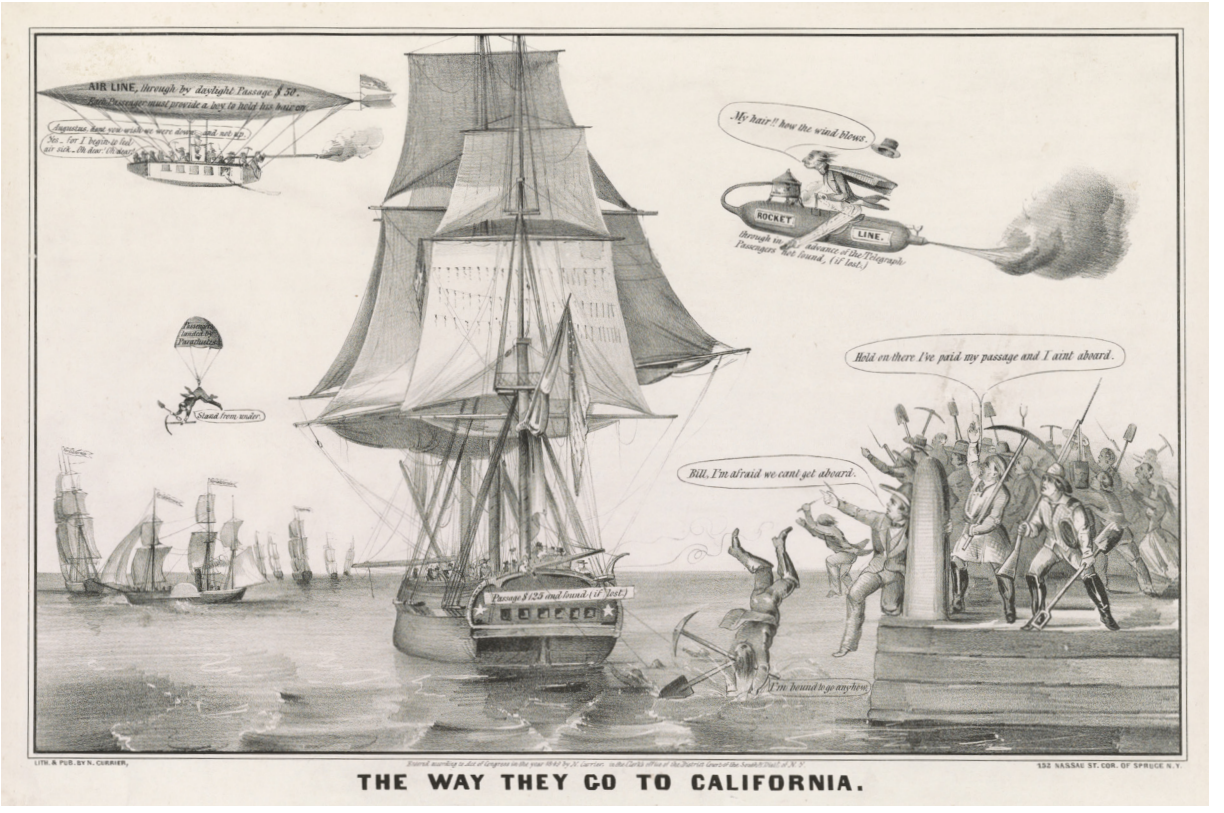


"The Way They Go to California" Lith. & Pub by N. Currier. *Courtesy of UC Berkeley, Bancroft Library.*

The California Supreme Court's First Mistake: *Von Schmidt v. Huntington*

BY HON. BARRY GOODE

It did not take long. The California Supreme Court's first consequential mistake is found in volume one of *California Reports* — on just page 55. It has taken more than one hundred and fifty years for the legislature and judiciary to correct.[1]

The case involved a relatively simple commercial dispute involving twenty-nine New Yorkers who came to San Francisco in 1849, hoping to find gold.

The men had formed the New York Union Mining Company. They raised capital and pledged to work together in the gold fields. They agreed to "devote their entire time and energies to promote the common interest in such manner as the company shall direct."[2]

On February 22, 1849, twenty-eight of the men sailed from New York to Chagres on the Atlantic side of Panama.[3] They crossed the isthmus to Panama City. There, they found thousands of would-be California miners on the shores of the Pacific, waiting for a ship to take them to San Francisco. They were stranded.

There were too few ships heading north. One historian said travelers with "through tickets" were boarded first. For the rest, "by a combination of priority, lottery, bribery, trickery and ticket scalping, prefaced by mass meetings and committees of protest, the Americans on shore were screened and . . . [the] lucky persons were selected."[4]

Several members of the New York Union Mining Company succeeded in a lottery and obtained early passage, arriving in San Francisco on June 9, 1849. Among them were Julius Von Schmidt, Thomas Holman, and Lewis Newman.[5]

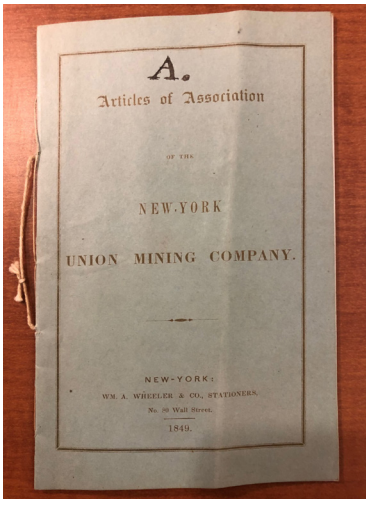
1. This article is a summary of an article that will appear in (2022) 17 *Calif. Leg. Hist*. In *Von Schmidt v. Huntington* (1850) 1 Cal. 55, the court rejected pre-trial mediation. For the next hundred years, courts generally did not encourage either pre- or post-filing conciliation. Beginning in the 1960s there was a resurgence of interest in alternative dispute resolution. Throughout the last part of the twentieth century, lawyers, academics, judges, and legislators took an increasing interest in alternatives to litigation. Their combined efforts resulted in the panoply of alternate dispute resolution methods in widespread use today.

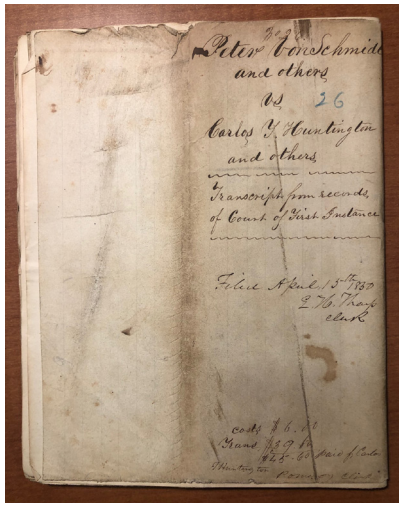
2. *Von Schmidt, supra,* 1 Cal. 55, 57.

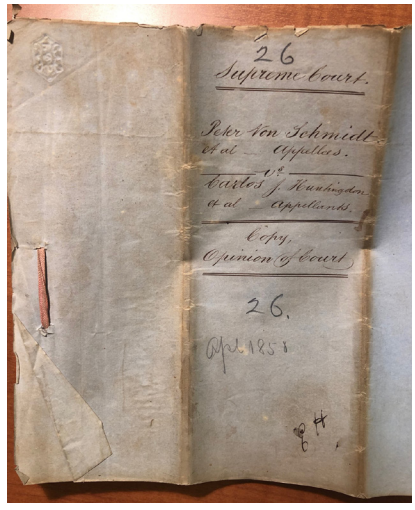
3. "The Emigration to California: Movements in New York," *The New York Herald*, Feb. 23, 1849, 2.

4. John Walton Caughy, *The California Gold Rush,* Berkeley and Los Angeles: Univ. of Calif. Press, 1975, 65–66.

5. Both the complaint and the answer in *Von Schmidt* allege that "several" members obtained early passage, including Von Schmidt, Holman, Newman, and unnamed others. Transcript from Records of Court of First Instance, California Supreme Court Case No. 26, filed April 15, 1850, p. 10, California State







Left to right: Articles of Association, New York Union Mining Company; Transcript, Court of First Instance; Opinion of Supreme Court, *Von Schmidt v. Huntington. Courtesy California State Archives, photos by Barry Goode.*

Most of the mining company did not reach San Francisco until sometime around September 1, 1849.[6] They soon discovered that three who left on the earlier ship — Von Schmidt, Holman, and Newman — did not wait for the rest of the company but headed for the gold fields. They must have done reasonably well, for the court's opinion states they "returned to San Francisco, where they engaged in business on their individual account, for the profits of which they refused to render any account to the company. . . ."[7]

The three refused to attend meetings called by the newly arrived members of the New York Union Mining Company. Worse, they tried to persuade some of the late arrivals to join them in their existing business. They "exerted their efforts to break up and disorganize [the firm] . . . and openly declared that they no longer considered themselves members of the association."[8]

The majority invoked article 22 of the Articles of Association: "any operative shareholder who shall, within three months after the arrival of the company in California, desert the company without leave, shall, in addition to his labor stock, forfeit his two shares of money stock."[9] They found the three to be deserters, expelled them from the company and declared their stock forfeited.

One member of the association, Peter Von Schmidt, lagged all the rest. (He was the father of Julius Von Schmidt, one of the early arrivals.) He arrived in San Francisco ten days after the second group of miners.[10]

The majority had heard reports that Peter had declared himself no longer a member of the New York Union Mining Company and that he had joined at least two other mining companies.[11] They determined he was both a deserter and "absent without leave" and stripped him of his stock.

Ironically, the majority also decided to abandon its plan of staying together and voted to sell the company's property. (The court noted this was understandable: "The successful prosecution of gold mining at the present time, under such an organization . . . appears to us to be an impracticability and a delusion . . . .")[12] According to plaintiffs, they planned to distribute the proceeds of the sale to holders of both labor stock and money stock.[13]

The four "deserters" sued in the Court of First Instance of the District of San Francisco. They sought reinstatement of their stock and a portion of the sale proceeds.[14]

Initially, defendants did not address the merits of the case. Instead, they entered a "plea," urging the court to find that it had no jurisdiction, because "complainants have not brought into this court any certificate of failure of conciliation between the said parties as required by law in order to give this court jurisdiction in the premises."[15] In plain words, they sought to dismiss the case because the plaintiffs had not sought to mediate the case before filing their complaint.

Archives, Sacramento, CA. One historian asserts they arrived in San Francisco on June 9, 1849. David Carle, *Putting California on the Map: Von Schmidt's Lines,* Lee Vining, CA: Phalarope Press, 2018, 19.

6. *Von Schmidt, supra* 1 Cal. 55, 58.

7. *Id*. 70. Plaintiffs denied that. Transcript from Records of Court of First Instance, *supra* n. 5, 2.

8. *Von Schmidt*, *supra,* 1 Cal. 55, 70.

9. *Id*. 70–71.

10. *Id*. 59.

11. Transcript from Records of Court of First Instance, *supra* n. 5, 10–11.

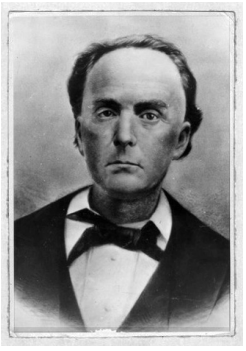
12. *Von Schmidt*, *supra,* 1 Cal. 55, 73–74.

13. Transcript from Records of Court of First Instance, *supra* n. 5, 4.

14. They also sought (i) a determination that only holders of the "money stock," not the "labor stock," should be remunerated, (ii) an injunction and (iii) appointment of a receiver. *Von Schmidt, supra,* 1 Cal. 55, 58.

15. Transcript from Records of Court of First Instance, *supra* n. 5, 8.

On Tuesday, December 4, 1849, Judge William B. Almond denied their plea. A few months later, the California Supreme Court affirmed that ruling, holding that mediation had no place in the state's new legal system. That was a mistake that would not be corrected for a century and a half.



Judge William B. Almond. *Public domain.*

A brief review of California's legal history demonstrates the court's error.

Prior to 1846, Alta California was part of Mexico. Under both the Mexican Constitution and an 1837 statute, civil suits alleging purely personal wrongs could not be brought until "conciliation" — mediation — had been tried and failed.[16] This was fundamental to the Hispanic legal system in North America.[17]

The Supreme Court nicely summarized the principles animating this law:

> Judges . . . shall discourage litigation . . . by using their endeavors to induce parties to compose their differences voluntarily and in a friendly manner . . . and by making use of persuasion, and all other means which their discretion shall dictate, to convince the parties of the benefit which will result to them from a composition of their differences, and the damage and expense inseparable from litigation, even when accompanied by success.[18]

There is no doubt that both this part of the Mexican Constitution and the 1837 statute were still in full force and effect. The general law of nations held that the rules of a conquered territory persisted until the conqueror replaced them.[19] Indeed, the California Constitution of 1849 said as much: "All . . . laws in force at the time of the adoption of this constitution, and not inconsistent therewith, until altered or repealed by the legislature, shall continue as if the same had not been adopted."[20]

By the time of the *Von Schmidt* appeal in March 1850, the newly created California Legislature had not altered or repealed the law requiring conciliation. Thus, defendants were right: plaintiffs were obliged to seek to mediate the dispute and present to the trial court a "certificate of failure of conciliation." Indeed, the court said as much: "*Conciliacion* . . . [was] necessary in this suit under the Mexican statute. . . ."[21]

The Supreme Court simply refused to apply the governing law. Why?

Society was changing. During the pastoral days of Alta California, communities were small, and the maintenance of harmony among the inhabitants was important. But as Americans moved into Alta California, they brought other values with them. When commercial disputes arose, they did not seek a vague compromise that could delay payment of a debt — as was often the outcome of conciliation. They wanted a predictable, decisive, enforceable outcome. They wanted to win.[22]

Justice Nathaniel Bennett. *California Supreme Court.*

As increasing numbers of Americans populated California, they expressed great dissatisfaction with the Mexican legal system. This view was particularly prevalent in the interregnum that prevailed between 1846, when California was conquered, and 1849, when the first Constitution was adopted.[23]

The three justices of the Supreme Court were like-minded Americans — all recent arrivals who had practiced in common law or code states. Mexican law was literally foreign to them. For example, Justice Nathaniel Bennett was a New Yorker who studied and practiced law in Ohio and New York. He had been in San Francisco fewer than nine months by the time he wrote the *Von Schmidt* opinion. But in that short time, he had become critical of the state of the law in Alta California. In a preface to the first volume of California Reports he wrote,

> Before the organization of the State Government [in California], society was in a disorganized state. It can scarcely be said that any laws were

16. Mexican Constitutional Law of 1836, Fifth Title (ley), Article 40, *www.ordenjuridico.gob.mx/Constitucion/1836.pdf* (as of Dec. 7, 2021); Judicial Act of May 23, 1837; *Von Schmidt, supra,* 1 Cal. 55, 59.

17. David J. Langum Sr., *Law and Community on the Mexican California Frontier,* San Diego: Los Californianos Antepasados (2nd ed.), 2006, 38, 97–101.

18. *Von Schmidt, supra,* 1 Cal. 55, 61. There were exceptions for cases seeking injunctive relief and for certain matters of ecclesiastical or public interest. The court found these exceptions did not apply to this case. *Von Schmidt supra,* 1 Cal. 55, 60–64.

19. *The American Insurance Company et al. v. 356 Bales of Cotton and David Canter* (1828) 26 U.S. 511, 542.

20. California Constitution of 1849, Schedule (following article XII), Section 1. And lest there be any question about "not inconsistent with . . . ," article VI, section 13 of the new California Constitution provided: "Tribunals for conciliation may be established with such powers and duties as may be prescribed by law . . . ."

21. *Von Schmidt, supra,* 1 Cal. 55, 64.

22. Langum, *Law and Community on the Mexican California Frontier,* 138–143.

23. Richard R. Powell, *Compromises of Conflicting Claims: A Century of California Law 1760–1860,* Dobbs Ferry, NY: Oceanea Publications, Inc., 1977, 64, 79–80, 127–130; Zoeth Skinner Eldredge, *History of California,* New York: The Century History Co., 1915, Vol. 3, 267–268. During this period, California remained under military rule.

> in existence further than such as were upheld by custom and tradition.[24]

Little surprise, then, that three justices shared the sentiment prevailing among the American forty-niners: "since the acquisition of California by the Americans, the proceeding of *conciliacion* has, in all cases, been deemed a useless formality by the greater portion of the members of the bar, by the Courts and by the people . . . ."[25]

So, the justices made a policy decision to jettison pre-filing mediation.

To support that decision, the justices cited the new legislature's act of February 28, 1850 — a law passed two months after the trial court's ruling. The justices admitted "as a general rule of statutory interpretation, it is undoubtedly true that a statute should be construed to operate on the future, and not upon the past."[26]

Still, the justices invoked the new law that gave them authority "to reverse, affirm, or modify any judgment, order, or determination . . . and render such judgment as substantial justice shall require, without regard to formal or technical defects, errors or imperfections, not affecting the very right and justice of the case."[27]

The governing Mexican Constitution and statutes required conciliation. The governing Mexican legal system was *premised* on conciliation. That surely affected the "very right and justice of the case." It required that the parties (especially defendants) be given an opportunity to compromise their disagreement before a court could make an order. Nonetheless, the Supreme Court asserted that the absence of mediation was a mere "technical defect" that could be ignored. It wrote,

> [E]ven conceding that it may operate beneficially in the nations for which it [*conciliacion*] was originally designed, still amongst the American people it can be looked upon in no other light than as a useless and dilatory formality, unattended by a single profitable result, and not affecting the substantial justice of the case."[28]

The court left no doubt about the depth of its feelings: "We have entered thus fully into an examination of the doctrine of *conciliacion,* and given our views of it at length, in order that the profession may understand, that the objection for the want of conciliatory measures is, so far as the Court is concerned, disposed of now, and, as we sincerely hope, forever."[29]

Forever? Well, close. The court's view prevailed for the remainder of the nineteenth and most of the next century. Although the ruling concerned pre-filing mediation, courts largely refrained from requiring any pre- or post-filing mediation.[30]

Nonetheless, alternative dispute resolution retained some popularity and enjoyed a resurgence in the last quarter of the twentieth century.

In 1986 the Legislature declared,

> "(a) The resolution of many disputes can be unnecessarily costly, time-consuming, and complex when achieved through formal court proceedings where the parties are adversaries and are subjected to formalized procedures. (b) To achieve more effective and efficient dispute resolution in a complex society, greater use of alternatives to the courts, such as mediation, conciliation, and arbitration should be encouraged . . . . (d) Courts . . . should encourage greater use of alternative dispute resolution techniques whenever the administration of justice will be improved."[31]

In 1993, the Commission on the Future of the California Courts wrote,

> "Appropriate dispute resolution is central to providing effective, affordable, satisfying justice to all Californians. . . . For many disputes, both today and tomorrow, . . . nonadjudicatory processes allow the parties greater involvement in the resolution of their conflicts, produce results that are equally or more satisfying, and often cost less. Fundamental to the commission's vision of multidimensional public justice is a wide array of appropriate dispute resolution (ADR) processes."[32]

In 1994 the legislature found "mediation . . . can have the greatest benefit for the parties in a civil action when used early, before substantial discovery and other litigation costs have been incurred."[33] In that same year the Judicial Council adopted pilot project mediation rules. A few years later it added general rules governing mediation in civil cases.[34]

Those steps finally began to give the imprimatur to the alternative dispute resolution procedures with which we are all so familiar today. It only took a century and a half from that initial, mistaken Supreme Court decision. ✯

Barry Goode is a retired Superior Court Judge. He serves on the board of the California Supreme Court Historical Society.

24. 1 Cal. Reports vi.
25. *Von Schmidt, supra,* 1 Cal. 55, 64.
26. *Id*. 67.
27. Cal. Stats. 1850, § 26, ch. 23.
28. *Von Schmidt, supra,* 1 Cal. 55, 65.
29. *Id*. 66.
30. The principal exception was in the field of family law.
31. Cal. Bus. & Prof. Code § 465.
32. "Justice in the Balance 2020: Report of the Commission on the Future of the California Courts," 1993, 40, *https://www.courts.ca.gov/documents/2020.pdf* (as of Feb. 9, 2022).
33. Cal. Code of Civ. Proc. § 1775, subd. (d). This bill established pilot civil mediation projects.
34. Now Rules 3.890–3.898 of the Rules of Court. *See also* Cal. Code of Civ. Proc. § 1775 et seq.