

### *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.<sup>1</sup>

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.<sup>2</sup>

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."<sup>3</sup> 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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<sup>1</sup> Joseph Glover Baldwin, *The Flush Times of California*, edited by Richard E. Amacher and George W. Polhemus (Athens: University of Georgia Press, 1966), 35.

<sup>2</sup> W. W. Robinson, *Lawyers of Los Angeles* . . . (Los Angeles: Los Angeles Bar Association, 1959), 14.

<sup>3</sup> 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.<sup>4</sup>

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."<sup>5</sup>

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."<sup>6</sup>

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<sup>4</sup> Cardinal Goodwin, *The Establishment of State Government, 1846-1850* (New York: The Macmillan Company, 1914), 281.

<sup>5</sup> 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.

<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> 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."<sup>10</sup> 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.<sup>11</sup>

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

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<sup>7</sup> Cal. Stats. (1850), chap. 125.

<sup>8</sup> *Bryant v. Mead* (1851), 1 Cal. 441.

<sup>9</sup> *Johnston v. Russell* (1869), 37 Cal. 670.

<sup>10</sup> *Ibid.*, 672.

<sup>11</sup> *Walther v. Rabolt* (1866), 30 Cal. 185.

expiration until his successor took office.<sup>12</sup> 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.<sup>13</sup> Said Justice Sanderson, “For the measure of damages we must,<sup>14</sup> therefore, look to the common law.”<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup> 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.”<sup>18</sup> 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

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<sup>12</sup> Stratton v. Oulton (1865), 28 Cal. 44.

<sup>13</sup> Cal. Stats. (1868), chap. 344.

<sup>14</sup> Chamon v. San Francisco (1869), 1 Cal. Unrep. 509.

<sup>15</sup> Gilmer v. Lime Point (1861), 19 Cal. 47.

<sup>16</sup> Loring v. Illsley (1850), 1 Cal. 24.

<sup>17</sup> Clark v. Sawyer (1874), 48 Cal. 133.

<sup>18</sup> 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.<sup>19</sup>

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.”<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup>

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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<sup>19</sup> *Ibid.*, 89.

<sup>20</sup> *Coppinger v. Rice* (1867), 33 Cal. 408.

<sup>21</sup> *Fowler v. Smith* (1852), 2 Cal. 568.

<sup>22</sup> *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.<sup>23</sup>

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.”<sup>24</sup>

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.”<sup>25</sup> 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.”<sup>26</sup>

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<sup>23</sup> *Ibid.*, 50.

<sup>24</sup> *Ibid.*

<sup>25</sup> Cal. Const. (1849), art. XII, § 1.

<sup>26</sup> *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.”<sup>27</sup>

Thus, any contract that did not conform to the California Statute of Frauds would be enforced if it met civil law requirements.<sup>28</sup> In *Havens v. Dale*, the Court declared a land sale valid even though no price or consideration was shown in the deed.<sup>29</sup> 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,<sup>30</sup> although in *Schmitt v. Giovanari* the Court said that no consideration was needed under Mexican law.<sup>31</sup> 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.<sup>32</sup>

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.<sup>33</sup> 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,<sup>34</sup> or that starting a will one day and completing it several days later was not unusual,<sup>35</sup> or that upon the death of witnesses to a codicil their proven signatures would validate the document.<sup>36</sup>

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<sup>27</sup> *Ibid.*, 571.

<sup>28</sup> Cal. Stats. (1850), chap. 114.

<sup>29</sup> *Havens v. Dale* (1861), 18 Cal. 359.

<sup>30</sup> *Merle v. Mathews* (1864), 26 Cal. 455.

<sup>31</sup> *Schmitt v. Giovanari* (1872), 43 Cal. 617.

<sup>32</sup> *Long v. Dollarhide* (1864), 24 Cal. 218.

<sup>33</sup> *Ibid.*, 64.

<sup>34</sup> *Panaud v. Jones* (1851), 1 Cal. 488.

<sup>35</sup> *Castro v. Castro* (1856), 6 Cal. 158.

<sup>36</sup> *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."<sup>37</sup> 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,<sup>38</sup> 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

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<sup>37</sup> Theodore Grivas, *Military Governments in California 1846-1850* (Glendale: The Arthur H. Clark Company, 1963), 165.

<sup>38</sup> *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.<sup>39</sup> 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.”<sup>40</sup>

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.<sup>41</sup> 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.”<sup>42</sup> 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.<sup>43</sup>

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

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<sup>39</sup> *Woodworth v. Fulton* (1850), 1 Cal. 295.

<sup>40</sup> *Ibid.*, 318.

<sup>41</sup> *Reynolds v. West* (1850), 1 Cal. 322.

<sup>42</sup> *Cohas v. Raisin* (1853), 3 Cal. 453.

<sup>43</sup> *Welch v. Sullivan* (1857), 8 Cal. 165; *Welch v. Sullivan* (1857), 8 Cal. 511.

alcalde,<sup>44</sup> and an alcalde could not issue a judgment for \$1,000, when his jurisdiction was limited to \$100.<sup>45</sup>

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.<sup>46</sup> In *Surocco v. Geary*, the Court stated that the house and goods were a nuisance which the municipality had the right to abate.<sup>47</sup> 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.”<sup>48</sup> 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

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<sup>44</sup> Ladd v. Stevenson (1850), 1 Cal. 18.

<sup>45</sup> Horrell v. Gray (1850), 1 Cal. 133.

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

<sup>47</sup> Surocco v. Geary (1853), 3 Cal. 69.

<sup>48</sup> 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.<sup>49</sup>

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.”<sup>50</sup> This comment by Justice Field was an understatement, since the land question was more difficult in California than on any other American frontier.<sup>51</sup> “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.”<sup>52</sup> 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.<sup>53</sup> 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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<sup>49</sup> 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.

<sup>50</sup> Field, *California Alcalde*, 79.

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

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

<sup>53</sup> 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 Micheltoarena 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.<sup>54</sup> 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.<sup>55</sup>

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 Micheltoarena 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.<sup>56</sup> 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.<sup>57</sup>

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.<sup>58</sup> 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

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<sup>54</sup> *Suñol v. Hepburn* (1850), 1 Cal. 254.

<sup>55</sup> *Leese and Vallejo v. Clarke* (1852), 3 Cal. 17.

<sup>56</sup> *Vanderslice v. Hanks* (1852), 3 Cal. 27.

<sup>57</sup> *Vanderslice v. Hanks* (1853), 3 Cal. 47.

<sup>58</sup> *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.”<sup>59</sup> 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,<sup>60</sup> although Murray continued to defend his own views.<sup>61</sup>

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<sup>59</sup> *Den v. Den* (1856), 6 Cal. 82.

<sup>60</sup> *Ritchie v. United States* (1854), 17 Howard, 525; *Fremont v. United States* (1854), 17 Howard, 542.

<sup>61</sup> *Gunn v. Bates* (1856), 6 Cal. 263.