Boston: Little, Brown, and Company, 1921, 1926), 257.

10 Ellison, California and the Nation, 231.

11 Bear River Co. v. York Mining Co. (1857), 8 Cal. 332.

12 Ibid.

it had trouble coping. That analogies of the common law were used served to acknowledge stare decisis, and that equitable justice was also applied indicated that as a viable entity, modifications in the common law, or reshaping of so-called precedents, was necessary to meet the conditions actually found in the state.

Considering the unstable conditions in California before statehood, the general trend of the Court's decisions during its first decade might be considered a quest for stability. This is particularly to be seen in the cases involving land grants and water cases. The rule in *Cohas v. Raisin*, upholding grants by the American alcaldes was a commonsense decision; to have ruled otherwise would have created a great deal of confusion and instability and would have caused much more turmoil over land titles than already existed. This view was enunciated by Chief Justice Murray in the second *Welch v. Sullivan* case. The reasoning in the whole area of water cases was also an attempt at providing stability by accommodating the law to the preexisting conditions in the state. To have decided differently would have virtually ended the system of mining as it then existed in the state.

As part of the attempt to stabilize conditions in the state, the Court also tried to delineate clearly between the branches of government, and within each branch, and between the levels of government. But throughout these cases also runs the concept of the Supreme Court as the literal court of last resort in these matters. This independence by the Court was united with an attempt at consistency. A good example of the Court's consistency was its decision in *Conant v. Conant*, the divorce case the Court felt it could review even though the sum of $200 or more was not at stake. While citing many precedents from other jurisdictions, the Court was in effect saying that since it could hear appeals from other cases originally heard in the district court, and since divorces also originated in the district courts, it should hear divorce cases as well, even though the Constitution was not explicit on the subject.

The fine work of the Court was accomplished with two handicaps in its composition. The first was in the turnover in the Court's personnel, with thirteen different men, sixteen if the two appearances of Justices Anderson, Wells, and Burnett are counted separately, sitting on the Court in the first decade under discussion. The Court also labored under the handicap of having only three members. This meant that in the absence of any one

justice the two remaining justices would have to reach a unanimous agreement or else a cause could not be decided. Another consequence of the small number of justices was the constant possibility of a decision being overturned by the replacement of only one justice. The decision in *Ex parte Newman* was reversed and Justice Field's views prevailed in 1861 when the Court upheld another Sunday "blue" law[13] in *Ex parte Andrews*.[14] Instances such as these were rare, which was a tribute to the soundness and consistency of the vast majority of the Court's decisions.

Faced with many problems as it was, the Court proved itself to be human. One characteristic that may be seen in a number of decisions was a possible streak of nativism, a feature not uncommon in the United States as a whole during the 1850s. This nativism was shown in the anti-Chinese and anti–Native American opinions as well as by occasionally ignoring rules of Mexican law which should have been taken into account when deciding several of the early cases. The Know-Nothings were potent in California in the 1850s, even electing J. Neely Johnson as governor in 1855, and this anti-foreign, anti-Catholic movement may have influenced the justices to dismiss certain points of Mexican law as mere formalities or outmoded after the American occupation. Another aspect of nativism was the strong adherence to the individual rights of trial by jury and the writ of habeas corpus, both of which were closely identified with American law, and which were considered to have been unknown in California before the American conquest.

In a very real sense, the Court's second and third decades saw a continuation of this quest for stability, although in a somewhat different way. The Court, in the earlier period, sought bases for its decisions to solve its more vexatious problems. In later years the Court examined its earlier decisions with an eye toward any possible modifications to stabilize matters still further by bringing decisions more in line with the general legal consensus nationally. Again, though, the Court was cognizant of California's problems. When the Court, in *Lux v. Haggin*, acknowledged the common law of waters, it did not destroy rights gained through the doctrine of appropriation. Thus, a modification, and California remained with a new system

[13] *Cal. Stats.* (1861), chap. 535.

[14] Ex parte Andrews (1861), 18 Cal. 678.

of water law. The Court recognized that some of its earlier decisions were at least questionable, if not completely wrong, for in 1858 the Court noted that the use of stare decisis as to its own decisions could not protect a decision that was contrary to well-settled principles. "The conservative doctrine of *stare decisis* was never designed to protect such an innovation."[15]

While not a "frontier institution," the California Supreme Court was still, vis-à-vis the rest of the state government and the populace, an independent body, and this in spite of being an elected judiciary. The Court was independent both in regard to the formulation of its decisions and its powers and duties. The Court established its own preeminence within the judiciary, and pointed out its importance by saying it could hear appeals even if there were no exact monetary value involved in the matter.[16] It enunciated this view in the divorce case *Conant v. Conant* in 1858, and in 1866 in the case of *Knowles v. Yeates* when, in an appeal of an election, the Court referred to itself as a court of "dernier resort."[17] At the same time the Court was responsive to individual rights and needs on numerous occasions, realizing that exceptions to technical matters could be allowed. In *People v. Lee* the Court agreed to hear an appeal even though the bill of exceptions was signed beyond the statutory period. Speaking for a unanimous Court, Chief Justice Stephen J. Field wrote that the Court would not "inquire into the reasons which may have induced his actions in signing the same after the statutory period, but will presume they were sufficient."[18] He went on to say that "the statute is in this respect not unlike a rule of Court to be enforced to advance the ends of justice, and not to prevent their attainment."[19]

In the 1860 case of *McCauley v. Brooks*, the Court acknowledged the interdependence of the branches of the state government,[20] but the Court was always jealous of encroachments on its prerogatives, and constantly sought to ascertain that such encroachments did not occur. In response to

15 Aud v. Magruder (1858), 10 Cal. 292.

16 See chapter 4.

17 Knowles v. Yeates (1866), 31 Cal. 88.

18 People v. Lee (1860), 14 Cal. 512.

19 Ibid.

20 See chapter 6, *supra*.

the idea of possible legislative encroachment, the Court, in *Smith v. Judge of the Twelfth District*, said,

> We have listened with proper respect to the appeal which has been made to us to protect the judiciary from legislative encroachment. With the unquestioned power of construing and pronouncing upon the validity of the laws in the last resort, the danger is not serious that this department will become the victim of injurious aggressions from the other branches of Government; and we think we have shown no disposition in the past to deny to the Courts the full measure of the powers with which they are constitutionally invested. It may be observed, however, that the protection of the Judiciary from usurpation is not to be sought in forced construction of their own jurisdiction, or in extravagant pretensions to power, but rather in a frank and cheerful concession of the rights of the coordinate department, and a firm maintenance of the clear authority of our own.[21]

An independent judiciary, then, has been part of the history of the California Supreme Court. That history goes on and will continue to do so, so long as there is a Court.

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[21] Smith v. Judge of the Twelfth District (1861), 17 Cal. 547.

BIBLIOGRAPHY

LAWS, STATUTES, COURT REPORTS, AND GOVERNMENT DOCUMENTS

United States

Statutes at Large.

Supreme Court Reports.

Circuit Court Reports.

California

Statutes.

Supreme Court Reports.

California. Legislature. *Senate and Assembly Journals* (1849–1850).

Massachusetts

Supreme Judicial Court Reports.

BOOKS

Angel, Myron. *History of San Luis Obispo County California*. Introduction by Louisiana Clayton Dart. Reproduction of Thompson and West's 1883 edition. Berkeley: Howell-North Books, 1966.

Aptheker, Herbert, ed. *A Documentary History of the Negro People in the United States*. Preface by W. E. B. DuBois. New York: The Citadel Press, 1951.

Ayers, James J. *Gold and Sunshine; Reminiscences of Early California*. Boston: Richard G. Badger, 1922.

Baldwin, Joseph Glover. *The Flush Times of California*. Edited by Richard E. Amacher and George W. Polhemus. Athens: University of Georgia Press, 1966.

Bancroft, Hubert Howe. *History of California*. San Francisco: The History Company, 1890.

Barth, Gunther. *Bitter Strength; A History of the Chinese in the United States 1850–1870*. Cambridge: Harvard University Press, 1964.

Barry, T. A., and B. A. Patten. *San Francisco, California, 1850*. Foreword by Joseph A. Sullivan. Oakland: Biobooks, 1947.

Bates, J. C., ed. *History of the Bench and Bar of California*. San Francisco: Bench and Bar Publishing Company, 1912.

Bean, Walton. *California; An Interpretive History*. New York: McGraw-Hill Book Company, 1968.

Beasley, Delilah L. *The Negro Trail Blazers of California. A Compilation of Records from the California Archives in the Bancroft Library at the University of California, in Berkeley; and from the Diaries, Old Papers and Conversations of Old Pioneers in the State of California. It is a True Record of Facts, as They Pertain to the History of the Pioneer and Present Day Negroes of California*. Reprint of 1919 edition. San Francisco: R and E Research Associates, 1968.

Berwanger, Eugene. *The Frontier Against Slavery; Western Anti-Negro Prejudice and the Slavery Extension Controversy*. Urbana: University of Illinois Press, 1967.

Billington, Ray Allen. *America's Frontier Heritage*. New York: Holt, Rinehart and Winston, 1966.

Black, Chauncey F., and Samuel B. Smith, eds. *Some Account of the Work of Stephen J. Field as a Legislator, State Judge, and Judge of the Supreme Court of the United States*. Introductory sketch by John Norton Pomeroy. [n.p.], 1881.

Black, Henry Campbell. *Black's Law Dictionary*. 4th ed., prepared by the publisher's editorial staff. St. Paul: West Publishing Co., 1951.

Blakely, William Addison. *American State Papers and Related Documents on Freedom in Religion*. 4th rev. ed. Washington, D.C.: The Religious Liberty Association, 1949.

Browne, J. Ross. *Report of the Debates in the Convention, on the Formation of the State Constitution, in September and October, 1849*. Washington, D.C.: John T. Towers, 1850.

Bryant, Edwin. *What I Saw in California: Being the Journal of a Tour, by the Emigrant Route and South Pass of the Rocky Mountains, Across the Continent of North America, the Great Desert Basin, and through California, in the Years 1846, 1847*. New York: D. Appleton & Company, 1848.

Buchanan, A. Russell. *David S. Terry of California; Dueling Judge*. San Marino: The Huntington Library, 1956.

Burnett, Peter H. *An Old California Pioneer*. Foreword by Joseph A. Sullivan. Oakland: Biobooks, 1946.

Catterall, Helen Tunnicliff, ed. *Judicial Cases Concerning American Slavery and the Negro*. Washington, D.C.: The Carnegie Institution of Washington, 1926.

Caughey, John Walton. *California; A Remarkable State's Life History*. 3rd ed. Englewood Cliffs: Prentice-Hall, Inc., 1970.

———. *Gold is the Cornerstone*. Berkeley: University of California Press, 1948.

Clawson, Marion. *Uncle Sam's Acres*. New York: Dodd, Mead & Company, 1951.

Cleland, Robert Glass. *The Cattle on a Thousand Hills; Southern California, 1850–1880*. 2nd ed. San Marino: The Huntington Library, 1951.

———. *From Wilderness to Empire; A History of California, 1542–1900*. New York: Alfred A. Knopf, 1944.

———. *A History of California; The American Period*. New York: The Macmillan Company, 1922.

Cloud, Roy W. *Education in California; Leaders, Organizations, and Accomplishments of the First Hundred Years*. Stanford: Stanford University Press, 1952.

Cole, Cornelius. *Memoirs of Cornelius Cole, Ex-Senator of the United States from California*. New York: McLoughlin Brothers, 1908.

Colton, Walter. *Three Years in California. Introduction and notes by Marguerite Eyer Wilbur*. Stanford: Stanford University Press, 1949.

Conmy, Peter Thomas. *The Constitutional Beginnings of California*. Historical Publication, Grand Parlor, Native Sons of the Golden West. San Francisco, 1959.

Coolidge, Mary Roberts. *Chinese Immigration*. New York: Henry Holt and Company, 1909.

Cosgrove, George. *Early California Justice; The History of the United States District Court for the Southern District of California, 1849–1944*. Edited by Roy Vernon Sowers. San Francisco: The Grabhorn Press, 1948.

Coy, Owen Cochran. *The Humboldt Bay Region 1850–1875; A Study in the American Colonization of California*. Los Angeles: The California State Historical Association, 1929.

Coy, Owen C., and Herbert C. Jones. *California's Constitution*. Los Angeles: Marjorie Tisdale Wolcott, 1930.

Crosby, Elisha Oscar. *Memoirs of Elisha Oscar Crosby; Reminiscences of California and Guatemala from 1849 to 1864*. Edited by Charles Albro Parker. San Marino: The Huntington Library, 1945.

Cross, Ira B. *Financing an Empire; History of Banking in California*. Chicago: The S. J. Clarke Publishing Co., 1927.

———. *A History of the Labor Movement in California*. University of California Publications in Economics, vol. 14. Berkeley: University of California Press, 1935.

Cruden, Robert. *The Negro in Reconstruction*. Englewood Cliffs: Prentice-Hall, Inc., 1969.

Daggett, Stuart. *Chapters on the History of the Southern Pacific*. New York: The Ronald Press Company, 1922.

Davis, Stephen Chapin. *California Gold Rush Merchant; The Journal of Stephen Chapin Davis*. Edited by Benjamin B. Richards. San Marino: The Huntington Library, 1956.

Davis, William Heath. *Seventy-five Years in California. A History of Events and Life in California: Personal, Political and Military; Under the Mexican Regime; During the Quasi-Military Government of the Territory by the United States, and after the Admission of the State to the Union;*

Being a Compilation by a witness of the Events described. Reissue and enlarged illustrated edition of Sixty Years in California, edited and with a foreword by Douglass S. Watson. San Francisco: John Howell, 1929.

Davis, Winfield J. *History of Political Conventions in California*, 1849–1892. Sacramento: The California State Library, 1893.

Dawson, Glen. *Californiana; A Priced Catalogue of One Thousand Books and Pamphlets Relating to the History of California*. Los Angeles: Dawson's Book Shop, 1943.

Dick, Everett. *The Lure of the Land; A Social History of the Public Lands from the Articles of Confederation to the New Deal*. Lincoln: University of Nebraska Press, 1970.

Dwinelle, John W. *The Colonial History of San Francisco*. San Francisco: Towne and Bacon, 1863. Reprinted. San Diego: Frye and Smith, 1924.

Eldredge, Zoeth Skinner, ed. *History of California*. New York: The Century History Company, [n.d.].

Ellison, Joseph Waldo. *California and the Nation 1850–1869; A Study of the Relations of a Frontier Community with the Federal Government*. University of California Publications in History, vol. XVI. Berkeley: University of California Press, 1927.

Ellison, William Henry. *A Self-Governing Dominion: California, 1849–1860*. Berkeley: University of California Press, 1950.

Eno, Henry. *Twenty Years on the Pacific Slope; Letters of Henry Eno from California and Nevada, 1848–1871*. Edited and with an introduction by W. Turrentine Jackson. Yale Americana Series, no. 8. New Haven: Yale University Press, 1965.

Fankhauser, William C. *A Financial History of California; Public Revenues, Debts, and Expenditures*. University of California Publications in Economics, vol. 3, no. 2, 101–408. Berkeley: University of California Press, 1913.

Field, Stephen J. *California Alcalde*. Foreword by J. A. Sullivan. Oakland: Biobooks, 1950.

———. *Personal Reminiscences of Early Days in California. To which is added the story of his attempted assassination by a former associate on the supreme bench of the state, By George C. Gorham*. New York: Da Capo Press, 1968.

Fite, Gilbert C. *The Farmers' Frontier, 1865–1900*. New York: Holt, Rinehart and Winston, 1966.

Fogelson, Robert M. *The Fragmented Metropolis: Los Angeles, 1850–1930*. Cambridge: Harvard University Press, 1967.

Foster, Stephen Clark. *El Quacheno, How I Went to Help Make the Constitution of California: Stirring Historical Incidents*. Los Angeles: Dawson's Book Shop, 1949.

Gates, Paul W. *History of Public Land Law Development*. Washington, D.C.: U.S. Government Printing Office, 1968.

Goodwin, Cardinal. *The Establishment of State Government in California, 1846–1850*. New York: The Macmillan Company, 1914.

Graves, Jackson A. *California Memories*. Los Angeles: Times-Mirror Press, 1927.

———. *My Seventy Years in California, 1857–1927*. Los Angeles: Times-Mirror Press, 1927.

Grivas, Theodore. *Military Governments in California 1846–1850; with a chapter on their prior use in Louisiana, Florida and New Mexico*. Glendale: The Arthur H. Clarke Company, 1963.

Handlin, Oscar. *This Was America; True Accounts of People and Places, Manners and Customs, as Recorded by European Travelers to the Western Shore in the Eighteenth, Nineteenth, and Twentieth Centuries*. Cambridge: Harvard University Press, 1949.

Haney, Lewis Henry. *A Congressional History of Railways in the United States, 1850–1887*. Bulletin of the University of Wisconsin, no. 342. Economics and Political Science Series, vol. 6, no. 1. Madison: University of Wisconsin Press, 1910.

Hansen, Woodrow James. *The Search for Authority in California*. Introduction by Joseph Augustine Sullivan. Oakland: Biobooks, 1960.

Harpending, Asbury. *The Great Diamond Hoax and Other Stirring Incidents in the Life of Asbury Harpending*. Edited by James H. Wilkins. San Francisco: The James H. Barry Co., 1913.

Hayes, Benjamin. *Pioneer Notes from the Diaries of Judge Benjamin Hayes 1849–1875*. Edited by Marjorie Tisdale Wolcott. Los Angeles: Marjorie Tisdale Wolcott, 1919.

Heizer, Robert F., and Alan F. Almquist. *The Other Californians; Prejudice and Discrimination Under Spain, Mexico, and the United States to 1920*. Berkeley: University of California Press, 1971.

Hittell, John S. *A History of the City of San Francisco and incidentally of the State of California*. San Francisco: A. L. Bancroft & Company, 1878.

Hittell, Theodore H. *History of California*. San Francisco: N. J. Stone & Company, 1885–97.

Hunt, Rockwell D. *John Bidwell, Prince of California Pioneers*. Caldwell: The Caxton Printers, Ltd., 1942.

———. *The Genesis of California's First Constitution (1846–1849)*. Johns Hopkins University Studies in Historical and Political Science, vol. XIII, no. 8. Baltimore: The Johns Hopkins Press, 1895.

Hutchins, Wells A. *The California Law of Water Rights*. Sacramento: State of California Printing Division, 1956.

Hyman, Harold Melvin. *Era of the Oath; Northern Loyalty Tests During the Civil War and Reconstruction*. Philadelphia: University of Pennsylvania Press, 1954.

Johnson, J. Edward. *History of the Supreme Court Justices of California*. vol. 1, San Francisco: Bender-Moss Company, 1963. vol. 2, San Francisco: Bancroft Whitney Company, 1966.

Johnson, Kenneth M. *Jose Yves Limantour v. The United States*. Los Angeles: Dawson's Book Shop, 1961.

Jones, Maldwyn Allen. *American Immigration*. The Chicago History of American Civilization, Daniel J. Boorstin, editor. Chicago: University of Chicago Press, 1960.

Kelley, Robert L. *Gold vs. Grain; The Hydraulic Mining Controversy in California's Sacramento Valley; A Chapter in the Decline of the Concept of Laissez Faire*. Glendale: The Arthur H. Clark Company, 1959.

Kung, S. W. *Chinese in American Life; Some Aspects of Their History, Status, Problems, and Contributions*. Seattle: University of Washington Press, 1962.

Miller, Stuart Creighton. *The Unwelcome Immigrant; The American Image of the Chinese, 1785–1882*. Berkeley: University of California Press, 1969.

Mowry, George E. *The California Progressives*. Berkeley: University of California Press, 1951.

Mulford, Prentice. *Prentice Mulford's Story: Life by Land and Sea*. New York: F. J. Needham, Publisher, 1899.

Nash, Gerald D. *State Government and Economic Development; A History of Administrative Policies in California, 1849–1933*. Berkeley: Institute of Governmental Studies, 1964.

Nunis, Doyce B., Jr. *The Trials of Isaac Graham*. Los Angeles: Dawson's Book Shop, 1967.

O'Meara, James. *Broderick and Gwin, The Most Extraordinary Contest for a Seat in the Senate of the United States Ever Known. A Brief History of Early Politics in California*. San Francisco: Bacon and Company, 1881.

Paul, Rodman W. *California Gold; The Beginning of Mining in the Far West*. Cambridge: Harvard University Press, 1947.

Pitt, Leonard. *The Decline of the Californios; A Social History of the Spanish-Speaking Californians, 1846–1890*. Berkeley: University of California Press, 1966.

Randall, J. G., and David Donald. *The Civil War and Reconstruction*. 3rd ed. Boston: D. C. Heath and Company, 1961.

Rice, William B. *The Los Angeles Star: 1851–1864; The Beginnings of Journalism in Southern California*. Edited by John Walton Caughey. Berkeley: University of California Press, 1947.

Riegel, Robert Edgar. *The Story of the Western Railroads*. New York: The Macmillan Company, 1926.

Robinson, W. W. *Land in California, the Story of Mission Lands, Ranchos, Squatters, Mining Claims, Railroad Grants, Land Scrip, Homesteads*. Berkeley: University of California Press, 1948.

———. *Lawyers of Los Angeles; A History of the Los Angeles Bar Association and of the Bar of Los Angeles County*. Los Angeles: Los Angeles Bar Association, 1959.

Rodman, Willoughby. *History of the Bench and Bar of Southern California*. Introduction by W. J. Hunsaker. Los Angeles: William J. Porter, 1909.

Rolle, Andrew F. *California; A History*. 2nd ed. New York: Thomas Y. Crowell Company, 1969.

Roske, Ralph J. *Everyman's Eden; A History of California*. New York: The Macmillan Company, 1968.

Royce, Josiah. *California; From the Conquest in 1846 to the Second Vigilance Committee in San Francisco; A Study of American Character*. Introduction by Robert Glass Cleland. New York: Alfred A. Knopf, 1948.

Scherer, James A. B. *"The Lion of the Vigilantes" William T. Coleman and the Life of Old San Francisco*. Indianapolis: The Bobbs-Merrill Company, 1939.

Shaw, William J. *An Appeal to Californians to Immediately Undertake a Peaceful Revolution in 1876 and Reorganize their State Government. Together with an Address by the Same Author on the Same Subject. Delivered in the Senate of California, February 7th, 1856*. San Francisco: A. L. Bancroft and Company, 1875.

Sherman, William T. *Recollections of California*. Foreword by Joseph A. Sullivan. Oakland: Biobooks, 1945.

Shinn, Charles Howard. *Land Laws of Mining Districts*. Johns Hopkins University Studies in Historical and Political Science, vol. II, no. 12. Baltimore: Johns Hopkins University, 1884.

———. *Mining Camps; A Study in American Frontier Government*. Edited by Rodman Wilson Paul. New York: Harper & Row, 1965.

Shuck, Oscar T. *History of the Bench and Bar of California. Being Biographies of many Remarkable Men, a store of Humorous and Pathetic Recollections. Accounts of Important Legislation and Extraordinary Cases, comprehending the Judicial History of the State*. Los Angeles: The Commercial Printing House, 1901.

Swett, John. *Public Education in California; Its Origin and Development, with Personal Reminiscences of Half a Century*. New York: American Book Company, 1911.

Swisher, Carl Brent. *Motivation and Political Technique in the California Constitutional Convention, 1878–79*. Claremont: Pomona College, 1930.

———, *Stephen J. Field; Craftsman of the Law*. Washington, D.C.: The Brookings Institution, 1930.

Taylor, Bayard. *Eldorado*. New York: G. P. Putnam's Sons, 1887.

Turner, Frederick Jackson. *The Frontier in American History*. New York: Henry Holt and Company, 1920.

Tutorow, Norman E. Leland Stanford: *Man of Many Career*s. Menlo Park: Pacific Coast Publishers, 1971.

Warren, Charles. *The Supreme Court in United States History*. Revised edition. Boston: Little, Brown, and Company, 1921, 1926.

Wiel, Samuel. C. *Water Rights in the Western States; The Law of Prior Appropriation of Water as Applied Alone in Some Jurisdictions, and as, in Others, Confined to the Public Domain, with the Common Law of Riparian Rights for Waters upon Private Lands, Federal, California and Oregon Statutes in full, with Digests of Statutes of Alaska, Arizona, Colorado, Hawaii, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Philippine Islands, South Dakota, Texas, Utah, Washington and Wyoming Forms*. 3rd ed., rev. and enlarged to June 1, 1911. San Francisco: Bancroft-Whitney Company, 1911.

Willey, Samuel H. *The Transition Period of California from a Province of Mexico in 1846 to a State of the American Union in 1850*. San Francisco: The Whittaker and Ray Company, 1901.

Wood, Forrest. G. Black Scare; *The Racist Response to Emancipation and Reconstruction*. Berkeley: University of California Press, 1968.

Yale, Gregory. *Legal Titles to Mining Claims and Water Rights in California, Under the Mining Law of Congress, of July, 1866*. San Francisco: A. Roman & Company, 1867.

ARTICLES

Batman, Richard Dale. "The California Political Frontier: Democratic or Bureaucratic?" *Journal of the Wes*t VII (October, 1968): 461–70.

Camp, Edgar Whittlesey. "Hugh C. Murray, California's Youngest Chief Justice," *California Historical Society Quarterly* XX (December, 1941): 365–73.

Carman, Harry J., and Charles H. Mueller. "The Contract and Finance Company and the Central Pacific Railroad." *The Mississippi Valley Historical Review* XIV (December, 1927): 326–41.

Clark, Alfred. "The San Gabriel River; A Century of Dividing the Waters." *Southern California Quarterly* LII (June, 1970): 159–69.

Cosgrove, George. "James McHall Jones," *California Historical Society Quarterly* XX (June, 1941): 97–116.

Ellison, Joseph. "The Currency Question on the Pacific Coast During the Civil War." *The Mississippi Valley Historical Review* XVI (June, 1929): 50–66.

Ellison, William Henry. "Memoirs of Hon. William M. Gwin," *California Historical Society Quarterly* XIX (March, June, September, December, 1940): 1–26, 157–84, 256–77, 344–67.

Fernandez, Ferdinand F. "Except a California Indian; A Study in Legal Discrimination." *Southern California Quarterly* L (June, 1968): 161–75.

Fisher, James A. "The Struggle for Negro Testimony in California, 1851–1863." *Southern California Quarterly* LI (December, 1969): 313–24.

Franklin, William E. "The Archy Case: The California Supreme Court Refuses to Free a Slave," *Pacific Historical Review* XXXII (May, 1963): 137–54.

Graham, Howard Jay. "An Innocent Abroad: The Constitutional Corporate 'Person.' " *U. C. L. A. Law Review* II (February, 1955): 155–211.

Hanchett, William. "The Blue Law Gospel in Gold Rush California." *Pacific Historical Review* XXIV (November, 1955): 361–68.

Kempin, Frederick G., Jr. "Precedent and Stare Decisis: The Critical Years, 1800 to 1850." *The American Journal of Legal History* III (January, 1959): 28–54.

Lapp, Rudolph M. "Negro Rights Activities in Gold Rush California." *The California Historical Society Quarterly* XLV (March, 1966): 3–20.

McMurray, Orrin K. "The Beginnings of the Community Property System in California and the adoption of the Common Law," *California Law Review* III (July, 1915): 359–80.

———. "Seventy-five Years of California Jurisprudence," *California Law Review* XIII (September, 1925): 445–67.

Miller, Stuart Creighton. "An East Coast Perspective to Chinese Exclusion, 1852–1882." *The Historian* XXXIII (February, 1971): 183–201.

Nelson, Ronald R. "The Legal Relationship of Church and State in California." *Southern California Quarterly* XLVI (March–June, 1964): 11–53, 125–60.

Nunis, Doyce B., Jr. "Historical Studies in United States Legal History, 1950–1959: A Bibliography of Articles Published in Scholarly Non-Law Journals." *The American Journal of Legal History* VII (January, 1963): 1–27.

Sandmeyer, Elmer C. "California Anti-Chinese Legislation and the Federal Courts: A Study in Federal Relations." *Pacific Historical Review* V (September, 1936): 189–211.

Still, Bayard. "California's First Constitution: A Reflection of the Political Philosophy of the Frontier." *Pacific Historical Review* IV (September, 1935): 221–34.

Wiel, Samuel C. "Public Policy in Water Decisions!" *California Law Review* I (November, 1912): 11–31.

Wyllys, Rufus Kay. "The French of California and Sonora." *Pacific Historical Review* I (September, 1932): 337–59.

UNPUBLISHED MATERIALS

Cordray, William Woodrow. "Claus Spreckels of California." Ph.D. diss., University of Southern California, 1955.

Harmon, Wendell E. "A History of the Prohibition Movement in California." Ph.D. diss., University of California, Los Angeles, 1955.

Haussler, John Cecil. "The History of the Seventh-Day Adventist Church in California." Ph.D. diss., University of Southern California, 1945.

Hinkston, Eugene Robert. "California's Assertion of States' Rights; A History of Jurisdictional Controversies with the Federal Government." Ph.D. diss., University of Southern California, 1960.

Jackson, Sheldon Glenn. "Henry Dalton, Southern California Ranchero." Ph.D. diss., University of Southern California, 1970.

McAllister, Walter Alexander. "A Study of Railroad Land Grant Disposals in California with Reference to the Western Pacific, the Central Pacific, and the Southern Pacific Railroad Companies." Ph.D. diss., University of Southern California, 1939.

Pitt, Leonard M. "The Foreign Miners' Tax of 1850: A Study of Nativism and Antinativism in Gold Rush California." M.A. thesis, University of California, Los Angeles, 1955.

Pulling, Hazel Adele. "A History of California's Range Cattle Industry 1770–1912." Ph.D. diss., University of Southern California, 1944.

Roth, Arnold. "The California State Supreme Court: 1850–1859." M.A. thesis, University of Southern California, 1969.

———. "The California State Supreme Court: 1860–1879: A Legal History." Ph.D. diss., University of Southern California, 1973.

Smith, Kenneth Aubrey. "California: The Wheat Decades." Ph.D. diss., University of Southern California, 1969.

Williams, David Alden. "The Political Career of David C. Broderick." Ph.D. diss., University of Southern California, 1963.

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