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.