IV. Reprises

The Court's First Year: Colorful and Chaotic

Robert H. Kroninger

In February of 1850, a group of men attacked an Indian village in Napa Valley, shooting some of the residents, burning their homes, and destroying their food. When arrested and charged, they sought their release on a number of grounds, among others lack of jurisdiction in the committing magistrate and that the trial court to which they had been remanded did not exist.

A year earlier one Daniels had been found guilty of murder while California was under Mexican rule, but the government changed before sentence could properly be pronounced. He therefore sought his release.

The American schooner *Jupiter* visited the Marquesas Islands in the summer of 1850 and, while there, the captain and mate lured aboard five young women, daughters of native chiefs, one of whom was, at age 14, "Queen of the Bay." They promptly weighed anchor and set sail for San Francisco, "cruelly" abusing the women throughout the voyage. Once in San Francisco Bay, the women jumped overboard but were recaptured, and the mistreatment continued on a further trip up the San Joaquin River to Stockton. One of the crewmen then went to court to seek their freedom.

In June 1850, Stephen J. Field, later to become California Chief Justice and subsequently one of the longest-serving justices of the U.S. Supreme Court, was ordered disbarred, fined, and imprisoned by the Yuba district judge in Marysville. Field was again ordered expelled from the bar in October after the state Supreme Court had reversed the earlier order.

These stories do not come from disparate sources and require no extended research for their elucidation. They and more than a hundred other such glimpses of early California life and the court's involvement are to be found in any law office library, for they appear in Volume I of California Reports.[1] And there is much more. In the same volume is to be found, for example, the report of the state's first Senate Judiciary Committee, weighing the relative merits of the civil and the common-law judicial systems and coming down in favor of the latter in making its

recommendation to the legislature. There is also "The Alcalde System of California," a detailed account of the judicial system that was in place prior to statehood, as well as a description of "San Francisco and its Provisional Government."

The preface to that volume also explains why Associate Justice Nathaniel Bennett's name, rather than that of the Reporter of Decisions, appears on the book's spine. (The Reporter resigned in frustration after his notes were destroyed in one of San Francisco's many early fires.)

A cover-to-cover reading of Volume I will reward any California history buff as a collection of short stories. Together with Volume 2 and those that follow, it provides a fascinating view of the difficulties met by our state's Supreme Court in its efforts at equitable transition from the Mexican civil to the American common law. At the same time these volumes give us a not-altogether-haphazard picture of life in the California of the 1850s.

Those years were not an easy time for anyone, the judicial system included. Supreme Court opinions of the day not infrequently commence with some such rueful observation as that "Such is the unorganized condition of the county court in the county of San Francisco that the immediate action of this court is required . . . ,"[2] or that "It will be unnecessary to enter into a detail of the proceedings in this case, from the fact that the laws of the country then in force were but imperfectly understood and error and irregularity are found in all of the proceedings of the courts, especially in criminal cases."[3] Another opinion commences, "This case, from the moment of its inception to its appearance here, presents to view a curious anomaly."[4] And still another begins, "It appears from the papers in this case that some kind of a proceeding . . . was instituted. . . . For what the action was brought nowhere appears, nor does it appear that there were any pleadings in the cause on either side."[5]

The court had to contend not only with law and men but with acts of God. Fires raged through San Francisco several times in its first years, and a decision of the Court in April 1851, commences, "The papers in this cause were destroyed by the late fire, and we must rely upon our recollection of the facts, as presented in the argument."[6] In another decision later the same year, Chief Justice Hastings' entire opinion reads, "The record having been destroyed in the late fires, I have prepared no opinion of this case, and cannot now concur or dissent."[7] And, as noted

above, a member of the court was compelled to step in when fire destroyed the Reporter of Decisions' notes.

The fires naturally led to litigation, as for example when, frustrated by the frequent and devastating fires, city authorities would blow up a line of buildings to serve as a fire break.[8]

Despite the many vicissitudes plaguing the courts, justice was usually swift, as one George Tanner quickly learned. On April 3, 1852, he stole from a merchant flour, potatoes, syrup, powder, and mackerel worth $400. Within days, the grand jury indicted him for grand larceny. He was tried by jury on April 14, found guilty, and sentenced to be hung on May 28. The District Court affirmed the judgment on April 24, and the Supreme Court affirmed in the same month. On May 24 a petition for rehearing was filed and a stay of execution granted to July 23. On July 16 the Supreme Court ordered execution to proceed, and Tanner was in fact hanged on July 23, less than four months elapsing from crime to punishment.[9]

The court was more benevolent in its treatment of a Stockton judge who was convicted by jury of refusing to discharge a certain prisoner on bail until an additional $100 was paid to him personally and of bargaining for and receiving still another $100 for later dismissing the charges and exonerating bail without investigation or trial. The court, with one dissent, reversed the convictions on the ground that it wasn't clear that the first $100 was intended as a fee or that the judge took it "wilfully and corruptly," and that the second count didn't allege that the judge took the money for acting "more favorable to one side than the other."[10]

The early court was compelled to confront the question of slavery and, in a lengthy decision, held that the owner of three slaves who he had brought to California before statehood was entitled to the aid of the state to return them to Mississippi by force, despite the fact that both Mexico and California outlawed slavery, on the authority of an 1852 California statute that provided that a slave who had been voluntarily brought to California before statehood should be deemed to be a fugitive if he refused to return to the slave state of origin, giving the owner a right of "reclamation." The reasoning of the two justices who rendered opinions provides an interesting picture of the temper of the times.[11]

Today's airline travelers may be more content with their lot upon reading of the indignities suffered by one Carrington, who presented himself at Pacific Mail's New Orleans office on December 15, 1849,

believing himself to have a "through ticket" to California on a ship leaving that day. Being told that was not the case, he paid for a through ticket for January 15, plus a penalty for not using his earlier ticket. Instructed to return for his ticket when it had been printed, he did so from day to day, each time being put off, only to be finally told on January 9 that the tickets had arrived but had all been given out and there was no longer space on the ship he had bargained for. On the agent's assurance, he took another ship to Panama with the promise that the connection from there to California would be as planned. He was held up in Panama for six weeks, however, waiting for the ship to California, and while there became ill and remained so until he arrived in San Francisco. On suit for damages, a jury awarded him $1,000, which the court affirmed on appeal with the comment, "I think the verdict is small enough. . . ."[12]

Many of the cases concern merchandise damaged, lost, or stolen on the perilous route from the East Coast, thus providing a source of the nature and prices of typical commodities of the period—and presenting the courts with the legal question of whether damages should be measured by eastern or western prices, which varied substantially. Many others deal with disputed mining claims and practices and with titles to real property, particularly in San Francisco and along its waterfront which, with self-help, owners and squatters altered almost daily.

One closes these volumes marvelling that so much order was so speedily carved out of a wilderness. And current members of the profession may be excused a prideful gratification that along with the gold-seekers, the merchants, and the seamen, California from its very beginning lured members of the legal profession who were equal to the demands of that chaotic era.

NOTES

[1]*Ex parte The Queen of the Bay*, 157; *People v. Smith*, 9; *People v. Daniels*, 106; *Ex parte Turner*, 143, 152, 188, 190; and *Ex parte Field*, 187.

[2]*People v. Clark*, 1 Cal. 406.

[3]*People v. Daniels*, 1 Cal. 406.

[4]*Horrell v. Gray*, 1 Cal. 133.

[5]*Mena v. LeRoy*, 1 Cal. 216.

[6]*Elliot v. Osborne*, 1 Cal. 396.

[7]*Weber v. City of San Francisco*, 1 Cal. 455, 458.

[8]*Dunbar v. The Alcalde*, 1 Cal. 355; *Correas v. City of San Francisco*, 1 Cal. 452.

[9]*People v. Tanner*, Cal. 257.

[10]*People, Ex Rel. Purley*, 2 Cal. 564.

[11]*In re Perkins*, 2 Cal. 424.

[12]*Carrington v. The Pacific Mail*, 1 Cal. 475.

"Ten Cents the Fifty Vara Lot": *Hart v. Burnett* and the Origins of the Public Trust Doctrine in California

Molly Selvin

Twentieth century California jurists and lawyers have come to think of the public trust doctrine primarily in its contemporary contexts: facilitating public beach access for recreational purposes[1] or mediating between competing claims of ecological preservation and provision of municipal water supply.[2] Yet the doctrine in California law originates in the state Supreme Court's painstaking effort to untangle twisted Spanish, Mexican, and U.S. claims to valuable urban parcels in nineteenth century San Francisco. The court rendered one of the most definitive—and earliest—statements of this doctrine in *Hart v. Burnett, Beideman, et al.*[3] The case arose from the tumultuous economic development at mid-century, a period during which city dwellers were plagued by problems sadly familiar to their twentieth century counterparts, including municipal debt, exploding population growth, and homelessness.

The significance of *Hart v. Burnett* stems not only from the vast amount of land, the huge sums of money, and the thousands of people touched by Supreme Court Justice Joseph G. Baldwin's opinion. The case is a touchstone for subsequent public trust adjudication, assimilating the doctrine into California and American jurisprudence as an instrument for resource allocation, and yet at the same time, confirming the state's power to alienate that property in the service of economic development.

The dispute that brought Messrs. Hart, Burnett, and Beideman before the California Supreme Court in 1860 concerned the title to several parcels of San Francisco real estate. Disposition of this land turned on the court's interpretation of Spanish and Mexican pueblo land titles. Spanish law originally granted title to four square leagues of land (approximately 12 square miles) to San Francisco—as with all California pueblos—upon its founding in 1834. Pueblo law typically reserved a portion of these lands as commons to be used collectively by pueblo inhabitants.

Peter H. Burnett (1807-1895)
Courtesy: The Bancroft Library

The terms of the treaty with Mexico[4] transferring authority over California stipulated that American law would honor land grants made under Mexican law. But San Francisco's explosive growth following its occupation by American troops in 1846 caused city officials to ignore their obligations as pueblo titleholders. Population jumped 200 percent in the two years preceding the gold rush; that growth brought feverish real estate subdivision and speculation to what had been a jumble of crude shanties, tents, and hastily built houses. The city's effort to serve new citizens prompted it to undertake a program of civic improvements; the city built a new jail, organized a police force, and planked and graded the main streets. But by early 1851, San Francisco was one million dollars in debt. The absence of adequate health facilities combined with rough conditions and primitive municipal sanitation facilities led to frequent outbreaks of virulent diseases. Since the city was without funds for such necessary facilities as a hospital or bulkhead along the harbor, it contracted with local doctors for indigent care and with construction contractors. To reimburse these individuals, the city issued script that it repaid by selling land at execution sales. Contrary to Mexican practice of individually granting lots by petition burdened with pueblo restrictions on title and use, during the early 1850s the city auctioned off large blocks to the highest bidder.

San Francisco's growing homeless problem further clouded title to much of the property within city limits. Many who emigrated simply squatted on vacant city land in the hope of acquiring title by surveying, improving, and registering the parcel. In 1850, George C. Potter and Daniel S. Roberts surveyed and recorded an unoccupied tract of 160 acres bounded by Larkin, McAllister, Sutter, and Laguna Streets. They fenced the lot, built a home on it and, in 1853, after Congress provided for pre-emption on California lands, they sold it to Jacob C. Beideman, a merchant and real estate speculator.[5] Yet most of this same parcel was also claimed by Jesse D. Carr and William Hart. By virtue of an 1851 execution sale the city held to discharge outstanding municipal warrants and script, J. P. Hill acquired title to the 18-block central city tract; he bought one of those blocks, containing 480 fifty vara lots, for just $50 or 10 1/2 cents per lot. Title to this tract quickly turned over several times and by 1852 ended up in Carr's possession.

By 1959, according to one account, nearly four-fifths of San Francisco real estate—between 9,000 and 10,000 acres worth millions of

dollars—was held under similarly contested titles.[6] The situation was such an alarming threat to San Francisco's economic future that in 1855 the city council passed the Van Ness Ordinance by which it relinquished its right and claim to a huge chunk of land to those in actual possession of the land.[7] This ordinance confirmed Beideman's title to the property contested by Hart and Carr.

Despite the Van Ness Ordinance, Hart and Carr proceeded with an ejectment suit against Beideman and co-defendants. The San Francisco Superior Court held trial in the matter of *Hart v. Burnett* in early 1857. A jury deliberated for one hour before finding in favor of plaintiff Hart. He had contended that the original Mexican pueblos grants conveyed absolute title to the successor city of San Francisco. Since the city had unrestricted power of disposition over the lands it held for its general and corporate purposes, title passed by an execution sale, in the form of a sheriff's deed, was a perfect legal title. Defendants appealed, alleging errors had been committed at trial.

The California Supreme Court heard arguments in late 1859. The appellants claimed that the city of San Francisco never had any title to the lands within its limits. Prior to American occupation, title resided in the Mexican government; since then in the United States. Even if the city was vested with title to the former pueblo common lands within its corporate limits, such lands were held for public purposes and were not subject to sale under execution. Respondent argued that San Francisco held unburdened title to her pueblo lands and that successor cities could sell those lands under execution.

Justice Baldwin's opinion for the court, released on June 22, 1860, reversed the superior court's judgment for the plaintiff. Baldwin reportedly journeyed to Mexico City prior to writing in order to trace the origins of pueblo titles and rights to "a conclusion in which there would be no flaw."[8] His opinion is heavily documented with Spanish and Mexican authorities as well as with American precedents, many of which were cited by neither side in the reported arguments. Re-affirming the principle that "property may be dedicated to the public use without vesting the legal title," Baldwin concluded that under Spanish law, the California pueblos did not have the full right of disposition over all categories of pueblo land. The pueblo common lands were "in the sense of endowments, to be held in trust for the purposes and objects specified in the laws or in the particular grant . . . but not in absolute ownership

with the full right of disposition." Neither the king nor any of his officers could grant away these lands, and municipal officers could not do so without "superior authority."[9]

Under American law, however, Baldwin concluded, the state legislature, as a sovereign power, could significantly abridge or even abrogate the trust with which these lands were clothed. These lands "became a fund for the support of local government, with a trust to be administered for that object," and could be disposed of "so as to promote the growth of the city and the comfort and convenience of the inhabitants." He therefore upheld the validity of San Francisco's Van Ness Ordinance, transferring the city's title to this trust property to actual possessors—including Burnett and Beideman. Baldwin wholeheartedly approved of the purposes for which the ordinance was passed, i.e., to quiet title to a large amount of city land.[10] Therefore, while *Hart v. Burnett* was the most developed statement of the public trust doctrine in American law in 1860, it was also a clear assertion of legislative supremacy over trust property.

Despite the city and state's ability to abridge or abrogate the trust with which the pueblo common lands were endowed, Baldwin denied that the city had any right to subject that trust property execution sale to satisfy the debts of the trustee. The property in this case, he wrote, came from the "Government stamped with the will of the Government. . . . It was not part of the intention of the grantor that this property should be sacrificed at public forced sale; the contrary *was* the intent." Alienation of this trust property at execution sale, according to Baldwin, would not "promote the growth of the city and the comfort and convenience of the inhabitants."[11]

> When a public trust is so directly connected with property as that taking the property destroys the trust, the property cannot be sold under execution . . . any more than the trust could be sold, or repudiated by the grantees. The trust is directly and indissolubly associated with the property, and the coercive sale of the last is equivalent to a destruction of the first.[12]

Why did Baldwin finally rest his opinion in *Hart* on the ability of the legislature to dispose of trust properties? Historians have traditionally depicted the nineteenth century legal system as having facilitated the privatization of resources and as scrupulously protecting vested property rights. Yet the whole notion of a public trust—the notion that the state

could indefinitely hold resources for common use—is fundamentally antithetical to that view. Indeed, in recent decades, a growing number of scholars have convincingly demonstrated that nineteenth century state governments frequently "expropriated" private property. These "takings" were justified as encouraging "the release of creative energy" and thereby promoting rapid economic growth.[13] A judicial determination that the state held inalienable trust resources, on the other hand, effectively removed those resources from the arena of economic development. But by defining the state's trust responsibilities over the pueblo lands so as to permit the disposition of that land to promote municipal development, Baldwin was able to reconcile the prevailing entrepreneurial ethos with the Spanish trust dedication. His decision also highlights the need for a new paradigm through which to interpret western legal and economic development, one that views such instrumentalist decisions as *Hart* as less anomalous than the norm.

NOTES

[1]See, for example, *Gion v. Santa Cruz*, 2 Cal.3d 29 (1970) and *Sea Ranch Assn. v. California Coastal Commission*, 102 S.Ct. 622 (1981).

[2]See, for example, *National Audubon Society v. Superior Court of Alpine County, Department of Water and Power of the City of Los Angeles*, 33 Cal.3d 419 (1983).

[3]15 Cal. 530 (1860).

[4]Treaty of Guadalupe Hidalgo, signed February 2, 1848.

[5]On the history of this tract, see Supreme Court of California, *Testimony Showing the Time of Possession, etc. of the Beideman Tract, and the Decision of the Supreme Court of California Thereon* (San Francisco, 1861).

[6]*San Francisco Daily Herald*, April 29, 1855. 150,000 acres were similarly contested in San Jose and 20,000 to 30,000 acres in Monterey. See Thornton, Williams, and Thornton, *in the Supreme Court of California, Burnett, Beideman, et al., Appellants v. William Hart, Respondent. Brief of Thornton, Williams and Thornton, Counsel for the Appellants* (San Francisco, 1859).

[7]W. A. Piper, James Van Ness, and Henry Haight, *The City's Relinquishment of City Titles* (San Francisco, 1858).

[8]Goodwin, *As I Remember Them* (Salt Lake City, 1913), 19.

[9]15 Cal. 530, 560, 568-569.

[10]15 Cal. 530, 593, 614.

[11]15 Cal. 530, 579.

[12]15 Cal. 530, 592. The initial popular reaction to the *Hart* decision was jubilant. Gun and cannon salutes were fired in celebration throughout the city. A "jubilee," attended by more than 5,000, followed within days. "San Francisco is free!!," proclaimed the *Daily Alta California* of June 27. "The sun of prosperity now beams in glorious effulgence. . . . Justice is triumphant! Let us meet together to hail the dawn of a new day, and to render honor to our country and its great tribunals!"

[13]See, for example, the work of Willard Hurst, Harry Scheiber, Lawrence Friedman, and Joseph Sax.

The Genesis of *Sail'er Inn* in the California Constitution

Sally M. Furay

To the majority of men who convened in Sacramento in late September 1878, the concept of "women's rights" was foreign indeed. Their minds were preoccupied with such matters as California's economic turmoil, the burgeoning Working Man's Party, the corruptive power of government and corporations, and the elimination of Chinese labor. Most of them considered the role of women to be well-established by legal precedent and societal customs; a proper woman was limited to maternity and the domestic sphere, under the protection of her husband.

Nonetheless, the final version of California's 1879 constitution contained two major sections dealing with what would today be called "women's rights," and a brief reference in a third section prohibiting a specific form of gender discrimination. In the face of the vehement antagonism to women's suffrage in the 1878 convention, it seems anomalous that an employment provision, fairly far-reaching in its implications, generated so little controversy among the delegates when it was offered as an amendment. Article XX, Section 18 in its final form provided that "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession." During discussion in Committee of the Whole concerning the proposals that later became Article XX: Miscellaneous Subjects, Charles Ringgold of San Francisco offered this new section prohibiting disqualification for business on the basis of sex. The proposed addition was adopted without reported discussion,[1] and the amendment was later concurred in, again without discussion, by the entire convention, on February 20, 1879.

Article XX, Section 18 had a long history of judicial interpretation—sometimes to establish that the constitutional provision meant what it said, and sometimes to limit its applicability in situations where regulations stemmed from what the court saw as a reasonable exercise of the police power or a necessary protection and preservation of the public health. The first of these interpretations was not long in coming.

Regardless of the provision in the newly adopted constitution of 1879, the San Francisco Board of Supervisors, in mid-1880, passed an

ordinance prohibiting the employment of females in places where beer or hard liquor was sold. California's highest court, in *In the Matter of Mary Maguire*,[2] held that the language of the ordinance plainly incapacitated a woman from pursuing a business lawful for men, and hence was "in conflict with and inconsistent with the Constitution, and therefore void." The contention that the inhibition on Mary Maguire's employment was not on account of sex, but on account of its immorality, was rejected by the court on the grounds that such arguments are an attempt "to do that by indirection which cannot be done directly."

The man who challenged a Stockton ordinance a decade later was not so fortunate as Mary Maguire. The city of Stockton's ordinance fixed a higher rate for the licensing of saloons where females were employed, and intoxicating liquors were sold in quantities less than one quart, than for saloons where women were not employed.[3] The California Supreme Court found nothing unfair, unreasonable, or arbitrary in this ordinance, perceiving it to be a valid exercise of the police power in regulating the employment of women. There was no allusion to the fact that economic discouragement of the employment of women was simply another form of doing by indirection what could not be done directly. The city of San Francisco also found an indirect means of reinstating its ordinance by making it unlawful to sell liquor in places where there is dancing or where musical, theatrical, or other public exhibitions are given and where females attend as waitresses. A challenge to this ordinance on the basis of discrimination against women in the matter of employment was disallowed on the grounds of police power in regulating intoxicating beverages.[4]

Erosion of Article XX, Section 18 continued into the early twentieth century as California joined other states in the wave of so-called protective labor laws. Limitation of working hours,[5] and establishment of minimum wages for women were upheld, the latter added in 1914 as a constitutional provision not repealed until 1976 (Article XX, Section 17 1/2).

What was left of Article XX, Section 18 was further restricted in 1918 by an appellate court decision (with hearing by the supreme court subsequently denied) upholding an Oakland rule that "In the case of the marriage of a woman employed by the board of education, her position shall at once become vacant. . . ."[6] Without responding to the constitutional basis for the petition—namely, that the rule operated as a restraint

upon marriage and discrimination against women in violation of the direct prohibition of Article XX, Section 18—the court noted that in California, "boards of education may exercise an unlimited discretion in the employment and dismissal of teachers under like employment with appellant," and that thus "the power of the board to discharge plaintiff was unrestricted and absolute."

Finally, in the landmark 1971 case *Sail'er Inn v. Kirby*,[7] the wheel came full circle. In a unanimous opinion by Justice Peters, the California Supreme Court returned to the thinking of Justice Thornton in *Matter of Maguire*, noting that "Well before the turn of the century this court enunciated the meaning and effect to be given this section of the Constitution in a case quite similar to the instant one." After extensive quotations from *Maguire*, Justice Peters ruled that "section 18 does not admit of exceptions based on popular notions of what is a proper, fitting or moral occupation for persons of either sex. . . . [M]ere prejudice, however ancient, common or socially acceptable" is not a justification for discrimination. Elaborating on the point, Justice Peters responded to many of the arguments made in the long line of cases progressively restricting Section 18. "The desire to protect women from the general hazards inherent in many occupations," he said, "cannot be a valid ground for excluding them from those occupations under section 18." Legal restrictions on employment opportunities based on "chivalrous concern for the well-being of the female half of the adult population" are discriminatory.

But the most significant aspect of *Sail'er Inn v. Kirby* is the interpretation of the "equal protection" clauses of the federal and state constitutions in their applicability to the use of gender as a classification. The case dealt with two provisions of the Declaration of Rights of the 1879 constitution, Article I, Section 11 ("All laws of a general nature shall have a uniform application"), and Section 21 ("No special privileges or immunities may ever be granted which may not be altered, revoked, or repealed by the legislature, nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.") Although the California Constitution was amended in 1976, the judicial interpretation in *Sail'er Inn v. Kirby* is equally applicable to the new Section 7 of Article I, which prohibits the denial of equal protection of the laws.

The unanimous 1971 *Sail'er Inn* decision first analyzed the proper standard of review for classifications under the equal protection clause. In "cases involving 'suspect classifications' or touching on 'fundamental interests,' the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." The *Sail'er Inn* court then probed the reasons for strict scrutiny in classifications based on sex. "Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by accident of birth . . . the characteristic frequently bears no relation to ability to perform or contribute to society." The conclusion drawn is that "sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental interest such as employment."[8]

The importance of declaring sex a suspect classification is that the "reasonable" basis of the earlier decisions that eroded the impact of Article XX, Section 18, and of other laws prohibiting gender-based discrimination, is no longer applicable in California. Instead, the "strict standard" of review demanded by a suspect classification requires that the state bear "the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose."[9] In *Sail'er Inn*, the court found no compelling state interest for prohibiting women from being employed as bartenders and struck down the statute as violative of the state constitution.

NOTES

[1]Willis and Stockton, *Debates and Proceedings of the Constitutional Convention of the State of California, 1878* (State Printing Office, 1880), II, 1395.

[2]57 Cal. 604.

[3]*Ex parte M. Felchin*, 96 Cal. 360.

[4]*Ex parte Joseph Hayes*, 96 Cal. 555.

[5]*In the Matter of the Application of F. A. Miller*, 162 Cal. 687.

[6]*Catania v. Board of Education*, 37 Cal.App. 593, at 594.

[7]5 Cal.3d 1.

[8]5 Cal.3d 1, at 16, 18, 20.

[9]5 Cal.3d 1, at 16-17, quoting *Westbrook v. Mihaly*, 2 Cal.3d 765, at 784-785.

A Legal Biography of Miller & Lux

Stephen Gillespie

M. Catherine Miller, *Flooding the Courtrooms: Law and Water in the Far West* (University of Nebraska, 1993)

Beginning with James Willard Hurst in the 1940s, a growing chorus of legal historians has insisted that anyone interested in law must look beyond the opinions of courts if they are to understand legal change. Hurst argued that by tradition and training, the legal community was biased toward equating law with what judges do, to the neglect of legislative, executive, and administrative activity and the effects on law of lay attitudes and practices affecting legal norms.

In *Flooding the Courtrooms: Law and Water in the Far West*, Catherine Miller provides a thoughtful and well-documented example of the type of legal inquiry advocated by legal historians following Hurst's lead. The book is the legal biography of one of early California's largest business corporations, the land and cattle company Miller & Lux, from 1858 to 1930. Miller focuses on the most prominent of Miller & Lux's legal concerns, control over the water flowing through its massive land holdings. She carefully documents the firm's successful efforts to shape the law in order to maximize the profit-making potential of its control over water.

Miller & Lux convinced the state's supreme court in *Lux v. Haggin* that California had adopted the doctrine of riparian rights when it adopted the common law, a holding of enormous value to the firm that shapes California water law to the present day. Once its control of water was defined as a property right, the firm was able to capitalize on the judicial bias in favor of private property to prevent interference from the legislative arena. As valuable as riparianism was to Miller & Lux, Miller reveals how the universality of legal doctrine hindered its attempts to prevent other riparians from interfering with its control over water resources. Miller also shows how Miller & Lux's ability to utilize the courts diminished with its financial decline.

The book tells a fascinating story about the demands made upon law by different groups with conflicting interests and how those demands helped shape legal doctrine. It is a valuable reminder, to all of us accustomed to thinking of law in terms of the "important" decisions of courts, that law is shaped by the demands and interests of specific people in specific times and places, whose interests and actions in pursuit of those interests are determined as much by place and circumstance as by doctrine and ideology. It will be of interest not only to those specifically interested in the development of California water law, but also to anyone interested in the sources and nature of legal change.

Water, Business, and the Law in California

Harry N. Scheiber

Donald Pisani, *To Reclaim a Divided West: Water, Law, and Public Policy 1848-1902* (University of New Mexico Press, 1992)

In *To Reclaim a Divided West*, Donald Pisani—a chair professor at the University of Oklahoma and one of the most respected historians of western legal development—offers a fascinating analysis of how Americans mobilized governmental authority in reclaiming arid regions of the West. As he writes in his preface, "private, public, and mixed enterprise" is the focus; but he also gives ample attention to events in Washington, as federal politicians struggled with western regional demands, and to the processes of legal innovation in California, Colorado, Nevada, and Wyoming.

Readers who are familiar with Pisani's earlier book, *From the Family Farm to Agribusiness: The Irrigation Crusade in California and the West, 1850-1931* (University of California Press, 1984), will find in this new study the familiar hallmarks of his scholarship: prodigious research in manuscripts and other original sources, a text that is written in a clear manner, and presentation of original interpretations of high significance to specialists that are also accessible to general readers.

"There was no single West," the author contends, and thus he makes "fragmentation" the book's main theme—the competition for use of the West's resources. This competition manifested itself in rivalries among local communities, regions within states, states contending against one another for favor with the national government and for private capital and immigration—and, not least, competitive private interests who were the users of natural resources.

Starting with the mining camps of Anglo-American California in the Gold Rush era, Pisani weaves his story of water law conflict and resolution to embrace the activities of grazing and farming interests. The landscape of his subject is populated not only by those who struggled to wrest a living—or better, a fortune—from the newly opened West, but also by utopians, visionary engineers and planners, shrewd political

manipulators, and corporate interests whose influence pervaded the era's litigation in both state and federal courts as well as debates in legislative halls.

California's Wright Act, the national Newlands Act, and the cluster of complex, interrelated federal and state reclamation activities that shaped western water policy, all receive amply attention. Seldom will one encounter in the literature of western water law, or for that matter resource law, an account so learned in the history of science and engineering, and of political history, as well as the law. It is somewhat disappointing that the Mexican Californians, as well as the native peoples, receive so little attention. Otherwise, the canvas is crowded with figures sketched in bright colors; it portrays a landscape of historic change that recaptures in vivid narrative and penetrating analysis the exciting era of enterprise, law, and "water politics" that stretched from the Gold Rush to the Progressive Era.

Together with M. Catherine Miller's new book on the legal-business history of Miller & Lux—reviewed elsewhere in this *Yearbook* by Stephen Gillespie—and also the recently published work of Professor Norris Hundley of UCLA, Pisani's new study enriches an impressive and growing modern literature on the history of western water law.