THE CALIFORNIA SUPREME COURT'S FIRST MISTAKE:

Von Schmidt v. Huntington — *and the Rise, Fall, and Ultimate Rise of Alternative Dispute Resolution*

BARRY GOODE*

"Where community ended, law began."[1]

Some maps of the California–Nevada border still display the "Von Schmidt line."[2] In 1872, Allexey Von Schmidt was hired by the United States to survey the two states' common boundary. Using nineteenth-century technology, he came close but erred slightly.[3] His line was redrawn in part by other surveyors, beginning in 1893.[4]

Coincidentally, Von Schmidt and his family were involved in the California Supreme Court's first consequential mistake. It is found in volume one of

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1 Jerold S. Auerbach, *Justice Without Law?* (New York: Oxford University Press, 1983), 53.

2 It is found alongside the segment from Lake Tahoe to the Colorado River. See, *e.g.*, U.S. Geological Survey. *California–Nevada: Woodfords Quadrangle*. 1979. 7.5-minute series (topographic), 1:24,000 scale.

3 Donald Abbe, "1872 California–Nevada State Boundary Markers," *National Register of Historic Places Inventory — Nomination Form,* January 23, 1980, https://npgallery.nps.gov/NRHP/GetAsset/NRHP/81000387_text; David Carle, *Putting California on the Map: Von Schmidt's Lines* (Lee Vining: Phalarope Press, 2018), 127–51.

4 California v. Nevada, 447 U.S. 125, 129–30 (1980).

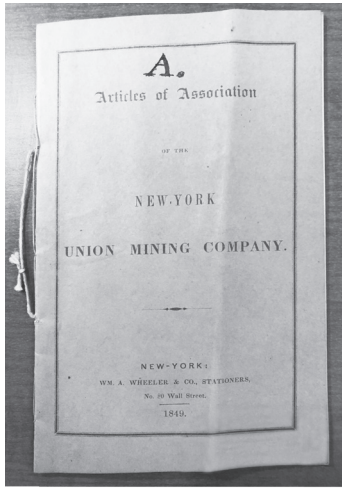
California Reports — on just page 55. However, the court's mistake, unlike Von Schmidt's, has taken more than one hundred and fifty years to correct.

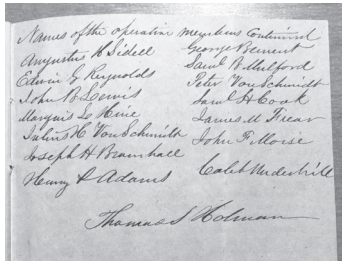
The case — only the thirteenth decided by the founding justices — was a relatively simple commercial dispute involving twenty-nine New Yorkers who came to San Francisco in 1849, hoping to find gold.

THE NEW YORK UNION MINING COMPANY

While still in New York, the men had formed the New York Union Mining Company. They raised capital and pledged to work together in the goldfields for more than four years. The company's Articles of Association stipulated that the twenty-nine "operative shareholders" would "devote their entire time and energies to promote the common interest in such manner as the company shall direct."[5]

The men created two classes of stock. "Labor stock" was awarded to the operative shareholders, *i.e.,* those who would travel to California and work in the goldfields. For that sweat equity, each was given eight labor shares and was expected to work hard. The articles specified that "any operative shareholder who shall be found gambling or intoxicated, shall be admonished . . . for the first offense, and for a repetition thereof, may be expelled . . . and forfeit his . . . labor stock."[6]


A.
Articles of Association
OF THE
NEW-YORK
UNION MINING COMPANY.
NEW-YORK:
WM. A. WHEELER & CO., STATIONERS,
No. 10 Wall Street.
1849.


Names of the Operative Members Contributed
Augustus A Sidell
Edwin L Reynolds
John B Lewis
Marquis L Rene
Julius H Von Schmidt
Joseph H Bramhall
Henry L Adams
George Bennett
Saml B Hufford
Peter Von Schmidt
Saml H Cook
James A Frear
John P Morse
Caleb Underhill
Thomas J Robinson

Articles of Association and names of operative members, New York Union Mining Company.

Courtesy California State Archives, photos Barry Goode.

[5] Transcript from Records of Court of First Instance, California Supreme Court Case No. 26, filed April 15, 1850, California State Archive, Sacramento, California, Exhibit A (Articles of Association of the New York Union Mining Company), 4; Von Schmidt v. Huntington, 1 Cal. 55, 57 (1850).

[6] Transcript from Records of Court of First Instance, Exhibit A, Article XXIII.

The "money stock" cost $250 a share. Each operative shareholder was required to purchase two shares. Another forty-eight shares were sold, some to passive investors.[7]

The mining company's total capital was $26,500. At least $16,000 was used to pay the miners' passage to California and to purchase food and tools for their use.[8]

Twenty-eight of the men were to have sailed from New York on the barque *Bogota* on February 22, 1849. The *New York Herald,* dated February 23, 1849, reports the departure of only twenty-six men grouped under the heading "New York Union Mining Company."[9] Their destination was Chagres on the Atlantic coast of the Isthmus of Panama.

STRANDED IN PANAMA

They arrived in Chagres and made the difficult land crossing to Panama City, only to discover thousands of would-be California miners waiting for a ship to take them to San Francisco. Few vessels were making a round trip because crews deserted upon arrival in the Bay Area and headed for the gold country. "[W]hat man would be a fireman on a voyage to the tropics when his two hands could gather gold . . . ?"[10]

Among the thousands stranded in Panama City with the New York Union Mining Company were Jessie Benton Frémont, the wife of the great explorer John C. Frémont, and Collis P. Huntington, the future railroad magnate.[11] Jessie Benton Frémont described how the Americans flooded the small city:

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[7] Some were bought by the operative shareholders. At least $4,000 worth of money shares were sold to passive investors. Transcript from Records of Court of First Instance, 4.

[8] *Von Schmidt v. Huntington*, 1 Cal. at 75; Transcript from Records of Court of First Instance, 2.

[9] "The Emigration to California: Movements in New York," *New York Herald,* February 23, 1849, 2 ("sailed yesterday"). There is no record of the other two operative shareholders. The mining company was accompanied by a "steward" and a "servant," neither of whom was a shareholder. Ibid.

[10] Jessie Benton Frémont, *Souvenirs of My Time* (Boston: D. Lothrop and Company, 1887), 180–81, https://archive.org/details/souvenirsofmytim00fr/page/180/mode/2up.

[11] Steve Inskeep, *Imperfect Union* (New York: Penguin Books, 2021), 211.

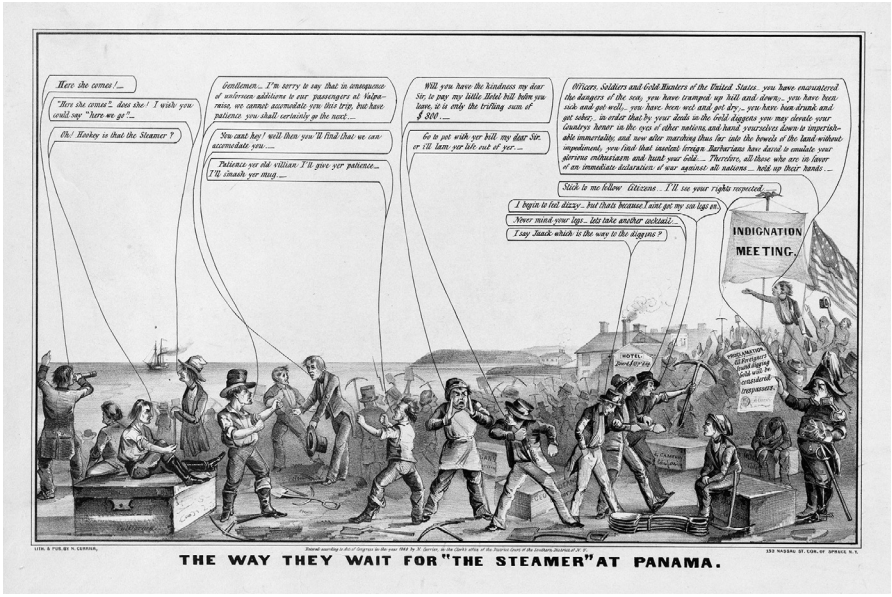

Illustration: The way they wait for "the steamer" at Panama.
Lith. & Pub. by N. Currier, Courtesy Library of Congress.

The madness of the gold fever was upon everybody up there, so we were detained in Panama seven weeks before the relief came . . . . Another monthly steamer, and sailing vessels from all our ports, brought in accessions, until there were several thousand Americans banked up in Panama, and none of them prepared for this detention . . . .[12]

[T]he Americans . . . felt, like ship-wrecked people, that there was no escape from there . . . .[13]

Another woman who was in Panama at the same time described the scene in a letter dated May 12, 1849:

Dear Daughter: Here we are yet in this miserable old town with about 2,000 Americans all anxiously waiting for a passage to the gold regions. [L]arge vessels . . . are coming in now every day, and

[12] Jessie Benton Frémont, *A Year of American Travel* (New York: Harper and Brothers, 1878), 66; http://www.loc.gov/resource/calbk.188.

[13] Ibid., 87.

> taking the passengers off, but they continue to pour in from the states so there does not seem to be any less here.[14]

She finally left Panama after spending more than two months on the isthmus.

Whenever a ship from California landed at Panama City, the forty-niners were excited by those debarking men who had reached the placers early. As Jessie Benton Frémont reports,

> All the passengers were landing, but the interest concentrated on those from California. Straightway men forgot all the trials connected with the crossing and the waiting, for there was the stream of returning gold-diggers, bringing with them the evidence that in the new country was more than justification for all the trials they were going through with to reach there.[15]

Another adventurer wrote home on May 11, 1849, to tell his mother, "The passengers from the *Oregon* bring glowing accounts from the diggins [sic]. I had the pleasure of lifting forty pounds of the precious metal that one of the men had dug in three months and a half which is pretty good wages."[16]

There was enormous eagerness to reach the gold country, but there were far fewer places on the ships than men vying for a berth. One historian says that those with "through tickets" were given priority. 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."[17]

Several members of the New York Union Mining Company, including Julius Von Schmidt, Thomas S. Holman, and Lewis F. Newman succeeded

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[14] Polly Welts Kaufman, ed., *Apron Full of Gold, The Letters of Mary Jane Megquier from San Francisco 1849–1856,* 2nd ed. (Albuquerque: University of New Mexico Press, 1994), 24. She landed at Chagres on or about March 13, 1849. Ibid., 10. She left on or about May 22, 1849. Ibid., 32.

[15] Frémont, *A Year of American Travel*, 86–87.

[16] Augustus Campbell and Colin D. Campbell, "Crossing the Isthmus of Panama, 1849: the Letters of Dr. Augustus Campbell, *California History* 78, no. 4 (Winter 1999/2000): 236.

[17] John Walton Caughy, *The California Gold Rush* (Berkeley and Los Angeles: University of California Press, 1975), 65–66.

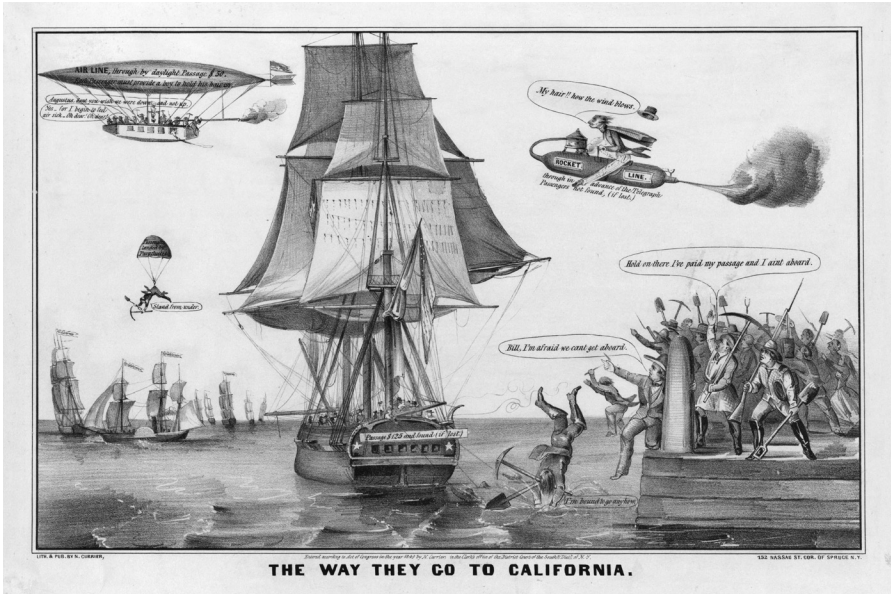

Illustration: The way they go to California.
Lith. & Pub. by N. Currier, Courtesy Library of Congress.

in obtaining relatively early passage on one of the few ships leaving Panama City. They arrived in San Francisco in June 1849.[18]

THE MINING COMPANY'S DISCORD

The majority of the New York Union Mining Company remained stranded in Panama City for more than two months.[19] They finally succeeded in boarding a ship and landed in San Francisco around September 1, 1849.[20] There, they discovered that three of the men who left Panama City on the earlier ship (Julius Von Schmidt, Holman and Newman) did not wait for

[18] Both the complaint and the answer in the *Von Schmidt* case allege that "several" members obtained early passage, including Von Schmidt, Holman, Newman, and unnamed others and arrived about three months before September 1, 1849. Transcript from Records of Court of First Instance, 2, 10. One historian says they sailed on the *Maunsel White* and arrived in San Francisco on June 9, 1849. Carle, *Putting California on the Map*, 19.

[19] Transcript from Records of Court of First Instance, 11.

[20] *Von Schmidt v. Huntington*, 1 Cal. at 58.

the rest of the company but headed for the goldfields.[21] Reportedly, 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 . . . ."[22]

The first week of September 1849 must have been tumultuous for the New York Union Mining Company. The newly arrived majority called meetings which the three early arrivals refused to attend. Worse, the three tried to persuade some of the majority to join them in their existing business. They "exerted their efforts to break up and disorganize [the company] . . . and openly declared that they no longer considered themselves members of the association."[23]

The majority, "upon due notice," 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."[24] They found the three to be deserters, expelled them from the company and declared both their labor stock and money stock forfeited.

One member of the association, Peter Von Schmidt, lagged the rest. (He was the father of Julius Von Schmidt, one of the handful of men who arrived on the West Coast before the others.) Peter arrived in San Francisco ten days after the second batch of miners.

It is not clear why he was delayed. According to the court, he had stayed in New York to finish building three "gold washing machines" on behalf of the company.[25] Another account says he too came across the Isthmus of Panama, having previously sent the machines around the Horn with another son, Allexey, who arrived in San Francisco *before* all the others.[26]

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[21] Transcript from Records of Court of First Instance, 2. It would make sense that the others who arrived in June also went to the gold fields and defendants' answer to the bill of complaint suggests they did. Ibid., 10. But there is no other record of what they did during the summer of 1849.

[22] *Von Schmidt v. Huntington*, 1 Cal. at 70.

[23] *Id*.

[24] *Von Schmidt v. Huntington*, 1 Cal. at 70–71.

[25] *Id*. at 58 and 72.

[26] Carle, *Putting California on the Map,* 10. According to Carle, Allexey brought the gold washing machines around the Horn and arrived in San Francisco on May 24, 1849. Ibid., 11–16. Carle also says that Peter arrived in San Francisco on August 22, 1849,

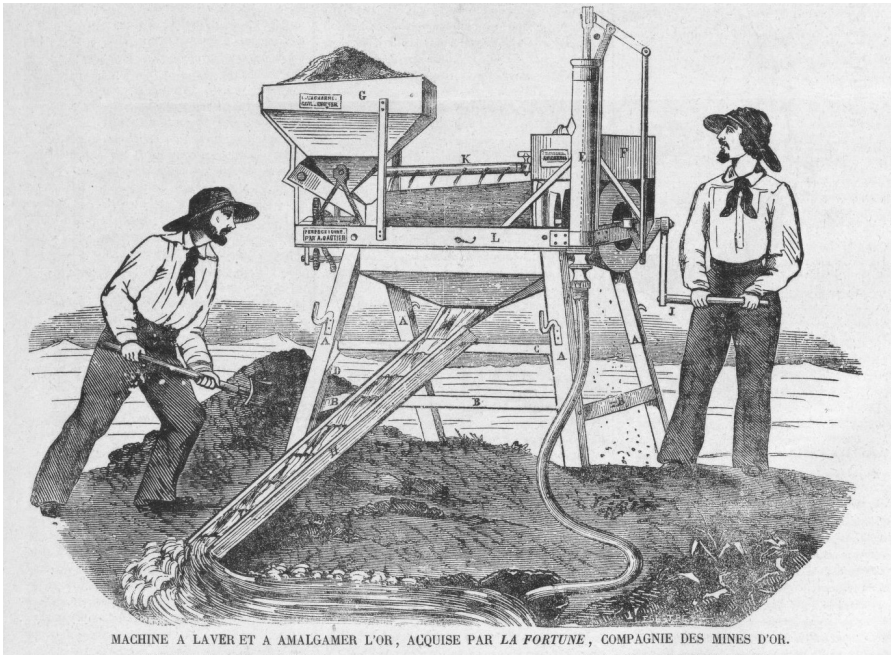


Illustration of a gold washing machine in California.
Le Charivari *magazine, Paris, June 25, 1850.*

The majority were unhappy with Peter Von Schmidt. They had heard reports that he had denounced the New York Union Mining Company and had joined two other groups of forty-niners. They likely considered him to be as obstreperous as his son, Julius, who was one of the three "deserters."

The majority could not give Peter "due notice" because he was still aboard a ship bound for San Francisco. Nonetheless, they determined that he, too, was a deserter and stripped him of his labor stock and money stock. In the alternative, they found he had violated another clause of article 22, in that he was "absent without leave." The penalty for that was loss of his labor stock.

Ironically, the majority abandoned its plan of staying together. It voted to sell the company's property. (The court noted that this was understandable: "The successful prosecution of gold mining at the present time, under

on the *Panama*. That is contrary to the facts stated in the pleadings of the parties and the opinion of the court.

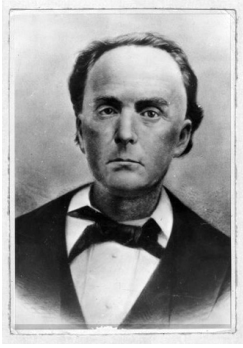
such an organization as is prescribed by these articles of association, appears to us to be an impracticability and a delusion . . . ."[27])

The company's property was to be auctioned on November 26, 1849, at 10:00 a.m.[28] On that same morning, the four who had been stripped of their stock filed a "Bill of Complaint" in the Court of First Instance of the District of San Francisco against Carlos T. Huntington, John F. Morse, Henry W. Havens, "officers and members of the New York Union Mining Company." Plaintiffs sought to enjoin the auction. They also asked the court to restore to them their forfeited stock, and to decree that any assets of the mining company be distributed only to holders of the money stock; not to the labor shareholders.[29]

JUDGE WILLIAM B. ALMOND

The case came before Judge William B. Almond, who had arrived in California only a few months earlier. He was a notable character.

Almond was born into an affluent family in Virginia on October 25, 1808, and graduated from Hampden–Sydney College in 1829. However, he was restless and moved to western Missouri in 1832. Still restless, he headed west with a group of fur-trapping mountain men the following year. Surviving a battle with Native Americans and a harsh winter at Fort William, North Dakota (during which he is reported to have read Blackstone's *Commentaries*) he returned to Missouri and became an attorney. By 1837 he was serving as a justice of the peace. In 1839 he moved farther west to Platte City, Missouri, where he practiced law. In 1844 he ran a losing campaign, on the Democratic ticket, for lieutenant governor of Missouri and settled back into the practice of law. From time to time, he served as county attorney.[30]



Judge William B. Almond

San José Public Library, California Room.

[27] *Von Schmidt v. Huntington*, 1 Cal. at 73–74.

[28] Transcript from Records of Court of First Instance, 6.

[29] In addition, they petitioned for the appointment of a receiver. *Von Schmidt v. Huntington,* 1 Cal. at 58.

[30] William McClung Paxton, *Annals of Platte County, Missouri: From Its Exploration Down to June 1, 1897; With Genealogies of its Noted Families, and Sketches of Its Pioneers and Distinguished People* (Kansas City, Mo.: Hudson–Kimberly Publishing

On February 3, 1849, having learned of the discovery of gold in California, he formed a company of forty men to travel overland to the placers. They arrived at Sutter's Fort on July 29, 1849.[31]

When he reached San Francisco, he found a Missouri acquaintance, Peter Burnett.[32] Destined to become the state's first governor, Burnett was then serving on the city's "legislative assembly" and was an influential voice in the debates over the form of government that ought to prevail in what was still a region under military occupation.

Although only a recent arrival, Almond was a striking man who inspired confidence. A close associate later described him this way:

> His classical education, Western adventures, social temperament, and varied experience supplied him with a fund of useful information and anecdote that made him a charming companion. He possessed genius, rather than talent. He was a brilliant orator, understood mankind, was quick to discover the weak and strong points of his adversary, and ready to take advantage of every opportunity.[33]

Through Burnett's influence, Almond was appointed to the Court of First Instance in San Francisco, effective October 15, 1849.[34] He had been in town little more than three months.

Company, 1897), 289–90, https://www.google.com/books/edition/Annals_of_Platte_County_Missouri/xz8VAAAAYAAJ?hl=en&gbpv=1&dq=Annals+of+Platte+County+Missouri&printsec=frontcover; Charles Clark, "William B. Almond," http://kansas-boguslegislature.org/mo/almond_w_b.html.

31 Paxton, *Annals of Platte County, Missouri,* 110.

32 Burnett and Almond undoubtedly met not later than March 25, 1839, when they were two of the twelve men enrolled as attorneys in the First Circuit Court for Platte, Missouri. Paxton, *Annals of Platte County, Missouri,* 26–27.

33 Ibid., 289–90.

34 By the time of Almond's appointment, the "legislative assembly" had dissolved, and the "town council" had been formed. Burnett was not a member of the town council, but was, no doubt, influential in Almond's appointment. Ibid., 290. One historian says Almond was appointed by the then–military governor of California, Bennet Riley. Henry H. Reid, "Historical View of the Judiciary System of California," in *History of the Bench and Bar of California,* ed. Oscar T. Shuck (Los Angeles: The Commercial Printing House, 1901), xvii.

One source says that Almond presided over cases "dressed in his trail clothes, chewed tobacco in the courtroom and occasionally announced a recess for all to adjourn to the nearest bar."[35] Another says:

> He would often sit in his court on an old chair tilted back, with his feet perched, higher than his head, on a small mantel over the fireplace; and in that position, with a red shirt on and sometimes employed in scraping the dirt from under his nails or paring his corns, he would dispense justice.[36]

But he was a workhorse. It was said, "His court did an immense business, and his name was on all lips."[37] He kept his court in session from eight in the morning until ten or eleven at night; "the result being that he had difficulty in keeping clerks. One clerk, stating that he was killing himself at the pace demanded of him by the court, resigned after a month's work."[38]

Peter Burnett described how justice was served in Almond's court:

> Judge Almond . . . well comprehended the situation of California. Perhaps substantial justice was never so promptly administered anywhere as it was by him in San Francisco. His Court was thronged with cases, and he knew that delay would be ruin to the parties, and a complete practical denial of justice.
>
> He saw that more than one half the witnesses were fresh arrivals, on their way to the mines, and that they were too eager to see the regions of gold to be detained more than two or three days. Besides, the ordinary wages of common laborers were twelve dollars a day, and parties could not afford to pay their witnesses enough to induce them to remain; and, once in the mines, no depositions could be taken, and no witness induced to return.

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35 KansasBogusLegislature.org.

36 Theodore Henry Hittell, *History of California,* vol. II, book VII (San Francisco: Pacific Press Publishing House and Occidental Publishing Co.: 1885), 778, https://books.google.com/books?hl=en&lr=&id=oWADAAAAYAAJ&oi=fnd&pg=PA43&dq=Hittell+History+of+California&ots=b9ZMYXPP2U&sig=QAD0xOMPzwGMLekFsMq11P83IAg#v=onepage&q&f=false.

37 Ibid.

38 Theodore Grivas, *Military Governments in California, 1846–1850* (Glendale: The Arthur H. Clark Company 1963), 181.

> He accordingly allowed each lawyer appearing before him to speak five minutes, and no more. If a lawyer insisted upon further time, the Judge would good-humoredly say that he would allow the additional time upon condition that the Court should decide the case against his client. Of course, the attorney submitted the case upon his speech of five minutes.
>
> At first the members of the bar were much displeased with this concise and summary administration of justice; but in due time they saw it was the only sensible, practical, and just mode of conducting judicial proceedings under the then extraordinary condition of society in California. They found that, while Judge Almond made mistakes of law as well as other judges, his decisions were generally correct and always prompt; and that their clients had, at least, no reason to complain of 'the law's most villainous delay.' Parties litigant obtained decisions at once, and were let go on their way to the mines.[39]

But that is not to say that he disdained juries. Stephen J. Field, who was to become a justice of the California Supreme Court and later the United States Supreme Court, recalled that on his first day in San Francisco, December 29, 1849, he noticed a crowd gathered around what turned out to be a courthouse. Inside, Judge Almond was conducting a jury trial. Since jurors were paid eight dollars for their service (and Field was down to his last dollar) he hung around the courtroom, hoping to be selected for the next jury.[40] (He was not.)

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[39] Peter H. Burnett, *Recollections and Opinions of an Old Pioneer* (New York: D. Appleton & Company, 1880), 343–44, https://www.loc.gov/item/01006673. Almond served in San Francisco for only seven months, until May 6, 1850. Paxton, *Annals of Platte County*, 110. He moved to San Jose and practiced law there before returning to Missouri in 1851 with $15,000. KansasBogusLegislature.org; Paxton, *Annals of Platte County*, 290. He again served as a judge in Missouri. However, he also had business interests and appears to have been a slaveholder. In July 1854 he helped to form the "Platte County Self-Defensive Association," whose purpose was to "urge the settlement of Kansas by Pro-slavery men, and to guard elections against the frauds of Abolitionists." He died in Leavenworth, Kansas (about ten miles from Platte City, Missouri) on March 4, 1860. Paxton, *Annals of Platte County, Missouri,* 184, 187, 290.

[40] Stephen J. Field, "Personal Reminiscences of Early Days in California, with other Sketches," ("Printed for a few friends," no publisher: 1880), 11, 15–16, https://tile.loc.gov/storage-services//service/gdc/calbk/114.pdf.

PROCEEDINGS IN THE TRIAL COURT

On November 26, 1849, plaintiffs appeared before Judge Almond and swore to the veracity of the matters in their Bill of Complaint. They posted a $5,000 bond and obtained an injunction from the frontier judge.[41]

On Saturday, December 1, 1849, defendants filed an answer. It was brief, but to the point. They alleged that they need not answer the bill because "plaintiffs 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."[42]

Two days later, on Monday, December 3, 1849, defendants filed a motion to dismiss the complaint based on that asserted lack of jurisdiction. They noticed the motion to be heard the following day.

THE MERITS OF THE MOTION TO DISMISS

In truth, defendants' motion was meritorious.

Prior to 1846, Alta California was governed first by Spanish and then by Mexican law. Under the 1836 Mexican constitution and an 1837 statute, civil suits alleging purely personal wrongs could not be brought until "conciliation" — mediation — had been tried and failed.[43] This was fundamental to the Hispanic legal system in North America.

Towns were small and communities close-knit. They were governed by *alcaldes*, who possessed judicial, executive, and legislative powers. Generally, *alcaldes* were well-respected men who sought to keep peace in the community. An 1820 manual for *alcaldes* describes them as, " 'citizens chosen as fathers of the country,' and 'true fathers of the pueblos.' They should

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41 The bond was guaranteed by the plaintiffs and three others, including Allexey Von Schmidt who was Peter's son and Julius' brother. Transcript from Records of Court of First Instance, 7.

42 Transcript from Records of Court of First Instance, 8.

43 Mexican Constitutional Law of 1836, Fifth Title (ley), Article 40, www.ordenjuridico.gov.mx/Constitucion/1836.pdf; Judicial Act of May 23, 1837; *Von Schmidt v. Huntington,* 1 Cal. at 59–60. The text of the 1837 law is found in Leon R. Yankwich, "Social Attitudes as Reflected in Early California Law," *Hastings Law Journal* 10, no. 3 (1959), 251–52, citing 1 Cal. 559 (1851). (Not all versions of 1 *California Reports* contain that text.)

'work assiduously for the interior harmony of society' and be an 'organ of the peace of the families and of the public tranquility.' "[44]

When a civil dispute arose, the contending parties were required to appoint *hombres buenos.* These were also respected men, one for each side, who worked initially with the parties and the *alcalde* to try to mediate a resolution of the dispute. If that failed, the parties might be excused from the conversation, and the *alcalde* and *hombres buenos* would continue the mediation.[45]

Conciliation was "a fixed principle under the Mexican law, and in fact of the civil law from which it sprang. . . . [A]lcaldes . . . were the ministers of conciliation."[46] Between 85 percent and 90 percent of the civil cases brought to the *alcalde* were resolved by conciliation.[47]

The California Supreme Court nicely summarized the principles animating this requirement:

> Judges . . . shall discourage litigation, as far as in them lies, by using their endeavors to induce parties to compose their differences voluntarily and in a friendly manner, by refusing legal process in cases of a trivial nature, whenever it can be done without prejudicing the lawful rights of the parties; 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.[48]

There is no doubt that this law was in full force and effect. The general law of nations, respected and applied by the United States Supreme Court, held that the law of a conquered territory persisted until the conqueror

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[44] David J. Langum Sr., *Law and Community on the Mexican California Frontier,* 2nd ed. (Los Californianos, *Antepasados* XIII) (San Diego: Vanard Lithographers, 2006), 133, quoting an 1820 publication by Mexican lawyer Juan M. Barquera.

[45] Langum, *Law and Community*, 98.

[46] Hittell, *History of California,* vol. II, book VII, 777.

[47] Langum, *Law and Community*, 98 ("approached 90%"), 101 ("about 85%").

[48] *Von Schmidt v. Huntington,* 1 Cal. at 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. *Id.* at 60–64.

affirmatively replaced it.[49] Indeed, the California Constitution of 1849 said as much: "All rights, prosecutions, claims and contracts, as well of individuals as of bodies corporate, and all laws in force at the time of the adoption of this constitution, and not inconsistent therewith, until altered or repealed by the legislature, shall continue as if the same had not been adopted."[50]

And lest there be any question about "not inconsistent with," article VI, section 13 provided: "Tribunals for conciliation may be established with such powers and duties as may be prescribed by law; but such tribunals shall have no power to render judgment to be obligatory on the parties, except they voluntarily submit their matter in difference and agree to abide the judgment, or assent thereto in the presence of such tribunal, in such cases as shall be prescribed by law."[51]

In fact, one of the first books published in California was "A Translation and Digest of Such Portion of the Mexican Laws of March 20 and May 23, 1837, as are supposed to be still in force and adapted to the present condition of California, with an introduction and notes."[52] Copies were given to judicial officers in Alta California.[53]

By the time the motion to dismiss was heard, the newly elected California Legislature had not met, and it certainly had not altered or repealed the law requiring conciliation.[54] Thus, defendants were right: plaintiffs

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[49] The American Insurance Company et al. v. 356 Bales of Cotton and David Canter, 26 U.S. (1 Pet.) 511, 542 (1828).

[50] California Constitution of 1849, Schedule (following art. XII), § 1.

[51] One legal scholar observes that this provision is identical to, and likely taken from, the New York Constitution of 1846. Amalia D. Kessler, *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877* (New Haven and London: Yale University Press, 2017), 225. As Kessler suggests, "conciliation court proceedings were well rooted in California at the time of annexation," and it is likely that at least some of the members of the California constitutional convention had the existing conciliation process in mind when adopting that provision.

[52] J. M. Guinn, "Pioneer Courts and Judges of California," *Historical Society of Southern California* 8 (1909–1910): 174. Guinn says it was published in San Francisco early in 1849 and 300 copies were circulated by the military governor of the territory.

[53] Grivas, *Military Governments in California 1846–1850*, 147.

[54] The first legislature convened on December 17, 1849. Herbert C. Jones, "The First Legislature of California," 5, Address before the California Historical Society, San Jose, December 10, 1949, https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1236&context=caldocs_senate.

were obliged to seek to mediate the dispute and present to the trial court a "certificate of failure of conciliation."

THE TRIAL COURT'S RULING ON THE MOTION TO DISMISS

At 9:00 a.m., on Tuesday, December 4, 1849, the attorneys for the parties appeared before Judge Almond and argued the motion to dismiss. Unfortunately, the record of the case is scant. It simply says, "the court hears the argument on the Answer and motion and overrules the same, give defendants till Thursday morning at 10 a.m. to file further answer."

That was it. Judge Almond rejected the argument that plaintiffs were required to mediate their case prior to filing. As to their request for injunctive relief he was undoubtedly right. Mexican law excepted from the rule of *conciliacion* a petition for urgent relief.[55]

But plaintiffs sought more than an injunction. They asked to have their stock restored to them, to have a declaration about the disposition of the company's assets, and to have a receiver appointed. None of those issues was exempt from the *conciliacion* requirement. Was that fine point laid before Judge Almond? Did he stick to his "five-minute rule"?

We cannot know, but it was said that Almond was not an indulgent judge:

> [W]hen he made up his mind, which he often did before he heard any evidence, nothing could change him. He had a sovereign contempt for lawyers' speeches, legal technicalities, learned opinions, and judicial precedents. He had an idea that he could see through a case at a glance, and imagined that he could, with a shake of his head or a wave of his hand, solve questions which would have puzzled a Marshall or a Mansfield.[56]

Even if the judge allowed extended argument, it is not difficult to understand the context in which he considered the case. He had learned law in America — in Missouri. He had been in California only a few months.

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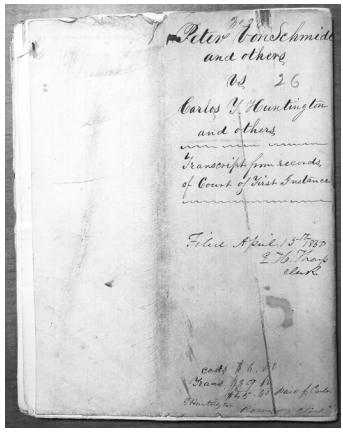
[55] The California Supreme Court acknowledged this. *Von Schmidt v. Huntington,* 1 Cal. at 63–64.

[56] Hittell, *History of California,* 778.

The Mexican concept of conciliation was, quite literally, foreign to him. It may have seemed "un-American." His ruling could have been more the product of simple reflex than studied reflection.

So, the motion to dismiss was denied and the case proceeded. On Saturday, December 8, 1849, defendants filed an extensive, fact-laden answer. They appeared before Judge Almond and swore to the veracity of the facts in their answer.[57]



Records of Court of First Instance.

Courtesy California State Archives, photo Barry Goode.

After two continuances, the case came on for trial on Saturday, January 12, 1850. It appears that the court took no testimony. The record reads simply, "the court hears the argument on bill and answer and takes the case under advisement . . . ."[58] Although Judge Almond originally indicated that he would rule on January 14, 1850, he did not do so until Thursday, January 24, 1850.

In his ruling, Judge Almond gave each side something. He reinstated the four plaintiffs as shareholders. But he ordered that the proceeds be distributed to the labor stockholders as well as the money stockholders. And he appointed defendant, Carlos T. Huntington, as receiver to marshal the company's assets.

Defendants appealed to the newly formed California Supreme Court. It was just the twenty-sixth case filed with the court and the thirteenth decided.

THE FIRST CALIFORNIA SUPREME COURT

The 1849 Constitution created a three-justice Supreme Court. The initial members were chosen by the legislature: Serranus Hastings, Henry Lyons, and Nathaniel Bennett.[59] Each was born and studied law elsewhere in the country; each came for the Gold Rush.

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57 Transcript from Records of Court of First Instance, 16.

58 Ibid.

59 California Constitution of 1849, art. VI, § 3.

Chief Justice Hastings was born in New York, studied law in Indiana and later settled in Iowa. (He served as Chief Justice of Iowa beginning in 1848.) He came to California in mid-1849.[60] Justice Lyons was born in Philadelphia and studied law either there or in Louisiana.[61] Justice Bennett was a native New Yorker who studied law in Cleveland and practiced there and elsewhere in Ohio and New York. He came around the Horn with a mining company, arriving in San Francisco at the end of June 1849. (On the voyage, he learned Spanish, and so, was able to read the Mexican laws at issue in the case.)[62]

Associate Justice Nathaniel Bennett

Courtesy California Judicial Center Library.

All three, like Judge Almond, came from a legal tradition that was very different from the Mexican law that governed the case of the New York Union Mining Company.

Each arrived in California during a difficult political time. The region was still under military law and with an increasing number of Americans pouring into the area, there was considerable agitation for creation of a proper government under recognizable laws.

THE ATTORNEYS

Both sides were well represented. But like the parties and the judges, the attorneys were recent arrivals in California.

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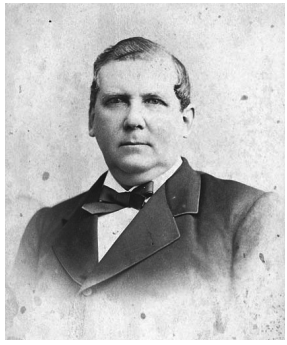
[60] One historian puts his arrival in August 1849. J. Edward Johnson, *History of the Supreme Court Justices of California, 1850–1900* (San Francisco: Bender–Moss Company, 1963), 13–19. A more contemporary source says he arrived on June 20, 1849. Anonymous, *A 'Pile' or A Glance at the Wealth of the Monied Men of San Francisco and Sacramento City, also An Accurate List of the Lawyers, Their Former Places of Residence, and Date of Their Arrival in San Francisco* (San Francisco: Cooke & Lecount, Booksellers, 1851), 13, https://books.google.com/books?id=jcBQAQAAIAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

[61] Ibid., 31–32.

[62] Ibid., 36–38.

Defendants were represented in the trial court and on appeal by John W. Dwinelle.[63] He was born in New York in 1816, the son of a congressman and a descendent of a signer of the Declaration of Independence. He studied law in upstate New York, practiced in Rochester and became a "Master in Chancery and Injunction" before coming to California in 1849.[64] When he died, the San Francisco Bar Association memorialized him, noting: "Although he had already won a reputation, and his future was gilded with the assurance of success, in New York . . . yet he relinquished these advantages to become one of the founders of a great empire in the West. In an eminent degree he was a public man . . . ."[65]

He was fluent in Spanish and learned in Mexican law.[66] Later he would serve as the mayor of Oakland, and as a member of the State Assembly, where, most notably, he carried the legislation that established the University of California. (He served on the founding Board of Regents, and Dwinelle Hall on the Berkeley campus bears his name.) At the time of the *Von Schmidt* case, he was one of the most accomplished attorneys in San Francisco.



Attorney Hall McAllister

Courtesy Bancroft Library, via WikiTree.com.

Plaintiffs were represented (at least on appeal) by Hall McAllister. He was equally distinguished. Born in Savannah, Georgia, in 1800, McAllister attended Princeton University and was admitted to the bar in his hometown at the age of twenty. Within seven years he became the United States attorney for the Southern District of Georgia. He later served as a mayor and state senator and ran for governor

63 The report of the case says that Dwinelle represented plaintiffs. *Von Schmidt v. Huntington,* 1 Cal. at 56. But the record on appeal clearly shows otherwise. Transcript from Records of Court of First Instance, 8. Perhaps the reporter of decisions meant that Dwinelle represented appellants.

64 "The Late Mr. Dwinelle," *New York Times*, February 12, 1881, 8. https://timesmachine.nytimes.com/timesmachine/1881/02/12/issue.html.

65 "Class of 1843; John Whipple Dwinelle," *Hamilton Literary Monthly*, May 1882, 365–66.

66 Ibid., 366.

in 1845.[67] He came to San Francisco during the Gold Rush and soon established himself as one of the leading members of the bar. One notable legal historian says he was "perhaps the greatest California trial lawyer of the nineteenth century."[68]

THE SUPREME COURT'S DECISION

The file in the State Archives does not contain the parties' briefs. But the Supreme Court was well informed about Mexican law. Justice Bennett's printed opinion spends several pages discussing the law of *conciliacion* as it appears in Mexican and Spanish sources.

The court first considered whether Mexican law required conciliation in this case. It examined the Mexican constitution and the statute of 1837 and found both did. Indeed, it traced the requirement of pre-filing mediation back to Spanish law, which applied in Alta California before 1821: "It thus appears to be the policy, not only of the Mexican statute above referred to, but also of the Spanish and Mexican law, in all cases of a civil nature, which are susceptible of being completely terminated by the agreement of the parties, to require conciliatory measures to be tried . . . ."[69]

Next, it considered whether Mexican law provided any exception to that general rule. Had plaintiffs sought only an injunction to stop the auction of the mining company's property, it might not have required conciliation. But since plaintiffs sought additional relief, the court found that conciliation was, indeed, required.[70]

So, the court came to the firm conclusion that Mexican law required pre-filing mediation in this case. Defendants were correct, to that extent.

Having made that determination, the Supreme Court then refused to apply the governing law. Why?

The answer reflects the changing nature of society. During the pastoral days of Alta California, communities were small, and the maintenance of

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[67] "Matthew Hall McAllister," in *Biographical Directory of Federal Judges,"* The Federal Judicial Center, https://www.fjc.gov/history/judges/mcallister-matthew-hall.

[68] Gordon Morris Bakken, *Practicing Law in Frontier California* (Lincoln and London: University of Nebraska Press, 1991), 39.

[69] *Von Schmidt v. Huntington,* 1 Cal. at 61.

[70] *Id*. at 63–64.

harmony among the inhabitants was prized. But Americans — raised in common law states — brought other values with them to California. They did not want to be governed by what a given *alcalde* thought was right or would restore some measure of peace; they wanted predictable laws on which they could rely.

And when commercial disputes arose, they did not want a compromise that delayed payment of a debt, as was often the case. They did not want a mediated resolution that failed to declare who was right and who was wrong. They wanted clarity. They wanted a remedy. They wanted vindication.[71]

This debate was not limited to California. France, Denmark, and Spain all had courts of conciliation, designed to resolve disputes quickly, inexpensively, privately, and without the need for attorneys. Many in America advocated for the adoption of such proceedings. Those advocates were vigorously opposed.[72]

Fundamentally, the debate was between two legal systems. On one side were those who believed that it was beneficial to promote inexpensive and equitable resolutions of disputes on a case-by-case basis via conciliation. They believed it would increase the sense of community and save the polity from the worst excesses of attorneys. On the other side were those who believed an adversarial system, based on a clear set of laws, was more rational and gave predictable results on which people could rely. They believed that system was more suited to Americans' notions of freedom and independence and would promote the economic development of the country.[73]

It is not clear whether Americans in California were aware of this debate in the eastern states, but it is clear that they shared the sentiments of those opposed to courts of conciliation. The new Californians expressed great dissatisfaction with the entire Mexican legal system, particularly during the interregnum which prevailed from 1846 when California was conquered to late 1849 when the first Constitution was adopted.[74]

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71 Langum, *Law and Community*, 138–43.

72 Kessler, *Inventing American Exceptionalism*, 202–05.

73 Ibid., 250–251.

74 Cardinal Goodwin, *The Establishment of State Government in California, 1846–1850* (New York: Macmillan, 1914), 61–70, Samuel H. Willey, *The Transition Period of California from a Province of Mexico in 1846 to a State of the American Union in 1850*

As early as January 1847, newspapers were publishing complaints about *alcalde* rule. In its very first edition, the *California Star* ran a piece entitled "The Laws of California" that opined,

> We hear the enquiry almost every hour during the day "WHAT LAWS ARE WE TO BE GOVERNED BY;" we have invariably told those who put the question to us, "if anybody asks you tell them you don't know" because . . . the same persons would be told at the Alcalde's office or elsewhere that "no particular law is in force in Yerba Buena . . . and that all suits are now decided according to the Alcalde's NOTIONS of justice, without regard to law or the established rules governing courts of equity.". . . [W]e hoped that . . . the citizens [would be] secured and protected in all their rights by a scrupulous adherence on the part of the judges to THE WRITTEN LAW of the Territory. . . .[75]

A short while later, the *California Star* observed, "An efficient, honest and independent judiciary being the great bulwark of the liberties of the people . . . it is of the first importance and demands . . . prompt action. . . . The present system is worse than none — it is worse than anarchy."[76]

Justice Bennett captured this sentiment in his preface to the first volume of *California Reports*: "Before the organization of the State Government, society was in a disorganized state. It can scarcely be said that any laws were in existence further than such as were upheld by custom and tradition."[77]

Mexican law well served the interests of the community that existed in Alta California before 1846. But most Americans who flooded the territory did not appreciate that. The Mexican model was so different from the statutory and common law system with which the Americans were familiar

(San Francisco: The Whitaker and Ray Company, 1901), 70–71, 78–79, Richard R. Powell, *Compromises of Conflicting Claims: A Century of California Law 1760–1860* (Dobbs Ferry, N.Y.: Oceanea Publications, Inc., 1977), 64, 79–80, 127–30; Zoeth Skinner Eldredge, *History of California* (New York: The Century History Company, 1915), vol. 3, 267–68. During this period, California remained under military rule.

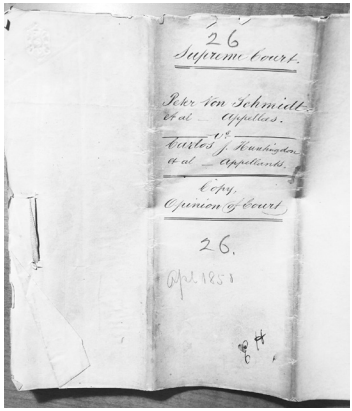
75 "The Laws of California," *California Star*, vol. 1, no. 1, January 9, 1847, 2.

76 "Council–Late Emigrants–Judiciary–Convention," *California Star*, vol. 1, no. 6, February 13, 1847, 2.

77 Nathaniel Bennett, "Preface," 1 Cal. Reports vi.

that it did not even seem to be a system of law. As a result, there was little appetite among the Americans to continue any vestige of Mexican rule.

So, when the justices confronted the Mexican law's requirement of pre-filing mediation they found, "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 . . . ."[78]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Supreme Court.
Peter Von Schmidt et al. Appellees.
vs.
Charles J. Huntington et al. Appellants.
Copy.
Opinion of Court.
26.
April 1851

Supreme Court Opinion, *Von Schmidt v. Huntington*.

Courtesy California State Archives, photo Barry Goode.

The justices understood that the supreme law of the land required the application of Mexican law. But they chose to follow the general sentiment; they chose to follow American — not Mexican — rules.

To give a semblance of authority to their ruling, the justices cited one of the first laws passed by the California Legislature: an act "to supersede certain Courts, and to regulate Appeals therefrom to the Supreme Court."[79] The law was passed two months after the trial court's ruling. And 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."[80]

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."[81]

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78 *Von Schmidt v. Huntington,* 1 Cal. at 64.

79 Stats. 1850, Ch. 23, § 26. The legislature passed the bill on February 28, 1850.

80 *Von Schmidt v. Huntington*, 1 Cal. at 65. Indeed, in a prior case, the court said of that statute, "[i]f its provisions were retroactive in their effect, impairing vested rights, they would be repugnant to the principles of the common and civil law, and void." *Gonzales v. Huntley & Forsyth,* 1 Cal. 32, 33–34 (1850).

81 Cal. Stats. 1850, § 26, ch. 23.

The fundamental purpose of Mexican civil law was to reconcile parties rather than drive them to active litigation. It was to seek to effect an agreeable compromise rather than to perpetuate division. Under this system of law, the "very right and justice of the case" was to harmonize the community. Mexican values reflected a very different role for a judicial system than that which the American justices had learned.

Nonetheless, the Court characterized plaintiffs' non-compliance with pre-trial mediation — a tool that served the fundamental purpose of Mexican civil law — as a mere technical defect.

> [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.[82]

The Court left no doubt of 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.[83]

Having disposed of pre-litigation mediation, the court turned to the merits of the case. It reversed in part and affirmed in part. It held that the three early arrivals had, indeed, forfeited their stock, but that Peter Von Schmidt was entitled to retain his money stock. It ordered the dissolution of the company — even though the plaintiffs had not expressly sought that. It confirmed the appointment of a receiver. But it determined that the proceeds of the company's assets should be distributed among only the money stockholders.

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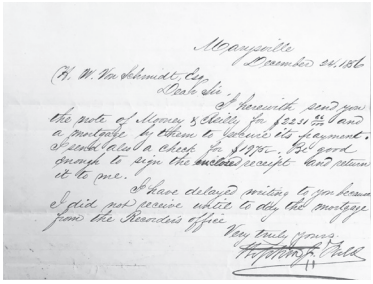
[82] *Von Schmidt v. Huntington*, 1 Cal. at 65.

[83] *Id*. at 66. Judge Yankwich observes that the court was more willing to ignore Mexican procedures than substantive law. Yankwich, "Social Attitudes," 255. That only underscores the fact that the court was honoring some controlling laws and not others at a time it was required to honor all.

THE VON SCHMIDTS IN LATER YEARS

Most of the members of the New York Union Mining company then disappeared from history. However, the Von Schmidt family did not. Peter died in San Francisco in 1855.[84] His sons, Allexey and Julius, continued to live in the Bay Area.

Allexey became quite well known as a surveyor and engineer. In addition to surveying the "Von Schmidt line" and doing considerable work relating to land grant claims, he worked with water companies to serve the needs of San Francisco, conceived a plan to bring water to the city from Lake Tahoe (anticipating by decades the plans of other engineers who sought to tap the Sierra snowpack), and built the first drydock in San Francisco Bay. In 1870, he was hired to blow up Blossom Rock, a hazard to navigation in the Bay. The spectacle attracted much attention and added to his notoriety. He built dredges that were used to create levees in the Delta, and the island of Alameda.[85]



Letter to Allexey Von Schmidt from Stephen J. Field, December 24, 1856, the year before Field was elected to the California Supreme Court.

Courtesy Bancroft Library, photo Barry Goode.

He came to the public's attention again in 1875. He was riding a Wells Fargo stagecoach near Oroville when it was stopped by an armed robber. Allexey jumped down from the coach with his revolver and foiled the robbery, for which he was presented a gold pocket watch by the company.[86]

However, Allexey's relationship with his brother, Julius, was not always happy. That caused him to cross paths with Clara Foltz, the first woman lawyer in California. By the 1880s, Julius had fallen on hard times. He believed Allexey had not shared profits owed to him from patents on and income from the dredges Allexey had invented and operated. He sued Allexey and retained Foltz to represent him. She won in the trial court but lost on appeal.[87]

84 Carle, *Putting California on the Map,* 41.

85 Ibid., *Putting California on the Map, passim.*

86 Ibid., 159–61.

87 Ibid., 155–56; Barbara Babcock, *Woman Lawyer: The Trials of Clara Foltz* (Stanford: Stanford University Press, 2011), 166–67.

A few years later, Allexey and Foltz crossed paths again, this time in a suit involving Allexey's son, Alfred. Allexey had committed Alfred to the Home for Inebriates. Investigations revealed the harsh treatment imposed there, including undue physical restraints. Alfred sued the home for false imprisonment. Allexey was called to testify and stoutly defended his decision to institutionalize Alfred. The jury found for the plaintiff but awarded only one dollar in damages.[88] Still, the publicity afforded the case illustrated both the celebrity that Allexey commanded, and the difficulty of aspects of his domestic situation.

Toward the end of his life, Allexey moved to Alameda and lived with his four orphaned grandchildren, not far from his daughter, Lily. She had married a lawyer named Charles Tilden, who served on the first Board of Directors of the East Bay Regional Park District, and for whom Tilden Park is named.[89] Allexey lived until a month after the San Francisco earthquake and fire, dying on May 26, 1906, at the age of 85.[90]

THE RETURN OF MEDIATION

The Supreme Court said it hoped to dispose of pre-trial mediation "forever."[91] It came close. The court's view prevailed for the remainder of the nineteenth and most of the twentieth century. Although the ruling concerned pre-filing mediation, courts largely refrained from requiring any pre- or post-filing mediation.

But "how people dispute is . . . a function of how (and whether) they relate."[92] And as society changed, so did the way in which people resolved their disputes. In twentieth-century California, the value of court-ordered mediation was first recognized, formally, in the family law context.

In 1939 the Legislature enacted the "California Children's Court of Conciliation Law."[93] It established a "children's court of conciliation," seemingly

88 Babcock, *Woman Lawyer,* 164–68.

89 Carle, *Putting California on the Map,* 175–78; Wikipedia entry for Charles Lee Tilden, https://en.wikipedia.org/wiki/Charles_Lee_Tilden.

90 Carle, *Putting California on the Map,* 178.

91 *Von Schmidt v. Huntington*, 1 Cal. at 66.

92 Jerold S. Auerbach, *Justice Without Law?,* 7.

93 Stats. 1939, Ch. 737. See Family Code Sec. 1800 et seq. which recodified what was originally Code of Civil Procedure Sec. 1730 et seq.

as a part-time assignment for a superior court judge.[94] In larger counties, the judge could be aided by a "director of conciliation" and an investigator.[95]

That statute authorized spouses with minor children to file a "Petition for Conciliation."[96] Once such a petition was filed, the conciliation judge would conduct one or more informal conferences seeking to reconcile the spouses or to reach "an amicable adjustment or settlement."[97] For thirty days after a petition for conciliation was filed, neither spouse could file for divorce, annulment or separation.[98] Remarkably, this law still persists, in substantially the same form.[99] However, it appears that no court in the state maintains a "conciliation court."

Individual judges in some counties found it useful to require mediation of child custody and visitation disputes. By the late 1970s, courts in San Francisco, Sacramento and Los Angeles had made mediation mandatory.[100]

In 1980 California mandated mediation of all child custody disputes.[101] So, whenever custody or visitation is contested, "the court shall set the contested issues for mediation"[102] which shall be held before or on the same date as the court hearing of that dispute.[103]

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94 "The judge . . . shall hold as many sessions of the conciliation court in each week as are necessary for the prompt disposition of the business before the court." Stats. 1939, Ch. 737, § 1, adding Code of Civil Procedure Sec. 1741.

95 Ibid., § 1744.

96 Ibid., § 1760–1772.

97 Ibid., § 1768.

98 Ibid., § 1770.

99 Family Code § 1800 et seq.

100 Michelle Deis, "California's Answer: Mandatory Mediation of Child Custody and Visitation Disputes," *Ohio State Journal on Dispute Resolution* 1 (1985): 155–56, https://kb.osu.edu/bitstream/handle/1811/75845/OSJDR_V1N1_149.pdf. This reflected a national move toward greater use of alternative dispute mechanisms. See generally, Larry Ray and Anne L. Clare, "The Multi-door Courthouse Idea: Building the Courthouse of the Future . . . Today," *Ohio State Journal on Dispute Resolution* 1 (1985): 10–12, https://kb.osu.edu/bitstream/handle/1811/75850/OSJDR_V1N1_007.pdf.

101 Stats. 1980, Ch. 48, § 5, adding Civil Code Sec. 4607.

102 Family Code § 3170(a)(1).

103 Family Code § 3175. The original version of Civil Code Sec. 4607 embraced what is now Family Code sections 3179(a)(1) and 3175 in one sentence: "Where it appears . . . the custody or visitation of a child . . . [is] contested . . . the matter shall be set for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing."

By then, the interest in mediation reached beyond family law. That reflected a larger, national trend toward alternative dispute resolution that began in the 1960s, gained steam in the 1970s, and took serious root in the 1980s.[104]

In 1986 the California 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.[105]

It enacted "The Dispute Resolution Programs Act of 1986."[106] That provided for the establishment of local, informal dispute resolution programs under the oversight of the Department of Consumer Affairs.[107] It also encouraged courts and the Judicial Council to promote alternative dispute resolution techniques.[108]

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104 Jerold Auerbach notes the persistence of mediation and conciliation in various communities in the United States throughout history and a more generalized resurgence starting in 1913. Auerbach, *Justice Without Law?, passim* (reference to 1913, at 97). However, he, too, says the modern renaissance began in the 1960s. Writing in 1983 he notes, "For nearly twenty years the idea of alternative dispute settlement has shimmered elusively like a desert mirage. The first call for its revival arose from the euphoric hope that burst forth during the sixties, when community empowerment became a salient theme of political reform." Ibid., 116. See also Jay Folberg, "A Mediation Overview: History and Dimensions of Practice," *Mediation Quarterly* 1 (September 1983): 5 ("Beginning in the 1960s, American society saw a flowering of interest in alternative forms of dispute settlement."); Eric van Ginkel, "Mediation under National Law: United States of America," *Mediation Committee Newsletter* (August 2005): 43, https://www.mediate.com/globalbusiness/docs/Mediation%20and%20the%20Law%20-%20United%20States.pdf; Harry T. Edwards, "Commentary: Alternative Dispute Resolution: Panacea or Anathema?," *Harvard Law Review* 9 (January 1986): 668.

105 Cal. Bus. & Prof. Code § 465.

106 Stats. 1986, Ch. 1313, amended by Stats. 1987, Ch. 28.

107 Cal. Bus. & Prof. Code § 465 et seq., 16 CCR § 3600 et seq.

108 Cal. Bus. & Prof. Code § 465(d), (f).

Still, by 1993, the Commission on the Future of California Courts found that, despite the utility of mediation, "in California . . . statewide mandates for appropriate dispute resolution are still limited to child custody mediation."[109] It wrote,

> Appropriate dispute resolution is central to providing effective, affordable, satisfying justice to all Californians. . . . For many disputes . . . 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.[110]

Clearly, the pendulum was swinging back. The Legislature made that clear in 1993, when it found and declared,

> The peaceful resolution of disputes in a fair, timely, appropriate, and cost effective manner is an essential function of the judicial branch . . . . Alternative processes for reducing the cost, time, and stress of dispute resolution, such as mediation, have been effectively used in California and elsewhere. . . . It is in the public interest for mediation to be encouraged and used where appropriate by courts.[111]

It further found — implicitly rejecting the notion that animated *Von Schmidt v. Huntington*: "Mediation . . . can have the greatest benefit for the parties in a civil action when used early . . . . Where appropriate, participants in disputes should be encouraged to utilize mediation . . . in the early stages of a civil action."[112]

It established a pilot program for "civil action mediation" in Los Angeles and any other county that chose to participate.[113] It also directed the Judicial Council to establish rules for mediation, which the Council did in

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109 "Justice in the Balance 2020: Report of the Commission on the Future of the California Courts," 1993, https://www.courts.ca.gov/documents/2020.pdf.

110 Ibid., 40 n.2.

111 Cal. Code of Civ. Pro. § 1775(a), (c).

112 Cal. Code of Civ. Pro. § 1775(d).

113 Ibid. In 1992 the Legislature amended the Penal Code to add Section 14150 et seq., authorizing district attorneys to establish "community conflict resolution programs" to provide alternative dispute resolution services, such as mediation and arbitration in cases in which a misdemeanor charge might be brought.

February 1994.[114] Symbolically, the third week of March was designated as "Mediation Week" — a designation that continues even now.[115]

In 1999, the Legislature enacted Code of Civil Procedure Sections 1730–1743 which required the judicial branch to select four superior courts in which to establish pilot civil mediation programs.[116] The law was amended the following year to add a fifth county.[117]

The pilot project was reported to be successful.[118] Effective 2006, the Standards of Judicial Administration were amended to state, "Superior courts should implement mediation programs for civil cases as part of their core operations."[119]

Those steps finally began to give the imprimatur to the alternative dispute resolution procedures with which we are so familiar today.[120] And it took only a century and a half from that initial, mistaken Supreme Court decision.

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114 Cal. Code of Civ. Pro. § 1775.15; California Rules of Court, Rules 3.890 to 3.898 (formerly Rule 1630).

115 Not all do it every year. See, Stats. 1993 Resolution, Chapter 12 (ACR 32)(designating Mediation Week), https://www.courts.ca.gov/documents/medweek_09.pdf (Standing Judicial Council Resolution); Report to Members of the Judicial Council, February 25, 2009, https://www.courts.ca.gov/documents/031209tem5.pdf.

116 Stats. 1999 Ch. 67, § 4.

117 Stats. 2000, Ch. 127, § 3. The five counties were San Diego, Los Angeles, Fresno, Contra Costa, and Sonoma. Administrative Office of the Courts, "Evaluation of the Early Mediation Pilot Programs" February 27, 2004, xix, https://www.courts.ca.gov/documents/empprept.pdf.

118 Ibid.

119 Standards of Judicial Administration, Standard 10.70, effective January 1, 2006.

120 The path has not been without its bends. In *Jeld-Wen, Inc. v. Superior Court*, 146 Cal. App. 4th 536 (2007), the Court of Appeal ruled that a superior court may not compel a party to attend and pay for private mediation over objection in cases in which the amount in controversy does not exceed $50,000. *Id*. at 540; Rules of Court, Rule 2.891(a)(1). Reflecting the shift in favor of mediation, the court wrote, "we suspect that in a large majority of complex cases most parties will agree to private mediation; as such, we foresee no apocalyptic consequences from this decision." *Jeld-Wen, Inc. v. Superior Court*, 146 Cal. App. 4th at 543. Indeed, that has proven to be true.