ARTICLES

PEREZ v. SHARP:

A California Landmark Case that Overturned a Century-Old Ban on Interracial Marriage

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EDITOR'S NOTE

The mission of the California Supreme Court Historical Society includes producing educational programs that benefit both the legal profession and the general public. The following is a preview of a program to be offered online by the Society in fall 2022.

— SELMA MOIDEL SMITH

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WELCOME:

Throughout its history, California has been ethnically and racially diverse. As historian Daniel Walker Howe wrote, "California was the first state to be settled by peoples from all over the world [and] it remains the most ethnically cosmopolitan society in existence today."[1]

Unfortunately, this diversity has not always meant tolerance. California's history has included tragic injustices.

This evening's program involves California's laws that, for a majority of our state's history, barred a person of the white race from marrying a person of another race. Lest we think of these laws as ancient history, perhaps some who are alive today were unable to marry someone they loved because of California's race laws.

In 1948, these laws were invalidated in California. As the Reverend Martin Luther King Jr. said decades later, "[T]he arc of the moral universe is long but it bends toward justice." To be sure, the arc here bent toward justice, but it was not inevitable. It needed individuals, most notably bride Andrea Perez and groom Sylvester Davis, their lawyer Daniel Marshall, and four California Supreme Court justices.

FIRST NARRATOR:

As we have heard, California's history includes both diversity and intolerance.

Before statehood, white miners refused to allow Native Americans to claim mining rights, despite many of the mining districts' being on traditional Native American grounds; instead, Native Americans were forced to perform manual labor on whites' claims. Likewise, Chinese immigrants were excluded from many mining districts. People born in what was then Mexican California — people known as Californios, whose equal rights were written into the 1848 Treaty of Guadalupe Hidalgo ending the U.S.–Mexico War — were subject to violence and discrimination in the mines.

After California was admitted as a state in 1850, racist violence and discrimination continued. Even the ending of the Civil War and the adoption of the Fourteenth Amendment to the U.S. Constitution guaranteeing

[1] Daniel Walker Howe, What Hath God Wrought: The Transformation of America, 1815–1848, 821 (2007).

equal rights to all failed to end the violence and discrimination. The state sanctioned murder of Native Americans, adopted a new Constitution in 1879 to prohibit corporations from hiring Asian employees, barred Asian immigrants from owning agricultural land, authorized public schools segregated by race, and on and on. During World War II, just a few years before California's interracial marriage ban was invalidated, state and local officials successfully urged the federal government to summarily imprison all Californians of Japanese ancestry.

Tonight, we will focus on California's statutes barring people of color and whites from marrying each other.

Laws that require segregation of people of different races, also known as "Jim Crow" laws, were critical for institutionalizing racism in the United States after the Civil War. However, as sociologists have long noted, a system of racial segregation breaks down with mixed-race people. Therefore, fundamental components of racial segregation are prohibitions on interracial marriage — sometimes called anti-miscegenation laws — that seek to prevent mixed-race children from being born. In other words, mixed-marriage bans are a foundation for maintaining segregation.

California was not unique in outlawing marriages between whites and people of color. Laws barring interracial marriages existed in America even before nationhood. In 1664, Maryland barred marriages between whites and Native Americans. In 1691, Virginia enacted a law providing that a marriage between a white person and a "Negro, mulatto, or Indian" was an "abomination." By the early 1700s, most British and French colonies in North America barred marriages between whites and African Americans. After the Revolutionary War, most states enacted similar laws.

California became part of this pattern. Indeed, the very first state legislature in 1850 outlawed marriages between whites and "negroes or mulattoes" and further provided criminal penalties for persons who entered into or solemnized such marriages.

In 1872, the California Legislature eliminated the criminal penalties, but re-enacted the prohibitions. Civil Code Section 60 provided, "All marriages of white persons with negroes or mulattoes are illegal and void." Civil Code Section 69 barred county clerks from issuing licenses for such marriages.

These bars to mixed-race marriages were overwhelmingly popular. A 1958 Gallup Poll showed that 92 percent — *92 percent* (!) — of whites in the western states opposed mixed-race marriages. Even after the civil rights era, a 1968 Gallup Poll revealed that, nationwide, 72 percent of the populace disapproved of mixed-race marriages. This public opinion, in turn, was also important in maintaining the anti-miscegenation structure: statutes prohibited interracial marriages, and the cultural habits reinforced the formal prohibitions.

While California's laws were typical of those in the U.S., it is important to note that the U.S. was nearly alone in this regard. Among the world's nations in the twentieth century, only Nazi Germany and South Africa also barred whites from marrying non-whites.

SECOND NARRATOR:

California's diversity complicated the 1850 marriage prohibitions. Californians were not just Blacks and whites, but also Native Americans and increasing numbers of Asians, Hispanics, Pacific Islanders, and other people of color.

The Legislature in those years was unconcerned about whom nonwhites married, so long as it was not whites. Given these racial and ethnic prejudices, the fundamental question was: who should be barred from marrying whom, or, more particularly, whom may whites marry or not marry, and who may marry whites? The original laws quoted above answered: African Americans and "mulattoes."

In 1880 and 1905, the Legislature further answered this question by amending Sections 69 and 60 to add "Mongolians" to the list of persons whites could not marry.

However, California's diversity was still more complex than this amendment. For example, in 1930s Los Angeles, a man of Filipino ancestry, Salvador Roldan, applied for a license to marry a Caucasian woman. The county clerk refused to issue the license on the ground that Mr. Roldan was "Mongolian," but the L.A. Superior Court ruled that Filipinos were not Mongolian. The county appealed.

In 1933, a California Court of Appeal unanimously ruled in favor of this couple in *Roldan v. Los Angeles County*.[2] The Court of Appeal affirmed that Filipinos were "Malays," not "Mongolians." The court cited ethnographers and lexicographers as showing that, when the Legislature added "Mongolians" to California's laws, Malays were not classified as Mongolians. The court also reviewed California's anti-Chinese political history and concluded that "Mongolian" meant "Chinese." With no law barring Filipinos and whites from marrying, the Court of Appeal ordered the license issued. Three California Supreme Court justices voted to accept the county's further appeal, but lacked the necessary fourth vote.

The state legislature reacted quickly to *Roldan*. The same year, the Legislature amended Sections 60 and 69 to add Malays to the persons whites could not marry. As a result, the laws read, "All marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void."

So matters stood until World War II. During the war, California became a major manufacturing center, especially of ships, planes, and vehicles. Some employers bowed to the heavy demands of wartime production and relaxed their prior practices of racially segregating workforces. As these workplaces became somewhat more integrated during the war, so did employees' social lives.

One of California's major wartime employers was Lockheed Aircraft's Burbank plant, which included what is now Burbank airport. During the war, the plant eventually employed 90,000, including women and persons of color, working around the clock.

Two Lockheed employees, Mexican American Andrea Perez and African American Sylvester Davis met during the war. Let's learn a bit about Ms. Perez and Mr. Davis.

Andrea Perez grew up in a Los Angeles neighborhood then named Dogtown. Dogtown was north of downtown and along the Los Angeles River. It was predominantly working class and Mexican American. Ms. Perez lived with her parents and they all attended a racially mixed Roman Catholic church, St. Patrick's. Ms. Perez worked as a babysitter for another St. Patrick's Catholic family.

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[2] 129 Cal. App. 267, 18 P.2d 706 (1933). The case is in the MCLE materials.

Sylvester Davis also grew up in Los Angeles, near Central Avenue. This neighborhood was one of the few in L.A. where African Americans were allowed to live. He, too, was Roman Catholic.

In 1941, Mr. Davis got a job with Lockheed in Burbank. A year later, after the U.S. went to war, Lockheed began hiring women, and Ms. Perez got a Rosie-the-Riveter job, also at Lockheed's Burbank factory. Mr. Davis helped to orient her, and soon began to drive her to and from the factory. Mr. Davis was drafted into the U.S. Army, served in France, and then returned to Los Angeles.

Ms. Perez and Mr. Davis resumed their friendship, which turned into a romance, and, in 1946, they decided to marry. However, the couple faced two major obstacles to marriage. First, Ms. Perez's parents opposed the marriage on racial grounds; indeed, they refused to speak to her after she and Mr. Davis announced their engagement.

The second major obstacle was California's statutes prohibiting whites from marrying African Americans. It is important to note here that, during this period and dating back to the 1848 treaty ending the U.S.–Mexico war, Hispanics were legally classified as white. Accordingly, the prospective Perez–Davis marriage was squarely barred by Civil Code Sections 60 and 69. This problem was especially acute in Los Angeles, where the head of the county's marriage license bureau bragged of her "sixth sense" in knowing whether each marriage applicant had accurately described his or her "race" on the application form.[3]

Ms. Perez and Mr. Davis could have followed in the footsteps of other mixed-race couples from California: drive two hours south into Mexico, get married there, and return to California, where the marriage would be recognized as valid. Alternatively, if they wanted to marry in the U.S., they could travel to New Mexico — a state without California's prohibitions — and return to California, where, again, the marriage would be recognized.

However, Ms. Perez wanted to be married at St. Patrick's Catholic Church, which she had attended since childhood, so the couple ruled out the Mexico or New Mexico end-runs.

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[3] *Marriage Recorder Uses "Sixth Sense" to Determine Race*, Los Angeles Sentinel 2 (Dec. 23, 1948).

Fortunately, the parents of the children for whom Ms. Perez had babysat years earlier were Daniel and Dorothy Marshall. Daniel Marshall had earned undergraduate and law degrees from Loyola and was a lawyer committed to racial justice. He chaired the small but dedicated Los Angeles Catholic Interracial Council, which met at the same St. Patrick's Catholic Church. By this time, Mr. Marshall had brought cases challenging racial covenants in real property deeds (which contractually barred current and future owners from selling or renting to non-whites). He had also challenged California's laws restricting Asian immigrants' land ownership. In 1947, he was one of the few California lawyers with some experience trying civil rights cases in California courts.

While Mr. Marshall was willing to represent the couple, he faced daunting odds. Courts had long rejected Fourteenth Amendment equal protection challenges to marriage bars, such as California's law. To be sure, the Fourteenth Amendment provides that a state may not "deny to any person within its jurisdiction the equal protection of the laws." However, the United States Supreme Court, in a case titled *Pace v. Alabama*,[4], decided in 1883, had unanimously upheld a state law outlawing — indeed, criminalizing as a felony — marriage or adultery between African Americans and whites.

Moreover, no other civil rights groups — neither the NAACP, ACLU, nor anyone else — would support Mr. Marshall's challenge to California's statutes. Perhaps they believed that any effort to overturn the statutes would be futile, given the unbroken precedents approving the laws. They may also have been worried that challenging the interracial marriage bars (which, as we noted, were very popular) would ignite a firestorm of counterattacks and set back overall progress on civil rights. Indeed, Ms. Perez and Mr. Davis endured volumes of hate mail once their challenge became public.

Likewise, the L.A. Catholic Diocese's leadership refused to get involved in the matter, even though interracial marriage was permitted by church doctrine.

The bottom line was that Mr. Marshall and his five-lawyer law firm were on their own in a case that would be legally difficult and would cause enormous public controversy.

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[4] 106 U.S. 583.

FIRST NARRATOR:

Mr. Marshall made three strategic decisions before Ms. Perez and Mr. Davis applied for a marriage license and filed the challenge to California's statutes. First, he decided to refrain from questioning whether persons of Mexican ancestry — such as Ms. Perez — were properly classified as white under Sections 60 and 69. He wanted to overturn the statutes altogether, not just argue that they were improperly applied to a particular marriage license applicant.

Second, when, as expected, the county clerk's marriage license bureau rejected the Perez–Davis application, Mr. Marshall decided to ask the state Supreme Court to exercise its original jurisdiction over the mandamus petition (which petition was a procedure for challenging such a decision by a public official), skipping the typical Superior Court and intermediate Court of Appeal stages.

Third, in support of the mandamus petition, Mr. Marshall would argue that Ms. Perez and Mr. Davis were being denied their freedom of religion, namely their right to marry within the Catholic Church. This argument, Mr. Marshall hoped, would avoid the numerous, prior judicial decisions rejecting equal protection challenges.

On August 1, 1947, Ms. Perez and Mr. Davis applied for a marriage license. Per the planned strategy, Ms. Perez correctly wrote on the license application that her race was "white," and Mr. Davis wrote that his race was "Negro." As expected, the Los Angeles County Clerk's marriage license bureau rejected the application as violating California law.

One week later, on August 8, 1947, Mr. Marshall filed with the California Supreme Court a petition for writ of mandamus, along with points and authorities and other paperwork, seeking an order that the county clerk issue a marriage license to Ms. Perez and Mr. Davis.

The mandamus petition alleged that petitioners Ms. Perez and Mr. Davis were over twenty-one years old, had valid health certificates, and met all of the other marriage requirements under California law, save that they were of different races and one of them was white. The petition then alleged that the county clerk had refused a license on the basis of the racial differences.

In keeping with Mr. Marshall's strategy, the petition argued that the clerk's refusal violated the petitioners' freedom of religion, in that the

Catholic Church had no rule against interracial marriage and, therefore, Ms. Perez and Mr. Davis qualified for Catholic marriage. The petition further requested that the Supreme Court exercise its original jurisdiction (a) because of the issue's importance and (b) to avoid delay, whether to petitioners or to other mixed-race couples who wished to marry now.

Five days later, on August 13, the Los Angeles County Counsel, on behalf of the respondent county clerk, filed an opposition to the petition. It noted that, as recently as 1941, a District Court of Appeal had upheld California's mixed-marriage ban, and recited a long line of federal and out-of-state decisions that had upheld such bans throughout the U.S.

The county's response to the freedom-of-religion argument was that while Ms. Perez and Mr. Davis may have had the *right* to marry each other in the Catholic Church, Church doctrine did not require them to do so. Therefore, because they had no *duty* to marry outside of their race, a state bar to the marriage therefore did not restrict Ms. Perez and Mr. Davis' freedom of religion. The county cited prior court precedents that upheld state bans on polygamy, ruling that such bans did not violate the freedom of religion of an adherent to the Mormon Church, which at one time permitted its members to have more than one spouse. In sum, the County argued that states have a fundamental authority to regulate marriage and may punish acts that "have a tendency . . . to corrupt the public morals," notwithstanding religious views regarding such acts.

About two months after this initial exchange of pleadings, the California Supreme Court held oral argument in Los Angeles. Based on a transcript of the October 6 oral argument, it appears that Justice Roger Traynor took the lead in questioning the county's counsel. Justice Traynor also wrote the majority opinion in the case.

We will hear more about oral argument and the majority opinion later. But let's pause to learn a little about Justice Traynor, who played a pivotal role in this case, and later earned national renown as chief justice of California.

Roger Traynor was born in Utah in 1900 and, encouraged by a high school teacher, began college at the University of California at Berkeley. He eventually earned bachelor's and master's degrees, and then, in 1927, simultaneously earned a Ph.D. in political science and a law degree. His focus was illustrated by a comment from a law school friend, "You could

see Roger, but you'd have to look at him through his pipe, and he would keep writing or reading at the same time you talked to him."[5]

A few months after graduation, he joined the Berkeley law faculty as a professor, primarily teaching tax law. After taking a leave of absence to help the U.S. Treasury Department draft tax legislation, Professor Traynor returned to UC Berkeley and became acting dean of the law school. In 1940, Professor Traynor, while still at the law school, also worked as a part-time deputy to then California Attorney General Earl Warren.

Later that same year, Professor Traynor was appointed as an associate justice of the California Supreme Court. How he got on the Court was a bit of an accident. The governor wanted to appoint someone else, but when it became clear that his chosen candidate was not going to be approved, he appointed Professor Traynor, who, as a tax expert, was considered uncontroversial. Professor Traynor was promptly approved. In 1964, he became chief justice.

Justice Traynor's work on the Court reflected policy concepts such as equality and fairness, and made enormous advancements in products liability, family law, criminal law, and corporation law. After Chief Justice Traynor retired in 1970, one prominent legal commentator said, "The justice of Traynor will far outlive Traynor, the Justice."[6] He was called "the ablest judge of his generation,"[7] and, after his death, a major news periodical called him "one of the greatest judges who never sat on the U.S. Supreme Court."[8]

SECOND NARRATOR:

During the oral argument in 1947, Justice Traynor asked the county's counsel if the California statutes violated equal protection under the U.S.

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[5] John R. Wierzbicki, *A Lawyer by Accident: Bernie Witkin's Early Life and Career, Part 1*, California Supreme Court Historical Society Review 30 (Fall/Winter 2020) (quoting Bernard Witkin).

[6] Bernard E. Witkin, *Through Bernie's Binoculars*, California Supreme Court Historical Society Newsletter 2, 4 (Spring/Summer 2007).

[7] Henry J. Friendly, *Ablest Judge of His Generation*, 71 Calif. L. Rev. 1039, 1039–40 (1983).

[8] *The Law: A Pioneer Retires*, Time (Jan. 19, 1970), at https://content.time.com/time/subscriber/article/0,33009,878687-2,00.html.

Constitution's Fourteenth Amendment. Counsel replied that the United States Supreme Court had already answered that question in *Pace v. Alabama*.

Justice Traynor then asked questions that had not been briefed by either side. For example, he asked the county's counsel to tell him who is supposed to be considered a "Negro" and who a "mulatto" under the statute? Counsel eventually admitted that he did not know because neither the California Legislature nor California courts had defined the terms. Justice Traynor then pressed him on what percentage African American ancestry would be needed to be considered a mulatto under the statute: One-sixteenth? One thirty-second? One sixty-fourth? Counsel acknowledged that it would have been better if the Legislature had defined the term, but argued that the statute should still not be declared unconstitutional on this ground.

The county's counsel then began to argue in terms that can only be considered racist, even by the standards of the day, based on the same cultural stereotypes that lay behind the ban's enactment. The counsel claimed that the white race is "superior physically and mentally" and that mixed racial offspring have lessened physical and mental vitality." Justice Traynor asked, "Are there medical men in this country who say such a thing?" The answer by the county's counsel referenced African Americans' likelihood of having sickle-cell anemia.

Perhaps the strongest legal argument of the county's counsel was that, even if experts disagreed on these racist theories, enough evidence — in our modern vocabulary, a "rational basis" — existed for the Legislature to have discretion to make political decisions that courts should not second-guess.

Justice Traynor next asked if the resulting California legislation was a "carfare statute," in that couples could avoid the statute — and its purported bases such as social harmony and single-race children — by simply travelling a few hours to another jurisdiction. The county's counsel acknowledged the point.

On the same day as the oral argument, the county submitted a 121-page supplemental brief that elaborated on its oral arguments. The county reargued its racist biological theories. It claimed that eliminating the ban would further "racial intermingling," which would create "antagonisms and hatreds" between the races. According to the county, these problems would be exacerbated with the increased numbers of African Americans in

California, whose population had doubled since 1940. In light of the threat of racial conflict, according to the county, separation enforced through the marriage ban was vital to maintain social harmony.

Petitioners' counsel Mr. Marshall replied to this 121-page brief the following month with a brief half as long. This reply largely abandoned the freedom-of-religion argument and instead focused on the equal protection issues that Justice Traynor had raised in oral argument. In short, Mr. Marshall did what good trial lawyers do: he paid close attention during the oral argument to the areas in which the judge was interested and was flexible enough to shift his later arguments to focus on those considerations.

Mr. Marshall replied to the county's biological and sociological theories by noting that the California statutes are arbitrary in that they bar only some mixed-race marriages — that is marriages between whites and certain other races — but allow Native Americans to marry anyone (including whites) and allow all other races to marry each other. As for the county's concern about increased numbers of African Americans in California, Mr. Marshall's reply brief explained the positive reason for the increase: African Americans had been recruited into California to work in war industries.

Still, Mr. Marshall's reply brief had to address some difficult legal issues. As for the county's argument that valid bans on polygamy were analogous to bans on mixed marriages, Mr. Marshall wrote that polygamy is outlawed by the "universal judgment of civilized mankind," while anti-miscegenation laws at that time existed only in the U.S.

As for the numerous precedents upholding mixed-marriage bans, Mr. Marshall argued that they were based on outdated and discredited views. He questioned how a California public servant, such as the County Counsel, could possibly espouse white supremacy. When the *Los Angeles Sentinel*, a local African-American newspaper, saw the County Counsel's brief embracing the notion that whites were superior to all others, it was outraged and demanded that the County Board of Supervisors investigate the County Counsel. The board tabled the matter, and no action was ever taken.

Finally, Mr. Marshall addressed the "rational basis" argument made by the county's counsel, that the Legislature has discretion to make policy decisions and could, even if evidence is conflicting, rationally choose to enact a racial ban. He argued that the ban was not rational: that race is a

"hallucination" and that "potentially" weak offspring of mixed marriages and racial "tensions" are insufficient biological and sociological considerations, respectively, to deny the fundamental right of marriage.

FIRST NARRATOR:

For nearly a year after oral argument, no word was heard from the Court. Then, on October 1, 1948, the California Supreme Court ruled four-to-three to invalidate Civil Code Sections 60 and 69. The racial marriage ban was no more.[9] Justice Traynor wrote the majority opinion that the statutes violated equal protection under the U.S. Constitution's Fourteenth Amendment. In so doing, he ignored the county's argument that, traditionally, states had been accorded primacy in regulating marriage. Justice Traynor also largely ignored Ms. Perez and Mr. Sylvester's position that California law infringed on their religion.

Instead, Justice Traynor began by questioning whether a state may restrict individuals "on the basis of race alone" without violating the Fourteenth Amendment's guarantee of equal protection. He then noted that the right to marry someone of one's own choice is "fundamental" and one of the "basic rights of man." Only a "clear and present peril" and the "most exceptional circumstances" should allow race to affect fundamental rights.

Justice Traynor next began an implicit assault on separate but equal, which was still the law of the land. Under his modern view, equal protection applied to individuals, not racial groups. Equal protection is not achieved "through indiscriminate imposition of inequalities," and any racial classifications "must be viewed with great suspicion."

With this new framework, Justice Traynor opined that the Legislature's only purpose in enacting the marriage bans was to prevent "contamination" of the white race. His majority opinion rejected this purpose. The majority opinion added that the laws led to absurdities, especially as applied to persons of mixed ancestry. Did race depend on "physical appearance" or "genealogical research"? The statues did not say, and the opinion continued:

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[9] 32 Cal. 2d 711. The complete case with the majority, concurring, and dissenting opinions is in the MCLE materials.

> If the physical appearance . . . is to be the test, the statute would have to be applied on the basis of subjective impressions . . . . Persons having the same parents and consequently the same hereditary background could be classified differently. On the other hand, if the application of the statute to persons of mixed ancestry is to be based on genealogical research, the question immediately arises what proportions of . . . ancestors govern the applicability of the statute.

Justice Traynor's majority opinion continued by emphasizing some of the statute's "absurd results" in a multi-racial state:

> [A] person with three-sixteenths Malay ancestry might have many so-called Malay characteristics and yet be considered a white person in terms of his preponderantly white ancestry. Such a person might easily find himself in a dilemma, for if he were regarded as a white person under Section 60 he would be forbidden to marry a Malay, and yet his Malay characteristics might effectively preclude his marriage to another white person.

Indeed, Justice Traynor's opinion implicitly questioned the validity of any racial classifications:

> [T]he Legislature has adopted one of the many systems classifying persons on the basis of race. Racial classifications that have been made in the past vary as to the number of divisions and the features regarded as distinguishing . . . each division. The number of races distinguished by systems of classification "varies from three or four to thirty-four."

But what about the United States Supreme Court decision in *Pace v. Alabama*? After all, that decision said, as the county's counsel argued, that such interracial marriage bans did not violate equal protection. How could the California Supreme Court now say that a ban did violate equal protection? Justice Traynor's opinion tried to find a way around it. In *Pace*, while the relevant statute barred interracial marriage and sexual relations, the actual conduct for which the parties were convicted was not marriage, but only "adultery and non-marital intercourse" between people of different races. Because *Pace* did not directly involve marriage, its holding regarding

a marriage ban was dictum, meaning that it did not have to be followed by the California Supreme Court.

Two justices wrote separate concurrences. Justice Jesse Carter quoted the Declaration of Independence, federal Constitution, and then-recent United Nations Charter to the effect that "the matter of race equality should be a settled issue." He also noted that men had died fighting the Civil War to bring about racial equality. Justice Carter then expressly raised World War II's lessons. He quoted Adolf Hitler's book, *Mein Kampf*, which formed a basis for Nazi ideology and warned Germans of the dangers of "blood-mixing" and of the importance of racial purity. Carter then wrote that such views were from "a madman, a rabble-rouser, a mass-murderer . . . . Let us not forget that this was the man who plunged the world into a war in which, for the third time, Americans fought, bled, and died for the truth of the proposition that all men are created equal." Justice Carter's concurrence also included an acute analysis of the U.S. Supreme Court's infamous 1896 *Plessy v. Ferguson* decision, which was the legal foundation for separate-but-equal Jim Crow laws. Justice Carter noted that *Plessy*, even accepting it at face value, required that the laws be "reasonable," and reasonableness may change over time.

Justice Douglas Edmonds' separate concurrence emphasized the original petition's freedom-of-religion argument.

The dissent stated that (a) traditionally, states had primacy in regulating marriage, (b) 30 of the then 48 states had laws barring whites from marrying people of color, and (c) all such laws had been upheld by an "unbroken line" of federal and state courts. The dissent added that racial "amalgamation" proponents should seek redress from the Legislature, rather than from the courts.

Two weeks after the decision, the county petitioned the California Supreme Court for a rehearing. The petition by the County Counsel reprised his earlier arguments, but added two new ones. First, it argued that the statutes' imprecise language — such as how does a clerk determine who is "Mongolian?" — did not invalidate the statutes. Its application in this case was straightforward: on the original marriage license application, Ms. Perez identified herself as "white," and Mr. Davis identified himself as "Negro." The only thing required of the clerk was to apply the law.

Second, the county's petition downplayed the majority opinion's criticism of the arbitrariness of Civil Code Sections 60 and 69. According to

the county's counsel, California was "predominantly white," and therefore the Legislature could rationally choose to allow whites to protect themselves as the "numerically prevailing race."

Mr. Marshall opposed the petition for rehearing. His opposition included a reference to the new U.S. Supreme Court decision in *Shelley v. Kraemer*,[10] which barred states from enforcing racial covenants in real property deeds. Mr. Marshall argued in favor of extending *Shelley v. Kraemer* by suggesting that any racial classifications are unconstitutional per se.

On October 28, 1948, the California Supreme Court denied the petition for rehearing by the same four-to-three vote as in the original decision. The Los Angeles County Board of Supervisors considered asking the U.S. Supreme Court to hear the case, but failed to do so. Thus, the California Supreme Court's *Perez v. Sharp* decision became final.

SECOND NARRATOR:

By this decision, California became the first state to strike down interracial marriage restrictions as violating the federal constitutional right to equal protection. Although a few states had repealed their restrictions by legislation, these could be reenacted at any time. The California case was important because it declared that such bans violated a fundamental right and therefore a new ban could not be enacted.

Newspapers gave the decision prominent coverage. The next day, the *Los Angeles Times* ran a story headlined, "State High Court Rules Out Race as Barrier to Marriage," with a sub-headline that the decision was "close." Statewide coverage was similar. The October 1, 1948 *Oakland Tribune* had a page-1 headline, "Interracial Marriages Ruled Legal." The *Bakersfield Californian*'s banner headline was "MIXED MARRIAGE BAN HELD ILLEGAL." National newspapers, such as the *New York Times*, and foreign newspapers, such as Australia's *Sydney Daily Telegraph*, reported on the decision.

Legal scholars across America also noted the decision. The *Harvard Law Review*'s December 1948 issue reported on *Perez v. Sharp*. The inaugural issue of the *Stanford Law Review* also reported on it. In 1950, the *Yale*

[10] 334 U.S. 1 (1948).

Law Journal speculated whether, under *Perez v. Sharp*, states would be able to continue their long-standing practice of requiring that adoptive parents be of the same race as their adopted children.

It is worth thinking about *Perez v. Sharp*'s broad importance, especially for its time. In 1948, separate-but-equal was still the law of the land; *Brown v. Board of Education* would be decided six years later and could hardly be imagined in 1948. Even after Nazi theories of racial superiority rose and fell in Germany during World War II, postwar California still had segregated public schools, still enforced racial covenants in property deeds, still barred Asian immigrants from owning agricultural land and having commercial fishing permits, and on and on. The *Perez v. Sharp* majority's willingness during this era to question the very notion of racial classifications and to invalidate the foundation of segregation — namely mixed-marriage bans — deserves our respect and thanks 74 years later.

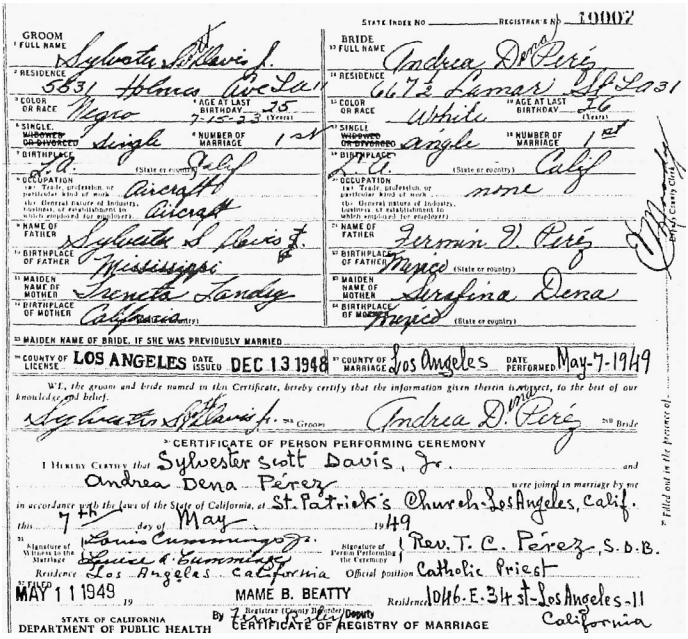
In sum, *Perez v. Sharp* was an early foundation of our modern theory of civil rights.

The immediate real-life impact of the decision, however, was simultaneously uplifting, disheartening, and uneven. The L.A. County Clerk's marriage license bureau refused to issue licenses to mixed-race couples even after *Perez v. Sharp*, until the county counsel stepped in and ordered the bureau to do so. Even then, the bureau continued for a time to require couples' races on the applications.

Across the nation, U.S. Army and Navy veterans returned after their World War II or Korean War service with Asian fiancées or wives. Eventually, over 10,000 veterans — three-quarters of them white — married foreign-born Asian women.

On the international stage, the United Nations' Economic and Social Council in Switzerland, a month before the 1948 California Supreme Court ruling, had condemned racial restrictions on marriage.

Some civil rights advocates hoped that these demographic and social trends, along with some early civil rights case law, would result in the U.S. Supreme Court following *Perez v. Sharp* and invalidating mixed-marriage bans across the nation. The Court, however, repeatedly ducked mixed-marriage cases. Now-opened U.S. Supreme Court archives suggest that the Court was unwilling to take the political heat from a nationwide invalidation.



STATE INDEX NO. _____ REGISTRAR'S NO. 19007

GROOM
1 FULL NAME: Sylvester Scott Davis Jr.
2 RESIDENCE: 5831 Homer Ave La
3 COLOR OR RACE: Negro
4 AGE AT LAST BIRTHDAY: 25 (Years) 7-15-23
5 SINGLE, WIDOWED, OR DIVORCED: Single
6 NUMBER OF MARRIAGE: 1st
7 BIRTHPLACE: Ala. (State or country)
8 OCCUPATION (a) Trade, profession, or particular kind of work: Aircraft
(b) General nature of industry, business, or establishment in which employed (or employer): Aircraft
9 NAME OF FATHER: Sylvester S. Davis Jr.
10 BIRTHPLACE OF FATHER: Mississippi
11 MAIDEN NAME OF MOTHER: Senecta Landy
12 BIRTHPLACE OF MOTHER: California (State or country)

BRIDE
13 FULL NAME: Andrea Dena Pérez
14 RESIDENCE: 6672 Lemari Ave La 31
15 COLOR OR RACE: White
16 AGE AT LAST BIRTHDAY: 16 (Years)
17 SINGLE, WIDOWED, OR DIVORCED: single
18 NUMBER OF MARRIAGE: 1st
19 BIRTHPLACE: Calif. (State or country)
20 OCCUPATION (a) Trade, profession, or particular kind of work: none
(b) General nature of industry, business, or establishment in which employed (or employer):
21 NAME OF FATHER: Jermin D. Pérez
22 BIRTHPLACE OF FATHER: Mexico (State or country)
23 MAIDEN NAME OF MOTHER: Serafina Dena
24 BIRTHPLACE OF MOTHER: Mexico (State or country)

25 MAIDEN NAME OF BRIDE, IF SHE WAS PREVIOUSLY MARRIED: _____

26 COUNTY OF LICENSE: LOS ANGELES DATE ISSUED: DEC 13 1948
27 COUNTY OF MARRIAGE: Los Angeles DATE PERFORMED: May-7-1949

WE, the groom and bride named in this Certificate, hereby certify that the information given therein is correct, to the best of our knowledge and belief.

Sylvester Scott Davis Jr. 28 Groom — Andrea D. Pérez 28a Bride

* CERTIFICATE OF PERSON PERFORMING CEREMONY

I HEREBY CERTIFY that Sylvester Scott Davis, Jr. and Andrea Dena Pérez were joined in marriage by me in accordance with the laws of the State of California, at St. Patrick's Church-Los Angeles, Calif. this 7th day of May, 1949

31 Signature of Witness to the Marriage: Louis Cummings Jr.
Residence: Los Angeles California
Signature of Person Performing the Ceremony: Rev. T. C. Pérez S.D.B.
Official position: Catholic Priest

32 FILED MAY 1 1 1949 19
By MAME B. BEATTY Registrar (County Recorder) Deputy
Residence: 1046 E. 34 st. Los Angeles 11 California

STATE OF CALIFORNIA
DEPARTMENT OF PUBLIC HEALTH
CERTIFICATE OF REGISTRY OF MARRIAGE

* Filled out in the presence of: _____

Marriage Certificate of Andrea Perez and Sylvester Davis, married May 7, 1949, in Los Angeles.

Certified copy, Los Angeles County Registrar-Recorder/Clerk.

Similarly, the U.S. Department of Justice refused to file amicus briefs in any federal courts regarding mixed-marriage bans during this time. Even the NAACP as late as 1955 avoided involvement, stating that it took "no position" on race-based marriage restrictions.

It took nearly two decades for the U.S. Supreme Court to invalidate all bans against interracial marriage, which it did in its 1967 decision, *Loving v. Virginia*.[11]

But *Perez v. Sharp*'s legacy did not end there. In 2008, nearly 60 years after Justice Traynor wrote his farsighted opinion, the California Supreme Court repeatedly cited it to strike down California's statutory ban on same-sex marriage in *In re Marriage Cases*.[12] There, *Perez v. Sharp* was cited not so much for its legal reasoning, but for its general historical lesson: long-standing marriage prohibitions — whether interracial or same-sex — may be overturned without catastrophic results. As the *Marriage Cases* held,

11 388 U.S. 1.

12 43 Cal. 4th 757.

"[H]istory alone is not invariably an appropriate guide for determining the meaning and scope of this fundamental constitutional guarantee [of marriage]. The decision in *Perez*, although rendered by a deeply divided Court, is a judicial opinion whose legitimacy and constitutional soundness are by now universally recognized." It is a tribute to Justice Traynor's pioneering majority opinion in *Perez v. Sharp* that, today, we find it hard to imagine racial restrictions on marriage. Indeed, a 2021 Gallup Poll found that 97 percent of Americans in western states now approve of interracial marriage.

FIRST NARRATOR:

As for our story's individual heroes, Andrea Perez and Sylvester Davis finally received their L.A. County marriage license in December 1948. They were married at Ms. Perez's childhood Catholic church on May 7, 1949. Ms. Perez's parents refused to attend, but later reconciled to the couple when their children were born. Mr. Davis used his G.I. Bill benefits to buy a house in the segregated Joe Louis housing tract in Pacoima, California, in L.A.'s San Fernando Valley, where they raised their family. Their marriage lasted for over fifty years, until Ms. Perez's death in 2000. The couple never sought to publicize their legal journey; instead, they viewed their marriage as private and lived quietly.

Justice Roger Traynor was elevated to chief justice in 1964 and served with national distinction until his retirement in 1970. He died in 1983, in Berkeley, California where he lived most of his life.

Our final hero, lawyer Daniel Marshall, continued his civil rights work and civil liberties work, and the Southern California ACLU honored him for his *Perez v. Sharp* advocacy in 1948. However, Mr. Marshall suffered during the McCarthy era. The Roman Catholic Diocese dissolved the Los Angeles Catholic Interracial Council that Mr. Marshall had chaired. His representation of alleged Communists, including teachers who were fired or threatened with firing for communist affiliations, led to his being accused of communist associations. His firm expelled him, and he struggled to earn a living. He died largely forgotten in 1966. Let us remember him now.

We now invite questions from our audience.

★ ★ ★

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

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

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).

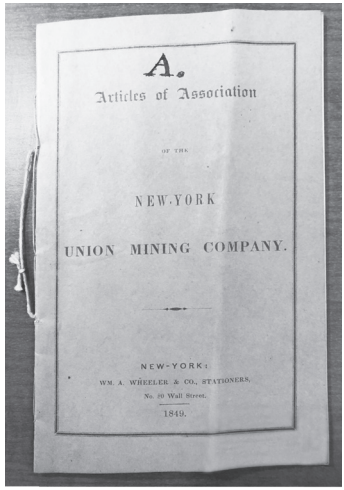
California Reports — on just page 55. However, the court's mistake, unlike Von Schmidt's, has taken more than one hundred and fifty years to correct.

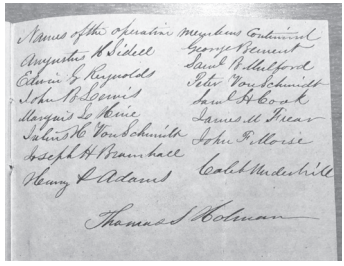
The case — only the thirteenth decided by the founding justices — was a relatively simple commercial dispute involving twenty-nine New Yorkers who came to San Francisco in 1849, hoping to find gold.

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.

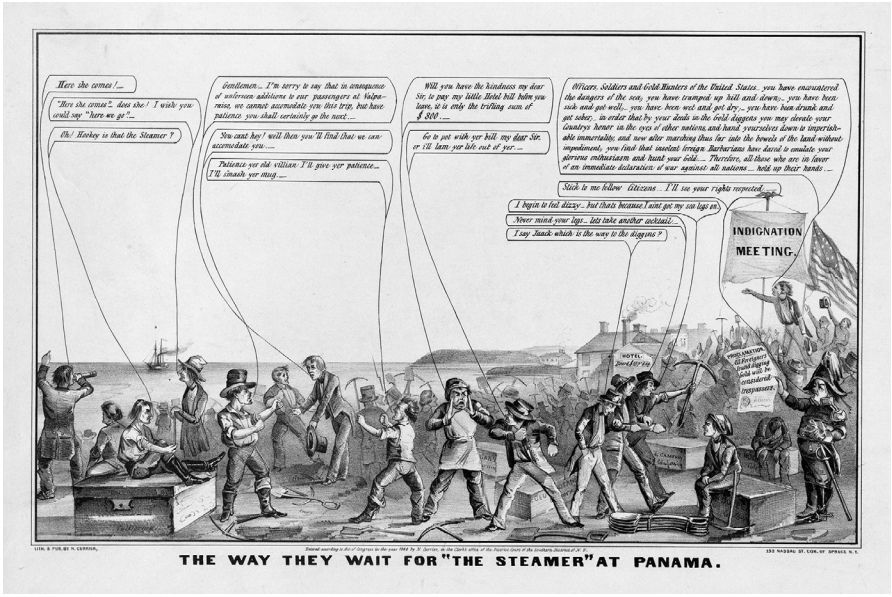

Illustration: The way they wait for "the steamer" at Panama.
Lith. & Pub. by N. Currier, Courtesy Library of Congress.

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.

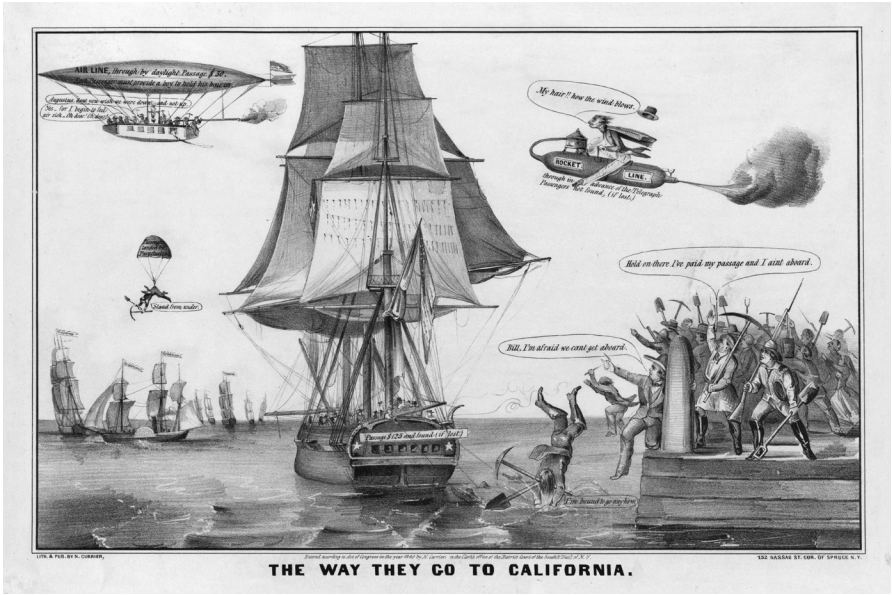

Illustration: The way they go to California.
Lith. & Pub. by N. Currier, Courtesy Library of Congress.

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,

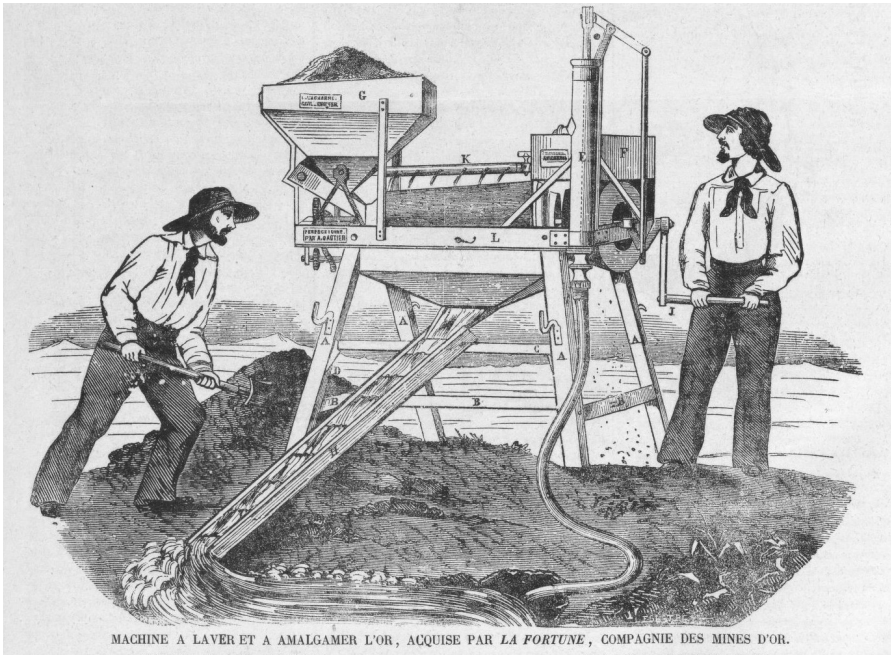


Illustration of a gold washing machine in California.
Le Charivari *magazine, Paris, June 25, 1850.*

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.

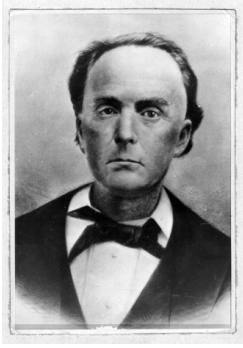
such an organization as is prescribed by these articles of association, appears to us to be an impracticability and a delusion . . . ."[27])

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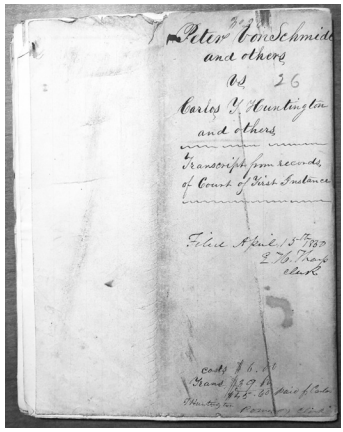
[55] The California Supreme Court acknowledged this. *Von Schmidt v. Huntington,* 1 Cal. at 63–64.

[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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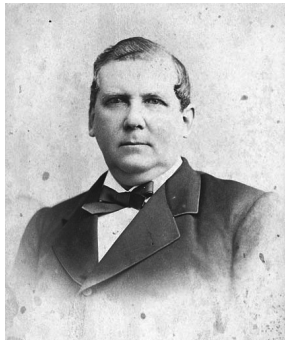
[60] One historian puts his arrival in August 1849. J. Edward Johnson, *History of the Supreme Court Justices of California, 1850–1900* (San Francisco: Bender–Moss Company, 1963), 13–19. A more contemporary source says he arrived on June 20, 1849. Anonymous, *A 'Pile' or A Glance at the Wealth of the 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.

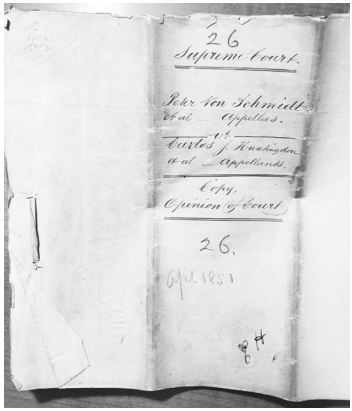
75 "The Laws of California," *California Star*, vol. 1, no. 1, January 9, 1847, 2.

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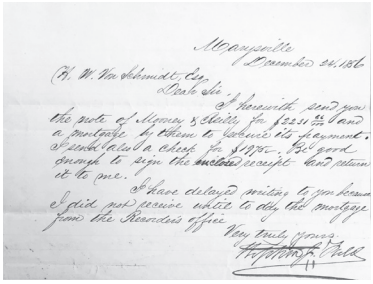
[82] *Von Schmidt v. Huntington*, 1 Cal. at 65.

[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.

* * *

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.

LEGAL HISTORY TREASURES IN THE CALIFORNIA STATE LIBRARY

GREG LUCAS, MICHAEL McCURDY & ELENA SMITH*

One of the first acts of the Legislature in 1850 was to create the California State Library. Over the past 172 years, the library has grown into an eclectic mix of physical and digital materials that includes millions of books and photographs as well as Gold Rush–era maps, suffragists' diaries, immigration logs, paintings, and posters.

Here's what eclectic means: One of the 232 known Shakespeare First Folios and the campaign materials from actor Gary Coleman's mercifully unsuccessful run for governor in 2003. Lawbooks, in Latin, from the 1500s and the moustache of Tiburcio Vasquez, an infamous thief hanged in 1875. The personal diary of the leader of the first wagon train into California in 1841 and more than 100 Family Dog posters of '60s San Francisco rock concerts.

There are stories of innovation, compassion, injustice and grit. Some well known, others obscure. Stories that describe who and what California is, has been and will become.

* Greg Lucas is California's twenty-fifth State Librarian. Michael McCurdy is a reference librarian in the Witkin Law Library. Elena Smith is a reference librarian in the California History Section of the State Library.

Some of the State Library's greatest treasures can be found at its one branch, the Sutro Library,[1] located on the top floor of the undergraduate library of San Francisco State University.

Besides the First Folio, Sutro is home to more than 90,000 rare books, photographs, pamphlets and manuscripts including one of only two known copies of the *Ordenanzas y Compilación de Leyes,* the Western Hemisphere's first lawbook, published in 1548 in Mexico City.

One of the characteristics that sets Sutro and the State Library apart from other research libraries is access. The materials in the State Library's care are owned by 39 million Californians. And if one of the owners comes to Sutro asking to see their lawbook or avail themselves of some Falstaffian wit, it's the State Library's pleasure to facilitate the request.

That said, a librarian will likely hover protectively. And nobody is going to be taking home the First Folio or the *Compilación de Leyes* — even if Dante's Inferno freezes over.

The State Library also stores and organizes federal and state publications, is home to the Bernard E. Witkin Law Library, and serves as the lead state agency for library-related services throughout California.

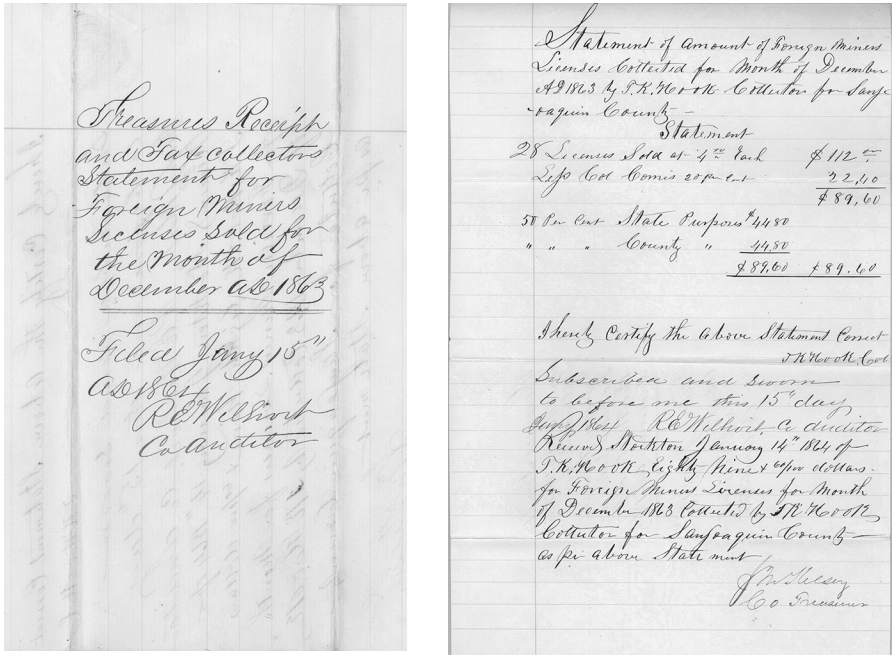
This kind of wide and often deep collection fosters a unique synergy in exploring California. For example:

In the first year of California's statehood, lawmakers and the governor enacted a Foreign Miners Tax, levying $20 a month on any "foreigner" engaged in mining. The measure was aimed at discouraging Chinese and Latino miners but also was imposed on European miners as well. Those immigrant miners who stayed, protested the measure and the tax was subsequently reduced to $4 a month and imposed primarily on Chinese immigrants.

In the State Library's California History collection, there is a Chinese translation of the ($4-per-month) 1852 Act and some receipt stubs issued to miners. One receipt, from the initial miner's tax, was issued to a German miner, reflecting his $20 payment. A later receipt lacks a name and simply states that the bearer had paid $4 — the fee Chinese miners had to shoulder after the 1852 tax renewal.

Speeches from lawmakers and the governor defending the tax are available, as are revenue records. For example, San Joaquin County's ledgers

[1] https://www.library.ca.gov/Sutro/Collection.



Treasurers Receipt and Tax collectors Statement for Foreign Miners Licenses Sold for the Month of December AD 1863

Filed Jany 15th AD 1864 R C Wilhoit Co Auditor

Statement of Amount of Foreign Miners Licenses Collected for Month of December AD 1863 by T. K. Hoover Collector for San Joaquin County

Statement

28 Licenses Sold at $4.00 Each $112.00
Less Col Comis 20 per ct 22.40
$89.60

50 Per Cent State Purposes $44.80
" " " County " 44.80
$89.60 $89.60

I hereby Certify the Above Statement Correct T. K. Hoover Col

Subscribed and Sworn to before me this 15th day Jany 1864 R C Wilhoit Co Auditor

Received Stockton January 14th 1864 of T. K. Hoover Eighty Nine & 60/100 dollars for Foreign Miners Licenses for Month of December 1863 Collected by T. K. Hoover Collector for San Joaquin County as per above Statement

J. M. Hussey Co Treasurer

San Joaquin County. "Treasurer's Receipt and Tax Collector's Statement for Foreign Miner's Licenses Sold for the Month of December AD 1863." January 15, 1864.

From the Foreign Miners Tax Documents. Box 3481, Manila Envelope. Courtesy California State Library.

from the mid-1850s lay out how much revenue the tax brought in and how the county divided this income with the state. Placer County's ledger for October 1861 shows the foreign miner's tax yielded $30,000 in revenue — 7,500 payments of $4. The revenue from the tax represented approximately one-third of the taxes and fees recorded in this ledger for that year.

More broadly, there is also a research guide to the resources the State Library has relating to mining in general in California.[2]

At the law library there is an 1864 compilation of the statutes of California and the Nevada Territory relating to mining corporations, canal companies, assessments, mining partnerships, mineral lands and actions respecting mining claims, taxation and foreign miners.

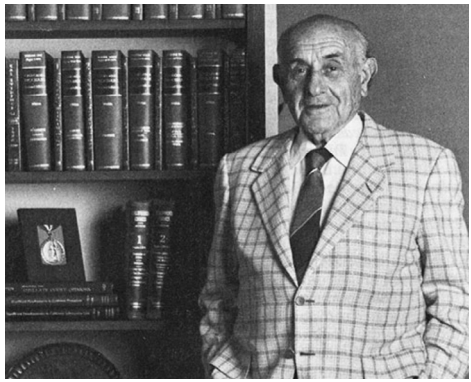
[2] https://www.library.ca.gov/wp-content/uploads/2021/08/MiningResearch.pdf.

The first compilation was followed by a subsequent volume in 1866 that includes a discussion of water rights.

A similar compendium of Spanish and Mexican law relating to mines and title to real estate, a thorny legal issue in California's early statehood, is also available.

WHAT'S AT THE WITKIN?

Although it holds an extensive collection of photos showing Bernie Witkin on both public and private occasions.[3] the Witkin Law Library's focus is historical California legal and regulatory research. To better place California in perspective, the Witkin Library includes statutory and judicial law from all fifty states and U.S. territories as well as federal and international specialties. Building upon an expansive collection of primary sources, secondary sources include historical court rules and treatises.



Witkin never tired of working, and continuously edited his books throughout his life. Former State Bar President Seth Hufstedler recounts that Witkin said, "I'm 80 this year. I've been thinking for some time that my books need rewriting . . . and I'm going to rewrite all of my books in the next five years" (and he did).

Witkin Law Library, Courtesy California State Library.

[3] The law library's namesake, Bernard Ernest Witkin is widely known for his foundational works on California law, which include the Treatises on Civil Procedure, Evidence, and Criminal Law, the original California Rules on Appeal, the California Style Manual, and the Manual on Appellate Court Opinions, as well as his philanthropic work in creating the Foundation for Judicial Education which provides continuing education to California judges. Bernie became the preeminent scholar of California law and created an entirely new standard for legal education and judicial ethics in California. *Bernard E. Witkin Biography*, California State Library, https://library.ca.gov/law/witkin (last visited August 15, 2022).

To honor Bernie's impact on California's legal system, the state legislature passed Education Code Section 19328 in 1997 and renamed the State Law Library as the "Bernard E. Witkin State Law Library of California." At the dedication ceremony in 1998, his portrait was officially unveiled and now hangs in the library.

More and more of the Witkin's resources are available online. Various research tools and guides can be found on the law library's homepage.[4] A particularly useful tool is a statute-to-bill number database[5] to assist researchers in locating a statute's legislative bill number, which differs from the measure's "chapter" number. The interactive tool contains information regarding California statutes and their corresponding bill numbers dating back to 1865. Given the time-savings this provides, it is puzzling that no one had created this already.

Elsewhere at the Witkin Library are:

California Supreme Court and Appellate Court Briefs

The collection of briefs at the Witkin Library is nearly complete. It is so extensive that not all can be housed on-site. Published opinions of these two courts are available online but briefs are not. For the Supreme Court, briefs date to 1863. Court of Appeal briefs date to the start of that court in 1904.

Senate and Assembly Bills

The law library has a nearly complete collection of legislative bills from 1867 forward and virtually all versions of legislation from 1876 to the present. The State Library is working to fill the collection's holes. Bill books contain all versions of a bill from its introduction through when it was either chaptered or last amended. Trying to establish legislative intent? This collection shows how the language of a bill changes between floor readings, helping to decipher what the authors did — and didn't — intend to do.

A different perspective can be found in the California History section by examining, for example, the Commonwealth Club of California's journal, *Commonwealth*. Running from 1903–1988, *Commonwealth* and its sister publication, *Transactions*, analyze a cornucopia of state and federal issues, from treaties to state highways to fire insurance rates. Often, the Commonwealth Club invited government representatives to speak at their meetings, and those speeches are also recorded in these two periodicals.

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[4] https://www.library.ca.gov/law.

[5] https://www.library.ca.gov/law/ca-statutes.

California Codes

Editions of the California Codes go back to 1872. There are copies of the original Code of Civil Procedure, the Civil Code, the Penal Code, and the Political Code. These code books provide enactment dates, notes to relevant court decisions, and complete citations of the code history to aid in legislative intent research.

California Code of Regulations (1945–date)

Laws beget regulations and one can no longer be considered without an understanding of the other. This collection contains all the administrative regulations of California state agencies adopted pursuant to the Administrative Procedure Act, dating to 1945.

California Building Standards Code

Routinely, the largest number of searchers on the State Library website are seeking Title 24 of the California Code of Regulations, which is maintained by the California Building Standards Commission and is published in its entirety every three years. The law library maintains a collection of building codes from various publishers dating to 1927, the genesis of the Uniform Building Code. In 1978, legislation required building standards be unified in a single code, Title 24. Ten years later, Title 24 was applied to all occupancies throughout the state. Is it any wonder, there are some many searches?

California Law Prior to and Immediately Following Statehood

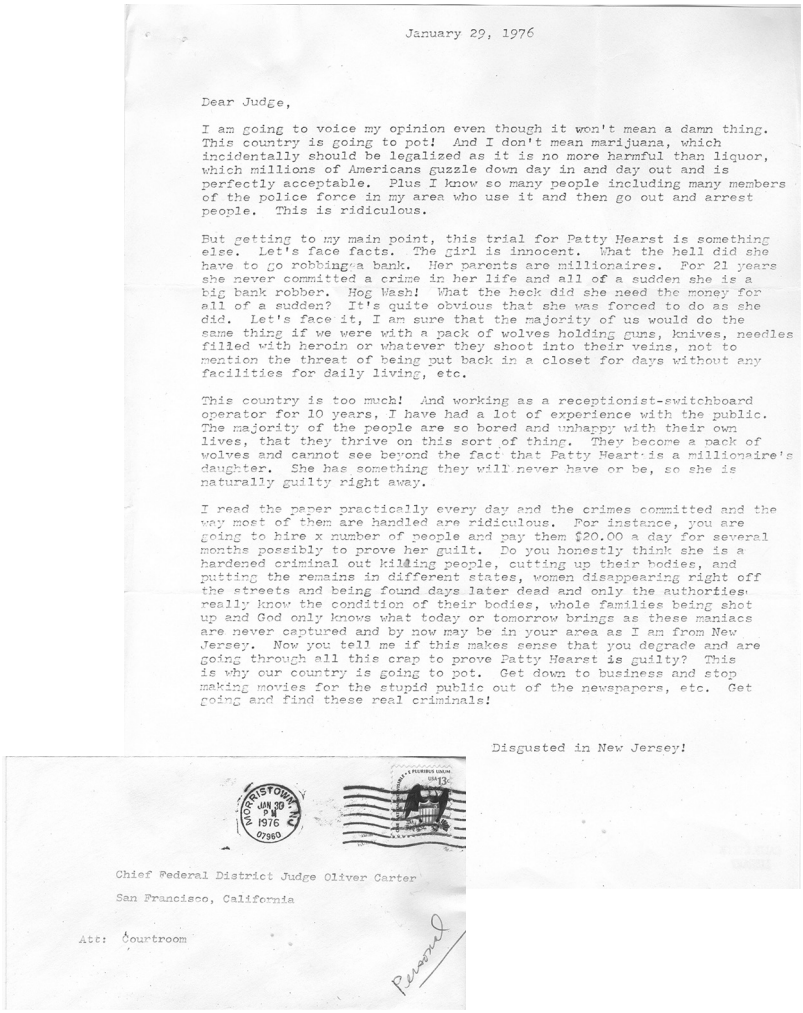
California laws were printed in Spanish up to 1879. As decreed by Article XI, Section 21 of the 1849 California Constitution, all laws, decrees, regulations, and provisions were published in both English & Spanish. This continued for 30 years until the 1879 Constitution no longer included this provision. Witkin has copies.

Pre-Statehood Leyes Constitucionales*, 1836*

The *Siete Leyes* (Seven Laws) were enacted under President Antonio López de Santa Anna of Mexico mainly to concentrate power in the president and his immediate subordinates, a fundamental altering of the structure of the first Mexican Republic. These laws would have theoretically been enforceable in the area that became California, but it is still debated whether they were.

A UNIQUE LOOK AT PATTY HEARST'S TRIAL

For an insider view, peruse the law library's transcript of the trial of Patricia Campbell Hearst and then review the personal papers of Oliver Carter, the federal judge who presided. In her 1982 memoir (also available at the library) chronicling her kidnapping by the Symbionese Liberation Army



January 29, 1976

Dear Judge,

I am going to voice my opinion even though it won't mean a damn thing. This country is going to pot! And I don't mean marijuana, which incidentally should be legalized as it is no more harmful than liquor, which millions of Americans guzzle down day in and day out and is perfectly acceptable. Plus I know so many people including many members of the police force in my area who use it and then go out and arrest people. This is ridiculous.

But getting to my main point, this trial for Patty Hearst is something else. Let's face facts. The girl is innocent. What the hell did she have to go robbing a bank. Her parents are millionaires. For 21 years she never committed a crime in her life and all of a sudden she is a big bank robber. Hog Wash! What the heck did she need the money for all of a sudden? It's quite obvious that she was forced to do as she did. Let's face it, I am sure that the majority of us would do the same thing if we were with a pack of wolves holding guns, knives, needles filled with heroin or whatever they shoot into their veins, not to mention the threat of being put back in a closet for days without any facilities for daily living, etc.

This country is too much! And working as a receptionist-switchboard operator for 10 years, I have had a lot of experience with the public. The majority of the people are so bored and unhappy with their own lives, that they thrive on this sort of thing. They become a pack of wolves and cannot see beyond the fact that Patty Heart is a millionaire's daughter. She has something they will never have or be, so she is naturally guilty right away.

I read the paper practically every day and the crimes committed and the way most of them are handled are ridiculous. For instance, you are going to hire x number of people and pay them $20.00 a day for several months possibly to prove her guilt. Do you honestly think she is a hardened criminal out killing people, cutting up their bodies, and putting the remains in different states, women disappearing right off the streets and being found days later dead and only the authorities really know the condition of their bodies, whole families being shot up and God only knows what today or tomorrow brings as these maniacs are never captured and by now may be in your area as I am from New Jersey. Now you tell me if this makes sense that you degrade and are going through all this crap to prove Patty Hearst is guilty? This is why our country is going to pot. Get down to business and stop making movies for the stupid public out of the newspapers, etc. Get going and find these real criminals!

Disgusted in New Jersey!

MORRISTOWN, N.J. JAN 30 P M 1976 07960

Chief Federal District Judge Oliver Carter
San Francisco, California

Att: Courtroom

Disgusted in New Jersey! "Letter to Judge Oliver J. Carter." January 29, 1976.

From the Oliver J. Carter Collection. Box 1949. Folder 3. Letter 3. Courtesy California State Library.

and subsequent trial for bank robbery, Patty Hearst calls Carter a "crusty old judge" who couldn't "resist the publicity."

Carter's papers illustrate the pressures faced by a judge presiding over a high-profile trial. In addition to Carter's trial notes and his personal summaries of each witness' testimony, are twenty-two boxes of largely "hate mail" directed at either Hearst or Carter or both.

VIOLATIONS OF THE CIVIL LIBERTIES OF JAPANESE AMERICANS

Lots of universities, museums and the National Parks Service have important materials that help bring the incarceration of Japanese Americans in World War II not only to life but keep it in memory so that, hopefully, such a thing is not repeated.

On February 19, 1942, the United States federal government issued Executive Order 9066. Under its provisions and subsequent military orders, 120,000 Japanese Americans were required to report to their local authorities for forcible removal to camps, where they were held for the duration of the war. Many Californians of Japanese ancestry had to sell homes, businesses, and farms at fire-sale prices, or just abandon them.

For more than twenty years, the State Library has been awarding grants to a variety of groups through its Civil Liberties Public Education program[6] to aid in remembering the rights violations of the past and help prevent them from happening today or in the future.

One of the grantees is the state university system, which is consolidating and digitizing its Japanese American incarceration collection to make it more accessible. The State Library is also using its own funds to create digital audio and video copies of the oral histories of camp internees in its possession.

The State Library offers several gateways into examining this stain on the state and nation including the papers of James C. Purcell, a lawyer who represented several Japanese Americans who fought the actions of the federal and state government.

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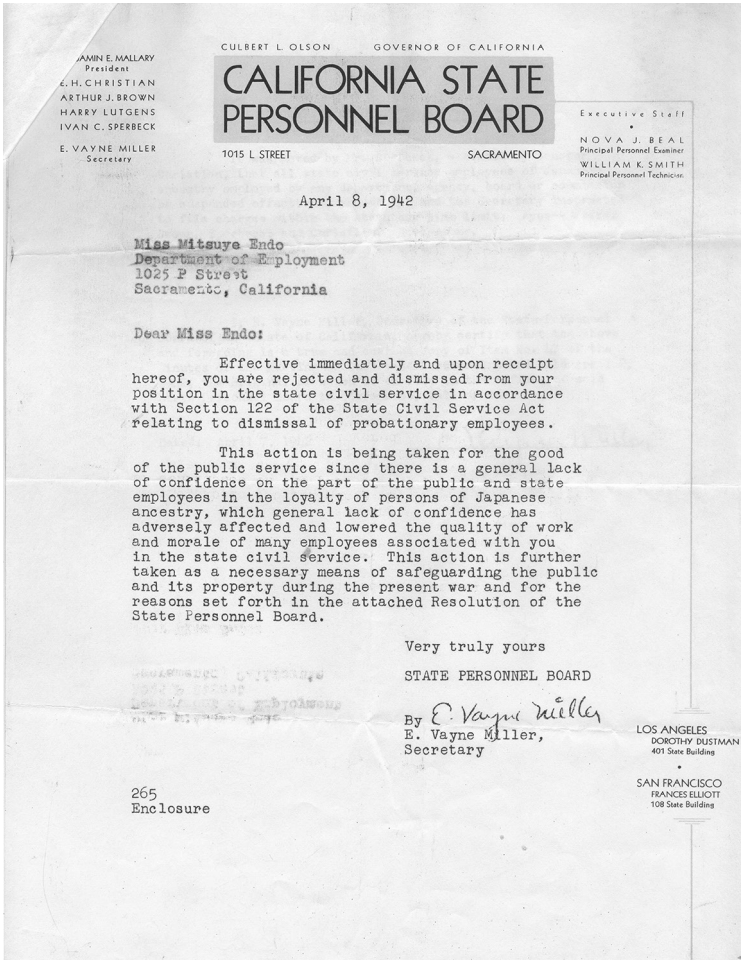
[6] https://www.library.ca.gov/grants/civil-liberties.

Purcell's clients include Arthur Morimitsu, Yoshio Kamikawa, and Mitsuye Endo. Like Morimitsu and Kamikawa, Endo was a state employee, fired from her job after the declaration of war on Japan due to her Japanese ancestry. She sued the state for wrongful termination.

Upon consulting with Purcell, Endo decided to aim higher and challenge the incarceration itself. Her case was eventually heard by the U.S. Supreme Court. The Purcell papers contain details of both the employment



CULBERT L. OLSON GOVERNOR OF CALIFORNIA

CALIFORNIA STATE PERSONNEL BOARD

1015 L STREET SACRAMENTO

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Executive Staff
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WILLIAM K. SMITH, Principal Personnel Technician

April 8, 1942

Miss Mitsuye Endo
Department of Employment
1025 P Street
Sacramento, California

Dear Miss Endo:

Effective immediately and upon receipt hereof, you are rejected and dismissed from your position in the state civil service in accordance with Section 122 of the State Civil Service Act relating to dismissal of probationary employees.

This action is being taken for the good of the public service since there is a general lack of confidence on the part of the public and state employees in the loyalty of persons of Japanese ancestry, which general lack of confidence has adversely affected and lowered the quality of work and morale of many employees associated with you in the state civil service. This action is further taken as a necessary means of safeguarding the public and its property during the present war and for the reasons set forth in the attached Resolution of the State Personnel Board.

Very truly yours

STATE PERSONNEL BOARD

By E. Vayne Miller
E. Vayne Miller,
Secretary

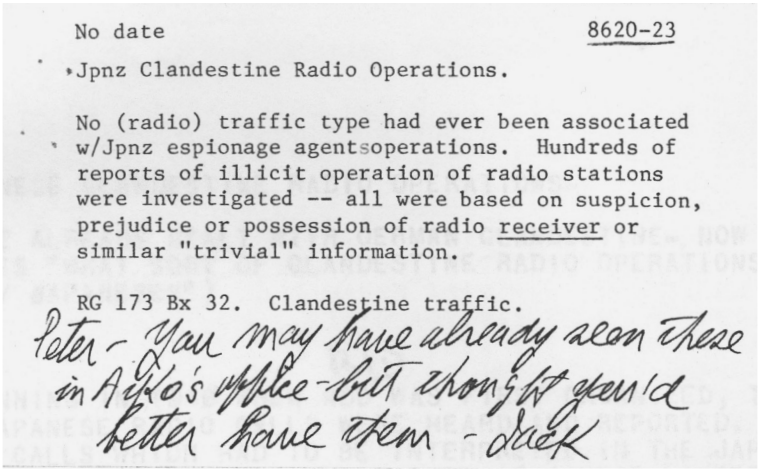
265
Enclosure

LOS ANGELES
DOROTHY DUSTMAN
401 State Building

SAN FRANCISCO
FRANCES ELLIOTT
108 State Building

California State Personnel Board. "Letter to Mitsuye Endo." April 8, 1942.

From the James C. Purcell Collection. Box 3755. Folder 6. Letter 14. Courtesy California State Library.



No date 8620-23

•Jpnz Clandestine Radio Operations.

No (radio) traffic type had ever been associated w/Jpnz espionage agentsoperations. Hundreds of reports of illicit operation of radio stations were investigated -- all were based on suspicion, prejudice or possession of radio receiver or similar "trivial" information.

RG 173 Bx 32. Clandestine traffic.

Peter - You may have already seen these in Aiko's office - but thought you'd better have them - Dick

"Copy of a note card titled 'Jpnz Clandestine Radio Operations.'"

From the Fred Korematsu Collection. Box 3895. Folder 13. Item 1. Courtesy California State Library.

case and of the subsequent habeas corpus case as it wound its way through the District Court, the Court of Appeals, and finally the Supreme Court.

Interestingly, the collection includes drafts of Purcell's various district court arguments showing how he refined his thinking before presenting the case. The collection also contains correspondence with Endo, including a letter regarding finances at the outcome of her wrongful termination case. Her award for that case was $58.99 in back pay, which Purcell asked for in fees rather than his previously agreed-upon $100.00 fee.

Purcell's papers also shed light on a parallel case before the Supreme Court filed by Fred Korematsu. Korematsu had also challenged the legality of Executive Order 9066, although his grounds were slightly different than those of Endo. Purcell's papers contain copies of some of the arguments submitted by Wayne Collins, Korematsu's attorney, at the district court level, as well as the briefs submitted by Collins and the ACLU at the Court of Appeals and the Supreme Court.

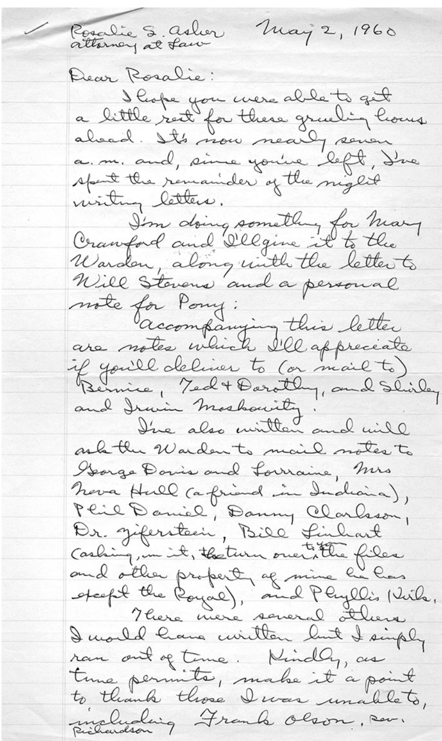
Unlike Endo, Korematsu lost his case in the Supreme Court, but tried again in 1982 with a *coram nobis* case against the federal government. The State Library holds a collection of papers related to this effort, documents that take the researcher through many of the background steps in building

the landmark case. Along with the briefs submitted by Korematsu's legal team to the district court and eventually to the Supreme Court, the Korematsu papers contain practically every scrap of documentation that Korematsu and his lawyers relied on to build their case, right down to the time sheets submitted by the researchers tasked with unearthing the letters between government officials.

CARYL CHESSMAN

Caryl Chessman was arrested on suspicion of being the "Red Light Bandit" in 1948. ("Red Light" because two of the crimes he was charged with involved cars stopped at traffic lights.) Chessman elected to represent himself in court, and in his legal briefs, kept on file at the State Library, he argued that he was not guilty of the crimes attributed to the Red Light Bandit.

After failing to convince the jury of his innocence, Chessman received the death sentence for two of the crimes (kidnapping for the purpose of robbery) and entered the fight of his life. He sent out appeal after appeal,



Rosalie S. Asher
attorney at law
May 2, 1960

Dear Rosalie:

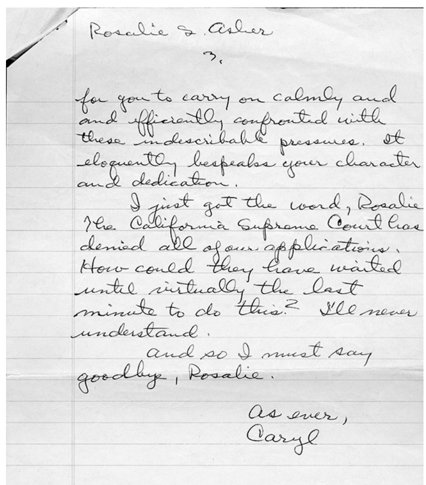
I hope you were able to get a little rest for these grueling hours ahead. It's now nearly seven a.m. and, since you've left, I've spent the remainder of the night writing letters.

I'm doing something for Mary Crawford and I'll give it to the Warden, along with the letter to Will Stevens and a personal note for Pony:

Accompanying this letter are notes which I'll appreciate if you'll deliver to (or mail to) Bernice, Ted + Dorothy, and Shirley and Irwin Moskowitz.

I've also written and will ask the Warden to mail notes to George Davis and Lorraine, Mrs Neva Hull (a friend in Indiana), Phil Daniel, Danny Clarkson, Dr. Ziferstein, Bill Linhart (asking, in it, ~~the~~ turn over to you the files and other property of mine he has except the Royal), and Phyllis Neils.

There were several others I would have written but I simply ran out of time. Kindly, as time permits, make it a point to thank those I was unable to, including Frank Olson, Rev. Richardson



Rosalie S. Asher
3.

for you to carry on calmly and and efficiently confronted with these indescribable pressures. It eloquently bespeaks your character and dedication.

I just got the word, Rosalie. The California Supreme Court has denied all of our applications. How could they have waited until virtually the last minute to do this? I'll never understand.

And so I must say goodbye, Rosalie.

As ever,
Caryl

CARYL CHESSMAN "LETTER TO ROSALIE ASHER." MAY 2, 1960. (THE DATE OF CHESSMAN'S EXECUTION).

From the Asher-Chessman Collection. Box 3428. Folder 10. Letter 27. Courtesy California State Library.

attacking the original decision on every ground he and his various legal advisors could think of, even seeking clemency from then Governor Pat Brown. The Chessman collection includes his well-used typewriter.

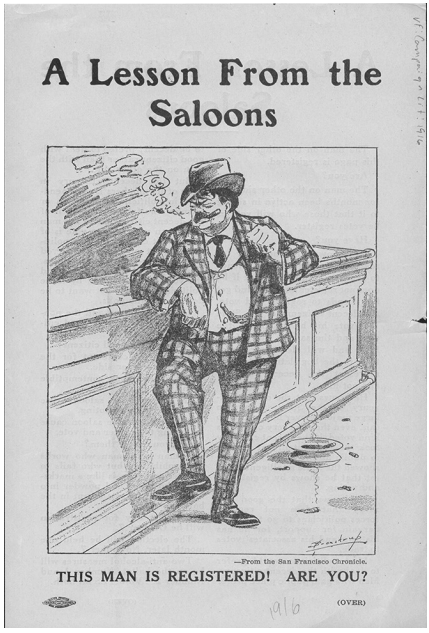
Chessman's appeals met with failure time and time again, but records of many of those attempts exist in these files, as does Chessman's extensive correspondence with individuals across the country, including Louise Caffin and legal advisor Rosalie Asher. According to Chessman himself, in his book, *Cell 2455*, also available at the library, "litigation was a means — seemingly the only means — to an end. That end was survival."

Chessman's papers were used to create a 2016 play, *Chessman*, dealing with his last months on Death Row and last-ditch efforts to avoid execution.

POLITICS

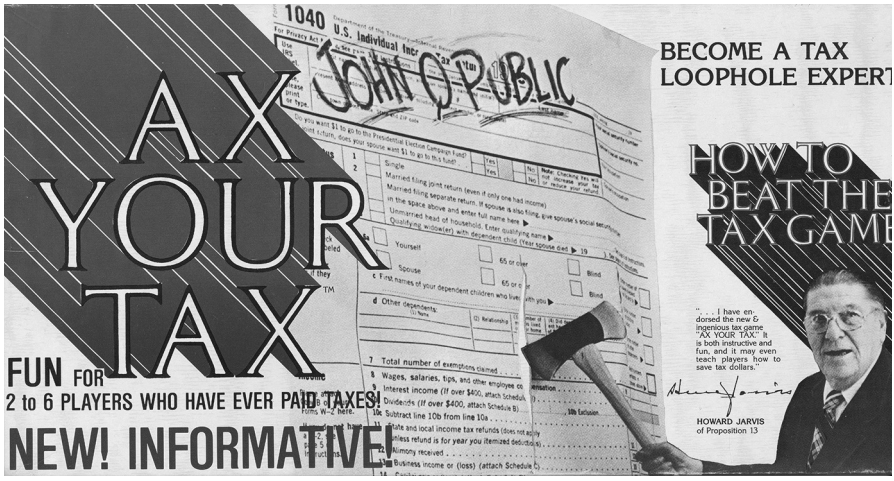
Any self-respecting state library located in any state capitol would have boxes of political material. California is no exception. Mailers, walking pieces, scripts, commercials from many statewide propositions are organized by election year. What makes this collection a standout is that the campaign ephemera goes back to 1850 for both candidates and ballot measures. Does it contain information on every campaign of every candidate and ballot measure? No. But the collection is quite extensive.

In addition to Gary Coleman's 2003 campaign materials, there are opposition arguments against Upton Sinclair's EPIC ("End Poverty in California") campaign for



Lesson from the saloons. San Francisco.

Allied Printing Trades Council [1916]. (1 sheet: 9 x 6 in). [CIFII_Scan130] Filed in Vertical File : Campaign Literature : 1916. Courtesy California State Library.



Howard Jarvis. Ax your Tax Board Game. 1979.

The Howard Jarvis Collection. Box 2124. Courtesy California State Library.

governor in 1934 and the successful pitch used by supporters to win approval of Proposition 13 in 1978.

Speaking of Proposition 13, the library has collections of materials from both of the proposition's backers, Paul Gann and Howard Jarvis. In the Paul Gann collection, researchers can see items like petitions, correspondence with election officials, information sent out to mailing lists, newspaper editorials, and many of the other items involved in helping a proposition reach the ballot.

There's also information on other campaigns Gann participated in such as Proposition 8 — the so-called Victims Bill of Rights — and Proposition 4. Approved by voters in 1979, Prop. 4 caps state spending. Prop. 4's restrictions are impacting lawmakers and the governor's budget decisions today.

The Jarvis collection, meanwhile, contains several boxes devoted to the legal defense of Prop. 13, including arguments in favor of the proposition used in a lawsuit that went before the Supreme Court as well as many items from the Howard Jarvis Taxpayers Association, which Jarvis founded and ran until his death in 1986. On the offbeat side is the "Ax your Tax" board game issued in 1979, which aimed at educating players about various California tax loopholes.

IN SUMMARY

The State Library isn't exactly Arlo Guthrie's "Alice's Restaurant:" A researcher can't get anything they want. But if the library doesn't have what someone is seeking, the team will work to connect the requestor with the requested item, wherever it might be located.

As the library moves deeper into the twenty-first century, the marching order is to make more and more unique holdings available to California and the world, whenever they want it. Because that's not only what's expected by the owners but what the owners deserve.

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