Chapter 7

STATE AND LOCAL AUTHORITY

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

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

THE STATE

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

[1] Cal. Const. (1849), art. XI, § 4.

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

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

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

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

3 Cal. Const. (1849), art. I, § 8.

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

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

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

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

8 Cal. Stats. (1858), chap. 43, § 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

20 Cal. Stats. (1850), chap. 75, § 5.

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

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

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

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

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

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

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

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

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25 Ibid., 469.

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

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

28 Ibid., 539.

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

30 Supra, 95–96.

31 Supra, 85–86.

32 Cal. Stats. (1867–68), chap. 70.

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

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

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

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

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

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

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

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

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

40 Ex parte Wall (1874), 48 Cal. 279.
41 Cal. Stats. (1873–74), chap. 300.
42 Ex parte Wall, 313.
43 Ibid., 314.
44 Ibid., 315.
45 People v. Nally (1875), 49 Cal. 480.

Legislature cancel or change the terms of the contract, as was tried in the case of *McCauley v. Brook*s.[46] Of course a binding contract could be entered into by a state agency as well as by the state itself, but for such a contract to be binding, the state agency in question had to follow all necessary statutory provisions.[47]

One of the attributes of power given to the state by the Constitution was the control of business corporations. Most often a corporation was formed by receiving a franchise from the state. As the Supreme Court stated in *People v. Selfridge*, "The right to be a corporation is in itself a franchise; and to acquire a franchise under a general law, the prescribed statutory conditions must be complied with."[48] Failure to comply with the required conditions would result in a forfeiture, and the state would not have to sue for a court order declaring the forfeiture. The franchise reverted to the state, which could grant it again at its pleasure.[49]

Once a corporation was formed by a general law, as required by the Constitution,[50] the Court, in *California State Telegraph Co. v. Alta Telegraph Co.*, said that such corporation could later be given an exclusive franchise. [51] There was no constitutional language prohibiting the Legislature "from directly granting to a corporation, already in existence and created under the general laws, special privileges in the nature of a franchise, by a special act, or prohibiting a corporation from purchasing or holding such franchises, which may have been granted to others."[52]

This decision was overturned some eleven years later in *San Francisco v. S. V. W. W.*, when the Court held that a law affecting the rights of one corporation alone was to be considered a special law, and thus contrary to the state constitution.[53] As to the effects of the earlier decision, the Court said that even if property rights had grown up under the decision in that case, it was better that some inconvenience should have been submitted to, rather than such a decision should stand and a valuable provision of the Constitution be obliterated.

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46 See, in chapter 6 *supra*, "Interpreting Other Laws."

47 Cowell v. Martin (1872), 43 Cal. 605.

48 People v. Selfridge (1877), 52 Cal. 333.

49 O. R. R. Co. v. O. B. & F. V. R. R. Co. (1873), 45 Cal. 365

50 Cal. Const. (1849), art. IV, § 31.

51 California State Telegraph Co. v. Alta Telegraph Co. (1863), 22 Cal. 398.

52 Ibid., 425.

53 San Francisco v. Spring Valley Water Works (1874), 48 Cal. 493.

The state also granted franchises for toll roads, bridges, and the like, but such "public grants are to be strictly construed, that nothing passes to the grantee by implication, and that the grant of a franchise is not exclusive, unless it is expressly made such by the grant itself."[54]

In *Wood v. Truckee Turnpike Co.*, the Court would not allow the defendant's franchise to collect tolls on a road through public lands pass to the plaintiffs through an execution by the sheriff. The defendant had neither a possessory interest nor a title in the land through which the road passed. Further, being a corporation, the defendant lacked the capacity to hold lands by title unless needed by the purpose of the corporation. That the road ran over public lands made no difference since a corporation was not considered a natural person; settlers, as natural persons, had the unlimited capacity to acquire estates in land and hold them indefinitely thereafter.[55]

The general trend of the Supreme Court's decisions was to allow the state government a large amount of latitude in its activities, feeling that such had been the intent of the framers of the Constitution. The result of this trend was to consider a state law constitutional unless it was clearly (in the eyes of the justices) repugnant to the Constitution. Thus, what generally would be considered "borderline" cases were allowed to stand, and this probably went a long way toward keeping the state government strong and the cities and counties relatively weak.

THE COUNTIES

When California was first organized as a state, it was not yet divided into counties, but a provision of the Constitution directed the Legislature to do so. A uniform system of county and municipal governments was to be established, and the Legislature was also to provide for the election of boards of supervisors and prescribe their duties as well.[56] By a series of acts the Legislature implemented the constitutional directive and continued to create new counties as time went on.[57]

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54 Bartram v. Central Turnpike Co. and Bartram v. Ogilby (1864), 25 Cal. 283.

55 Wood v. Truckee Turnpike Co. (1864), 24 Cal. 474.

56 Cal. Const. (1849), art. XI, §§ 4, 5.

57 Cal. Stats. (1850), chap. 15.

The right of a county to build a bridge across a county line was upheld as a right of sovereignty in *Gilman v. County of Contra Costa*.[58] In 1852 Contra Costa County entered into a contract with one T. C. Gilman for the construction of a bridge across San Antonio Creek. The lower court held that the bridge, which crossed San Antonio Creek to the city of Oakland, was in Oakland, and that the city had jurisdiction over the bridge. The Supreme Court reversed the lower court, with Justice Heydenfeldt saying, "In such a case, I think the rule for public convenience would admit the power of either jurisdiction to have a bridge constructed, to enable the citizens of its own territory to pass beyond it."[59]

However, Gilman never actually received recompense because there was no money in the county treasury. He was given a warrant, but had no recourse at that time because the law of private contracts was not applicable where the state or county government was a party, in regard to either the mode or measure of enforcement. In 1854, however, the Legislature gave counties the right to sue and be sued in general terms,[60] and also enacted legislation the following year to fund the debts of the county.[61] Gilman, choosing not to avail himself of the funding act, sued, and was awarded a judgment, the Court holding that the 1854 act applied to claims that arose prior to its passage as well as afterward.[62] Gilman was unable to execute his judgment, even trying to execute and levy funds in the hands of the county treasurer and public buildings belonging to the county.[63] Having failed here, Gilman sued out an alias execution against property owned by a county resident, and an attempt was made to prevent the execution in *Emeric v. Gilman*.[64] The Court held against Gilman, with Justice Field saying:

> Whoever becomes a creditor of a county, must look to its revenues alone for payment. The statute has authorized a suit against the county by which his demand may pass into judgment, but it has

58 Gilman v. County of Contra Costa (1855), 5 Cal. 426.
59 Ibid., 428.
60 Cal. Stats. (1854), chap. 122.
61 Cal. Stats. (1855), chap. 16.
62 Gilman v. County of Contra Costa (1856), 6 Cal. 676
63 Gilman v. County of Contra Costa (1857), 8 Cal. 52.
64 Emeric v. Gilman (1858), 10 Cal. 404.

> given no remedy by execution. When the judgment is rendered, it becomes the duty of the supervisors to apply such funds in the treasury of the county as are not otherwise appropriated, to its payment, or if there are no funds, and they possess the requisite power to levy a tax for that purpose, and if they fail or refuse to apply the funds, or to exercise the power, he can resort to a *mandamus*. But if they have no funds, and the power to levy the tax has not been delegated to them, the Legislature must be invoked for additional Authority.[65]

Gilman assigned his judgment to George F. Sharp, who could not get satisfaction either, but on March 14, 1860, the Legislature passed an act to settle the judgment at a lesser rate of interest,[66] which Sharp accepted, but then sued to recover the original amount. In *Sharp v. Contra Costa County*, decided at the Supreme Court's October 1867 term, the Court held for the county, saying that Sharp had no recourse except to take what had been offered, for

> the State had the power to pay or not as she pleased, and of course to determine the time, mode and measure of payment. This she did by passing the Funding Act, and in passing it she fully vindicated her good faith, and left all claimants for whom provision was made in that Act without further claims upon her.[67]

The 1860 act was *ex gratia*; neither Gilman nor Sharp could ask for anything more. As the Court said in the *Sharp* case, regarding the relationship between the state and the counties:

> In this case a sovereign is one of the contracting parties; for the government of the County of Contra Costa is a portion of the State Government, and as against a sovereign there are no remedies except such as the sovereign, in the exercise of that good faith by which all Governments are presumed to be actuated, may accord. The State Government, neither in its general nor its local capacity, can be sued by her creditors or made amenable to judicial process

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65 Ibid., 410.

66 Cal. Stats. (1860), chap. 124.

67 Sharp v. Contra Costa County, 291–92.

> except by her own consent. Her creditors must rely solely upon her good faith as to the time, mode, and measure of payment.[68]

Another case arising from Gilman's bridge was *People v. Alameda County* in which the Court said that a county could take part in a suit as a plaintiff, in this case a petition for a writ of mandamus to compel Alameda County to pay its statutory share of the cost of the bridge.[69] Here the county was a relator, but under the 1854 act mentioned above, a county could sue in its own name.[70]

The legal nature of a county was ruled upon in 1856 in *Price v. Sacramento*, where the plaintiffs sued Sacramento County to collect on a contract entered into with the county; the Board of Supervisors had previously refused to pay the plaintiffs for the performed services.[71] With the 1854 act having granted the power to sue and be sued in general terms,[72] the Court now said, "The right to sue is not limited to cases of torts, malfeasance, etc., but is given in every case of account."[73] The Court referred to the county as a quasi-corporation — while remaining a subdivision of the state for purposes of government, the county was given powers similar to those of a municipal corporation. In such a corporation the people of the county were represented by the board of supervisors.[74] As the Court stated in *El Dorado County v. Davison*, "The Board of Supervisors are a municipal body, having no powers except those expressly granted by the sovereign authority, or which are necessary to the powers granted in terms."[75] The practical effect was to allow a county to be sued directly in most instances, whereas the state could be sued only in certain types of cases.

Each county, like the state, possessed the right of eminent domain; for the most part the counties used this power to create new roads. The Court ruled in 1857 that when a county was forced to condemn land for a road, the title did not vest in the county until just compensation was tendered.[76]

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68 Ibid., 290.
69 People v. Alameda County (1864), 26 Cal. 641.
70 Solano County v. Neville (1865), 27 Cal. 465.
71 Price v. Sacramento (1856), 6 Cal. 254.
72 Cal. Stats. (1854), chap. 41, § 1.
73 Price v. Sacramento, 256.
74 Calaveras County v. Brockway (1866), 30 Cal. 325.
75 El Dorado County v. Davison (1866), 30 Cal. 520.
76 McCann v. Sierra County (1857), 7 Cal. 121.

In 1859 the Court went further, allowing damages when Alameda County appropriated land without paying compensation, saying further that the opening of a highway on plaintiff's land was illegal and void, and that the county was guilty of a trespass.[77] Because the taking of private property was involved in these cases, the Court, in *Curran v. Shattuck*, said that boards of supervisors "must strictly pursue the statute or the proceedings will be void."[78] Under review in that case was an instance in which the plaintiff had no notice of the action of the Board of Supervisors, "And in such proceeding the person whose rights are to be affected against his will must have notice."[79] In *Grigsby v. Burtnett*, the Court said that "just compensation" was not what the county wanted to pay; if the landowner objected, the amount of the compensation would have to be adjudicated before title passed to the county, and before the county could enter and use the land.[80] The Court upheld a statute in 1870, dealing with roads in Santa Clara County,[81] that said that money had to be actually set apart in the treasury before the land could be taken.[82] Control over roads did not mean or even remotely imply that a county could convert a public highway into a toll road and grant a franchise to collect the tolls thereon.[83] The Legislature did pass an act for the establishment of toll roads,[84] but as with other laws dealing with franchises, no corporation could be given privileges not enjoyed by other similar corporations.[85]

That all statutory provisions had to be followed in land condemnation proceedings applied to the owner of the land to be taken as well. The Court said, "Strict compliance with the requirements of the Act is necessary to accomplish a condemnation on the part of the public, and a like compliance with all the provisions relating to the assessment of damages and their recovery is essential also on the part of the landowner."[86]

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77 Johnson v. Alameda County (1859), 14 Cal. 106.
78 Curran v. Shattuck (1864), 24 Cal. 427.
79 Ibid., 433.
80 Grisby v. Burtnett (1866), 31 Cal. 406.
81 Murphy v. De Groot (1870), 44 Cal. 51.
82 Cal. Stats. (1865), chap. 440.
83 El Dorado County v. Davison, *supra*.
84 Cal. Stats. (1867–68), chap. 181.
85 Waterloo Turnpike Road Co. v. Cole (1876), 51 Cal. 381.
86 Lincoln v. Colusa (1865), 28 Cal. 662.

Thus, in *Harper v. Richardson*, the plaintiff's action for damages over the opening of a road was barred because the action was not brought within the statutory period.[87] However, the steps prescribed for the landowner to use in pursuing compensation "must not destroy or substantially impair the right itself."[88]

Counties also had jurisdiction over bridges and could arrange for ferry lines, as well as roads. As noted above, the original *Gilman* case decided that a county could even build a bridge across a county line.[89] The repair and maintenance of roads, bridges, and the like also fell to the county, and again strict compliance with statutory provisions was a prerequisite. In *Murphy v. Napa County*, the Court upheld the refusal of the board of supervisors to pay for repairs on a bridge in the absence of a written contract.[90] If repairs were faulty, or if the county neglected to have a bridge or highway repaired, the county itself was not liable for injuries occurring due to the lack of proper repairs; any remedy that existed had to be sought against the supervisors or road overseers individually.[91] This view was upheld in *Crowell v. Sonoma County*, with the Court denying any master–servant relationship between a road overseer and the county.[92]

The government of each county was made up of several county officers, generally a treasurer, auditor, sheriff, and tax collector, and a board of supervisors, with the latter body being the most important. The Supreme Court found the board of supervisors to be a special body, with mixed powers, legislative, executive, and judicial. Its discretion in certain matters had to be trusted, and its judgment conclusive.[93] A county was considered to be both a geographical and a political subdivision of the state and subject to the latter's dominion. Thus, an act of the Legislature ordering the board of supervisors to submit to the voters the question of subscribing to $200,000 worth of stock in the San Francisco and Marysville Railroad Company was considered within the former's powers.[94] The Court held

87 Harper v. Richardson (1863), 22 Cal. 251.
88 Potter v. Ames (1872), 43 Cal. 75.
89 Gilman v. County of Contra Costa (1855), 5 Cal. 426.
90 Murphy v. Napa County (1862), 20 Cal. 497.
91 Huffman v. San Joaquin County (1863), 21 Cal. 426.
92 Crowell v. Sonoma County (1864), 25 Cal. 313.
93 Waugh v. Chauncey (1859), 13 Cal. 11.
94 Cal. Stats. (1857), chap. 243, § 1.

that the submitting of such a question to the voters was considered to be a mere ministerial function with which an individual could not interfere.[95] So broad was this power of the Legislature over the counties, that it could even confer extraterritorial jurisdiction. For example, in 1867, the Court upheld the power of the Legislature to grant Sonoma and Lake Counties the authority to "lay out, open, and maintain a road" in Napa County.[96]

An instance of a board of supervisors using its discretionary powers occurred in *El Dorado County v. Elstner*, which involved the examination and settlement of a claim against a county.[97] Justice Joseph G. Baldwin wrote that in such an instance the board was a quasi-judicial body, in that the allowance and settlement of the claim against the county were an adjudication of the claim and thus conclusive. In *Babcock v. Goodrich*, the Court added that courts would not review a board's action, unless there were some gross irregularity, such as fraud.[98] Whether a board, when acting in its judicial capacity, exceeded its jurisdiction could be examined by a writ of certiorari, and a board could be forced to perform a ministerial function by the use of a mandamus.

Where a board had no discretion, it had to follow legislative enactments exactly.[99] "It is settled in this state that no order made by a Board of Supervisors is valid or binding, unless it is authorized by law."[100] In *People v. Bailhache*, the Contra Costa Board of Supervisors was authorized to consolidate certain county offices, but such consolidation was voided due to the board's failure to publish the ordinance of consolidation.[101] Two years later the Court voided a contract because the Stanislaus Board of Supervisors did not first advertise for bids as was required by the political code.[102] Even a power left to a board's discretion was not exempt from legislative control. Boards of supervisors could grant franchises for toll roads, ferries, and bridges. To use the franchising of ferries as an example, the Court said, "The Supervisors have the *general* power to grant a ferry franchise, and to

95 Pattison v. Board of Supervisors of Yuba County (1859), 13 Cal. 175.
96 People v. Lake County (1867), 33 Cal. 487.
97 El Dorado County v. Elstner (1861), 18 Cal. 144.
98 Babcock v. Goodrich (1874), 47 Cal. 488.
99 People v. Sacramento County (1873), 45 Cal. 692.
100 Linden v. Case (1873), 46 Cal. 174.
101 People v. Bailhache (1877), 52 Cal. 310.
102 Maxwell v. Supervisors of Stanislaus (1879), 53 Cal. 389.

determine when, and under what circumstances, and to whom, it shall be granted."[103] But the Legislature, in allowing boards of supervisors to grant such franchises, did not divest itself of the right to make further grants:

> These franchises, being sovereign prerogatives, belong to the political power of the State, and are primarily represented and granted to the Legislature as the head of the political power; and the subordinate bodies or tribunals making the grants are only agents of the Legislature in this respect. But the delegation of these powers to these subordinates in no way impairs the power of the legislature to make the grant.[104]

The various boards of supervisors were given numerous other statutory powers and duties. They could create offices and raise salaries, if a statute provided for such an office, but they could not pay a salary higher than the statutory limit.[105] Boards of supervisors were the guardians of the property interests in each county, and in that capacity occupied a position of trust and were bound to the same measure of good faith toward the county as was required of an ordinary trustee toward his *cestui que trust*, or an agent toward his principal. In taking care of this property no supervisor was entitled to extra pay for services rendered,[106] but if in the discretion of a board additional aid were needed, such as private counsel, such expense became a legal charge against the county.[107] Of course the hiring of or granting a contract to a supervisor by the board of the same county was a conflict of interest and barred by statute.[108]

Of the various county officers the ones who seemed to appear most often in Supreme Court litigation were the tax collector, auditor, and treasurer. It is no coincidence that all three were involved in county financial matters. Tax collectors will be treated in the chapter dealing with taxation, but auditors and treasurers will be discussed here.

The county auditor was charged with drawing warrants for all claims legally chargeable to the county that were allowed by the board of

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103 Henshaw v. Supervisors of Butte County (1861), 19 Cal. 150.

104 Fall v. County of Sutter (1862), 21 Cal. 252.

105 Robinson v. Board of Supervisors of Sacramento (1860), 16 Cal. 208.

106 Andrews v. Pratt (1872), 44 Cal. 309.

107 Hornblower v. Duden (1868), 35 Cal. 664.

108 Domingos v. Supervisors of Sacramento (1877), 51 Cal. 608.

supervisors. If a claim were not "legally chargeable" the county treasurer did not have to pay the warrant, and could not be compelled to do so.[109] Most of the cases involving these two officers were attempts to compel a warrant to be drawn and/or paid. The auditor could not have an order drawn without an order from the board of supervisors, for whom the auditor was a clerk in this respect.[110] If the auditor refused to accede to the board's order, he could be compelled to do so by a writ of mandate.[111]

One problem faced by many county officers had to do with receiving salaries. Pay was relatively poor, and oftentimes salary warrants were not paid due to a lack of funds in the treasury. Henry Eno, as county judge, faced this problem. He acidly noted: "Salary $1800 payable monthly. Should be glad if I could get it at the expiration of a year. On the first of May $600 will be due me. Have not received a dime yet — and have so far lived on borrowed money paying 2½ per cent per month."[112]

In the same 1866 letter, he stated that Alpine County was $22,000 in debt at that time. The reason was all too clear. As the county's debt rose, the treasurer refused to pay on the salary warrants. Warrant holders either had to wait until the county became solvent or collect as little as fifty cents on each dollar by selling the warrant to a speculator at a discount. Eno decided to force the issue, suing out a writ of mandamus to force the treasurer to pay, and the case eventually reached the Supreme Court in 1867 as *Eno v. Carlson*.[113] The Court upheld the treasurer, who was registering warrants in order of presentation, and paying them accordingly. The Court said there was no redress available, "except by refusal to accept judicial appointments, or resigning them when they may have been accepted, or by appeal to the people."[114]

In *Foster v. Coleman*, the Board of Supervisors of Los Angeles County was prevented from creating a debt or liability not provided for by law.[115] This case was a taxpayer's suit brought to prevent payment to a deputy

109 Keller v. Hyde (1862), 20 Cal. 593

110 Connor v. Norris (1863), 23 Cal. 447.

111 Babcock v. Goodrich, *supra*.

112 Henry Eno, *Twenty Years on the Pacific Slope; Letters of Henry Eno* . . . (Yale Americana Series, no. 8; New Haven: Yale University Press, 1965), 144.

113 Eno v. Carlson (1867), 1 Cal. Unrep. 354.

114 Ibid., 355.

115 Foster v. Coleman (1858), 10 Cal. 278.

assessor whom the supervisors had been trying to compensate because his earlier fees had been paid by a warrant which was worth only 40 percent of its face value. Although an attempt at equalization, it was not authorized by law and was thus illegal. Further, a board of supervisors could not put aside part of the county's revenue as a fund for current expenses,[116] as it was not authorized to do by law,[117] or pay warrants in any order other than that specified by the Legislature.[118] The county treasurer could not pay any warrants or the interest thereon unless first audited by the board of supervisors, as the treasurer was not an independent agent with regard to the county's funds.[119]

The cases discussed indicate the almost second-class status of the counties. Although forced to create counties by the Constitution, the Legislature retained an inordinate amount of power over them, being able to enact a law dealing with almost any aspect of county government, including creating and eliminating counties. One result was that the state often would step in, as with Gilman's bridge, but too often counties had to settle their problems with their very limited powers.

With the state's broad control over the counties clearly constitutional, the Court's role was virtually limited to cases involving individual contests and to seeing that counties did not go beyond the powers granted by the state; this was the situation with municipalities as well.

THE MUNICIPALITIES

As previously noted, that section of the Constitution providing for the division of the state into counties also authorized the Legislature to provide for the establishment of towns;[120] the Legislature again complied. Like a county, a municipal government was a political subdivision of the state, having as its primary object the administration of governmental functions. But the town, as a municipal corporation incorporated by its inhabitants, could also administer local affairs and business outside the sphere

116 Laforge v. Magee (1856), 6 Cal. 285.
117 Cal. Stats. (1850), chap. 42, § 13.
118 McDonald v. Maddux (1858), 11 Cal. 187.
119 People v. Fogg (1858), 11 Cal. 351.
120 Cal. Const. (1849), art. XI, § 4.

of government; a town or city could engage in proprietary activities such as supplying water or other utilities, or operate public transportation lines.

But whatever a municipal corporation did, it was forever subject to legislative control. The Supreme Court summarized the state–municipality relationship when it said: "Municipal corporations possess and can exercise only such powers as are expressly or by necessary implication conferred or delegated by the legislative act of incorporation; and when the legislative charter prescribes the mode of exercising such delegated powers, it must be strictly construed."[121]

Discussing the manifold problems of Los Angeles in the first two decades of statehood, one historian wrote in much the same vein, adding that the city's legal status hampered the municipal government somewhat: "Los Angeles, which was entitled to the rights of a private corporation, was subject to the authority of the California Legislature which had created and could abolish it and could expand, contract, or otherwise modify its powers. In practice, however, the state seldom interfered — except to limit the town's tax rate and bonded debt."[122]

Some typical problems faced by a city included assessing property for municipal improvements, street maintenance, and the abatement of public nuisances. In *Weber v. The City of San Francisco*, the Supreme Court held that a city, in this case San Francisco, could assess property for improvements in the city, but could not impose a penalty of 1 percent per day for the nonpayment of the assessment.[123] The right to abate a nuisance was brought up in *Gunter v. Geary*, as mentioned before, and while the justices themselves disagreed whether the wharf actually constituted a nuisance, they agreed that if it was a nuisance, the city could remove it.[124]

On occasion, a city had need to acquire property either by purchase or by the use of its right of eminent domain. In *DeWitt v. San Francisco*,[125] the Supreme Court stated that the laws authorizing the San Francisco Board of Supervisors to build a courthouse and jail necessarily implied the purchase

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121 City of Placerville v. Wilcox (1868), 35 Cal. 23.

122 Robert M. Fogelson, *The Fragmented Metropolis: Los Angeles, 1850–1930* (Cambridge: Harvard University Press, 1967), 27–28.

123 Weber v. The City of San Francisco (1851), 1 Cal. 455.

124 Gunter v. Geary, 462.

125 Dewitt v. San Francisco (1852), 2 Cal. 289.

of all required real and personal property as well.[126] In *People v. Harris*, the Court upheld a contract to fix up a building bought jointly by the city and county of San Francisco for their mutual use.[127] Chief Justice Murray stated: "The right to fit up a building for city or public purposes, and provide suitable accommodations for the transaction of the business of the City, is a necessary incident to the administration of every municipal government, without which it would be impossible to carry out the objects and purposes of the incorporation."[128] A city, too, had to pay a just compensation for exercising its right of eminent domain; here also the compensation had to be paid before the owner lost his title.[129] In a case where the city made part payment, the Court held that this was not sufficient either, and that the property could be reclaimed by the owner.[130]

Whenever the Legislature chose to pass laws dealing with municipal affairs, such enactments had to be followed with great exactitude. This was made explicit in *People v. McClintock*, when the Court said that Sacramento could not purchase a site upon which to erect a waterworks,[131] because the statute authorizing the city to contract for a water supply did not mention a site or a building.[132]

The powers of municipalities were laid out in their charters. Each charter was in the form of a separate legislative enactment. The only method by which a charter could be changed in any way was by a new law by the Legislature. The charters were considered to be "special grants of power from the sovereign authority, and they are to be strictly construed. Whatever is not given expressly, or as a necessary means to the execution of expressly given powers, is withheld."[133]

Under discussion in the case from which this statement was quoted was an attempt by Placerville to pay for a railroad survey from that city to Folsom. The Court did not allow the survey because there was no direct

126 Cal. Stats. (1851), chap. 70, § 7; Cal. Stats. (1852), chap. 38, § 7.
127 People v. Harris (1853), 4 Cal. 9.
128 Ibid., 10.
129 San Francisco v. Scott (1854), 4 Cal. 114.
130 Colton v. Rossi (1858), 9 Cal. 595.
131 People v. McClintock (1872), 45 Cal. 11.
132 Cal. Stats. (1871–72), chap. 491.
133 Douglass v. Mayor of Placerville (1861), 18 Cal. 647.

authority for it in the charter.[134] To allow the survey would have meant considering it to be a municipal benefit like a city street, but the Court refused to go that far.

Varied provisions of state statutes came to the Court for interpretation. An act amending the original act incorporating Marysville said that the city could not take stock in any public improvement without first submitting the question to the voters.[135] The Court, in *Low v. City*, said the words "public improvement" had to be considered in a limited sense, applying to those improvements normally included in police and municipal regulation. They could not be extended to objects foreign to the purposes of the incorporation of the town; buying stock in a private navigation company was not what the Legislature had in mind.[136] When the city of Oakland was given full powers over docks, wharves, etc., in its charter,[137] the city could not grant the exclusive privilege of controlling these and the right to collect fees therefrom, because such an unconditional grant left no power of regulation to the city itself.[138] The Court went on, in *City of Oakland v. Carpentier*, to say, "These police regulations are essential to the interest of the city, to commerce, its health, possibly, certainly its convenience and general prosperity."[139]

The cases of *Holland v. The City of San Francisco*[140] and *Gas Co. v. San Francisco*,[141] taken together, had much to say about municipal corporations. In the first case, the plaintiff had purchased some land from San Francisco under authorization of an ordinance which proved to be void. Before the sale of the land, the common council passed another ordinance appropriating the proceeds from the sale, and the money paid by the plaintiff was appropriated and used by the city. The second ordinance was held to be a sufficient recognition of the first ordinance, thereby making the sale valid. In its ability to own and dispose of property, the municipality acted like a private corporation, and in such case its discretion could be controlled by

134 Cal. Stats. (1859), chap. 93.
135 Cal. Stats. (1854), chap. 10, § 1 (special law).
136 Low v. City (1855), 5 Cal. 214.
137 Cal. Stats. (1852), chap. 107, § 3.
138 City of Oakland v. Carpentier (1859), 13 Cal. 540.
139 Ibid., 547.
140 Holland v. The City of San Francisco (1857), 7 Cal. 361.
141 Gas Co. v. San Francisco (1858), 9 Cal. 453.

the judicial department. In the second case, the city denied any knowledge of the gas furnished by the plaintiff for lighting the city hall and city fire engine houses. Justice Field said such an answer was unsatisfactory; while the city was not a natural person, its officers and agents could gain the knowledge. In its private character a municipal corporation exercised the powers of a private individual or private corporation. Here, the city used the gas and even put up the meters and gas fixtures, so it could not claim a lack of knowledge.

One case that arose had to do with the power of a municipal corporation to require a license tax from a transport company, even though the latter did only a part of its business in the city. The decision in *Sacramento v. The California Stage Company* stated that Sacramento had this power, as the company had its office and place of business in the city. Even though the larger part of the transportation was out of the city, much of its business was done in the city. Since it received the protection of the local government, it ought to contribute to the support of that government.[142]

A municipal corporation could enter into contracts, but only if the act of incorporation delegated the power to make them. Further, anyone contracting with a municipality was bound to know the extent of the powers of its officers.[143] In *People v. Swift*, the Court said a city could validate a contract for certain repairs by a subsequent ratification since the charter gave the city both the right to enter into that type of contract in the first place, with the right to validate it by subsequent ratification.[144] A municipality could sue,[145] but any suit had to be in the name of the city or town, and not in that of a municipal official.[146]

The idea of "municipal benefit" mentioned above included control over city streets, their repair, and the authority to build bridges. Repairs "to the streets, though, required scrupulous compliance with the charter, as assessments were levied on the affected property owners.[147] The responsibility for the repairs fell on the city's council, not on the city, and as with

142 Sacramento v. The California Stage Company (1859), 12 Cal. 134.
143 Wallace v. Mayor of San Jose (1865), 29 Cal. 180.
144 People v. Swift (1866), 31 Cal. 26.
145 San Francisco v. Sullivan (1875), 50 Cal. 603.
146 Leet v. Rider (1874), 48 Cal. 623.
147 City of Stockton v. Whitmore (1875), 50 Cal. 554.

counties, the individual officers could be sued for an injury, but not the local corporation itself.[148] Control over bridges included the right to grant a franchise for their construction and use,[149] and a business established under a state act was still subject to local taxation.[150]

As was the case with the counties, the Supreme Court could do nothing but acquiesce to the state's control over municipalities. The Court's decisions created no landmarks in constitutional law, but were important nonetheless in helping determine the powers of local governments. More often than not the Court was dealing with everyday problems such as interpreting a contract entered into by a city, or an act of the Legislature empowering a municipality to perform some service. As an example of the type of cases faced by the Court, an examination of a series of cases involving San Francisco follows.

SAN FRANCISCO: A CASE STUDY

San Francisco, as the largest and most important city in the state, had a consequently larger share of litigation reach the Supreme Court. Many of the most important of these cases were the result of San Francisco's continuing financial problems, but many also arose from the normal development of a large, metropolitan area, while others dealt with the powers of any ordinary city or town.

The earliest cases could be placed in two groups, each based on a different act of the Legislature. The first group arose from the sale of beach and water lots; the second was from the creation of the sinking fund.

Even before the advent of statehood the city of San Francisco was getting all its revenue from the sale of beach and water lots.[151] These sales were void at the time, but were later validated by the Legislature in March 1851.[152] The first case involving this law was *Eldridge v. Cowell* in which the Court held that since the plan of the city extended streets into the tide

148 Winbigler v. City of Los Angeles (1872), 45 Cal. 36.

149 Fall v. Mayor of Marysville (1861), 19 Cal. 391.

150 San Jose v. San Jose & Santa Clara Railroad (1879), 53 Cal. 475.

151 Theodore H. Hittell, *History of California*, vol. III (4 vols., N. J. Stone & Company, 1885–97), 379.

152 Cal. Stats. (1851), chap. 41, § 2.

waters, it was necessarily anticipated that purchasers would fill the lots until the level depth of water suitable for handling ships was reached.[153] The defendant's lot had been reclaimed from the water before he purchased it; when the plaintiff later bought the next lot *away* from the water, he bought without *any* riparian rights. By passing the March 1851 law the state recognized the city's plan and constituted an act consistent with her complete sovereignty over her navigable buoys and rivers.

A landmark case in the group of cases dealing with the sale of beach and water lots was *Wood v. San Francisco*.[154] In this case the defendant bought the Broadway Wharf, which had already been laid down as a public street. The sale by the city was void as it could not convert a public easement to a private use. Further, when the city laid out the streets, they were here held to continue on to high water if the front were filled in. This was affirmed in *Minor v. City of San Francisco*.[155] In *Hyman v. Read*, the plaintiff questioned the boundaries covered by the 1851 law. The Court denied any ambiguity, but even if there were, it would construe the law favorably to the city.[156] Thus, all the land within the designated boundaries, whether divided into lots or not, was included.

In spite of the income from land sales, the financial situation of San Francisco was quite bleak. At the 1851 session of the Legislature a series of acts was passed to help alleviate San Francisco's financial crisis by passing on May 1 an act to fund the floating debt of the city and for its payment.[157] The debt at this time was over $1,500,000; in order to help the situation, the city created Sinking Fund Commissioners to whom it transferred all the city's real property. On the same day the Sinking Fund Commissioners transferred the real property to the commissioners of the funded debt. These moves by the city were tested early in the important case of *Smith v. Morse*, which upheld the sale of much of San Francisco's unsold land to satisfy various creditors of the city.[158] Dr. Peter Smith, one of the principal creditors of San Francisco, won several judgments against the city,

153 Eldridge v. Cowell (1854), 4 Cal. 80.
154 Wood v. San Francisco (1854), 4 Cal. 190.
155 Minor v. City of San Francisco (1858), 9 Cal. 39.
156 Hyman v. Read (1859), 13 Cal. 444.
157 Cal. Stats. (1851), chap. 88.
158 Smith v. Morse (1852), 2 Cal. 254.

but being unable to collect, got writs of execution against some of the real property of the city, which he himself purchased. The Court held that the transfers of the land to the funded debt commissioners were void, since they would have been void as being fraudulent if done by an individual and were also void when done by a corporation. The city could sell land, but not to create a new department, and take revenues and place them in the hands of the city's own creation. Nor could the sale be blocked by the city claiming the state had an interest in the land; the state could make its own claims if it so wished. Further, since the plaintiff's claims preceded the enactment of the funding law, the latter's provisions were void as to him.

Thorne v. San Francisco[159] decided the question as to whether the city could redeem land sold in the executions against it, under the Redemption Act of 1851.[160] The Court said that the land could not be redeemed, as that would make the law retrospective, when laws are to be construed as prospective. If retrospective, it would be an ex post facto law, and in contravention of the United States Constitution.[161] The Court further held that the provision in the 1855 San Francisco charter, which limited the amount of indebtedness that the city could incur to $25,000, did not include the previous funded debt.[162] The new charter attempted to provide protection for the new government, and not to interfere with the old debt. If the old debt had been included, being far more than $25,000, the municipal government in San Francisco would have become a nullity as it would not have been able to contract for necessary expenses.[163]

At the April 1857 term, the Supreme Court had more to say about the 1851 law creating the sinking fund. In *People v. Woods*,[164] the Court said that the 1851 law created a contract between San Francisco and its creditors which could not be changed by subsequent acts. Thus, provisions of the Consolidation Act of 1856, which changed the terms of the earlier law were void.[165] In *People v. Bond*, the Court amplified its views by saying that

159 Thorne v. San Francisco (1854), 4 Cal. 127.
160 Cal. Stats. (1851), chap. 5, § 229.
161 U.S. Const., art. I, § 9.
162 Cal. Stats. (1855), chap. 197, § 32.
163 Soule v. McKibben (1856), 6 Cal. 142.
164 People v. Woods (1857), 7 Cal. 579.
165 Cal. Stats. (1856), chap. 125, § 95.

the contract created was substantially a trust deed under which the city gave to trustees much of its revenue and property, the trustees to apply these to redeem the city's obligations.[166] In this case, the assessor added the interest to pay the debt to the tax roll, according to the provisions of the Consolidation Act. The Court voided the assessor's action, again saying that the Legislature could not change the terms of the contract, unless, now, the creditors sanctioned such a change. In a suit brought by the city and county of San Francisco to prevent the commissioners of the funded debt from receiving certain moneys, the Court defined the position of the commissioners. In reversing the plaintiffs' injunction, the Court said that the commissioners were not private agents but public officers, and could not be interfered with unless it were shown that they were acting in some way to harm the fund.[167]

In 1858 the Legislature passed an act amending the 1851 funding act so that the commissioners could redeem the earlier issued stock in exchange for 6 percent bonds, although the 1851 law had said that the stock had to be redeemed at a price no higher than par.[168] The Court in *Blanding v. Burr* held that this provision was legal since the vested rights were not affected and therefore the creditors under the 1851 law were not being injured.[169] *Thornton v. Hooper* added that while the Legislature could not impair the obligation of contracts, it could enact laws respecting them, here revising the way of giving effect to the purposes of the 1851 law, to reduce San Francisco's debt.[170]

Like other municipalities, San Francisco was under a great deal of legislative control. Such was the California experience. The Legislature could provide for the erection of a city hall on a certain site,[171] grant the right to lay down and construct a railroad on public streets,[172] and could force the city to pay from its treasury for the extension of certain city streets.[173] In the latter case the Court restated the constitutional power of the Legislature to

166 People v. Bond (1858), 10 Cal. 563.
167 County of San Francisco v. Fund Commissioners (1858), 10 Cal. 585.
168 Cal. Stats. (1858), chap. 225, § 3.
169 Blanding v. Burr (1859), 13 Cal. 343.
170 Thornton v. Hooper (1859), 14 Cal. 9.
171 San Francisco v. Canavan (1872), 42 Cal. 541.
172 Carson v. Central R. R. Co. (1868), 35 Cal. 325.
173 Sinton v. Ashbury (1871), 41 Cal. 525.

direct and control the affairs and property of a municipal corporation for municipal purposes.

Under various consolidation acts the City and County of San Francisco were combined, with the Board of Supervisors also functioning much the same as a city council. The board was given certain areas in which it could use its discretion without interference from either the Legislature or the courts,[174] but when it was mandated by the Legislature to perform an act, it had to do so.

The increase in San Francisco's population brought about the introduction of various utilities, such as street railroads, gas for lighting, and especially waterworks. Each of these utilities was amply represented by cases taken to the Supreme Court, but those cases dealing with water companies were both quite complex and quite informative. They shed light on the powers of the municipality, particularly that of entering into contracts; indicate the relationship between the city and the state, primarily the control of the latter over the former; and graphically illustrate the type of problems brought before the Court.

In respect to waterworks, the first two companies making an appearance in the Court were the San Francisco Water Works and the Spring Valley Water Works. The San Francisco Water Works was organized in 1857 under the 1853 act providing for the formation of corporations generally,[175] as amended in 1855,[176] and the 1858 act for the incorporation of water companies.[177] In order to lay its pipes, the company needed some land belonging to Leonard D. Heyneman, and sought to appropriate it by condemnation proceedings. In *Heyneman v. Blake*,[178] the Supreme Court upheld the waterworks' incorporation under the 1853 and 1855 acts as being within the general description of a business organized "for the purpose of engaging in any species of trade or commerce, foreign or domestic."[179] The Court also upheld the corporation's power to appropriate private land

174 Hall v. Supervisors of San Francisco (1862), 20 Cal. 596.

175 Cal. Stats. (1853), chap. 65.

176 Cal. Stats. (1855), chap. 162.

177 Cal. Stats. (1858), chap. 262.

178 Heyneman v. Blake (1862), 19 Cal. 579.

179 Cal. Stats. (1853), chap. 65, § 1; Cal. Stats. (1855), chap. 162, § 1.

under the 1858 act. The 1858 law was amended in 1861,[180] and in *Spring Valley Water Works v. San Francisco* the Court upheld the right of this company, too, to appropriate land necessary for the use of the company.[181]

The 1858 act concerning water companies said that if one company brought water to San Francisco, the city was entitled to use whatever water it needed to put out fires, and if more than one company became involved in bringing water to the city, each was to give its proportionate share of water to fight fires, "and for other municipal uses," a phrase not used in reference to only one company. The Spring Valley Water Works took over the San Francisco Water Works in 1865, thus attaining a monopoly as the only company to bring fresh water into the city. It continued to supply the city with water for all its municipal uses for several years, and then limited the city only to water for fighting fires. The city brought suit to restrain the Spring Valley company, but the Court upheld the water company, saying that while the intent of the Legislature was to have the company supply all the city's water, it could not override the plain language of the statute.[182] The city then brought suit again, this time alleging that an act of the Legislature granting the company's owners special privileges was unconstitutional because it was a special act.[183] The Court agreed that the act was unconstitutional, but even under the general law dealing with water companies the company need only supply water for fighting fires or for some other great necessity.[184] In 1877 the Spring Valley company applied to the Supreme Court directly for a writ of prohibition to prevent the San Francisco Board of Supervisors from passing an ordinance ordering the mayor to connect the city's pipes to those of the company.[185] Speaking for the Court, Justice Elisha McKinstry said:

> In my opinion, the writ ought not to issue to arrest any legislation pending before a body authorized by the Constitution and laws to legislate with matters of public interest. Error committed by such

180 Cal. Stats. (1861), chap. 227.

181 Spring Valley Water Works v. San Francisco (1863), 22 Cal. 434.

182 San Francisco v. Spring Valley Water Works (1870), 39 Cal. 473.

183 Cal. Stats. (1858), chap. 288.

184 San Francisco v. Spring Valley Water Works, supra.

185 Spring Valley Water Works v. San Francisco (1877), 52 Cal. 111.

> bodies cannot usually be corrected by resort to this extraordinary writ without great public inconvenience . . . .
>
> I know of no way in which it can be shown that the members of the Board of Supervisors threaten (in their official capacity) to pass an ordinance, and it must be presumed that the members of that legislative assembly will fully consider the question of the *power to pass* the order, as well as the merits of the order itself.[186]

Justice McKinstry then turned his attention to the last case between the two parties, saying that the unconstitutionality of the 1858 act was the only point really decided there. He went on to say that the water company had as its duty to "furnish water free (to the extent of its means) for the extinguishment of fires, and to the Fire Department, and for all other purposes for which it may be demanded by the authorities of the city and county in discharge of their direct duties as governmental agents."[187]

The company could charge ordinary rates for other city government uses such as schools, hospitals, and the like.

At the same April 1877 term, the Supreme Court heard *Spring Valley Water Works v. Ashbury*[188] and *Spring Valley Water Works v. Bryant*,[189] both cases involving more controversy between the city and the company. In the first of these two cases the company brought suit to compel Monroe Ashbury, the city and county auditor, to endorse a $92,000 demand allegedly due the company for water furnished for municipal purposes in the forty-six-month period prior to December 1872. The claim was approved by both the mayor and the Board of Supervisors, but Ashbury claimed the approval by the board was irregular on two counts. First, the board did not publish the resolution of approval, and also because the amount approved was indefinite, being a larger sum than was needed, with the company's demand to be paid from it. The Court agreed with Ashbury that under the act consolidating the city and county governments, the Board of Supervisors erred in both respects. The second case involved an attempt to have the courts review a resolution of the city's board of supervisors dealing

186 Ibid., 117.

187 Ibid., 122.

188 Spring Valley Water Works v. Ashbury (1877), 52 Cal. 126.

189 Spring Valley Water Works v. Bryant (1877), 52 Cal. 132.

with the delivery of water. The Supreme Court said it could only review acts involving the exercise of judicial functions.

In an effort to finally settle the controversy between these parties, Justice McKinstry again referred back to the decision declaring the special law unconstitutional, and stated that that case determined

> that corporations in this State, except for municipal purposes, must be formed under general laws, and can exercise no powers except such as are conferred by such general laws. The power to charge tolls or rates for water is a *franchise* conferred on corporations formed under the general laws for the formation of water companies, and can be exercised only in the manner provided for in those laws.[190]

The general law dealing with water companies set the method by which rates were to be set. If the mode provided by the statute proved unsatisfactory, the Legislature should be asked to change the general law. This decision was affirmed in yet another case two years later.[191]

The Legislature did step in by authorizing the city to provide and maintain its own waterworks, and granting the power to condemn and purchase private property for that purpose.[192] The last San Francisco water case in the period under discussion, *Mahoney v. Supervisors of S. F.*, laid down the statutory rules for condemning land, again holding that the city was bound to follow the statute in all particulars.[193]

The *Water Works* cases indicate the extent of legislative control over matters that were purely local in nature but which, because of the power granted the Legislature, became the subject of a state law.

Another group of cases, more than seventy in the thirty-year period from 1850 to 1879, involved nothing more than street repairs in San Francisco. An early example was *Hart v. Gaven*,[194] in which the Court ruled that where an ordinance said owners of lots were responsible for keeping up the streets in front of their lots, the city of San Francisco could perform

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190 Ibid., 140.

191 San Francisco v. Spring Valley Water Works (1879), 53 Cal. 608.

192 Cal. Stats. (1875–76), chap. 234.

193 Mahoney v. Supervisors of San Francisco (1879), 53 Cal. 383.

194 Hart v. Gaven (1859), 12 Cal. 476.

reasonable repairs, and the lot owner would have to bear the cost, as long as the cost was reasonable under the city's taxing power as established by the Consolidation Act of 1858.[195] These street repair cases, too, indicate the extent of the authority of the state in general and the control of local government by the state. A statement by Justice Augustus L. Rhodes from a street repair case in 1865 will serve to conclude this chapter because the case was typical of cases involving municipalities adjudicated by the court, and also because it spelled out the relationship between state and local government. Justice Rhodes wrote:

> The municipal governments, in causing street improvements to be made, act under the authority conferred upon them by the Legislature, the authority being a portion of the sovereignty delegated to them for the purposes of municipal government.
>
> The municipal government, in the exercise of the authority thus conferred, is subject to all the constitutional restraints and limitations imposed on the Legislature, and has no other or greater power than is and lawfully may be conferred on it by the legislative act.[196]

* * *

[195] Cal. Stats. (1856), chap. 125, §§ 56, 57.

[196] Creighton v. Manson (1865), 27 Cal. 613.