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.
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> 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.